**(2003) 04 AP CK 0005**

**Andhra Pradesh High Court**

**Case No:** Writ Petition No''s. 4770 and 4771 of 2002 and CMA No''s. 1025 and 1931 of 2003

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| RCI Power Limited | APPELLANT |
| Vs | |
| Union of India (UOI) and Others | RESPONDENT |

**Date of Decision:** April 18, 2003

**Acts Referred:**

- Andhra Pradesh Electricity Reforms Act, 1998 - Section 11, 11(1), 12, 12(3), 15(4)
- Constitution of India, 1950 - Article 226
- Electricity Regulatory Commission Act, 1998 - Section 22, 22(1), 29

**Citation:** AIR 2004 AP 60 : (2003) 3 ALD 762

**Hon'ble Judges:** G. Yethirajulu, J; B.S.A. Swamy, J

**Bench:** Division Bench

**Advocate:** C. Kodanda Ram, T. Surya Karan Reddy for Central Government, Government Pleader for Irrigation and CAD, P. Sri Raghuram, SC for APERC, K.N. Jwala, SC for AP TRANSCO, P. Arvind Datar, for P. Srivastava Reddy, Goolam Vahanvathi, for S. Ravi, P.P. Rao, for C.V. Nagarjuna Reddy, M. Katrogadda Gopala Chowdary and S. Somayaji, for K. Raghuveer Reddy, B. Adinarayana Rao, R. Raghunandan Rao and M. Mohan Parasaran, for C. Sindhu Kumar, K. Harinath and E. Manohar, for K.N. Jwala, SC for AP TRANSCO, for the Appellant;

**Final Decision:** Allowed

**Judgement**

B.S.A. Swamy, J.

Petitioners in Writ Petition Nos. 4770 and 4771 of 2002 are the appellants in CMA Nos. 1351 and 1356 of 2001. These petitioners along with the appellants in other CMAs have established power generation units in private sector from time to time, both conventional and non-conventional, pursuant to the policy of the Central Government to encourage greater investments by private enterprises in power sector formulated in the year 1991 and in allowing private participation in generation, distribution, renovation and modernization of the power projects in its

quest for increasing availability of electricity since the per capital electricity consumption in the country happened to be the lowest and to bridge the gap between demand and supply and entered into agreements with the then A.P. State Electricity Board the predecessor-in-interest to the 2nd respondent A.P. TRANSCO with the approval of the State Government for transmission of the energy generated by them to their consumers and were paying wheeling charges in kind as fixed by the Government to different categories of developers of energy. These power generation units can be categorized broadly into eight categories: (1) Rain Calcining Limited (RCL) Visakhapatnam - appellant in C.M.A. No. 1025 of 2002 involved in the manufacture of calcind petroleum coke which is also generating power from the flue gases developed in the process, (2) A.P. Gas Power Corporation Limited - appellant in C.M.A. No. 1049 of 2002, a major gas based power plant, which sells the power generated to its shareholders including A.P. TRANSCO, (3) Mini Power Plants established as per the changed policy of the Government of A.P. envisaged in G.O. Ms. No. 1 16, dated 5.1.1995 and as modified in G.O. Ms. No. 152, dated 29.11.1995, - (4) Developers of non-conventional energy, (5) Developers based on isolated gas wells. As per the information furnished by the licensee, out of 61 power generating plants (both Mini Power Plants and non-conventional energy developers) 41 Generating Companies entered into agreements with the Board before the Reforms Act came into force and 20 Generating Companies entered into agreements after the Act came into force. The payment of wheeling charges by these companies and the contractual periods were specified in the agreements entered into between the parties. Likewise, schedule consumers like Ferro Alloy Companies, purchasing power from N.T.P.C., A.P.G. Power Corporation and other Companies also filed appeals though there is no contract between them and A.P. TRANSCO unlike the others.

2. The appellants in CMA Nos. 1793 and 1794 of 2001, who are engaged in generation of electricity through non-conventional energy sources also filed Writ Petition Nos. 4770 and 4771 of 2002, seeking issuance of a writ of prohibition against the Regulatory Commission, stating that the Commission has no jurisdiction to fix the charges for wheeling the energy generated by the petitioner companies, to be sold to or purchased by TRANSCO or other private parties. Subsequently, WPMP No. 13904 of 2002 was filed seeking amendment of the prayer to declare the proceedings of the Commission in OP No. 1075 of 2001 dated 20.6.2001 banning the sale of energy to third parties and a further direction to those generating companies to sell the power generated by them only to A.P. TRANSCO by issuance of a writ of mandamus and the following reliefs were sought for:

(a) The Commission has no jurisdiction to fix the price at which energy'' generated by the Petitioner - company can be sold to or purchased by A.P. TRANSCO or other private parties.

(b) The Commission has no jurisdiction to direct the Petitioner -company to sell electrical energy generated by it to A.P. TRANSCO at the price fixed by it.

(c) The Commission has no jurisdiction to fix the wheeling and banking charges to be paid to A.P. TRANSCO and DISTCOMS contrary to the policy of the Government of A.P. and the Central Government or otherwise and consequently issue a writ of certiorari quashing the orders passed by the third respondent commission in O.P. No. 1075 of 2000 dated 20.6.2001.

(d) To issue a writ of mandamus declaring the orders passed by the third respondent Commission in O.P. No. 510 of 2001 dated 24.3.2002 as contrary. Illegal and ultra vires and without jurisdiction violative of the petitioners right guaranteed under Articles 14, 19(1)(g), 300 of the Constitution of India.

(e) To pass such other order or orders as this Hon''ble Court deems fit and proper in the interest of justice.

3. During the course of arguments the Counsel for the petitioner sought leave of the Court to withdraw the reliefs sought for, in grounds (A) and (B) with liberty to raise the contentions in appropriate proceedings as they are being dealt with separately by the Hon''ble Court in another batch of cases. Since the issues raised in these writ petitions are of public importance, we are inclined to allow this application and it is accordingly allowed.

4. Several Senior Counsel from other States appeared before this Court and addressed arguments spreading over more than four weeks. While Mr. Goolam Vahanvati, Senior Advocate and Advocate General of Maharashtra led the arguments in this batch on behalf of M/s. Rain Calcining Limited (RCL), appellant in C.M.A. No. 1025 of 2002 and the Counsel appearing for other appellants supplemented his arguments. Mr. C. Kodanda Ram addressed the arguments in W.P. Nos. 4770 and 4771 of 2002 filed by the appellants in C.M.A.No. 1794 of 2001 and 1193 of 2001 (i.e.) M/s. R.C.I. Power Limited and M/s. Wescare India Limited respectively.

5. Since the issues cropped up in these appeals and Writ Petitions being first of their kind, we have given our anxious thoughts to the issues raised before this Court duly keeping in mind the interest of the A.P. TRANSCO, the power generating plants, the financial institutions from which these generating companies availed term loans for establishment of these Units and the interest of the end consumers, who are expected to bear the brunt of the decision and proceed to render this judgment as hereunder.

Maintainability of writ petitions:

6. Before going into the merits of the case the objection raised by the respondents with regard to the maintainability of the writ petitions, having filed a statutory appeal under the provision of the Act, has to be answered.

7. The Counsel for the petitioners contended that the very jurisdiction of the Commission is being questioned in these writ petitions since the same cannot be

gone into in a statutory appeal filed by the petitioners under the Act, having surrendered to the jurisdiction of the Commission. Hence the petitioners are entitled to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, as the powers conferred on the High Court are far wider than the powers conferred on an appellate Court, and the writ petitions are maintainable. The sheet anchor of the argument of the learned Counsel is that since no specific provision was made in the Act with regard to the collection of the wheeling charges and such a power was specifically conferred on the State Commission to be constituted under the Electricity Regulatory Commission Act, 1998 (Central Act), levying of wheeling charges is not within the competence of the State Commission constituted under the State Act (i.e.) Reforms Act.

8. In support of his contention on the maintainability of the writ petition Mr. Kodanda Ram, placed reliance on the judgment of the Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , wherein their Lordships having reviewed the case law on the aspect whether existence of alternative remedy is a bar to invoke the extraordinary jurisdiction of the Hon''ble High Court under Article 226 of the Constitution of India, held as follows:

"Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

9. A Constitutional Bench of the Supreme Court in Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others, , their Lordships rejected the arguments of the Counsel for the respondents that an application under Article 32 of the Constitution of India is not maintainable by observing that:

"There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under Article 32 are much wider and are not confined to issuing prerogative writs only." ..... The mere existence of an adequate alternative legal remedy cannot per se be a good and sufficient ground for throwing out a petition under Article 32, if the existence of a fundamental right and a breach, actual or threatened, of such right is alleged and is prima facie established on the petition. In T.C. Basappa Vs. T. Nagappa and Another, , Mukherjea, J., speaking for the Bench expressed a similar view "the language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for enforcement of the fundamental rights in the

case of the High Courts, for other purposes as well. In view of the express provisions of our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English Law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges."

"..... On a consideration of the authorities it appears to be well established that this Court''s power under Article 32 are wide enough to make even a declaratory order where that is the proper relief to be given to the aggrieved party....."

10. In The Bengal Immunity Company Limited Vs. The State of Bihar and Others, , while reversing the judgment of the High Court, dismissing the writ petition by observing that "a decision, however erroneous, will nevertheless, be a decision within the ambit of his jurisdiction and the High Court cannot interfere with it by issuance of a writ of prohibition or certiorari to quash, held that a person placed in such a situation has the right to be told definitely by the proper legal authority exactly where he stands and what he may or may not do" by placing reliance on an earlier judgment of the Supreme Court in Commissioner of Police, Bombay Vs. Gordhandas Bhanji, , wherein it was held as follows:

"when an order or notice emanates from the State Government or any of its responsible officers directing a person to do something, then, although the order or notice may eventually transpire to be ''ultra vires'' and bad in law, it is obviously one which ''prima facie'' compels obedience as a matter of prudence and precaution.

It is, therefore, not reasonable to expect the person served with such an order or notice to ignore it on the ground that it is illegal, for he can only do so at his own risk and peril."

11. Nextly, the power of judicial review exercisable by the High Court under Article 226 as well as the Supreme Court under Article 32 of the Constitution over the actions of Legislature and executive so that they may not transgress the constitutional limitations in exercise of their functions and the power of judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions intended to oversee that the judicial decisions rendered by those who man the subordinate Courts and Tribunals do not fall foul of strict standards of legal correctness and judicial independence forms part of the basic structure of the Constitution of India vide L. Chandra Kumar Vs. Union of India and others, . Hence, the power of judicial review exercisable by the High Court to test either the constitutionality of a legislation or an administrative action or the correctness of the orders of the Tribunals is on a high pedestal than that of an appellate Court under Common Law, which cannot be abrogated by a statute enacted by the Legislature in exercise of its legislative power. On that ground also we hold that a writ petition is maintainable in spite of an alternate remedy provided under the statute law.

12. Hence, in the light of the law laid down by the Supreme Court, we hold that the writ petitions filed by the petitioners are maintainable. Since they are questioning the very jurisdiction of the State Commission to determine the tariff for using transmission facilities, as the jurisdiction of the Commission cannot be raised in the statutory appeal having submitted to its jurisdiction and the objection of the respondents is accordingly rejected.

13. Now we would like to deal with the contentions raised in these writ petitions since they go to the root of the matter.

Whether regulatory commission constituted under the state act is having power to levy wheeling charges:

14. Nextly Mr. C. Kodanda Ram Counsel for the petitioners in the writ petitions, supported by Mr. Ghulam Vahan Vatti, Advocate General of the State of Maharashtra, appearing for the appellants in CMANo. 1025 of 2002, strenuously contended that under the provisions of Reform Act, 1998, the Regulatory Commission has no jurisdiction to determine the transmission/wheeling charges payable by generating companies to TRANSCO, which is licensed to carry out the business of procurement, transmission and bulk supply of electrical energy, in the State of Andhra Pradesh.

15. The case of the Counsel is that Item No. 38 of List-III of Schedule No. VIl i.e., the concurrent list deals with "electricity" and under Article 246(2) of the Constitution of India, the Parliament as well as the State Legislature, are having power to make laws with respect to any of the matters enumerated in List-Ill of Seventh Schedule. Under Article 251 of the Constitution of India, if a law is made both by the Legislature of the State and the Parliament on any of the matters enumerated under the concurrent list, the law made by the State Legislature has to give way to the law made by the Parliament to the extent of repugnancy. But under Article 254(2) if the law made by the State Legislature has been reserved for the consideration of the President and has received his assent, the State law to the extent of repugnancy will prevail in that State. To put it aptly, if there is any inconsistency between the law made by the Parliament and the State Legislature, the law made by the State Legislature to the extent of repugnancy is declared as inoperative unless the same received the assent of the President.

16. To appreciate the contention of the Counsel we have to refer to the developments that have taken place to regulate the supply and use of electricity in the country.

17. The Indian Electricity Act, 1910 (hereinafter referred to as "Electricity Act") is the first Act that was enacted in the year 1910 regulating the supply and use of electrical energy.

18. u/s 3 of the Act, the State Government is empowered to issue licence to any person to supply energy in any specified area, and also to lay down or place electric supply-lines for the conveyance and transmission of energy in consultation with the State Electricity Board.

19. Subsequently, in the year 1948 the Parliament enacted the Electricity (Supply) Act, 1948 (hereinafter referred as "Supply Act") to rationalise the production and supply of electricity, and for taking all measures conducive that are necessary for giving effect to the provisions of the Act.

20. u/s 15A of the unamended Act, a monopoly was created in the State for generation and supply of electrical energy. Under Sub-section 2(a) the Central Government or any State Government or the Central Government or one or more State Governments or two or more State Governments may jointly form a generating company with the objective of establishment, operation and maintenance of generating stations and tie-lines, sub-stations and main transmission lines connected therewith by the Government or Governments forming the Generating Company.

21. In 1991 the Government of India having realised that it is virtually not possible for the State owned power generation projects to meet the ever-increasing demand for power in the country because of their financial crunch decided to encourage private investments in the electricity sector. From the document published by the Central Government under the caption -"The Indian Electricity Scenario" the Government noted that for a developing country like India, electricity is the most commonly used form of energy. Indeed it is the fulcrum on which rests the future pace of growth and development. As per this document, the per capita electricity consumption in the country increased from 15.6 kwh in 1950 to 270 kwh by 1990, which is one of the lowest in the world and in the developed countries the per capita consumption ranges from 8000 Kwh to 25000 kwh per annum. Having realised that it is not possible to bridge the gap between rapidly growing demand for electricity and supply in the context of paucity of resources at their command, Government initiated a policy to encourage greater investments by private enterprises in the power sector in the year 1991 with the objective of mobilizing additional resources for capacity addition in power generation and distribution. As per para 4.5 of resolution No. 7/8/88-Thermal, dated 22.10.1991 the power generation units established in private sector can directly supply power to the bulk consumers with the consent of the State Government. This position was further clarified in Para 3.2 of the notification dated 30.3.1992 (i.e.) the Generating Company is permitted to supply electricity directly to consumers in terms of Section 43-A(1)(c) of Supply Act at mutually negotiated rate, subject to the approval of the Government. The policy permitted 100% foreign owned companies to set up power projects of any capacity and of any type (coal, gas, hydel, wind or solar) in India and repatriate profits without any export obligation. The policy also allows liberal capital structuring and

an attractive return on investment. An attractive two-part tariff structure was provided through a notification in March, 1992 which allowed recovery of full fixed charges with 16% return on Equity at 68,5% Plant Load Factor. This was further modified in January, 1994 making some of the normative parameters still more attractive. The tariff structure has been made broad based through a recent notification which allows the promoters some flexibility in determining tariff, provided that the tariff arrived by their formula is lower compared to the two part tariff formula.

22. To give effect to this scheme in Resolution No. 7/70/90-l.P. Cell, dated 22nd October, 1991 the Ministry of Power and Non-Conventional Energy Sources Department of Power constituted Investment Promotion Cell headed by Cabinet Secretary and Secretaries of the Departments whose involvement is there in granting licence and financial assistance etc. Under Clause-9 of the said resolution, the Board is given the power to co-opt representatives from financial institutions, banks and professional experts from industry and commerce/power sector. In this resolution, the clearances required for power projects and the procedures to be followed were also identified for quickening the process of establishment of power generating companies in private sector.

23. This cell was treated as a nodal agency to provide information and assistance to prospective entrepreneurs in the electricity sector. This Cell was treated as a single reference agency to involve private sector and other things. This Cell is expected to involve the private sector in power generation in a big way by providing information on the policy regarding private sector participation in the power sector, guidance on clearances to be obtained and the modalities for obtaining these clearances speedily. It is expected to resolve various issues related to private participation in the power sector as expeditiously as possible.

24. The broad features of the policy of the Government on power development permitted private participation in all areas of power production and supply be it power generation, distribution, renovation and modernization or co-generation. Private Sector companies can set up thermal projects (coal/naphtha and other liquid fuel based), hydel projects and wind/solar energy projects of any size. These companies can set up enterprises to operate either as licensees or as generating companies. Under this policy a host of incentives were offered to encourage the entrepreneurs to enter power generation and distribution.

25. As per this scheme, the Generating Companies have to sell the power to State Electricity Boards or to any person with the consent of the Competent Government on the basis of an agreement, and, a tariff, based on parameters applicable to generating companies.

26. By Act 51 of 1991, dated 27.9.1991 both the Electricity Act, 1910 and Supply Act, 1948 were amended to give effect to the changed policy of the Government.

Amendments to 1910 Act in 1991:

27. Section 3 of 1910 Act was amended permitting the sale of power by the Generating Companies to any person with the permission of State Electricity Board.

28. The other amendments will be adverted to while dealing issues in controversy.

Amendments to Electricity (Supply) Act, 1948:

29. Section 2 deals with definitions.

30. Sub-section (3A) was introduced whereunder "Competent Government" was defined as Central Government in respect of a Generating Company wholly or partly owned by it and in all other cases the Government of the State in which the generating station of a Generating Company is located or proposed to be located.

31. Likewise, as per amended Section 4A "Generating Company" is defined as a company, which has among its objects the establishment, operation and maintenance of generating stations.

32. Section 15A(1) of the Act as it stood by then enabling the Central and State Governments to form a Generating Company was omitted and Section 15A(2) was substituted. As per the substituted section "The objects of a Generating Company shall include - (a) establishment, operation and maintenance of generating stations and tie-lines, sub-stations and main transmission lines connected therewith; (b) operation and maintenance of such generating stations, tie-lines, sub-stations and main transmission lines as are assigned to it by the Competent Government or Governments. Section 15A(3) - The Generating Company shall carry on its, activities within such areas as the Competent Government or Governments, as the case may be, may, from time to time specify in this behalf.

33. While Section 43(3) was omitted, a new Section 43A was inserted. Under Sub-section (1) of Section 43A--A Generating Company may enter into a contract for the sale of electricity generated by it :--(a) with the Board constituted for the State or any of the States in which a generating station owned or operated by the company is located; (b) with the Board constituted for any other State in which it is carrying on its activities in pursuance of Sub-section (3) of Section 15A; and (c) with any other person with consent of the Competent Government or Governments.

34. Under Sub-section (2) - The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by issuance of a notification in the Official Gazette. Proviso deals with the determination of tariff for sale of electricity in case of Government owned Generating Companies. But the whole of Sub-section (2) was omitted by the Central

Government with effect from 11.9.2000 by issuance of SO 826(E) in exercise of its powers u/s 51 of the Electricity Regulatory Commission Act, the power to fix tariff for supply of energy to the consumers was conferred on the Regulatory Commission constituted under the Central and State Acts enacted to restructure the power sector.

35. Thereafter, the Ministry of Power by its Notification dated 30th March, 1992 issued guidelines determining the factors to be taken into consideration in fixing the tariff for sale of electricity by Generating Companies to the Board and to other persons. These factors were further amended by Notification No. S.O.36(E), dated 18/19th January, 1994 and S.O.605 (E), dated 22nd August, 1994.

State Government action:

36. The Government of Andhra Pradesh following suit issued G.O. Ms. No. 116, Energy (Power-I) Department for the first time on 5th August, 1995 for generation of power through Mini-Power Plants of capacity of 30 MW in private sector without the intervention of Investment Promotion Cell set up at the Central Level to provide assistance and information to the prospective entrepreneurs. The reasons given for establishment of Mini-Power Plants in the G.O. is that they cost less than Rs. 100 crores and do not require Central Electricity Authority''s Clearance and such projects could be cleared at the State Level expeditiously and they can be established within a period of 12 to 18 months. Under para 1 of the G.O. the private parties who intend to set up mini power plants with residual fuel have to secure a tie-up with the consumers regarding quality, quantity and price of power to be supplied. Under para 2 there shall be an arrangement for an uninterrupted power supply to the industrial load centres, except during unavoidable outages like maintenance etc, in the scheme and the generating stations must have a contract with A.P. State Electricity Board to supplement power as a back up in the event of necessity. The modalities of such arrangement will have to be worked out between the generator and A.P. State Electricity Board mutually. As per para 4 the pricing arrangement will be subject to fixation of tariff by the Regulatory Commission ultimately. As per para 6 of the G.O. the wheeling of power wilt be made through A.P. State Electricity Board at the request of the generator at a rate to be finalised on mutual agreement with Andhra Pradesh State Electricity Board. Para 7 says that the Board shall fix upper ceiling limit for generation of power by the private Generating Companies. As per para 8 this scheme shall operate within the framework of the Indian Electricity (Supply) Act, 1948 and the Rules made thereunder.

37. As per para 10, the State Electricity Board was authorised to identify the tail end areas which are suffering from stress on account of transmission and distribution problem for location of the units and proper care shall be taken to ensure that both competitive prices and proven and cost effective technologies are preferred in the bidding process.

38. This Government Order was modified in G.O. Ms. No. 152, Energy (Power-1) Department, dated 29th November, 1995. Under the revised policy the Mini Power Plants are specifically permitted to supply power generated by them to identified consumers by entering into agreements with the end consumers of power. This change was effected to serve customers through a dedicated distribution system, preferably over small compact areas. Under Clause 3 of the said G.O. the mini power plants can supply energy either through the existing distribution network of the Board or by setting up a dedicated transmission network after obtaining a licence u/s 3 of the Indian Electricity Act, 1910. If the mini power. plants intend to use the existing distribution network of the Board, like lease, rent etc., will be worked out on mutually acceptable terms between the Andhra Pradesh State Electricity Board and the Mini Power Plant Developers. Under Clause (4), in the event of the power generated by Mini Power Plants to be wheeled using the Boards transmission network, wheeling charges will be collected from the developers in kind and at a percentage of the energy delivered at the inter-connection point. In fact, the wheeling charges to be collected were also mentioned in this clause i.e., for 132 KV consumers - 8% of the energy developed; for 33 KV consumers, 11 K.V consumers and LT consumers - 10% for a distance upto 50 km, 12% for distance between 51 km and 100 km and 15% beyond 100 km respectively. Clause (5) speaks of infrastructure like sub-stations and tie lines to be erected for interfacing the mini power plants with the Board''s grid will be at the cost of the developer. Under Clause (6) in the event of the mini power plants generating power in excess of the requirement of their consumers, the same can be purchased by the Board. Under Clause (8) the developer shall necessarily sell power to the consumers above the Board''s High Tension Tariff rates. Under Clause (10) the Government of Andhra Pradesh undertake to recommend for custom duty exemption on the Mini Power Plant equipment and in obtaining preferential treatment in fuel supply allocation.

39. The sum and substance of these GOs is that the Government encouraged establishment of Mini Power Plants of 30 MWTs, who can secure a tie-up with the identified consumers for purchase of the power and the Government agreed to collect wheeling charges for using the transmission network of the Board in kind on percentage basis on the energy delivered at the interaction point. Further, the developers have to sell power to their consumers above Board''s High Tension Tariff rate.

Non-conventional energy:

40. As far as non-conventional power generating plants are concerned, General Assembly of United Nations at its 96th Plenary Meeting held, on 11th December, 1987 in Item 42/186 - Environmental Perspective to the Year 2000 and beyond, having considered the report of World Commission on Environmental Perspective recommended the following action:

Renewable energy sources should receive high priority and should be applied on a wider scale than in the past, giving full consideration to their environmental impacts. Technologies to develop renewable sources of energy, such as wind, geo-thermal and especially solar, should receive particular attention. International co-operation should facilitate this process;

41. To give effect to the above recommendation of the U.N.O. the Government of A.P. issued G.O. Ms. No. 150, Energy Forests Environment Science and Technology (Res) Department, dated 30.5.1992 approving the guidelines framed by the Non-Conventional Energy Development Corporation of Andhra Pradesh Limited, Hyderabad, at its 124th meeting held on 6.1.1992 for promotion of Private Wind Farms in the State. As per the guidelines several incentives were offered to the developers of non-conventional energy.

42. As per these guidelines, the A.P. State Electricity Board has to provide interfacing work to the entrepreneurs at its cost and agreed to deduct 2% of energy generated from these windmills for wheeling the power produced by these developers to their consumers. The A.P.S.E.B. also agreed to purchase the surplus power produced by the private Wind Electric Generators on a mutually agreed rate.

43. In G.O. Ms. No. 238, Energy Forest (Res) Department, dated 26.11.1993, the Government modified the incentives provided to these developers. In para 4(3) (A) the Electricity Board was directed to deduct 2% of the generated energy fed to the grid by the wind mills towards wheeling charges during the initial period of five years and provided for review of the same after expiry of five years.

44. In G.O. Ms. No. 202, Energy and Forests (Res) Department, dated 30.9.1994, the Government after consultation with the Electricity Board, held that a power producer in the Non-conventional Energy Sector, who has been given permission to establish a wind power station, is not a person engaged in or about to engage in the business of supplying energy to the public within the meaning of Section 28(1) of Indian Electricity Act, 1910 and directed that the developer of Non-conventional energy who feeds the power to Board''s grid in terms of an agreement entered into with the Board need not be a licensee u/s 3 of Indian Electricity Act and the Chief Electrical Inspector to Government is requested to take necessary immediate action in the matter. The Government after reviewing the establishment of Wind Farm Mills under the Chairmanship of the Chief Secretary to Government on 15.7.1995 provided further incentives to the entrepreneurs in G.O. Ms. No. 119, Energy (Res) Department, dated 18.8.1995. In para 4 (1) while the Board was directed to purchase the power generated by these developers at Rs. 2.25 ps per unit for a period of five years, in sub-para (2) the Board was directed to collect the wheeling charges at 2% of the generated power fed to the Grid at 11 KV and 33 KV lines for the next five years. In order to attract more profit to the Wind Farm developers, the Government gave some more incentives in G.O. Ms. No. 147, dated 15.11.1995 one of the incentives is the collection of wheeling charges at a concessional rate of 2% of the

energy in kind fed to the Grid up to December, 2000 AD. Once again, the Government revised the incentives extended to the developers of Non-conventional Energy in G.O. Ms. No. 93, Energy (Res) Department, dated 18.11.1997, wherein the collection of wheeling charges in kind at 2% was reiterated apart from permitting the developers to sell the energy to third parties at a rate higher than H.T. tariff of the Board. In G.O. Ms. No. 112, Energy (Res) Department, dated 22.12.1998, the Government declared that the developers using Non-conventional Energy Sources for Power Generation selling the energy generated by them to third parties are deemed to be licensees for the purpose of Section 3 of the Electricity Duty Act, 1939 read with Section 28 of Indian Electricity Act.

45. From the Strategy Paper on Power published recently, the Government laid much stress to generate energy through renewable and Non-conventional Energy Sources by observing that the conventional fuels for power generation are depleting and it is therefore imperative to generate energy through renewable and Non-conventional Energy sources. It speaks of establishment of Non-conventional Energy Development Corporation of A.P. (NEDCAP) as a Nodal Agency for promoting power generation through non-conventional and renewable energy sources. It is estimated that about 2222 MW of Power from Non-conventional Energy Sources like Mini Hydel, Wind, Bio-mass, Bagasse Cogeneration, Municipal and Industrial Waste. Until the publication of this paper, the Government sanctioned projects with installed capacity of 1013 MW of power and only the projects with an aggregate capacity of 189 MW have been commissioned till then and the rest of the sanctioned projects are under various stages of implementation.

Establishment of power plants:

46. Pursuant to the above orders of the Government, most of the appellants were given LOC for establishment of Mini Power Plants as well as power plants based on renewable resources, while some of the developers started generating energy even before the Reforms Act came into force, some other developers started generating power after the Commission was established and they were paying the wheeling charges fixed by the Government in G.O. Ms. No. 152 by entering into agreements for periods specified therein with the Electricity Board.

Restructure of Electricity Boards:

47. As the problems of Power Sector was deepening year after year due to lack of rational retail tariffs, the high level of cross-subsidies, poor planning and operation, inadequate capacity, the neglect of the consumer, the limited involvement of private sector skills and resources and lack of creditworthiness of the State Electricity Boards, which is acting as a deterrent in attracting investment both from the public and private sectors. Government of India organized two conferences of Chief Ministers to discuss the whole gamut of issues in the power sector and the outcome of these meetings was the adoption of the Common Minimum National Action Plan

for Power (CMNAPP). After finalisation of the national agenda contained in CMNAPP, the Ministry of Power assigned the task of studying the restructuring needs of the regulatory system to Administrative Staff College of India (ASCI), Hyderabad, who in turn strongly recommended for establishment of independent Electricity Regulatory Commissions both at the Centre and the States to improve the financial health of the State Electricity Boards (SEBs).

48. The object of Reform and Restructure is to create conditions for the sustainable development of its Power Sector through promoting competition, efficiency, transparency and attracting the much needed private finances into the Power Sector. The ultimate goal of the reform process is to ensure power to be supplied under the most efficient conditions in terms of cost and quality to support the economic development of the State; and power sector ceases to be a burden on the State''s budget and eventually becomes a net generator of resources apart from governing, withdrawing from its earlier role as a regulator of the industry and will be limiting its role to one of policy formulation and providing policy directions.

Electricity Regulatory Commission Act (Act 14 of 1998):

49. The Parliament passed the Electricity Regulatory Commission Act, 1998 (Act 14 of 1998) and the same came into force on 25.4.1998. The Act aimed at improving the financial health of the State Electricity Boards, which are losing heavily on account of irrational tariff and lack of budgetary support from the State Governments. This Act contemplates establishment of a Central Electricity Regulatory Commission at the Central level (CERC) and the State Electricity Regulatory Commissions (SERC) at the State levels for restructuring the power sector in the country, on the lines suggested by the Administrative Staff College of India, Hyderabad, by publishing a notification u/s 17 of the Act in the Official Gazette. Both the Regulatory Commissions are expected to function independently in their specified fields. While Central Regulatory Commission takes care of the matters concerning inter-State electricity trade, the State Commissions were entrusted with the matters concerning intra-State electricity trade. While the Central Commission is empowered to fix tariff for the use of intra-State transmission utilities, the State Commission is empowered to fix tariff for the use of intra-State transmission utilities, by providing necessary para-metres to be followed in fixing the tariff.

50. Chapter III deals with the powers and functions of the Central Commission.

51. u/s 13 of the Act, the main functions of the CERC include (1) regulate the tariff of Generating Companies owned or controlled by the Central Government; (2) to regulate inter-state transmission including tariff of the transmission utilities; (3) to regulate inter-State sale of power and (4) to aid and advise the Central Government in formulation of tariff policy. This Act came into force with retrospective effect from 25.4.1998, the day on which ordinance was promulgated.

52. Chapter IV deals with the establishment of State Electricity Regulatory Commission for each State by issuance of a notification in the Official Gazette.

53. Chapter V deals with the powers and functions of the State Commission.

54. Section 22 deals with the powers and functions of State Commission to be constituted under the Central Enactment.

Section 22(1)(a), the State Commission is expected to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in Section 29.

(b) to determine the tariff payable for the use of the transmission facilities in the manner provided in Section 29.

(c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the Generating Companies, generating stations or from other sources for transmission, sale, distribution and supply in the State.

(d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of the Act.

55. u/s 22(2) of the Act, subject to the provisions of Chapter III and without prejudice to the provisions of Sub-section (1), the State Government may, by notification in the Official Gazette, confer the functions specified therein including one to aid and advise the State Government in the matters concerning electricity generation, transmission, distribution and supply in the State, apart from other things.

56. u/s 29 of the Act, the State Commission is empowered to determine the tariff for intra-state transmission of Electricity and the tariff for supply of Electricity etc. subject to the other provisions of the Act.

57. u/s 29(2) the State Commission is authorised to determine by regulations, the terms and conditions for the fixation of tariff and in doing so, shall be guided by the principles and other applications provided in Sections 46, 57 and 57A of the Supply Act and the VI Schedule thereto and also the electricity generation, transmission, distribution and supply and national power plants formulated by the Central Government apart from other things.

The A.P. Electricity Reform Act, 1998:

58. Though the Central Act was introduced in the Parliament much earlier to the State Act i.e., on 14.8.1997, on the basis of common minimum national action plan for power drawn, in the Chief Ministers'' Conference. Perhaps with a view to be ahead of the Central Government and other States, the State Legislature passed an independent Act on the same lines at the same time. The A.P. Electricity Reforms Act, 1998 - Act 30 of 1998 on 19.5.1998 and received the assent of the President on

28.10.1998. The same was published in the A.P. Gazette on 29.5.1998.

59. Under this Act the integrated power sector i.e., generation, transmission and distribution of energy was bifurcated and two separate Corporations - one for generation and the other for transmission and distribution of electricity were incorporated by the State Government under Companies Act, 1956 apart from constituting subsidiary transmission and supply Companies or Corporations. Initially, these Corporations have to function as wholly owned subsidiaries of the State Government but in due course it will be open for private sector participation. The essence of restructuring the power sector is to achieve the balance required to be maintained in regard to competitiveness and efficiency on the one part and the social objective of ensuring a fair deal to the consumer on the other part.

60. The Act provided for constitution of an Electricity Regulatory Commission (hereinafter referred to as ''Commission'') as an autonomous statutory body by divesting the State from its regulatory functions with a view to balance the interests of all the stake holders of the electricity industry and to promote healthy growth of the power sector in the State, except in matters of policy, planning and co-ordination on the matters concerning electricity in the State. Apart from several other functions, the Commission has been vested with the authority to restructure the electricity industry and rationalization of the generation, transmission, distribution and supply of electricity avenues for participation of private sector in the electricity industry and generally for taking measures conducive to the development and management of the electricity industry in an efficient, economic and competitive manner.

61. Some of the important functions of the Commission are (1) to aid and advise in matters concerning electricity generation, transmission, distribution and supply in the State; (2) to regulate the working of the licensees and to promote their working in an efficient, economical and equitable manner including laying down standards of performance for the licensees in regard to services to the consumers; (3) to issue licences in accordance with the provisions of the Act and determine the conditions to be included in the licences; (4) to promote efficiency, economy and safety in the use of the electricity in the State including and in particular in regard to quality, continuity and reliability of service and enable to meet all such reasonable demands for electricity; (5) the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected; (6) to promote competitiveness and progressively involve the participation of private sector, while ensuring fair deal to the customers; (7) to regulate the assets, properties and interest in properties concerning or related to the electricity industry in the State; and (8) to regulate working of licensees and promote their working in an efficient economical and equitable manner.

62. The Act also stipulates that a supply or Transmission Licensee may enter into arrangement for the purchase of electricity from Generating Company or from another holder of supply licence only with the consent of the Commission and any agreement to purchase power without the consent of the Commission was declared as void.

63. u/s 2(p) of the Act, "transmit" in relation to electricity means the transportation or transmission of electricity by means of a system operated or controlled by a licensee from one place to the other.

64. Section 11 of the State Act deals with the functions of the Regulatory Commission to be constituted and to the extent of relevancy the provisions of that section are extracted hereunder.

"11. Functions of the Commission :--(1) Subject to the provisions of this Act, the Commission shall be responsible to discharge amongst others, the following functions, namely:-

(a) to aid and advise, in matters concerning electricity generation, transmission, distribution and supply in the State;

(b) .....

(c) .....

(d) .....

(e) to regulate the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected;

(f) to promote competitiveness and progressively involve the participation of private sector, while ensuring fair deal to the customers;

(g) to collect data and forecast on the demand and use of electricity and to require the licensees to collect such data and forecast;

(h) to require licensees to formulate prospective plans and schemes in coordination with others for the promotion of generation, transmission, distribution and supply of electricity;

65. From the above clauses, it is seen that the Commission''s role with regard to generation of electricity, transmission, distribution and supply in the State is only advisory in nature as per Section 11(1)(a), (g), (h). "But u/s 11(e) the Commission is empowered to regulate the purchase of electricity, maintaining quality of service by the licensees and in fixation of tariff to be collected from the consumers keeping both the interests of the consumers as well as the licensees. In Clause (e)

empowering the Commission to fix price for purchase of power and tariff to be collected from the consumers, the words "generation and transmission" are conspicuously missing. Hence, Section 11 itself made a clear distinction on the role of Regulatory Commission in matters concerning generation and transmission of electricity and in the matters relating to purchase of power and fixation of tariff for supply of electricity to consumers and as such it cannot fix the charges for transmission of the power generated by the Generating Companies.

66. Whereas Section 22(1)(b) of the Central Act specifically speaks of determination of tariff payable for the use of transmission facilities by the State Commission to be constituted under that Act in the manner provided in Section 29 of that Act and u/s 29 while determining the tariff it has to take into consideration the national power plans formulated by the Central Government duly keeping in mind that the electricity generation, transmission etc., are conducted on commercial principles. There is no such provision in the State Act. But the Commission placing reliance on Section 26(2) of the Act contends that it is entitled to levy charges for wheeling the energy produced by the Generating Company through the transmission lines owned by the licensee. This contention will be adverted while dealing with the powers of the Commission u/s 26 of the Reforms Act. In fact, the Commission in its written arguments while admitting that mere omission of words ''transmission'' and ''generation'' in Section 11(1)(e) of the Act does not detract the powers of the Commission since no person can transmit electricity without licence u/s 14, and the Commission is authorised to grant license and impose conditions u/s 15 and also fix charge u/s 15(5) read with Section 26 of the Act.

67. The sheet anchor of the arguments of the Generating Companies is that since the Central Act specifically speaks of determination of tariff payable for the use of transmission lines of the licensee and in the absence of any provision in the State Act the field is covered by Central Legislation and the Commission constituted under the Reforms Act is not empowered to levy charges for wheeling the energy.

68. At this stage, we have to refer the changes brought in, in the existing enactments after Reforms Act came into force, to appreciate the merits of the rival contentions of the parties.

Electricity Act, 1910:

69. By Amending Act 22 of 1998, dated 31.12.1998 the provisions of the Acts 1910 and 1948, were amended to give effect to the changed policy of the Government. u/s 2(1a) of the Amended Act, the State Commission means State Commission established u/s 17(1) of the Electricity Regulatory Commission Act, 1998. u/s 2(1b) State Electricity Board means an Electricity Board constituted u/s 2.2 of the Supply Act and includes any board, which functions under Sections 6 and 7 of Supply Act. u/s 2(1c) State Transmission Utility means the utility notified by the State Government u/s 27B(1) of that Act. A new chapter Part H(a) under the caption

"transmission of energy" was introduced in 1910 Act. u/s 27A of the Act, the Central Government may by issuance of a notification in the Official Gazette specify any Government Company as a Central transmission utility to perform the functions specified therein. Likewise, u/s 27B the State Government is expected to constitute the State transmission utility by issuance of a notification in the Official Gazette specifying the State Electricity Board or any Government Company as State transmission utility to discharge the functions specified in Section 27(b)(2) of the Act, including undertaking transmission of energy through intra-State transmission system and to discharge the functions of planning and coordination relating to intra-State transmission system with named authorities including Generating Companies or any other person notified by the Commission.

70. u/s 27(c) the Central Government till the constitution of Central Commission and thereafter the Commission and u/s 27D the State Government till the constitution of the State Commission and thereafter the State Commission are entitled to grant transmission licences to any person Who obtains the approval of the Central Transmission Utility as required u/s 27C(4) of 1910 Act. u/s 27(f), every notification/ order issued by the Central Government as well as the State Government have to be laid before the Parliament as well as the concerned State Legislature respectively.

71. From the above it is seen that a State Transmission Utility has to be constituted to plan and co-ordinate the intra-State Transmission system with the agencies mentioned in Section 27B(2)(h) including Generating Companies, or any other person notified by the State Government in that behalf. The Government of Andhra Pradesh in exercise of its powers under Sub-section (1) of Section 27B of the Indian Electricity Act, 1910 (Act No. 9 of 1910) the Governor of Andhra Pradesh notified that the Transmission Corporation of Andhra Pradesh Limited as a State Transmission Utility for the purpose of the above Act in G.O. Ms. No. 13, Energy (Power III), dated 30.1.1999.

Electricity (Supply) Act, 1948:

72. Like wise, Section 41 of the Supply Act, 1948 that was in existence till then was substituted by a new section by the same amending Act (i.e.,) Act 22 of 1998. The newly introduced Section 41 of the Electricity Supply Act, 1948 is as follows:

"41. Use of transmission lines :--(1) Until the Central Commission is established, the Central Government and thereafter the Central Commission in the case of inter-State transmission system and until the State Commission is established, the State intra-State transmission system may determine the charges payable to the Central Transmission Utility or State Transmission Utility, as the case may be, for the use of transmission system by a Board, its successor entity, generating company, licensee or any other person.

(2) The Central Transmission Utility or State Transmission Utility, as the case may be, may enter into an agreement with any transmission licensee for the exclusive use of

the transmission system constructed, maintained and operated by the transmission licensee.

(3) Where the Central Transmission Utility or the State Transmission Utility, as the case may be, considers it necessary to use for any purpose any transmission system or transmission line or main transmission line of a Generating Company or a licensee, it shall have the power to use such lines to the extent to which the capacity thereof is surplus to the requirements of the Generating Company or the licensee on payment of charges calculated in accordance with the provisions of the Fifth Schedule."

73. As per this section in case of intra-State transmission system, the State Government till the constitution of State Commission and thereafter the State Commission has to determine the charges payable to the State Transmission Utility for the use of transmission system by a Board, its successors entity, a Generating Company, licensee or any other person in accordance with the provisions of the Fifth Schedule.

74. u/s 56(3) of the Reforms Act, upon establishment of the Commission the provisions of 1910 Act and 1948 Act are to be read subject to the modifications and reservations mentioned therein. Under Sub-clause (ii), the matters provided in Sections 3 - 11, 28, 36(2), 49A, 50 and 59 of the Indian Electricity Act, 1910, shall not apply to the extent where specific provisions are made in the Reforms Act. Under Sub-clause (iii) the provisions of all other Sections of Indian Electricity Act 1910, are saved and are made applicable. Under Sub-section (iij)(b) the provisions of 1910 & 1948 Act has to be taken as reference to the corresponding provisions of the Reforms Act to the extent modified by the Act. Under Sub-section (iv) the Schedules to 1910 Act are applicable to the provisions of this Act, wherein the application of the schedule are specified and not otherwise. Under Sub-section (v) all matters provided in Sections 5 - 18, 19, 20, 23 - 27, 37, 40 - 45, 46 - 54, 56 - 69, 72 and 75 - 83 of the Supply Act, shall not apply to the extent, the act made specific provisions in this Act.

75. Chapter IV of Principles of Statutory Interpretation by Justice G.P. Singh deals with External Aids to Construction. Item 4 of this Chapter deals with reference to other statutes.

76. The well settled principles of interpretation of statutes is that if there are different statutes in peri materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system and as explanatory of each other.

77. In J.K. Steel Ltd. Vs. Union of India (UOI), , while considering Item No. 26-AA in First Schedule of Central Excise and Salts Act levying ad valorem plus excise duty on pig iron and, steel and Item No. 63(36) in the First Schedule of the Indian Tariff Act, 1934 imposing only countervailing duty, their Lordships of the Supreme Court held

that "the Central Excise Act and Salt Act, 1944 and Indian Tariff Act are cognate legislations. In other words, they are legislations which are pari materia. They form one code. They must be taken together as forming one system and as interpreting and enforcing each other. It is proper to assume from the surrounding circumstances, that these two entries were introduced in pursuance of a common purpose, that purpose being that the articles listed in Entry 26AA whether produced out of indigenous Pig Iron or Steel Ingot or made out of imported Pig Iron or Steel Ingot must bear the same amount of duty."

78. From the above, it is seen that the Reforms Act, Central Electricity Regulatory Commission Act (Central Enactment), the Electricity Act, and the Supply Act are cognate legislations and the State Commission constituted under Central Act is vested with the power to determine the tariff payable for the use of transmission facilities by the Generating Company in the manner provided in Section 29 of that Act.

79. Section 15 of the Reforms Act deals with grant of licence to the licensee. Sub-section (3) deals with the duration of licence and the terms and conditions under which the transmission or supply of energy is to be made. u/s 15(4) without prejudice to the generality of Sub-section (3) the Commission may require the licensee to (a) enter into an agreement on specified terms with other person for the use of any electric lines, electrical plant or plants and associated equipment operated by the licensee.

80. Under Clause 5.1.2 of the licence "the licensee shall not commence any new service to third parties for the transportation of electricity through the licensee''s transmission system, except with general or special approval of the Commission." Even assuming that the Commission constituted under the Reforms Act is empowered to approve the "specified terms" either by way of a general order or special order, till this date no regulation with regard to use of the properties, assets and interests in the properties or in connection with the electricity industry in the State were made by the Commission as required u/s 54(k) of the Reforms Act. Though Schedule-V provided parameters for fixation of wheeling charges u/s 43 of Supply Act, this Section was omitted as per Section 54(V) of the Reforms Act. On the other hand, the State Commission constituted under the Central Act was not only authorised to determine the tariff for use of the transmission facilities, but the guiding principles for determination of the tariff were also specified in Section 29 of the Central Act and such guiding principles for issuance of a general or special order are conspicuously absent in the State Act.

81. In Chapter 2 of Principles of Statutory Interpretation dealing with the guidelines of Interpretation of Statutes, Justice G.P. Singh observed that the Court should avoid interpretation of provisions of two statutes "a head on clash" and whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise in the following words:

"A familiar approach in all such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific. The principle is expressed in the maxims Generalia specials bus non-derogant and Generalibus specialia derogant. If a special provision is made on a certain matter, that matter is excluded from the general provision. These principles have also been applied in resolving a conflict between two different Acts and in the construction of statutory rules and statutory orders."

82. If we look at Section 15(4) of the Reforms Act and Section 22 read with Section 29 of the Central Act, while the levy of wheeling charges under the Reforms Act is only general in nature, a special provision was made in the Central Act by specifying the guiding principles in fixation of wheeling charges.

83. A Constitutional Bench of the Supreme Court in M. Karunanidhi Vs. Union of India and Another, , while considering the question whether there is any repugnancy between the Tamil Nadu Public Men (Criminal Misconduct) Act, 1973 and the Code of Criminal Procedure, as well as the Prevention of Corruption Act and Criminal Law Amendment Act, having surveyed the case law, the Supreme Court enunciated the principles as follows:

84. So far as the Concurrent List is concerned though both the Parliament and State Legislatures are entitled to legislate in regard to any of the entries appearing therein, but that is subject to the conditions laid down by Article 254(1) of the Constitution.

"(A) Constitution of India. Article 254 -Repugnancy between law made by State and Parliament - When may arise.

Repugnancy between a law made by a State and by the Parliament may result from the following circumstances:

1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

2. Where however if law passed by the State comes into collision with a law passed by Parliament on an entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with Clause (2) of Article 254.

3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four comers of the State List and entrenchment, if any, is purely incidental or inconsequential

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.

Their Lordships further held

1. That in order to decide the question of repugnancy, it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results,

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

85. A Full Bench of the Supreme Court in Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, , while considering the scope of Sections 62 and 72 of the A.P. Panchayat Samithis and Zilla Parishads Act, 1959, held as follows:

"Under Sub-section (2) of Section 62, the Government shall, before taking action under Sub-section (1) thereof shall give the Panchayat Samithi or the Zilla Parishad, as the case may be, an opportunity for explanation. Section 72 confers a general power on the Government; and on its terms, if there was no other section, it can cancel a resolution of a Panchayat Samithi. But Section 62 of the Act confers a special power on the Government to cancel a resolution passed by a Panchayat Samithi in the circumstances mentioned therein. The principle generalia specialibus non derogant compels us to exclude from the operation of Section 72 the case provided for u/s 62."

86. In The South India Corporation (P) Ltd. Vs. The Secretary, Board of Revenue Trivandrum and Another, , a Constitution Bench of the Supreme Court while considering the scope of Articles 277 and 372 of the Constitution, held that "while Article 372 of the Constitution, which saves all pre-Constitution valid laws Article 277 is confined only to taxes, duties, cesses or fees lawfully levied immediately before the Constitution. Therefore, Article 372 cannot be construed in such a way as to

enlarge the scope of the saving of taxes, duties, cesses or fees by observing that it is settled law that a special provision should be given effect to the extent of its scope, leaving the general provision to control cases, where the special provision does apply."

87. In Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., , while considering the vires of Forward Contracts (Regulation) Act (1952) (Act 74 of 1952) their Lordships of the Supreme Court held that "though the Act would be a legislation on Future Markets as found in Entry 48 in List I of the seventh schedule, the same would also be a law with respect to trade and commerce coming under Entry 26 of List II Entry 48 in List I being a specific one must be excluded from the general Entry 26 in List II. Thus, the Forward Contracts (Regulation) Act being legislation on Forward Contracts must be held to fall within the exclusive competence of the Union under entry 48 in List I."

88. In State of A.P. v. National Thermal Power Corporation Limited 2002 (127) STC 280, a Constitutional Bench of the Supreme Court while considering the Entries 53 and 54 in the Concurrent List held that "a mere consumption of goods (other than electricity), not accompanied by purchase or sale would not be taxable under Entry 54 because it does not provide for taxes on the consumption and Entry 53 does not speak of goods other than electricity. Thus in substance Entries 53 and 54 can be and must be read together and to the extent of sale of electricity for consumption outside the State, the electricity being goods, shall also be subject to provisions of Entry 92-A of List I....."

89. In arriving at that decision their Lordships relied on Judgment in Central Provices and Berar Sales of Motor Spirit and Lubricants Taxation Act AIR 1939 FC 131, 1938, In re (1938 1 STC 1 (FC), wherein it was held that "two entries in the Lists may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them. The Court should strive at searching for reasonable and practical construction to seek reconciliation and give effect to all of them. If reconciliation proves impossible the overriding power of Union Legislature operates and prevails."

90. Gwyer, C.J., observed - "A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implication of the context, and even by considerations arising out of what appears to be the general scheme of the Act." His Lordship further held that"..... an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying the language of the one by that of the other. If indeed such a reconciliation would prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail".

91. In the light of the foregoing discussion, we hold that the Central Enactment clearly speaks of determination of tariff for using transmission facilities by the State Commission to be constituted under Central Electricity Regulatory Commission Act by providing necessary guidelines for fixation of charges for wheeling the energy generated by the Generating Companies through the transmission lines of the licensee. A vague and a general provision in the Reforms Act without providing any guidelines has to give way to the specific provision made in the Central Act. Since there is no conflict at all between the provisions of the Central Act and the State Act, the State Act has to give way to the Central Act. Hence, we hold that the State Commission constituted under the Reforms Act has no power to levy charges for wheeling the energy generated by the Generating Companies to their consumers. Accordingly, we answer this issue in favour of the petitioners,

92. In the light of the above finding, it may not be necessary to advert to the other issues that arose for our consideration. But, since arguments were addressed in extenso, we would like to record our findings on those issues also.

93. As the other issues raised in the Writ Petitions and appeals arising out of the orders of the Commission are being common and they have arisen under the provisions of the Reforms Act they are dealt with in seriatum as per the provisions of the Reforms Act while dealing with the contentions of the appeals.

Whether the commission can exercise legislative function under the Reforms Act:

94. The sheet anchor of the argument of the Commission is that fixation of tariff is a legislative function and the Commission being a regulatory authority, its functions under the Act are Legislative, Regulatory, Advisory and Adjudicatory. Hence, it is having powers to deviate from the wheeling agreements signed by the A.P.S.E.B. earlier and the earlier notifications issued by the Government by contending that it is the Commission''s duty to ensure that the charges for wheeling are levied in a fair and just manner and are equitable and economical.

95. Mr. P. Sriraghuram placed reliance on the following in support of his contention.

96. Bernard Schwartz in his treatise on Administrative Law and Administrative Agencies described the regulatory power as a power of legislative and quasi-judicial telescoped into regulatory power.

"These are powers of immense scope, and represent an amalgam of functions devised with little regard to constitutional theory. The regulation of industry cannot be carried out effectively under a rigid separation of powers. Concentrated industrial power must be controlled by concentrated governmental power. Regulatory agencies like the ICC have been made the repositories of all three types of governmental power legislative, executive, and judicial. Instead of being separated in the traditional way, these powers have been telescoped into a single agency.

97. He also cited the judgment of the Supreme Court in Sri Venkata Seetaramanjaneya Rice and Oil Mills and Others Vs. State of Andhra Pradesh etc., , for the proposition that the word "Regulate" includes power to increase so as to make it fair and realistic one. He also cited a host of decisions in support of his plea that fixation of tariff is a legislative function and the Courts cannot interfere with the legislative functions of the Commission.

98. Countering the arguments of the Commission, the Counsel for the appellants contended that the case in V.S. Rice and Oil Mills'' case (supra), was dealing with the powers of the Government under Essential Commodities Act and the Government''s power to issue orders in exercise of its powers u/s 3 of the Act were very much in existence when the contracts were entered into, and the contract entered into were subject to the State restriction. On the contrary, in the present case, the Commission is trying to set aside the contracts, which have created vested rights and which were entered into much prior to the coming into force of the Reforms Act. Since, the Reforms Act is not there when power purchase agreements were entered into, the rationale in this case has no application.

99. Assuming for a moment that such a power of regulation is vested in the Commission that power has to be exercised for achieving the objects and the purposes of the Act and the Commission cannot exercise unbridled power to nullify the very intention of the Legislature, underlying the Act. There is no dispute with regard to the principle that fixation of tariff is a legislative function. Under the Reforms Act, the powers of the Government in giving licences and the power of the Board to fix the tariff were amalgamated into an independent transparent system, therefore the powers of the Government as well as the Board are made available to the Commission.

100. They also contended that it is difficult to give proper definition to the word ''regulate'' by placing reliance on a judgment of the Supreme Court reported in Jiyajeerao Cotton Mills Ltd. and Another Vs. Madhya Pradesh Electricity Board and Another, under two orders issued by the State Government (i.e.,) M.P. Electricity (Supply and Consumption Regulation) Order, 1975 and the M.P. Electricity (Generation, Control and Consumption) Order, 1975, the consumers were asked to reduce their consumption in accordance with the provisions therein. It was further provided that without prejudice to the Board''s power to disconnect the supply in the event of any violation thereof, the consumer will have to pay the charges at penal rates for the excess energy consumed.

101. The question that fell for consideration of their Lordships of the Supreme Court is whether Section 22-B permits the State Government to issue an appropriate order for regulating the supply, distribution and consumption of electricity, their Lordships while interpreting the word ''regulate'' occurring in Section 22 held that "it is difficult to give the word a precise definition. It has different shades of meaning and must take its colour from the context in which it is used having regard to the

purpose and object of the relevant provisions. The Court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied. The Generation Order says that if a consumer had an alternative source of generating power from his own generating set (described as captive power by the parties) it may be required to generate electricity to the maximum extent technically feasible and the supply by the Board would be reduced to that extent. The Order in Clause (3) provided for assessment of the generating capacity of the captive power of the consumer.

102. The arguments advanced on behalf of the respondent was that Clause (3) of the Order mandatorily require a consumer to generate maximum feasible electricity from its own Generating Company is ultra vires to Section 22-B, as the Clause-B being in excess of the powers, their Lordships held in para 32 as follows:

"32. .....Section 22-B permits the State Government to issue an appropriate order for regulating the supply, distribution and consumption of electricity. The expression "regulate" occurs in other statutes also, as for example, the Essential Commodities Act, 1955, and it has been found difficult to give the word a precise definition. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, and as has been repeatedly observed, the Court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied....."

103. Before considering the rival contentions, it is useful to refer the case law relating to legislative function.

104. Their Lordships of the Supreme Court in Supreme Court Employees Welfare Association v. Union of India, , while considering the question how and in what manner the President of India should act under proviso to Article 146(2) of the Constitution of India, whereunder the rules relating to salaries etc., of the officers and servants of the Supreme Court require the approval of the President after the Chief Justice of India submits to him the rules framed by the Court relating to the salaries, allowances, leave and pensions of the officers and servants of the Supreme Court, ruled "that while the President exercises legislative power under Article 111 of the Constitution in his capacity as a part of the Legislature, he acts as a delegate when he acts under the proviso to Article 146(2) of Constitution of India. In exercise of this function, he does not assume the mantle of the Legislature, but functions as the head of the executive to whom the Constitution has delegated specific legislative power to make subordinate legislation. This power is limited by the terms, and subordinate to the objects, of delegation. On the advice of his Council of Ministers, the President grants or refuses approval of the rules made by the Chief Justice of India. It is indeed, this power of approval, which the Constitution has under the proviso to Clause (2) of Article 146 delegated to the President that can vitalize and activate the rules, so far as they relate to salaries, allowances etc., as

subordinate legislation. In the making of such instruments, both the Chief Justice and the President act as delegates by virtue of the constitutional conferment of power. They must in this regard necessarily act in good faith, reasonably, infra vires the power granted, and on relevant consideration of material facts."

105. In arriving at the above decision, their Lordships relied on Wade''s Administrative Law, Sixth Edition, page 863 it is stated as follows:

"Acts of Parliament have sovereign force, but legislation made under delegated power can be valid only if it conforms exactly to the power granted. Even where, as is often the case, a regulation is required to be approved by resolutions of both Houses of Parliament, it still falls on the ''subordinate'' side of the line, so that the Court may determine its validity."

106. Thommen, J., in a separate judgment while agreeing with the view of the majority, in para 100 of the judgment, observed that "where the validity of a subordinate legislation (whether made directly under the Constitution or a statute) is in question, the Court has to consider the nature, objects and scheme of the instrument as a whole, and, on the basis of that examination, it has to consider what exactly was the area over which, and the purpose for which, power has been delegated by the governing law."

107. Having reviewed the case law on the power to be exercised by a delegate held thus:

"an act is Ultra vires either because the authority has acted in excess of its power in the narrow sense, or because it has abused its power by acting in bad faith or for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness."

Para 106 "the true position thus appears to be that, just as in the case of an administrative action, so also in the case of subordinate legislation (whether made directly under the Constitution or a Statute), its validity is open to question if it is ultra vires the Constitution or the governing Act or repugnant to the general principles of the laws of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it."

108. Even if it were to be assumed that rules made by virtue of power granted by a provision of the Constitution are of such legislative efficacy and amplitude that they cannot be questioned on ground ordinarily sufficient to invalidate the generality of statutory instruments, they are nevertheless liable to be struck down if found to be intrinsically arbitrary or based on an irrational classification or otherwise repugnant to constitutional principles.

109. In Singh (Pargan) v. Secretary of State for the Home Department 1992 (1) WLR 1052, the House of Lords while considering whether Regulation 3(4) of the Immigration Appeals (Notices) Regulations, 1984 dispensing with the written notice

to be served on the person in respect of whom the decision to deport is ultra vires of Section 18 of the Act, framed under Immigration Act, 1971.

110. In the above context while considering the scope of Section 18, Lord Jauncey of Tullichettle speaking for the Court held that "in my view Parliament intended that the Secretary of State should be required to make regulations which would ensure, so far as practicable, that persons upon whom the rights of appeal had been conferred should be enabled effectively to exercise those rights. It follows that the Secretary of State does not have a discretion as to whether or not he shall make regulations."

111. While recording the above finding their Lordships approved the view of Bridge L.J of Court of Appeal in Ekrem Mehmet (1977) Imm A.R. 56 at page 66,

"..... I gravely doubt whether that is right and whether it can be said that Parliament intended to leave it to the Secretary of State to decide whether any regulations at all should be made under this section. .....Looking at these provisions, it seems to me that one should construe Sub-section (1) not as leaving it open to the Secretary of State''s discretion whether he makes any regulations at all, but as requiring him to make regulations under the sub-section".

112. In Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc., Justice O. Chinnappa Reddy speaking for the Bench with regard to the fixation of high prices by the manufacturers of bulk drugs under para 3 of Drugs (Price Control) Order, 1979 observed that:

"We start with the observation, ''Price-fixation is neither the function nor the forte of the Court''. We concern ourselves neither with the policy nor with the rates. But we do not totally deny ourselves the jurisdiction to enquire into the question, in appropriate proceedings, whether relevant considerations have gone in and irrelevant considerations kept out of the determination of the price. For example, if the Legislature has decreed the pricing policy and prescribed the factors, which should guide the determination of the price, we will, if necessary, enquire into the question whether the policy and the factors are present to the mind of the authorities specifying the price. But our examination will stop there. We will go no further. We will not deluge ourselves with more facts and figures. The assembling of the raw-materials and the mechanics of price fixation are the concern of the executive and we leave it to them. And, we will not revaluate the considerations even if the prices are demonstrably injurious to some manufacturers or producers. The Court will, of course, examine if there is any hostile discrimination. That is a different ''cup of tea'' altogether.

The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing. There

are several instances of the Legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate -, in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation...

Occasionally, the Legislature directs the subordinate legislating body to make "such enquiry as it thinks fit" before making the subordinate legislation. In such a situation, while such enquiry by the subordinate legislating body as it deems fit is a condition precedent to the subordinate legislation, the nature and the extent of the enquiry is in the discretion of the subordinate legislating body and the subordinate legislation is not open to question on the ground that the enquiry was not as full as it might have been. The provision for "such enquiry as it thinks fit" is generally on enabling provision, intended to facilitate the subordinate legislating body to obtain relevant information from all and whatever source and not intended to vest any right in anyone other than the subordinate-legislating body....

The right of the citizen to obtain essential articles at fair prices and the duty of the State to so provide them are transformed into the power of the State to fix prices and the obligation of the producer to charge no more than the price fixed. Viewed from whatever angle, the angle of general application, the prospectivity of its effect, the public interest served, and the rights and obligations flowing therefrom, there can be no question that price fixation is ordinarily a legislative activity. Price-fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals. Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the Government or its nominee and the price to be paid is directed by the Legislature to be determined according to the statutory guidelines laid down by it. In such situations the determination of price may acquire a quasi-judicial character. Otherwise, price fixation is generally a legislative activity. We also wish to clear a misapprehension which appears to prevail in certain circles that price-fixation affects the manufacturer or producer primarily and therefore fairness requires that he be given an opportunity and that fair opportunity to the manufacturer or producer must be read into the procedure for price-fixation."

113. Further, in State of U.P. and Others Vs. Renusagar Power Co. and Others, , their Lordships of the Supreme Court while holding that Section 3(4) of U.P. Electricity (Duty) Act 1952 enabled the State Government to fix different rates of Electricity duty in relation to different classes of consumption of energy or allow any exemption from payment thereof held that "it appears to us that Sub-section (4) of Section 3 of the Act in the set up is quasi legislative and quasi administrative insofar as its power to fix different rates having regard to certain factors and so far as its power to grant exemption in some cases, in our opinion is quasi-legislative in

character. Such a decision must be arrived at objectively and in consonance with the principles of natural justice. It is correct that with regard to the nature of the power u/s 3(4) of the Act, when the power is exercised with reference to any class it would be in the nature of subordinate legislation, but when the power is exercised with reference to individual it would be administrative.

114. In Paragraph No. 76 their Lordships held "that if the exercise of power is in the nature of subordinate legislation the exercise must confirm to the provisions of the Statute. All the conditions of the statute must be fulfilled."

115. In M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, , their Lordships of the Supreme Court held as follows:

47. Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. All his decisions, whether characterized as legislative or administrative or quasi-judicial, must be in harmony with the Constitution and other laws of the land. They must be "reasonably related to the purposes of the enabling legislation". See Leila Mourning v. Family Publications Service (1973) 411 US 356, 36 Law Ed.2d 318. If they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation, Courts might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires": per Lord Russel of Killowen, C.J. in Kruse v. Johnson (1898) 2 QB 91, 99.

48. The doctrine of judicial review implies that the repository of power acts within the bounds of the power delegated and he does not abuse his power. He must act reasonably and in good faith It is not only sufficient that an instrument is intra vires the parent Act, but it must also be consistent with the constitutional principles :

Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another,

49. Where a question of law is at issue, the Court may determine the rightness of the impugned decision on its own independent judgment. If the decision of the authority does not agree with that which the Court considers to be the right one, the finding of law bv the authority is liable to be upset. Where it is a finding of fact, the Court examines only the reasonableness of the finding. When that finding is found to be rational and reasonably based on evidence, in the sense that all relevant material has been taken into account and no irrelevant material has influenced the decision, and the decision is one which any reasonably minded person, acting on such evidence, would have come to, then judicial review is exhausted even through the finding may not necessarily be what the Court would have come to as a trier of fact. Whether an order is characterized as legislative or administrative or quasi-judicial, or, whether it is a determination of law or fact, the judgment of the expert body, entrusted with power, is generally treated as final and the judicial

function is exhausted when it is found to have "warrant in the record" and a rational basis in law.

52. The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could even have made it.

55. In this connection we would recall the observations of Chinnappa Reddy, J. in Union of India v. Cynamide India Limited, AIR 1987 SC 1802:

"We do not agree with the basic premise that price fixation primarily affects manufacturers and producers. Those who are most vitally affected are the consumer public. It is for their protection that price fixation is resorted to and any increase in price affects them as seriously as any decrease does a manufacturer, if not more."

In Gupta Sugar Works Vs. State of U.P. and Ors, one of us (Jagannatha Shetty, J) stated:

"In this view of the matter, the primary consideration in the fixation of price would be the interest of consumers rather than that of the producers."

116. In Kerala State Electricity Board Vs. S.N. Govinda Prabhu and Bros. and Others, , the Honourable Supreme Court held that "a State Electricity Board created under the provisions of the Electricity (Supply) Act is an instrumentality of the State subject to the same constitutional and public law limitation as one applicable to the Government including the principle of law inhibits arbitrary action by the Government."

117. From the above judgments, the following principles can be deduced.

118. (1) Price fixation is ordinarily legislative activity; (2) By an Act of Legislature, the sovereign function can be delegated to an authority named thereunder and the delegatee has to exercise its powers inconformity with the power granted under the Act; (3) All the decisions of the authority, whether characterised as legislative, administrative or quasi-judicial must be in harmony with the Constitution or other laws of the land; (4) when the Court is called upon to decide validity of the subordinate legislation, it has to consider what exactly was the area over which and the purpose for which the power has been delegated by the governing law and if the authority concerned acted in excess of its power or abused its power or exercised the power on irrelevant grounds, without regard to relevant considerations or with gross unreasonableness or the action of the authority is so arbitrary, unreasonable and no fair-minded authority could ever have made it the Court is expected to declare such an action as illegal; (5) When the statute speaks of framing regulations in exercise of the power by the delegatee the same way it has to

be exercised; (6) Though price fixation is primarily the legislative act and sufficient guidelines are prescribed for exercise of that power, it may acquire quasi-judicial character; (7) Though price fixation is neither the function nor the forte of the Court in proper proceedings, the Court is competent to inquire into whether relevant considerations have gone in and irrelevant considerations kept out of the determination of price and if there is any hostile discrimination and declare the action of the authority as illegal if it do not confirm to the provisions of the statute; (8) When the power is exercised with reference to a class, it would be in the nature of subordinate legislation, but when the power is exercised with reference to an individual, it would be administrative; and (9) price fixation would be in the interest of the consumer.

119. Keeping the above principles in mind, we refer to the provisions of the Act. As stated supra, following a common minimum National action plan for power drawn by the Central Government after organising two conferences of the Chief Ministers, decided to re-structure the power structure mainly to improve the financial health of the State Electricity Boards, which are losing heavily on account of irrational tariff and lack of budgetary support from the State Governments. As a result of which, the Electricity Boards have become incapable of even proper maintenance, leave alone purposive investments. Further the lack of creditworthiness of the State Electricity Boards has been a deterrent in attracting investment both from public and private sectors. Almost with the same objectives the State Legislature passed the Reforms Act. The integrated power sector was unbundled and two separate Corporations one for generation and the other for transmission and distribution of electrical energy to be incorporated under the Companies Act were constituted for restructuring the power sector. The Commission constituted under the Reforms Act is expected to achieve the balance required to be maintained in regard to competitiveness and efficiency on one part and the social objective of entering a fair deal to the consumer on the other part and is vested with the authority to prevent monopoly, abuse and to regulate and adjudicate on tariffs, of course, subject to the policy directions to be given by the State Government from time to time with regard to overall planning and co-ordination on the matters concerning electricity in the State including determination of structure of tariffs for supply of electricity to various classes of consumers.

120. u/s 11(2), the Commission is expected to act always consistent with the objectives and purposes for which the Commission has been established and all acts, decisions and orders of the Commission shall be pursuant to and shall seek to achieve such objectives and purposes. u/s 15(4), under the terms and conditions of the licence issued to the licensee, the Commission is empowered to permit the licensee to enter into agreement on specified terms with other persons for the use of electrical lines etc. u/s 26(2), the Commission has to frame regulations prescribing the terms and conditions for the determination of the licensee''s revenues and tariffs and the same has to be published in the Official Gazette, u/s 26(7)(c), the tariff

fixed by the Commission shall satisfy all the relevant provisions of this Act and conditions of the relevant licence. Under Sub-section (8), the Commission is competent to fix tariffs in such a manner that as far as possible similarly placed consumers in different areas pay similar tariff. Under Sub-section (9), while fixing the tariff for supply of electrical energy to the consumers, the Commission has to consult the Advisory Committee. u/s 31, the Commission has to frame regulations for imposition of fines and charges for non-compliance or violation of the provisions of the Act or Rules and Regulations and directions or orders of the Commission made from time to time on the part of the generating companies, licensees and other persons. u/s 32, the Commission is under obligation to take the advise of the Advisory Committee on major questions of policy relating to the electricity industry in the State. u/s 52, all proceedings before the Commission shall be deemed to be judicial proceedings. u/s 54(g), the Commission has to frame regulations prescribing the method and manner of determination of licensee''s revenues, tariff fixation, the matters considered in such determination and fixation and u/s 54(k) for regulation of the properties, assets, interests in the properties used for or in connection with the Electricity Industry.

121. Admittedly, no regulations were framed by the Cpmmission for exercise of the above powers conferred on it. Though u/s 11(e), the Commission is having the power to regulate the purchase, distribution and supply of electricity, decision has to be taken on policy matters by the State Government with regard to overall planning and co-ordination and how to bridge the gap between the supply and demand. In discharge of its functions, the Government has already committed to encourage private entrepreneurs to set up Generating Companies; what type of incentives have to be provided to them, how to meet the ever increasing demand for electricity is purely within the realm of the Government function and the Commission can only act as per its advise and it cannot take decision on its own, as far as generation of electricity by companies functioning in the State.

Constitution of Regulatory Commission:

122. u/s 3(2) of the Reforms Act, the Commission shall consist of a Chairman and two members to be appointed by the State Government from persons selected by the selection committee constituted for the purpose.

123. Section 4 deals with the manner of the selection of the Chairman and members of the Commission.

124. Sections 5 and 6 deals with the conditions for appointment of Chairman, term of office etc.

125. Section 8 deals with the appointment of the Secretary, staff and consultants of the Commission.

126. Part-Ill deals with proceedings, powers and functions of the Commission.

127. u/s 9(2), the Commission shall alone have the exclusive power to make regulations for the conduct of its proceedings and discharge of its functions and all such regulations framed shall be published in the Official Gazette.

128. As per Sub-section (3), all decisions of the Commission shall be on the basis of majority of the Members present and voting.

129. Under Sub-section (4) the quorum for the meeting fixed at two.

130. As per Sub-section (7), all decisions, directions and orders of the Commission shall be in writing and shall be supported by reasons. The decisions, directions and orders of the Commission shall be available for inspection by any person and copies of the same shall also be made available in a manner the Commission may prescribe.

131. u/s 10, the Commission shall, for the purposes of any inquiry or proceedings under this Act shall have the powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit in respect of the matters enumerated therein.

132. Under Sub-section (4), the Commission is having powers to review its decisions, directions and orders.

133. Under Sub-section (7), in discharge of its function, the Commission shall be entitled to and shall consult to the extent the Commission considers appropriate from time to time such persons or group of persons who may be affected or are likely to be affected by the decisions of the Commission.

134. This Clause is nothing but extending the principle of audi alteram partem to the affected persons.

135. u/s 32, the Commission has to constitute Advisory Committee to advice the Commission on major questions of policy relating to the electricity industry in the State.

136. u/s 52, all proceedings before the Commission are deemed to be judicial proceedings.

137. In G.O. Ms. No. 51, Energy (Power-III), dated 4.3.1999 issued by A.P. Electricity Regulatory Commission (Conditions of Services of Chairman and Members) Rules, 1999, it is seen that while the Chairman of the Commission is treated on par with the Chief Justice of the High Court, the members of the Commission are treated on par with IAS Officers with regard to pay, allowances and leave etc., as per note to Rule 3(1) and Rule 4 of the Rules.

Constitution of Advisory Committee:

138. Regulation 1, dated 17.6.1999 relates to Constitution of Advisory Committee, u/s 32(5) of the Act. Clause-2 of this regulation, the Advisory Committee to be

constituted has to reflect balance of various interest groups, like representatives from holders of supply licence, transmission licence. Generating Companies, Commerce, Industry, Transport, Agriculture, Labour employed in the Electricity Supply Industry and consumers of electricity etc. Under Clause 3.1.1 the Advisory Committee has to advise the Commission on major questions of policy, relating to the electricity industry in the State. Under Clause 3.3 the Committee has to advise the Commission in a General Tariff Proceeding pursuant to Section 26(9) of the Act apart from other functions.

Business Rules of the Commission:

139. Regulation 2, dated 5.7.1999 framed by the Commission in exercise of its powers u/s 54(2)(a) of the Act framed (Conduct of Business) Regulations, 1999.

140. Clause 4 says that the language of the Commission is in English.

141. Chapter II deals with General Rules concerning the proceedings before the Commission.

142. Under Clause 7(2)(i) all matters which the Commission is required under the Act to undertake and discharge through hearings shall be done through hearing in the manner specified under the Act and in these Regulations.

143. Under Sub-rule 2(ii) all matters affecting the rights or interests of the licensee or any other person or class of persons shall be undertaken and discharged through hearing in the manner specified in these Regulations, unless the Commission for reasons to be recorded in writing may otherwise provide.

144. Under Regulation 9, all the petitions to be filed before the Commission shall be type written etc. and those petitions shall be accompanied by such documents as the Commission may specify.

145. Under Regulation 11, all petitions have to be verified through an affidavit in Form 2 and the other provisions of the section deals with the information to be furnished, if so directed by the Commission. As per this Regulation, while the Commission is given the liberty to admit the petition for hearing without requiring the attendance of the party filing the petition, the Commission is injuncted from passing any order refusing admission without giving the party concerned an opportunity of being heard by giving a notice for hearing the petition on admission.

146. Regulation 13 deals with service of notices and processes issued by the Commission, again synonymous to that of service of notices by the Courts.

147. Regulation 14 deals with the filing of reply, opposition, and objections or to put it aptly defence of the other side.

148. Regulation 15 deals with the hearing of the matter.

149. Regulation 19 speaks of the order to be passed by the Commission and in Clause (1) the Chairman and the Members of the Commission who heard the matter alone have to sign the orders. Final orders of the Commission shall be communicated to the parties in the proceedings under the signature of the Secretary or an Officer empowered in this behalf by the Chairman or the Secretary.

150. Regulation 20 deals with inspection of records and supply of certified copies.

151. Under Sub-clause (1) Records of every proceeding shall be open, as of right, to the inspection of the parties or their authorised representatives and entitled for certified copies on payment of fees.

152. Under Sub-clause (2) only the papers which the Commission feels are confidential or privileged are not open to scrutiny.

153. Under Sub-clause (3) all parties are entitled to certified copies of the orders, decisions, directions and reasons in support thereof given by the Commission subject to payment of fees and compliance with the terms as the Commission may direct.

154. Chapter III deals with Arbitration, which we are not very much concerned in this case.

155. In one word the filing of the petitions, the scrutiny, objections to be answered by the petitioner, registration and also admission of the petition after compliance of the objections are similar to that of the procedure adopted in a law Court without any deviation.

156. A learned Single Judge of this Court in Ind-Barath Energies Ltd., Hyd. Vs. State of Andhra Pradesh and others, , held that a bare reading of these regulations would in unmistakable terms reveal the nature of the Commission''s proceedings, which are practically quasi-judicial nature.

In Para 37 of the judgment it was held as follows:

''37. The learned Senior Counsel Sri E. Manohar, however, made an attempt to submit that the impugned order is in the nature of an administrative one, and therefore, the same is not required to be strictly in conformity with the Regulations. I find it very difficult to accept the submission. The Commission is not entitled to pass any such administrative order, which is of binding nature. The administrative order if any that could be passed by the Commission may relate to its own organizational set up. The Commission cannot pass any administrative order whatsoever adversely affecting the interest of the licensees, developers or the Generating Companies as the case may be. An order intended to be binding may have to be necessarily a quasi-judicial order passed in accordance with the provisions of the Act and Regulations framed thereunder. At any rate, the impugned order cannot be characterized as an administrative order. It had virtually altered the

position of the developers adversely affecting their right of third party sales. In the circumstances, the impugned order cannot be treated as an administrative one."

157. In the light of the above discussion, we hold that though tariff fixation is a legislative function, since that power was conferred on the Commission under the provisions of the Reforms Act, it has to exercise the powers in the manner provided under the Act and consistent with the objectives and purposes for which the Commission is established read with the regulations framed by the Commission, relating to conduct of business as required u/s 54(2) (a) of the Act.

158. All the provisions of the Act, rules and regulations referred supra leads to an irresistible conclusion that the powers of the Commission under the Reforms Act are more in the nature of judicial function exercisable by a Civil Court in the adversary system of adjudication of dispute, but not legislative in character.

Whether the wheeling charges fixed are reasonable:

159. Even assuming that it is legislative measure, the Court is not prohibited from enquiring into the question whether the legislative action is based on relevant considerations or any irrelevant considerations have crept in, in exercise of the power by the Commission and whether the same resulted in hostile discrimination.

160. The Commission in O.P. No. 2 of 1999, dated 31.3.2002, while considering the application of GBR Power Projects Limited, now claiming to be RVK Energy Private Limited for grant of exemption under Sections 15 and 16 of the Reforms Act, who entered into business agreement on long term basis with third parties for supply of power, relying on Blacks Law Dictionary with regard to the meaning of "Regulation" held that Commission''s function is not only an adjudicatory one, but a pro-active function for the development of the electricity industry in the State. Having taken such a view the Commission held that the earlier orders of the Government under G.O. Ms. Nos. 116 and 152 do not confer vested rights to the applicant to have a licence or exemption after the Reforms Act, which came into force with effect from 1.2.1999. The scheme of the provisions of the Reforms Act is clearly to the contrary. If the vested rights under G.O. Ms. Nos. 116 and 152 were intended to be protected the same would have been recognized under the Reforms Act. On the other hand the provisions of Section 14 of the Reforms Act, specify the requirement to get a licence or exemption in all cases of supply of electricity, notwithstanding any licence or sanction earlier given under the Indian Electricity Act, which is obviously incorrect.

161. Likewise, the Commission observed that any "other person" used in Section 43A(1) of the Supply Act cannot be said to refer to an individual end consumer but only to the licensee, which is again incorrect. Such an observation was made even without looking into the provisions of the Act, the policy of the Government and the terms and conditions of the licence given to the licensee. Admittedly, Section 43-A was introduced in the Supply Act by Amendment Act 50 of 1991 to give effect to the

changed policy of the Central Government permitting the private sector to establish generation companies. !n fact, Clause 20 of the licence deals with the use of transmission system of the licensee by third parties. In the explanation ''third parties'' referred in Paragraph No. 20.1, are persons authorised under legislation enacted by the Union of India to wheel power across the transmission system in inter-State conveyance of energy to such persons as the Commission may authorise to use the transmission system. Without looking all these aspects the Commission jumped at the conclusion that "any other person" occurring in Section 43-A of the Supply Act is referable only to the licensee, but not third parties.

162. Perhaps taking inspiration from the order of the Commission dated 31.3.2002 in O.P. No. 2 of 1999, that is not bound by the previous agreements, the A.P. TRANSCO, while submitting its Tariff proposals for the financial year 2001-2002 to the Commission for its approval as required u/s 26 of the Act claimed Re. 1/- per K.Wh. for wheeling the energy generated by the Generating Companies, by contending that the wheeling charges received by it in kind are substantially lower than the expenditure incurred by it for wheeling the energy including the cost of losses and expenditure. The Commission in Paragraph No. 143 of the Tariff Order 2001-2002 dated 24.3.2001, held that issues relating to setting appropriate transmission/distribution, wheeling charges are complex in nature and require proper consideration and the Commission will consider the issues of appropriate transmission/distribution wheeling charges in a separate proceeding. In Paragraph No. 160 of the said order, the distribution losses were estimated at 30.9% i.e., 17.9% technical and 13% commercial losses.

163. Subsequently, the A.P. TRANSCO as well as the distribution companies filed a joint application on 8.10.2001 again seeking revision of wheeling charges for the financial year 2001-2002 by stating that on 17.1.2001, the A.P. TRANSCO filed a combined bulk supply and transmission tariff proposals for the year 2001-2002 for the DISCOMS also, since A.P. TRANSCO is the exclusive transmitter and bulk supplier of energy procured by the DISCOMS. In Paragraph No. 3 of the application it is stated that "this wheeling charge was proposed as a change from the present practice of collecting wheeling charges in kind from the generators of power as per the MOUs signed by the A.P. TRANSCO or its predecessor entity A.P.S.E.B. Reasons for seeking change are given in Paragraph No. 4 by stating.

(a) existing wheeling charges in kind is resulting in inadequate composition for costs incurred and service provided by A.P. TRANSCO and the DISCOM in wheeling of the energy through the transmission and distribution net work;

(b) the beneficiaries/end users and/or the Generators stand to make abnormal profits on account of the present arrangements due to large differences between the cost incurred by the generators and the rates paid by the beneficiary industries; and

(c) DISCOMS are compelled to provide cross subsidies to a large body of consumers who do not have the capacity to pay cost reflective tariffs.

164. Since the Commission in its order dated 24.3.2001 observed that the issue required proper consideration, this application was filed and this time they came up by contending that the request was made on the basis of calculations and the components set out in detail in Annexure A-2 of the application, which includes sharing of certain portion of the wheeling charges with the respective DISCOMS, whose systems may also be utilized for undertaking wheeling of energy. It is useful to extract Paragraph No. 9 of the application, where the licensee has given break up for Re. 1/-:

"9. As per the computations, the charges for use of the system of A.P.TRANSCO and the DISCOMS for wheeling of energy amounts to Ps.80.74 per KWh. Due to the data constraints, AP TRANSCO has computed cost to service based on embedded cost method of computation of costs as summarised in the table below:

| | DESCRIPTION I | COST. (PS.K.WH.) |
|---|---|---|
| 1. | Costs of net work establishment and operation | 41.63 |
| 2. | Costs of losses in the system | 30.63 |
| 3. | Returns | 4.94 |
| 4. | Transmission and Wheeling Charges (External) | 3.54 |
| 5. | Total | 80.74 |

| | | |
|---|---|---|
| 6. | Surplus recovery proposed from wheeling | 19.26 |

165. From the above it is seen that they are claiming 80.74 paise per K.Wh. as per components 1 to 5 shown in the table and they also proposed to recover 19.26 paise towards surplus recovery from wheeling.

166. Paragraph No. 5: The charges of Re. 1/- per K.Wh for wheeling comprises the following costs which are as per the Tariff Order approved by the Hon''ble Commission for the year 2001-02.

| Sl. No. | PARTICULARS | DISCOMS | TRANSCO | TOTAL |
|---|---|---|---|---|
| 1. | Wages and Salaries | 407.70 | 32.79 | 440.49 |
| 2. | Administration and General Expenses | 66.56 | 1.36 | 67.92 |
| 3. | Repairs and Maintenance | 146.59 | 29.79 | 176.38 |
| 4. | Rent, rates and taxes | 2.35 | 2.04 | 4.39 |
| 5. | Approved Loan and Interest | 244.91 | 197.98 | 442.89 |

| | | | | |
|---|---|---|---|---|
| 6. | Interest on consumer security deposit | 26.81 | | 26.81 |
| 7. | Legal Charges | 0.33 | 0.50 | 0.83 |
| 8. | Auditors Fees | 0.08 | 0.02 | 0.10 |
| 9. | Depreciation | 240.63 | 100.11 | 340.74 |
| 10. | Other expenses | 29.89 | 4.83 | 34.72 |
| 11. | Contribution Employees Fund | 51.65 | 5.84 | 57.49 |
| 12. | Special appropriation permitted by the Commission | 0.00 | 90.29 | 90.29 |
| 13. | Contribution to contingency reserve | 9.48 | 6.58 | 16.06 |
| 14. | Total | 1226.98 | 472.13 | 1699.11 |
| 15. | Reasonable Return | 34.40 | 167.12 | 201.52 |
| 16. | Total network value addition | 1261.38 | 639.25 | 1900.63 |

Paragraph No. 6: The break up of Re. 1/- per K.Wh proposed for wheeling charges is as follows:

| S. No. | PARTICULARS | AMOUNT (RS.CRS.) | RATE (PS/K.WH.) |
|---|---|---|---|
| 1. | Network Establishment and Operation Cost | 1699.11 | 41.63 |
| 2. | Cost of Losses in the System (Up to 11 KV System) | 676.46 | 30.63 |
| 3. | Reasonable Return | 201.52 | 4.94 |
| 4. | Transmission and Wheeling Charges (External) | 144.56 | 3.54 |
| 5. | Surplus recovery proposed from wheeling | | 19.26 |
| | Total | | 100.00 |

167. In Paragraph No. 10 (enquiry), they also filed the extracts of Clauses 38, 39 and 42 and xxxxx of the electricity bill 2001 introduced in the Parliament on 30.8.2001 envisaging cross subsidy on the energy wheeled by third parties using transmission and distribution networks. As per Paragraph No. 10(g), the wheeling charges are proposed to be shared as hereunder.

| | A.P TRANSCO | DISCOMS |
|---|---|---|
| Wheeling at 132 K.V. | 100% | 0% |
| Wheeling at 33 and 11 p. | 25% | 75% |

168. In Chapter 8 of the impugned order dated 24.3.2002 in O.P. No. 510 of 2001 the Commission framed as many as 9 issues and held in favour of the respondents on all the issues, holding that the Commission as a regulator is vested with statutory functions under the Reforms Act and has the authority to deviate from the charges and also the terms and conditions contained in the wheeling agreement earlier signed by the A.P.S.E.B., and it is the Commission''s duty to ensure that the charges for wheeling are levied in a fair and just manner and are equitable and economical. ,In Paragraph No. 8.20, the Commission further held that the project, developer will have to enter agreement only with the DISCOM of the area where the wheeled energy is consumed irrespective of whether the wheeling would involve the use of transmission system of the A.P. TRANSCO or the use of the distribution system of other DISCOMS.

169. In Paragraph No. 8.28, the Commission having noted that the electricity generated by the developers is being supplied on displacement basis held that the technical losses of the total system have to be borne by the Power Generating Companies also proportionately, and levied the wheeling charges in kind at 28.4% towards system losses to the energy input by the project developers into the licensees grid as arrived at by the Commission in details of system losses and 50 paise in cash towards network charges whose details were given in Paragraph No. 9.12 of the impugned order.

170. The Commission under the guise of public hearing acted upon the representation of the staff and held that losses in system have to be adjusted in kind and the network and other charges should be paid in cash.

171. In Paragraph No. 8.36, the Commission observed that the A.P. TRANSCO cannot collect the wheeling charges retrospectively for the financial year 2001-2002, since the very application was filed in October, that too without adequate particulars, forgetting the fact that the licensee did not file any fresh application for the year 2002-2003 having taken the view that applications for wheeling charges will be

made annually along with the annual requirements in Paragraph No. 9.13 of the impugned order.

172. Paragraph No. 8.37: Wheeling charges should be applied to all persons who avail the service of wheeling without discrimination. The Non Conventional Energy Developer should also pay the wheeling charges like other.

173. Chapter IX deals with tariff structure - wheeling charges.

174. Paragraph No. 9.12: The wheeling charge leviable from 1.4.2002 for the F.Y.2002-2003 is accordingly worked out as below:

Calculation of Wheeling Charges for 2002-03:

(a) In cash:

| PARTICULARS OF EXPENDITURE | AMT. RS. CRS. |
|---|---|
| Wages and Salaries | 490.65 |
| Administration and General Expenses | 105.20 |
| Repairs and Maintenance | 185.66 |
| Rent, Rates and Taxes | 5.13 |
| Approved Loan Interest | S60.31 |
| Security deposit interest | 31.37 |
| Legal Charges | 0.97 |
| Audit and other Fees | 233 |
| Depreciation | 508.59 |
| Other Expences | 39.30 |
| Contribution to Staff Pension and gratuity | 64.95 |
| Contribution to Contingency Reserve | 21.45 |
| Sub Total of Expenditure | 2015.81 |
| Reasonable Return | 82.37 |
| Total Gross Revenue Required | 2098.18 |
| Less Won Tariff Income | 529.86 |
| NET REVENUE REQUIREMENT | 1568.32 |

| | | |
|---|---|---|
| Million Units (Gross) | 41954 | (DISCOMS 39259 + Wheeling 2695) |
| | Rate in Paise | |
| Network Charges Including Reasonable return | 37 Ps/kwh | (1568.32 Crs/ 41964MU) |
| Wheeling charges (External) | 3 ps/kwh | (Based on Information) |
| Balancing and ancllary charges | 10 Ps/kwh | |
| Total wheeling charges in Ps/Unit | 50 Ps/kwh | (Total of above three charges) |

(b) In Kind:

In addition, wheeling charges in kind of 28.4% of energy input by the project developer into the Licensee''s grid being the system loss are leviable.

General conditions for wheeling charges.

9.13: The application for Wheeling Charges will be made annually with the filings of Annual Revenue Requirements by the Licensees and the charges will be adjusted in relation to the approved network and other costs and losses projected in the filings and as accepted by the Commission.

9.14: Wheeling charges are applicable uniformly to all project developers. The network and balancing and ancillary charges will be recovered in cash and the losses in kind.

9.15: In case of GOAF desires to allow wheeling of power to any person/s at lesser rates than prescribed by the Commission, they can do so only if they agree to compensate the respective licensees for the loss of revenue.

9.16: The licensees are required to submit the tariff filings based on embedded costs as well as marginal costs as per the guidelines issued by the Commission, in regard to the future filings for wheeling tariffs.

9.17: This order will apply uniformly to all classes of users of wheeling service including Non-conventional Energy Sources and irrespective of voltage level of connection of developer of his end user.

175. The contents of the application as well as the order extracted extensively supra, will prove that the licensee as well as the Commission invented an innovative method in trying to recoup the losses sustained by the licensee from the Generating Companies by contending that since transmission, distribution and supply of electrical energy to the consumers being an integrated system, the network charges as well as the system losses have to be borne by the Generating Companies in proportion to the energy generated by them and the technical and non- technical losses in the system have a nexus to the use of transmission and distribution system by the project developers which seeks to avail the wheeling services and therefore are to be taken into account in determining the charges for wheeling services. The reasons given by the licensee and the Commission in revising the wheeling charges are completely at variance and they have nothing to do with the other. One redeeming feature in the impugned order is that while the licensee included cross subsidies given to different categories of end consumers at the instance of the Government. The Commission rejected that cross subsidies stating that it cannot be taken into account while determining the tariff or charges for wheeling, since the same is reimbursable by the State Government u/s 12(3) of the Reforms Act.

176. A reading of the impugned order shows how the Commission went out of the way to pull out the licensee from the debt trap. From various orders passed by the Commission, we have a feeling that the Commission is acting more as an agent of the licensee and trying to save the sinking ship under its own weight at the cost of private Generating Companies. For instance in Para 27 of the order in O.P. No. 2 of 1999 dated 31.3.2002 the Commission held that one of the important functions of the Commission is to assure that the third party sales are properly regulated to protect the interests of the distribution, licensing the concerned area of supply and the electricity distribution and supply are carried out efficiently by the licensees. And that is the only way in which the licensees, i.e., A.P. TRANSCO can be helped to recover its financial health and perform its assigned functions efficiently.

177. To our mind, it appears that the very approach to the issue by the Commission is a distracted one and not based on any realistic approach. As per the agreement the energy generated by the Generating Companies will be utilized locally and the A.P. TRANSCO from its grid will be supplying to its consumers fully from the other sources. Surprisingly the Commission by observing that since the energy wheeled is being recorded in the area of supply of DISCOMS, even though the energy is transmitted from the transmission company directly, the project developers also

have to be treated as the consumers of DISCOMS and as such they have to enter into agreement with the DISCOMS of the respective areas where the wheeled energy is consumed irrespective of the fact whether the wheeling would involve the use of transmission system of A.P. TRANSCO or the use of distribution system of other DISCOMS.

178. u/s 2(c) of the Electricity Act "consumer" means any person who is supplied with the energy by a licensee. Likewise, Part I of the licence given by the Commission to the licensee deals with the definition ''consumer'' means the end or final user of electricity irrespective of the voltage at which or the system or line from which the electricity is supplied and shall include such other persons purchasing electrical energy from the licensee, whom the Commission may specify to be a consumer of the licensee. But the Commission declared the project developer as a consumer though he never received energy either from TRANSCO or DISCOMS. Even according to the Commission the supply of energy by the Generating Company to its end consumer is being recorded in the area of supply of the DISCOM.

179. Nextly, the case of the Commission is that as the supply of energy being a public utility service and the transmission and distribution system was brought into existence with the use of money contributed by public at large. Hence, the A.P. TRANSCO and DISCOMS have a principal claim over the network, which vested in them, having admitted that DISCOMS are independent companies. This very view of the Commission proves the fallacy of its contention that the Generating Companies have to bear system losses incurred by DISCOMS, which have nothing to do with the A.P.TRANSCO and which have no control over the transmission lines of the A.P.TRANSCO.

180. The Commission further observed that the A.P. TRANSCO should enter into agreement with DISCOMS for use of transmission system and payment of transmission charges by DISCOMS to A.P. TRANSCO have to be determined by the Commission while deciding of Annual Revenue Requirements of A.P. TRANSCO. If the view taken by the Commission is correct, it is not known why the Commission wants to determine the transmission charges payable by DISCOMS to TRANSCO separately. Whatever the charges that are being collected from the Generating Companies, they have to be collected from DISCOMS also as the Commission itself observed that the wheeling charges are applicable uniformly to all project developers. Further, the Tariff Order for the year 2002-2003 does not disclose that any wheeling charges are being collected from DISCOMS. During the course of the arguments neither the Counsel for the licensee nor the Commission brought to our notice that the DISCOMS are paying any transmission charges to the A.P. TRANSCO.

181. We have carefully perused the second transfer scheme, whereunder the A.P. TRANSCO entered into an arrangement for assigning its distribution functions to the DISCOMS. Transfer Scheme 2(g) deals with assets makes it abundantly clear that transmission lines owned by the A.P. TRANSCO were not treated as assets of the

DISCOMS. Under Clause 4, it is clearly stated that A.P. TRANSCO has not and shall not be deemed to have transferred and shall continue to hold all rights and interests in and bear all obligations and liabilities including all assets, liabilities, proceedings and personnel relating to A.P. TRANSCO, other than distribution undertakings transferred to DISCOMS. Under Clause 3 of Schedule-B of the transfer scheme all the DISCOMS have to issue and allot 6,39,69,030 number of equity shares of face value of Rs. 10/- each as per value, to the A.P. TRANSCO in consideration of the transfer of the distribution undertaking to it and nowhere it is stated that the DISCOMS have to pay wheeling charges to TRANSCO.

182. In Paragraph No. 8.28, the Commission observed that in an integrated system where electricity is supplied on displacement basis rather than direct conveyance of the particular electricity generated, the technical losses up to the voltage level at which the electricity is delivered alone cannot be considered. The technical losses of the total system need to be taken into account as it is impossible to determine electricity from which source is being supplied to which particular consumer. The electricity from all sources gets combined in the system and loses its identity and the use of the system cannot be isolated from the losses in the system as they form an integral part of the system. We are rather astonished to see the reasoning given by the Commission. We have no doubt whatsoever that the power generated by the developer will be measured at the point of interconnection, while injecting the same into the grid of the licensee and again the electricity consumed by its end consumer will be recorded in the metres installed in the premises of the consumer.

183. From the above it is also evident that the Commission knowing fully well that the losses for the use of system are rather minimal as estimated by Central Power Research Institute (i.e.) 6.65% observes that losses cannot be isolated, from these losses in the system i.e., distribution losses incurred by the DISCOMS, having held that A.P.TRANSCO and DISCOMS are separate identities.

184. Though the A.P.TRANSCO is initially constituted with the principal object of engaging in the business of procure, transmit and supply of electrical energy, under the second transfer scheme the Commission assigned its distribution functions to DISCOMS. u/s 2(p) of the Reforms Act the word "transmit" in relation to electricity was denfied as a means of transportation or transmission of electricity by means of a system operated or controlled by a licensee from one place to another. u/s 2(7) of the Supply Act, "main transmission lines" were defined as high-pressure cables and overhead lines to transmit electricity from one place to another, including step-up and step-down transformers.

185. u/s 2(ma) "transmission licence" means a licence granted under Part II-A to transmit energy. u/s 2(mb) ""transmission licensee" means a person who holds a transmission licence. u/s 2(mc) "transmit" means conveyance of energy by means of transmission lines and the expression "transmission" shall be construed accordingly.

186. Admittedly, the A.P.TRANSCO is the transmission licensee and it has to convey the energy by means of transmission lines owned by it generated by Generating Companies as well as the energy sold by it to DISCOMS for sale of electricity to the end consumers. In other words, the DISCOMS have nothing to do with the transmission lines owned by the licensee,

187. u/s 2(3) of the Electricity Supply Act, "bulk licensee" means a licensee who is authorized by his licence to supply electricity to other licensees for distribution by them. From this it is evident that there is a clear distinction between bulk licensees and other licensees, who are authorised to supply electricity to the end consumers. Admittedly, in this case, the A.P. TRANSCO holds licence for transmission of energy as well as for bulk supply of electricity to other licensees and under the second transfer scheme, it is authorised to supply electricity to the distribution companies for supply of energy to the end consumers. Hence, the stand taken by the Commission that the Generating Companies using the transmission lines of the licensee for transmitting the energy produced by them to their end consumers have to bear the distribution losses incurred by DISCOMS is meaningless and absurd. The action of the Commission is like a bus-owner asking the passengers travelling in his bus to pay the loss sustained by him in running the vehicle with some empty seats or asking them to reimburse the losses sustained by him if the vehicle meets with an accident. Another example would be asking the Railway platform vendors to reimburse the loss sustained by the Railways, if a train meets with an accident. Likewise, asking the Generating Companies to share the network charges proportionately, for using the transmission lines of the licensee is unknown to law. It is like the owner of a building asking the tenant to pay the cost of construction as he is living in the house on rent. Hence, the very idea entertained by the Commission that the Generating Company has to bear the system losses as well as network charges has to be rejected outright.

188. The Commission fixed wheeling charges at 28.4% comprising of 20.4% distribution losses + 8% transmission losses in kind towards system losses and 50 paise in cash towards network charges, which we have already extracted supra. The system losses comprise of losses in metering, faulty meter reading, billing and theft (pilferage), but not include transmission losses. The network charges include the capital expenditure incurred by the licensee. Likewise wages, salaries, pensions and legal charges etc.

189. For example, from the application it is seen that DISCOMS incurred 0.33 crores and A.P. TRANSCO incurred 0.50 crores of rupees towards legal expenditure for the year 2001-2002. The Commission allowed for 2002-2003 an amount of 0.97 crores of rupees towards legal charges. This expenditure is apart from the expenditure incurred by the Commission as well as its consultants in defending its actions. Both the Commission as well as the A.P. TRANSCO are having regular Standing Counsel. But in almost all the cases they are engaging Senior Counsel and paying their fees

not as per the Legal Fee Rules, but as demanded by them. We also came to know that the Commission is having consultants who engage their own Counsel to defend the actions of the Commission and the poor consumer has to bear all this expenditure through his nose for no fault of him.

190. Nextly, under the guise of public hearing, this proposal seemed to have emanated from one Economic Professor, working for the Commission. She appeared before this Court and when we asked her, how much a developer has to pay wheeling charges in kind, if the cash component is converted into kind, she is reluctant to answer. The Counsel appearing for the licensee half-heartedly agreed that it comes to 56.8% of energy wheeled in kind. In other words, the Commission wants that the Generating Company has to pay in kind 56.8% out of 100 units of the energy generated by it. We are astonished to see the logic behind the decision of the Commission.

Non-conventional energy developers:

191. It is also interesting to see that the Commission directed both the Mini Power Plants and the Non Conventional Energy Developers to pay wheeling charges uniformly, since no discrimination can be made by the end consumers on the basis of the proposal worked out by this professor. It is useful to extract Paragraph No. 6.6 of the order.

"6.6: The staff stated that the losses occurring in the system being an inseparable component of any wheeling service, such losses are to be borne without discrimination by all end users, the consumers of the Licensee as well as suppliers/end users of the wheeled electricity."

192. In other words, the Commission and its staff treated the Generating Companies as end users, as if the electricity is supplied to them. We have already adverted to the reasoning of the Commission on this aspect.

193. The Government of India having accepted the resolution adapted by the United Nations General Assembly with regard to establishment of power projects through renewable resources announced that it is the policy of the Government to promote energy from renewable sources. It also created Ministry of Non Conventional Energy Resources to look into the policy measures, draw up programme, schemes to popularize the energy consumed through renewable resources and also directed the respective State Governments and the Electricity Boards to provide facilities for wheeling, banking, third party sale and purchase of power by Electricity Boards on remunerative prices in their policy announcements for evacuation of power generated from the renewable energy projects. Following the policy direction given by the Central Government, the State Government apart from providing additional incentives than the incentives suggested by the Central Government, has taken a policy decision to deduct 2% of the generated energy conveyed to grid by the developers of Non Conventional Energy in G.O. Ms. No. 238 dated 26.11.1993

initially for a period of five years and they are being extended from time to time. It is true that under G.O. Ms. No. 112 dated 22.12.1998, the incentives were extended by three more years and the erstwhile Electricity Board was asked to come up with suitable proposals for review for further conferment of the incentives in the present form or in a suitable manner to achieve the objective of power generation through Non Conventional Energy Source. The Commission in para 14 of its Proceedings No. APERC/Secy./Engg/No. 5, dated 6.3.2000 relating to terms of sale of power by the Non-Conventional Energy based projects observed that "A suo motu review of the incentives to take effect from 1st April, 2004, will be undertaken by the Commission after discussions with all the concerned parties. There will be a further review of the purchase prices with specific reference to each developer on completion of 10 years from, the date of the commissioning of the project (by which time the loans from IREDA would have been repaid), when the purchase price will be worked out on the basis of return on equity, O & M expenses and the variable cost." In para 15 it is observed that "the Commission hereby directs that the developers are entitled to plan their investments on the above principles without any need for any further order from the Commission. However, if any developer wishes to raise a specific issue, he may apply to the Commission in the manner provided in the regulations". Likewise, in the orders passed in O.P. No. 1075 of 2000, dated 20.6.2001 in a suo motu proceedings initiated by the Commission while directing the Non-Conventional Energy developers to sell the power generated by them to TRANSCO did not disturb the wheeling charges to be collected. Ignoring the national policy underlying the establishment of the power plants and the two orders passed by the Commission itself, now it started contending that the incentives given by the Government comes to an end by 2001. From this it is evident that the A.P. TRANSCO, which stepped into the shoes of the Board, is expected to approach the Government for review of the incentives that were extended to these developers subject to the condition that any review should achieve the objectives of power generation through Non Conventional source.

194. Nextly, u/s 26(7) of the Reforms Act, the tariff fixed by the Commission shall not show undue preference to any consumer of electricity and may differentiate according to consumer''s load factor, power factor, the consumers total consumption of energy during any specified period or the time at which supply is required or paying capacity of the category of consumers and need for cross subsidization. In other words, the Commission is fully empowered to fix different tariffs for supply of electricity to different categories of end consumers and in fact, in the tariff order for 2002-2003 itself the Commission fixed different tariffs for various categories of consumers from high tension consumers down to agricultural consumers.

195. Admittedly, the capacity of the generation plants based on renewable resources is up to 3 to 4 M.Whs and the capacity of the Mini Power Plants is around 30 M.Whs. If the Commission starts equating these tiny Power Plants with that of

Mini Power Plants and ask them to pay wheeling charges without reference to the National Policy on par with other Power Plants, it will be an unbearable burden to them. The well settled principle is that treating unequal as equals is an arbitrary exercise of power and offends Article 14 of the Constitution of India. Not only the Reforms Act but also Article 14 of the Constitution of India permits reasonable classification from among the persons similarly situated, subject to the condition that there should be reasonable nexus to the object, which is sought to be achieved. Hence, the action of the Commission treating Mini Power Plants and Power Plants based on renewable resources (i.e.) unequals as equals clearly offends Article 14 of the Constitution of India and the National Policy. On this ground also the action of the Commission cannot be sustained.

196. While the licensee sought exclusion of the Non-Conventional Energy sources when the application was filed for the first time, the joint application filed by TRANSCO and DISCOM on 8.10.2000 is silent on the aspect. Perhaps, knowing fully well that whether licensee asks for increase or not, the Commission is ever willing to help the licensee at the cost of the Generating Companies.

197. The less we speak about this order the better for us. None of the reasons given by the Commission in fixing the wheeling charges has any nexus with the object sought to be achieved under the provisions of Reforms Act It is nothing but arbitrary exercise of power and a reading of the order of the Commission will reveal that the Commission was feeling that there are no fetters on the exercise of the powers by it under the Act, we are of the opinion that they are under the impression that no force on earth can place fetters on their exercise of power under the Reforms Act.

198. The Commission seemed to have not realised the ill effects of the impugned orders. In Union of India''s case (supra) the Supreme Court held that price fixation would be always in the interest of the consumers as the right of the citizen to obtain essential articles at fair price and the duty of the State to so provide them or transform into the power of the State to fix the price. Further, in Gupta Sugar Works Vs. State of U.P. and Ors, , the Honourable Supreme Court held that "the exercise provided under the Act was intended ultimately to serve the interest of consumers....." In fact, under proviso-C to Section 26(2) of the Reforms Act, price fixation should be with the social objective of ensuring a fair deal to the consumer. It is a known fact that if the irrational and illogical order of the Commission is upheld, the extra expenditure incurred by the Generating Companies in payment of wheeling charges will ultimately be passed on, to the end consumers of the Electricity and thereafter to the purchaser of the finished products has to bear the brunt of these faulty decisions. Likewise, no individual will establish an industry with his own monies and here also most of the Power Plants were established by the entrepreneurs by availing term loans from the financial institutions. It is an admitted fact that the State owned Corporations in the electricity trade are in the debt trap due to various factors like wrong priorities, inefficiency, corruption etc. If the

Commission follows the same principle, the Power Generation Plants that were established in private sector will face the same fate very soon.

199. We have no second thought that if the Generating Company has to pay the wheeling charges at 56.8% in kind, these Power Plants will come to a grinding halt and the financial institutions have to enter into long drawn legal battles for realization of the monies. Ultimately while their Counsel may be the beneficiaries they may be the losers and there is remote possibility of realization of these funds. Again a man with loincloth has to bear the brunt of these actions, who will be subjected to high taxation.

200. Viewed from any angle, we feel that the levy of wheeling charges is irrational, illogical and suffers from serious infirmities and in violation of the provisions of the Act. This issue is also answered in favour of the appellants and against the respondents.

Collection of wheeling charges - whether a policy matter or a regulatory measure:

201. Nextly, the Commission tried to justify its action by contending that the collection of charges for transmitting the energy generated by the Generating Companies to their customers is not a policy matter and it is perfectly justified in revising the wheeling charges in exercise of its regulatory functions. The Generating Companies countered the arguments by contending that amendments made to various provisions of the existing Acts and the provisions of the Reforms Act clearly indicate that fixation of wheeling charges is a policy matter and the Government alone is competent to fix the charges to be collected for transmitting the power and the Commission''s role in that regard is only advisory. Hence, it has no power to fix or revise the wheeling charges.

202. The Commission instead of ascertaining the views of the State Government simply usurped the power and taken the stand that in exercise of its regulatory powers, it is not bound by the policy directions given by the State Government and it is not bound to honour the power purchase agreements entered into by the Board or the licensee. Surprisingly, the respondents started contending that the Commission being a regulator is not bound by any policy direction given by the Government, anterior to the Reforms Act since the Act did not say/save such policy decisions and the PPAs entered into between the Generating Companies with the then Electricity Board under the directions of the Government cannot restrain the Commission from exercising the regulatory power forgetting the fact that even under the Reforms Act, the State Government alone is entitled to take policy decisions on all matters concerning electricity in the State, including the overall planning and coordination. Under the Reforms Act, though the Government got itself divested with the day to day regulatory functions, u/s 12 of the Act, the State Government''s power to give directions on policy matters concerning electricity in the State including the overall planning and co-ordination are retained in tact and all

policy directions shall be issued by the State Government consistent with the objects sought to be achieved by the Reforms Act and they shall not adversely affect or interfere with the functions and powers of the Commission including, but not limited to determination of the structure of tariff for supply of electricity to various classes of consumers. To put it aptly the Legislature preserved the prerogative of the Government to give directions not only in policy matters but also in determination of the structure of tariff even for supply of Electricity to various classes of consumers and if any dispute arises between the Commission and State Government with regard to any policy direction that is likely to affect or interfere with the exercise of the functions of the Commission, the State Government has to refer the matter to a retired Judge of Supreme Court in consultation with Chief Justice of Supreme Court and decision shall be final u/s 12(2) of the Act. In other words, the State Government while trying to bridge the gap between the supply of electricity and demand by inviting private entrepreneurs for establishment of Generating Companies is alone competent to decide what incentives or concessions to be extended to attract the private entrepreneurs. In fact Section 11(1)(a), (g) and (h) makes it abundantly clear in matters concerning electricity generation, transmission, distribution and supply in the State, the role of the Commission is only advisory. If we give any other interpretation to the provisions of the Act, the very effort of the Government in trying to persuade the private agencies to establish Generating Companies will become a futile exercise, apart from stretching the language used in the section out of proportion.

203. While dealing with the issue "whether the Commission constituted under the State Act is having power to levy wheeling charges" we have taken the view that the Regulatory Commission has no power to fix the charges payable to the licensee for transmission of the energy generated by the Generating Companies and its role is only advisory with regard to generation and transmission of electricity.

204. u/s 78A of the Supply Act, the Board is always guided in its functions by the directions given by the State Government on questions of policy. In fact, pursuant to the policy directions given by the Government, the Board entered into agreements with forty-one developers prior to the Reforms Act and twenty agreements were entered into by A.P. TRANSCO after commencement of 1998 Act.

205. Nextly, the Act came into force, u/s 56(2) of the Act the Commission and the A.P. TRANSCO upon their constitution shall discharge the functions of the Board under Electricity Act, 1910 and Supply Act, 1948 to the extent they relate to the domain of these two functionaries. But at the same time, under proviso to Section 56(2) "the State Government is entitled to issue all policy directions

206. It is useful to extract the proviso (a) to Section 56(2) of the Reforms Act.

"(a) the State Government shall be entitled to issue all policy directives and undertake overall planning and co-ordination as specified in Section 12 of this Act

and to this extent the powers and functions of the Andhra Pradesh State Electricity Board as per the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 or rules thereunder shall vest in the State Government and the State Government shall co-ordinate and deal with the Central Government and the Central Electricity Authority."

207. From the above it is seen that keeping the forecast on the demand and use of electricity in the State, it is the bounden duty of the State to meet the demands in consumption of electricity by co-ordinating with the Central Government, Central Authorities and with various organisations.

208. Coming to the facts of the case, as per the particulars furnished by the TRANSCO with regard to the power purchase agreements entered into by the Board with the Power Generating Companies the period of agreements varies, but at the same time they are all subsisting.

209. The Commission in Para 12 of its counter admitted that while fixing of wheeling charges and banking charges may be policy matters before the Commission came into existence but not thereafter.

210. We are really astonished to see the stand of the Commission. We do not know how a policy matter ceased to be a policy matter after the Act came into force more so when the power of the Government to give directions is specifically preserved u/s 12 of the Act including giving directions in determination of the structure of tariff for supply of electricity to various classes of consumers as well as under proviso to Section 56(2) of the Act. Such a stand was taken by the Commission forgetting the intention of Legislature in constituting the regulatory commission (i.e.,) the Commission was constituted to improve the financial health of licensee, A.P. TRANSCO, which is crumbling because of irrational tariff, the high level cross subsidies, poor planning and operation, inadequate capacity, total neglect of the consumer and to restructure the electricity industry in an efficient economic and competitive manner with the social objective of ensuring a fair deal to the consumer with the ultimate object of entrusting the transmission and supply of electricity to private companies, but not to meddle in every sphere of Electricity Trade, by presuming that it can do and undo the things in the alleged exercise of regulatory power. As far as generation and procurement of energy required, to meet the ever increasing demand is the primary responsibility of the State, which in turn having realised in early 1990s that it is not in a position to make a dent in the power deficit invited private enterprises to establish Generating Companies by offering several incentives. Even the new Act is intended to open avenues for participation of private sector to prevent monopoly of State organisation and increase competitiveness through participation of private sector and to manage electricity industry in an efficient, economical manner to ensure the social objective of fair deal to the consumer. The State Government in its wisdom decided to collect wheeling charges in kind duly keeping the parameters enshrined in Schedule V of Supply Act. Now the

Commission being a delegatee of the power of the Government, as a regulator but not as a policy maker, is contending that it is all supreme and the delegator cannot give any direction to it though the said power of the delegator is very much preserved under the Act.

211. Further, it is seen from the public notice given by the Secretary to the Commission published in Hindu and vernacular paper Eenadu dated 21.2.2000 that all power purchase and/or wheeling agreements with A.P. TRANSCO or any distribution companies after 3rd April, 1999 and also any extension or renewal of earlier PPAs or altering any terms and conditions of such PPAs require the consent of the Commission in terms of Sub-clause (4) of Section 24 of Reforms Act.

212. From the above it is seen that the wheeling agreements that are likely to be entered after 3rd April, 1999 or any extension or renewal or alteration of any terms and conditions of the earlier PPAs require the consent of the Commission, but not otherwise. To put it aptly, the wheeling agreements entered into by the Private Generating Companies with A.P. TRANSCO prior to 3rd April, 1999 continues to be in operation till the agreement period is expired. The Commission further reiterated this view in Paragraphs 185 and 186 of the tariff order for 2002-2003. Having posed a question in Para 185 whether the Commission should revisit the PPAs entered into as concluded contract before the coming into force of the Reform Act - answered the same in Para 186 as hereunder:

"The issue whether a regulatory commission constituted under the Reform Act can or should examine the PPAs concluded before the constitution of the Commission is a different matter. Such concluded PPAs cannot be covered by the expression "enter into" used in Section 21(4) of the Reform Act. It is therefore not possible for the Commission to reopen such PPAs concluded in ail respects before the Reform Act came into force."

213. This will clinchingly establish that apart from the legal niceties involved in the matter, initially the Commission is very clear in its mind that the concluded power purchase or wheeling agreements before the Reforms Act came into force cannot be reopened. But surprisingly taking a round about turn, the Commission started contending in Para 8.9 of the impugned order that the Commission as the regulator and further being vested with the statutory functions under the Reform Act has the authority to deviate from the charges and also the terms and conditions contained in the Wheeling Agreements earlier signed by APSEB and, for the same reasons from the earlier notifications issued by the Government of A.P. It is further observed that it is the Commission''s duty to ensure that the charges for wheeling are levied in a fair and just manner and are equitable and economical. But at the same time the Commission did not specify to whom the charges levied should be fair and just or to whom the charges levied shall be equitable and economical. The Commission might have felt that consistency is the "hobloblin of small minds" as observed by Ral Wald Emerson in his article on ''Self Reliance''

214. Further in case of Non-Conventional Energy Developers, the Government of A.P. in its letter No. 8290/RES/AJ/99, dated 20.10.1999 categorically stated that the incentives and concessions provided prior to the Act came into force shall continue to be valid.

"the incentives provided to Non-conventional Energy Developers based on reasonable resources in G.O. Ms. No. 93, Energy (RES) Department, dated 18.11.1997 and G.O. Ms. No. 112, Energy Department, dated 22.12.1998 are within the ambit of and in accordance with the law governing the subject on the dates of issuance. The A.P. Electricity Reforms Act, 1998 which came into force later is prospective and was not made retrospective in its operation expressly or impliedly and therefore except to the extent specifically provided in the said Act, the rights and liabilities created under the law prior to A.P. Act 30/98 coming into force stand preserved and not obliterated by virtue of the principle of Section 6 of the General Clauses Act, 1897 or Section 8 of the A.P. General Clauses Act, 1891. Hence, unless a different intention appears from the A.P. Act 30/98, the incentives and concessions under G.O. Ms. No. 93, read with G.O. Ms. No. 112 continue to be valid and operative in terms of the said Government orders and cannot be interfered with. In view of the above legal position, the A.P. Electricity Regulatory Commission cannot interfere with the validity and operability of the said two G.Os. during the period of their currency, unless there is any specific enabling provision in A.P. Act 30/98 and it is only after the expiry of the period prescribed by the said G.Os. for undertaking any review, the A.P.E.R.C. can exercise any powers or functions in respect of the same as conferred on them by A.P. Act 30/98."

215. This letter of the Government clearly clinches the issue and makes it abundantly clear that fixation of wheeling charges for transmitting the energy developed by the developers is a policy matter since the Government is anxious to invite private entrepreneurs for establishing Power Plants, as the Governmental Agencies are not in a position to bridge the gap between supply and demand. Without reference to the above letter the Government in its counter dated 26.6.2002 started supporting the irrational stand of the Commission brushing aside the scheme evolved by itself by taking a round about turn. In the counter at one breath it is stated that after establishment of the 3rd respondent Commission under the provisions of the Reforms Act with effect from 1.4.1999, the power to review incentive schemes relating to wheeling, banking charges etc., vested with the Commission and as such there is no question of the Commission not having jurisdiction in the matter. At the same time, the counter states that the incentives offered under G.O. Ms. No. 93, dated 18.11.1997 were only within a time frame and were subject to further review after the expiry of three years. Since the incentives and concessions were provided prior to the Reforms Act came into force before the Commission was constituted and the legislation being prospective in operation, the agreements entered into by the erstwhile Electricity Board with the Generating Companies under policy directions given by the Government u/s 41 read with

Section 78A of the Supply Act will not be obliterated till the contract period expired. Even after the expiry of the period, it is doubtful whether the Commission is entitled to take a decision in this regard without the approval of the Government.

216. Nextly, the Commission contended that Section 12 of the Reforms Act categorically defined the role of Government and Commission and if any dispute arises between them, the same shall be referred by the State Government to a retired Judge of the Supreme Court, whose decision thereon shall be final and binding. But the Commission without questioning the correctness of the order of the Government dated 20.10.1999 reviewed the orders on its own by holding that it is vested with the power of regulating the electricity industry by observing that there are no fetters on its powers and it can do and undo anything that comes in its way to save the TRANSCO, which is a sinking ship because of the wrong policies followed by it.

217. Admittedly no provision was made in the Reforms Act taking away the right of the Government to give direction on policy matters. Accordingly, we hold that the agreements entered into by the then Electricity Board are not only statutory contracts, which are also specifically saved under various provisions of the Reforms Act and both the Transfer Scheme Rules. Hence, these agreements are very much binding on its successors.

218. Nextly, except the assertion of the Commission that it is having authority to brush aside the notification issued by the Government prior to the Act coming into force since it is vested with the statutory functions, as a regulator nowhere in the Act or in the Transfer Schemes any provision is made that the memorandum of understandings entered into by the Board with the Generating Companies under the policy directions given by the Government ceased to exist and the Commission is having the power to stipulate the charges for wheeling the energy. The well settled principles of law is that where there is no clear provision of law to that effect, no provision in the new Act can operate to destroy the vested rights of the parties. If the Legislature intends to destroy the vested rights of the parties and confer powers on the authority to vary the existing rights, it has to be done in specific terms.

219. In Rafiquennessa Vs. Lal Bahadur Chetri (Dead) through his Representatives and Others, , accepting the arguments of the Counsel for the appellants, their Lordships of the Supreme Court held that "where vested rights are affected by any statutory provision, the said provision should normally be construed to be prospective in operation and not retrospective, unless the provision in question relates merely to a procedural matter. It is not disputed by him that the Legislature is competent to take away vested rights by means of retrospective legislation. Similarly, the Legislature is undoubtedly competent to make laws which override and materially affect the terms of contracts between the parties; but the argument is that unless a clear and unambiguous intention is indicated by the Legislature by adopting suitable express words in that behalf, no provision of a statute should be

given retrospective operation if by such operation vested rights are likely to be affected. These principles are unexceptionable and as a matter of law, no objection can be taken to them."

220. In the case on hand, the Commission itself has taken the view that the Act is only in prospective in nature Hence the vested rights of the parties cannot be divested or destroyed in the absence of a clear provision of law to that effect in the new statute.

221. In Indian Aluminium Company Vs. Kerala State Electricity Board, , the issue that arose before the Honourable Supreme Court in this appeal is whether a State Electricity Board has power to enhance the rates for supply of electricity notwithstanding an agreement binding it to supply electricity at certain rates though the contractual rates are less than the cost of generation, distribution and supply of electricity. The Court held that "the Board can, in exercise of the power conferred under Sub-section (3) of Section 49, enter into an agreement with a consumer stipulating for a special tariff for supply of electricity for a specific period of time. Such a stipulation would amount to fixing of special tariff and it would clearly be in exercise of the power to fix special tariff granted under the above section.

222. Indeed, if the power to fix special tariff through the modality of an agreement with the consumer were not there in Sub-section (3) of Section 49, it cannot be found in any other provision of the Supply Act and in such a case it would be impossible for the Board to enter into any agreement with a consumer binding itself to supply electricity at a special rate for a certain period of time. Such an agreement would be wholly ultra vires the power of the Board and that would cause considerable mischief and inconvenience as no industry would be able to enter into an agreement ensuring supply of electricity which would be binding on the Board. Tariff is the most important element in such an agreement and if no binding stipulation can be made in regard to tariff the agreement itself would be meaningless and would be no more than a mere rope of sand. The power to enter into an agreement fixing a special tariff for supply of electricity for a specified period of time is, therefore, relatable to Sub-section (3) of Section 49 and such an agreement entered into by the Board would be in exercise of the power under that sub-section."

223. In para 17 of the judgment, their Lordships held as follows:

"17. Now in the present case, as we have already pointed out above, the stipulations as to charges contained in the agreements entered into with the appellant were made in exercise of the statutory power to fix special tariffs conferred under Sub-section (3) of Section 49, and, therefore, there could be no question of such stipulations being void as fettering or hindering the exercise of the, statutory power under that provision. These stipulations did not divest the Board of this statutory

power or fetter or hinder its exercise: in fact, they represented the exercise of this statutory power. Once the agreements were made containing these stipulations, it was not competent to the Board to override these stipulations which were binding as having been validly made in exercise of statutory power. The Board could not enhance the charges in breach of these stipulations. To hold that the Board could unilaterally revise the charges notwithstanding these stipulations, would mean that the stipulations had no binding effect, or in other words, the Board had no power to enter into such stipulations. That would negate the existence of statutory power in the Board under Sub-section (3) of Section 49 to fix the charges for a specific period of time, which would be contrary to the plain meaning and intendment of the section. The Board was also not competent to enhance the charges under the guise affixing uniform tariffs for all high tension consumers, including the appellant, under Sub-section (1) of Section 49, because Sub-section (1) is, on its plain language, subject to Sub-section (3) of Section 49 and once special tariffs were fixed for the appellant under Sub-section (3) of Section 49, there could be no question of fixing uniform tariffs applicable to the appellant under Sub-section (1) of Section 49. The power to fix uniform tariffs under Sub-section (1) of Section 49 could not be exercised in derogation of the stipulations fixing special tariffs made under Sub-section (3) of Section 49. Moreover, if the stipulations as to charges were not binding and the Board could enhance the charges unilaterally in disregard of them, it is difficult to see how the agreements, of which the stipulations formed a term as well as consideration, could be sustained. We can understand an argument that the whole of the agreements were void. But strangely, the claim of the Board was that the appellant should be held to the agreements, though, at the same time the Board should be free to repudiate the stipulations which formed the consideration or part of the consideration. That is a claim which is highly illogical and we find it difficult to appreciate it. The stipulations as to charges are inseverable from the rest of the agreements and if these stipulations are disturbed and the charges are revised unilaterally by the Board, how could the agreements continue to bind the appellant? On the view contended on behalf of the Board, it would be impossible for a consumer to enter into an agreement with the Board for supply of electricity at a certain specified tariff. That surely could not have been intended by the Legislature. Far from promoting the object of electrical development and industrial growth in the State, it would act as a regressive factor. It may be pointed out that the Board also did not contend that the agreements entered into with the appellant were wholly void. The attack was only against the validity of the stipulations as to charges and that attack must, for reasons which we have given, fail insofar as it is bated on Section 49."

224. Though this case relates to tariff for supply of energy u/s 49 of Supply Act, which stood repealed after the Reforms Act came into force, the ratio decidendi laid down in that case (i.e.) upholding the power of the Board to enter into a special contract u/s 49(3) of the Supply Act and its incompetence to repudiate a clause in a

concluded contract, which is inconvenient to it while seeking enforcement of the other clauses of the agreement holds good.

225. This case covers almost all the contentions raised by the respondents. In the case on hand also it is neither the case of the licensee nor the Commission that the entire agreement entered into prior to the Reforms Act have to be repudiated. The stipulation with regard to collection of wheeling charges is inseverable from the rest of the terms of the agreement.

226. In MTNL Vs. Telecom Regulatory Authority of Delhi, , Telecommunication Interconnection (Charges and Revenue Sharing First Amendment) Regulation, 1999 dated 17th September, 1999 and the Telecommunication Tariff (Fifth Amendment) Order, 1999 also dated 17th September, 1999 to regulate the telecommunication services and the matters connected therewith issued by Telecom Regulatory Authority constituted under the Telecom Regulatory Authority of India Act (Act 24 of 1997) have been impugned on various grounds including the one that the Regulatory Authority of India does not have any power to issue any Regulation, which affect the rights of individuals under contracts or which seeks to override terms and conditions of licences issued by the Central Government to various parties.

227. Section 11 of the Act speaks of the functions of the Regulatory Authority.

228. Section 11 starts with a non-obstante clause, which provides that the functions are to be exercised Notwithstanding anything contained in the Indian Telegraph Act, 1885" (13 of 1885), the functions of the Authority shall be to ..... By virtue of the non-obstante clause used in this section, the provisions of 1997 Act were given overriding effect over the Indian Telegraphic Act, 1885.

229. Considering the effect of non-obstante clause, Justice S.N. Variava speaking for the Bench observed as follows:

"In this behalf, it is very pertinent to note that even though Section 11 starts with a non-obstante clause which provides that the functions are to be exercised "Notwithstanding anything contained in the Indian Telegraph Act, 1885" the section nowhere provides that the functions are to be exercised notwithstanding "any contract or any decrees or orders of Courts." It is well settled now that when the Legislature intends to confer on a body the power to vary contracts of existing private rights, it has to do so specifically. In the absence of any provision authorising the Authority to vary private rights under existing contracts or licences, no such power can be presumed or assumed. This is the law as laid down by the Supreme Court in the case of Indian Aluminium Company Vs. Kerala State Electricity Board, .

230. In this case, their Lordships clearly ruled that non-obstante clause used in Section 11 of the Act gave overriding effect to the provisions of the present Act over the Indian Telegraph Act, 1885, nowhere in the Section it is stated that the functions

are to be exercised notwithstanding any contract or any decree or order of the Court.

231. In the case on hand, neither any non-obstante clause is used nor any provision was made for repudiating the earlier agreements.

232. In Shyam Sunder and Another Vs. Ram Kumar and Another, , their Lordships of the Supreme Court having held that the appeal being continuation of suit, the appellate Court is required to give effect to any change in law, which has retrospective effect.

233. A Constitution Bench of the Supreme Court while considering whether the substituted Section 15 introduced by Haryana Amendment Act of 1995 on the substantive rights of the parties in the Parent Act i.e., Punjab Pre-emption Act (1 of 1913) is retrospective or not referred to interpretation of statutes by Max Well and Francis Bunnion:

23. In Maxwell on the Interpretation of Statutes, 12th Edn. The statement of law in this regard is stated thus:

"Perhaps no rule of construction is more firmly established than thus - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in the language, which is fairly capable of either interpretation, it ought to be construed as prospective only. The rule has, in fact, two aspects, for it, "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

24. In Francis Bennion''s Statutory Interpretation, 2nd Edn, the statement of law is stated as follows:

"The essential idea of legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow''s backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex-post facto law is enshrined in the United States Constitution and in the Constitution of many American States, which forbid it. The true principle is that lex prospicit non respicit (law looks forward not back). As Willes, J. said retrospective legislation is ''contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transaction carried on upon the faith of the then existing law." and having referred to case law held as

follows:

29. From the aforesaid decisions, the legal position that emerges is that when a repeal of an enactment is followed by a fresh legislation such legislation does not effect the substantive rights of the parties on the date of suit or adjudication of suit unless such a legislation is retrospective and a Court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of suit. However, the position in law would be different in the matters, which relate to procedural law but so far as substantive rights of parties are concerned they remain unaffected by the amendment in the enactment. We are, therefore, of the view that, where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act such legislation is prospective in operation and does not effect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment.,.,..."

234. In R.V.K. Energy Pvt. Ltd., Hyderabad Vs. A.P.S.E.B., Hyderabad and Another, , a Division Bench of this Court held in Para 25 as follows:

"25. It is seen from the order impugned, which was passed by the Regulatory Commission that they are trying to set aside the order and solemn promise given by the State Government earlier to the private Power Generating Companies for generating and supplying of electricity to identified consumers. Such power is not vested under the Reform Act. Therefore, the direction given by the Regulatory Commission has to be set aside to that extent and it is accordingly set aside."

235. Nextly, the Commission contended that no provision was made in the Reforms Act saving the existing rights and as such they ceased to be in force after the new Act came into force.

236. In State of Punjab v. Mohar Pratap Singh AIR 1955 SC 84, their Lordships of the Supreme Court held as follows:

"The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them."

237. On the other hand, we have already held that the Act as well as the Transfer Schemes specifically saved all agreements entered into by the erstwhile Electricity Board and they are deemed to have been entered into by the TRANSCO as referred supra.

238. Nextly, u/s 8, read with Section 4 of the A.P. General Clauses Act in the event of an Act being repealed and a new Act is brought into existence notwithstanding the repeal of the old Act, the rights, privileges, obligations or liabilities acquired, brought or incurred under the repealed enactment shall not be effected and they are saved unless the rights brought under the repealed Act are specifically taken away by the repealing Act.

239. A Constitution Bench of the Supreme Court in Bansidhar and Others Vs. State of Rajasthan and Others, , the Counsel for the appellant contended that (when there is a repeal of the statute followed by re-enactment of the new law on the same subject, with or without modifications, Section 6 of the Rajasthan General Clauses Act is not attracted and the question as to the extent to which the repealed law is saved would be dependent upon the express provisions of the later statute or what must be held to be its necessary and compelling implications. Where the repeal is accompanied by a fresh legislation on the same subject, the new law alone will determine if, and how far, the old law is saved and that in the absence of an express appeal to Section 6 of the Rajasthan General Clauses Act or of express provisions to similar effect in the new law itself. A Constitution Bench of the Supreme Court observed that "when there is a repeal of the statute accompanied by re-enactment of law on the same subject, the provisions of the new enactment would have to be looked into, not for the purpose of ascertaining whether the consequences envisaged by Section 6 of the General Clauses Act ensued or not - Section 6 would indeed be attracted unless the new legislation manifests a contrary intention - but only for the purpose of determining whether the provisions in the new statute indicate a different intention."

240. u/s 14(1) of the Reforms Act not only the licensee or any other person by virtue of exemption granted to him under the Reforms Act, but also the persons authorised to or exempted by any other authority under the Electricity Supply Act, 1948 are entitled to carry on the business of transmitting electricity or supplying electricity. To put it aptly, not only the persons authorised under this Act, but persons authorised or exempted by the authority under the Supply Act can also carry on business of transmitting electricity or supplying electricity. We should also keep in mind that Reforms Act is not a substitute for the Electricity Act, 1910 and Supply Act, 1948. Though the provisions of the Reforms Act were given overriding effect over certain provisions of the old Acts, which are not in conformity with the provisions of this Act, all other provisions of these two Acts are applicable to the electricity trade in the State and in fact u/s 56(3)(iii)(b) the provisions of both the Acts shall be taken as a reference to the corresponding provisions of this Act to the extent modified by the Reforms Act and they are to be treated as cognate Acts. u/s 57 of the Reforms Act, the powers of other authorities and the State Government under both the Acts and rules framed thereunder remained unaffected and they shall continue to be in force.

241. Under the Reforms Act the Regulatory Commission was constituted mainly to pull up the public sector undertakings from the debt trap by rationalising the tariff structure etc. Nowhere it is stated that the obligations and liabilities incurred into, by the erstwhile Electricity Board with the Generating Companies or as a matter of fact with any others are repealed. On the other hand, they were saved. On this ground also the action of the Commission cannot be sustained in law.

242. We have already referred the various provisions of the Reforms Act and Transfer Schemes I and II to show that all the contracts and liabilities entered into by the erstwhile Electricity Board are subsisting on the effective date shall continue to be in force and they deemed to have been incurred or entered into by the transferee and they are enforceable against the transferee.

243. Hence, we do not find any substance in this contention of the Commission also.

244. The Commission being a creature of statute, it cannot act beyond the power conferred on it under the Act. The same is evident from Section 11 (2) of the Reforms Act, the Commission has to act consistent with the objectives and purposes for which the Commission is established and all acts, decisions and orders of the Commission should be in the direction of achieving those objectives and purposes. Without reference to any of these aspects the Commission contends that it is not bound by the policy directions given by the Government, which were acted upon by the Electricity Board into whose shoes the TRANSCO entered now after the Reforms Act came into force.

245. We also hold that no public authority would be free to denounce the stipulations as nullity and claims to exercise its statutory power. Hence, we do not find any substance in the contention of the Commission that it is not bound by the policy directions given by the Government in exercise of its powers under the Reforms Act or the licensee u/s 78A of the Supply Act in the light of the provisions of Section 12 and proviso (A) (A) of Section 56(2) of the Act.

246. In the light of the view taken by us, we make it clear that after expiry of the term of the agreement, the Government alone is competent to fix wheeling charges since it is in the realm of the policy direction that after specifying the parameters to be taken into consideration for fixation of wheeling charges akin to that of Schedule-V u/s 41 of Supply Act and in consultation with all the concerned involved in the electricity trade.

Whether the power purchase agreements are statutory contracts and are binding on A.P. TRANSCO and the commission :

247. Secondly, the Commission tried to justify its action by contending that any directions given by the Government do not bind the Commission, since the role of the Commission under the Act is not only adjudicatory, but a proactive one for the development of the electricity industry in the State. It is also their case that if the orders of the Government are categorized as policy direction u/s 78-A of the Supply Act it need not be implemented, if it results in financial loss to the Board. In support of its contention the Commission relied on the following judgments:

(1) Easter Industries Ltd. v U.P. State Electricity Board (1996) II SCC 199, wherein their Lordships of the Supreme Court held as follows:

"Determination of rates of tariff and terms and conditions subject to which the electrical energy to be supplied to the consumers and enforcement thereof. This being a legislative policy, while exercising the power u/s 78-A, policy directions issued by the Government may also be taken into consideration by the Electricity Board, which has a statutory duty to perform. But so long as the policy direction issued by the Government is consistent with the provisions of the Act and the tariff policy laid down by the Board, it may be open to the Board to either accept it or not to accept the directions as such."

(2) Chittoor Zilla Vyavasaya-Darula Sangham v. A.P. State Electricity Board AIR 2001 SC 107.

In this case the revision of tariff for supply of electricity to agriculture sector on the basis of Horse Power of the motor rescinding the earlier policy of supply electricity at the rate of Rs. 50/- in B.P. Ms. No. 110, dated 5.6.1995 on the basis of assurance given by the Chief Minister on the floor of the Assembly on 20.1.1995 that electricity will be supplied for cultivation to ryots, was questioned. Approving the action of the Board their Lordships of the Supreme Court held in Para 12 as follows:

"12. Board supplies electricity and fixes tariff from time to time u/s 49. In doing so, it has classified the consumers into low tension consumers and high tension consumers. Under low tension consumers among the 7 categories the agriculturists is category No. 5 (to which we are concerned) and under high tension consumers fall factories, industries and also agriculture of high tension consumers. Different tariff rates are being fixed from the very inception, by the Board for each class or category. The impugned tariff revision was undertaken by the Board keeping in view its statutory responsibility it has to undertake in terms of Section 59. In doing so, it has to ensure that the total revenue in any year, after meeting all expenses properly chargeable including operation, maintenance and management expenses, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds, and loans, leave such surplus as is not less than 3% or such high percentage as State Government may, by notification in the Official Gazette, specify. It is one of the statutory obligation cast on the Board...."

In para 18 of the judgment, their Lordships observed that "strong reliance has been placed by Mr. Rao on the certain observations made by this Court in M/s. Real Food Products Ltd. and others, etc. etc., Vs. Andhra Pradesh State Electricity Board and others, . The reliance is on the following observations:

"It does appear that the view expressed by the State Government on a question of policy is in the nature of a direction to be followed by the Board in the area of the policy to which it relates. .....

In the present case, the flat rate per H.P. for the agricultural pump sets indicated by the State Government, appears to have been found acceptable by the Board as appropriate particularly because it is related to the policy of concessional tariff for

the agriculturists as a part of the economic programme....."

The view expressed by the State Government on a question of policy is in the nature of direction to be followed by the Board in the context of Boards function to which it relates.

It is further held in para 20 that "It is necessary first to examine the periphery of the statutory fields within which, the Board and the State Government has to function. Admittedly both are statutory functionaries under the Central Act. They have to perform their obligations within the limits they have been entrusted with. Section 78-A empowers the State Government to issue directions to the Board on question of policy, on the other hand the Board has to perform its statutory obligations under the said Act and with reference to the fixation of tariff it has to act in terms of what is contained in Sections 49 and 50(59). But this field of policy direction is not unlimited. There cannot be any policy direction which pushes the Board to perform its obligations beyond the limits of the said two sections. Any policy direction, which in its due performance keep the Board within its permissible statutory limitations would be binding on the Board. So, both State and the Board have to maintain its cordiality and co-ordination in terms of the statutory sanctions. If any policy directions pushes the Board in its compliance beyond statutory limitations, it cannot be a direction within the meaning of Section 78-A. It is significant that opening words of Section 78-A is, "in the discharge of its functions, the Board shall be guided by such directions." So, the direction of the State is for the guidance to the Board, in the discharge of its functions. Thus this direction has also limitation to give such direction which will subserve in performing its statutory obligation.
In para 24 of the judgment, their Lordships held that "on the facts of this case the policy decision by the State Government, for the year in question, can only be construed to mean to supply the electricity to ryots at the subsidized and concessional tariff rates. The other part of the assurance, namely, to supply electricity at the rate of Rs. 50/- per H.P. per annum which results into the aforesaid loss to the Board cannot be construed to be part of the policy direction u/s 78A....."

In para 26, it is further held that " So, we may conclude, on the facts of this case, the aforesaid letter of the Government following assurance of the Chief Minister, could not be construed to be a binding direction u/s 78-A, except to the extent which is implicit, to supply electricity to the Ryots at the subsidized and concessional rate, which the Board has followed.

(3) M/s. Real Food Products Ltd. and others, etc. etc., Vs. Andhra Pradesh State Electricity Board and others, .

In this case also their Lordships of the Supreme Court while considering the nature and effect of the direction given by the State Government to the Electricity Board to revise the power tariff for agricultural pump-sets at a flat rate of Rs. 50 per H.P. per annum with effect from 1.11.1982 held that "the direction to fix a concessional tariff

for agricultural pump-sets at a flat rate per H.P., it docs relate to a question of policy which the Board must follow. However, in indicating the specific rate in a given case, the action of the State Government may be in excess of the power of giving a direction on the question of policy, which the Board, of its conclusion be different, may, not be obliged to be bound by. But where the Board considers even the rate suggested by the State Government and finds it to be acceptable in the discharge of its function of fixing the tariffs, the ultimate decision of the Board would not be vitiated merely because it has accepted the opinion of the State Government even about the specific rate. In such a case the Board accepts the suggested rate because that appears to be appropriate on its own view. If the view expressed by the State Government in its direction exceeds the area of policy, the Board may not be bound by it unless it takes the same view on merits itself."

248. Firstly, these cases deal with the determination of rates of tariff and terms and conditions subject to which electrical energy to be supplied to the consumers under repealed Section 49 of the Supply Act, which is altogether different from the facts of the case on hand. Even then in the 2nd case their Lordships of the Supreme Court upheld the power of the Government to give policy directions. In the instant case, as per the policy of the State Government referred supra, the Board and its successor entity are entitled to collect the charges for wheeling energy generated by the private entrepreneurs, at a rate to be finalized by mutual agreement. Hence, it cannot be contended that the collection or determination of rates, tariff to different classes of consumers for supply of electrical energy, can be equated to that of the service charges that can be collected by the Board for using its transmission lines and as per the directions given by the Government, the charges to be collected in kind as specified in G.O. Ms. No. 152. Hence, the collection of wheeling charges is by way of a contract entered between the parties on the terms and conditions mutually agreed upon may be with the approval of the Commission after the Reforms Act came into force. This position is made clear in Section 15(4) of the Reforms Act, which was already referred above.

259. The Commission has forgotten the fact that the Board which was in existence at the time, when the agreements were entered, did not question the authority of the Government in fixing the wheeling charges either in G.O. Ms. No. 116, dated 5.8.1995 or the directions given to it to collect wheeling charges in kind in G.O. Ms. No. 152, dated 29.11.1995 and the Board with eyes wide open entered into the agreements.

260. Further, the policy directions dates back to the year 1995 and the then Electricity Board never raised any objection stating that the Board is incurring financial loss. Even now, it is not the case of either the Commission or the TRANSCO that the licensee is incurring financial loss because of the transmission of energy generated by the Generating Companies through the transmission lines of the TRANSCO. Their contention is that since the Generating Companies are using the

transmission lines, they have to also share the commercial losses sustained by TRANSCO and DISCOMS in the supply of electricity to their end consumers and the net-work charges of these Corporations. This aspect will be dealt with separately.

261. Secondly, we should keep in mind that the power generated by the Generating Companies is being transmitted by the TRANSCO on displacement basis to the end consumers i.e., while the power generated by the Generating Companies is being utilized by the TRANSCO and DISCOMS locally, they will be supplying power to the consumers of the Generating Companies locally from other sources. Hence, it cannot be said that the licensee is suffering any transmission losses. Assuming that the Generating Companies has to share the transmission losses, the Commission requested the Central Power Research Institute (CPRI) to make an independent study with regard to the transmission losses suffered by the TRANSCO, through the transmission lines of the licensee. The Commission after making a detailed study submitted its report saying that the transmission losses are around 6.65% in Paragraph No. 214 of the Tariff Order 2002-03, which is as follows:

"The Commission considers 6.65% as reasonable transmission loss for the financial year 2002-2003 reflecting lower external PGCIL loss due to drawal from central generating stations.

262. But the licensee rounded up the figure to 8% on the belief that this difference could be due to commercial losses. At the same time, no data whatsoever for this belief was given by the licensee in its application. Be that as it may, all the Generating Companies are paying wheeling charges in kind more than the transmission losses suffered by the licensee.

263. Nextly, u/s 41 of the Supply Act, until the State Commission is established, the State Government and thereafter the State Commission in the case of intra-State transmission system is to determine the charges payable to the State Transmission Utility for the use of transmission system by a Board, its successor entity, Generating Company, licensee or any other person. But unfortunately the Commission without looking into the provisions of Supply Act started contending that there is no provision dealing with wheeling charges in the Supply Act.

264. From the above it is seen that till the State Commission is constituted, the State Government is well within its powers to determine the charges payable for the use of transmission system, by Generating Company to the State Transmission Utility (i.e.,) A.P. TRANSCO. u/s 41(3) of the Act, the State Transmission Utility shall have the power to use the transmission lines of a licensee to the extent to which capacity thereby is surplus to the requirement of the licensee on payment of charges calculated in accordance with the provisions of V Schedule. Under Para 1 of this Schedule while fixing charges for use of transmission lines by a Generating Company, the following factors have to be taken into consideration;

1. actual cost of maintenance of the lines;

2. sums paid in respect of lines for insurance and as rents, rates and taxes;

3. the proportion of management and general establishment charges properly attributable to the lines;

4. any other expenses on revenue account properly attribute to the lines; and

5. interest on the depreciated cost of the lines shown in the books of the undertaking and interest on such working capital as is properly attributable to the lines;

265. As per Para 2 of the Schedule, if the lines are used partly by the Board and partly by the Generating Companies, the charges and allowances referred supra have to be shared on pro rata basis-having regard to the use of the lines.

266. To give effect to the changed policy of the Government, the Ministry of Power issued Notification dated 30th March, 1992 u/s 43A(2) of the Supply Act, 1948 determining the factors in accordance with which the tariff for sale of electricity by Generating Companies to the Board and to other persons. In Clause 3.2 of the policy, it is clearly stated that in case a Generating Company is permitted by the competent Government to supply electricity direct to a consumer in terms of clause (c) of Sub-section (1) of Section 43A of the said Act, such sale shall be at mutually negotiated rate, agreed upon between the Generating Company and the other persons, subject to the approval of the competent Government.

267. The State Government in exercise of the powers vested u/s 41 of the Supply Act directed the Board to collect wheeling charges in kind taking into account all the factors mentioned in V Schedule. The reason behind the direction to collect the wheeling charges in kind seems to be that these wheeling charges have to be collected throughout the period of contract and the value of the Rupee is likely to vary from time to time and to avoid financial loss in such a contingency the State Government might have decided to collect wheeling charges in kind. The Board not only consented to this direction, but also implemented the same while reducing the terms of contract to writing. Under Article 10 of the power purchase agreement the Board gave a warranty to the Generating Company that it is having all the authority and legal power to enter into the agreement.

268. Article 10 deals with represents and warrants and it is useful to extract the warranty given by the Board to Generating Company, which was already referred while considering the issue whether PPAs are statutory contracts and are binding on A. P. TRANSCO and the Commission.

"Under Article 302 the Board represents and warrants to the company that;

(i) The Board is a statutory corporation duly organized and validly existing under laws of India and has all requisite legal power and authority to execute this Agreement and to carry-out the terms, conditions and provisions applicable to it

hereunder:

(ii) This Agreement constitutes the valid, legal and binding obligation of the Board, enforceable in accordance with the terms hereof, except as enforceability may be limited by applicable bankruptcy, insolvency, moratorium or other similar laws affecting creditors'' rights generally and to the extent that the remedies of specific performance, injunctive relief and other forms of equitable relief are subject to equitable defenses, the discretion of the Court before which any proceeding therefore may be brought, and the principles of equity in general;

(iii) There are no actions, suits, or proceedings pending or to Board''s knowledge, threatened against or affecting the Board before Court or administrative body or arbitral Tribunal which might materially adversely affect the ability of the Board to meet and carry-out its obligations under this Agreement; and

(iv) The execution and delivery of this Agreement by the Board has been duly authorized by all requisite action, and will not contravene any statute or regulation applicable to the Board or any provision of, or constitute a default under, any agreement or instrument to which the Board is party or by which it or its property may be bound."

269. From the clauses of the Agreement extracted above, it is seen that the Board made the Generating Company to believe, that the Board is competent to enter into the agreement under Clause 10(ii) and under Clause 10(iv) the Board gave a warranty that the agreement do not contravene any statute or regulation etc. From other clauses of the agreement, it is seen that the agreement will be in force for a period of 30 years from the date of Agreement and the Board has to collect charges for wheeling energy developed by the Generating Company to its identified consumer.

270. It is not in dispute that all the agreements entered into are still subsisting. After the Reforms Act came into force the State Electricity Board functioning under the Electricity Supply Act of 1948 stood abolished.

271. u/s 23(1), the State Electricity Board that was functioning under Electricity Supply Act, 1948 was abolished and any property, interest in property, rights and liabilities of the Board before the effective date were vested in the State Government.

272. Under Sub-section (2), any property or interest in property, rights and liabilities vested in the State Government on abolition of the Board were re-vested by the State Government in the APTRANSCO and Generating Company, in accordance with the transfer scheme so published and subject to such terms and conditions as may be agreed between the State Government and A.P.TRANSCO or Generating Company as the case may be.

273. In Sub-section (3), the State Government may, by notification specify the rights and powers be exercisable by the TRANSCO or Generating Company.

274. u/s 23(6-a), the transfer scheme provided for the formation of subsidiaries etc. Under Sub-clause (b) the transfer scheme has to define property, interest in property, rights and liabilities to be allocated by (i) specifying or describing the property, rights and liabilities in question; (ii) referring to all the property/interest in property, rights and liabilities comprised in a specified part of the transferor''s undertaking; or (iii) partly in the one way and partly in the other;

275. Under Sub-section (6-c), the transfer scheme may provide that any rights or liabilities specified or described in the scheme shall be enforceable by or against the transferor or the transferee.

276. Since Section 7 is having a direct bearing on the issue in question, we would like to extract the same.

"(7) All debts and obligations incurred, all contracts entered into and all matters and things engaged to be done by the Board, with the Board or for the Board, or the AP TRANSCO or Generating Company or companies before a transfer scheme becomes effective shall, to the extent specified in the relevant transfer scheme, be deemed to have been incurred, entered into or done by the Board, with the Board or for the State Government or the transferee and all suits or other legal proceedings instituted by or against the Board or transferor, as the case may be, may be continued or instituted by or against the State Government or concerned transferee, as the case may be."

First transfer scheme - dated 29.1.1999 :

277. As per Rule 2(e) "Asset" includes "contracts, deeds, schemes, bonds, agreements and other instruments and interest of whatever nature and wherever situate" among host of other assets specified therein.

278. Rule 2(h) "liabilities" includes all liabilities, debts, duties, obligations and other outgoing including statutory Liabilities and Government levies of whatever nature including the contingent Liabilities which may arise in regard to dealings before the effective date in respect of the specified undertakings excluding however personnel and personnel related matters;

279. Under Rule 4 classified the assets as (a) Generation Undertakings as set out in Schedule-A and (b) Transmission and Distribution Undertakings as set out in Schedule-B.

280. Under Rule 5(2) the assets, liabilities and Proceedings forming part of Transmission and Distribution undertaking as set out in Schedule B shall stand transferred to and vest in AP TRANSCO on the effective date of transfer notified for the purpose without any further act or thing to be done, by the State Government or

the Board or AP TRANSCO or any other person subject, however, to the terms and conditions in these rules.

281. Rule 5(3) deals with transfer of assets and liabilities.

282. Rule 5(3) "On such transfer and vesting of the assets, liabilities and Proceedings in terms of Sub-rule (1) to AP TRANSCO as the case may be, the APGENCO or Sub-rule (2) to APGENCO or the AP TRANSCO, the Transferee shall be responsible for all contracts, rights, deeds, schemes, bonds, agreements and other instruments of whatever nature to which the Board was initially a party, subsisting or having effect on the effective date of transfer, in the same manner as the Board was liable immediately before the effective date, and the same shall be in force and effect against or in favour of the Transferee and may be enforced effectively as if the Transferee had been a party thereto instead of the Board"

283. Assets of Transmission and Distribution Undertaking referred under caption "Miscellaneous" Part-I of Schedule-B referred in Rule 4(1)(b) of the transfer scheme includes ""contracts, agreements, interest and arrangements to the extent they are associated with or related to Transmission and Distribution activities or to the undertakings or assets referred to in Clauses I, II, III and IV above".

Appendix-I of IInd Transfer Scheme - dated 31.3.2000:

"5. Substitution of AP TRANSCO by APDISTCOs

On the transfer and vesting of the Distributing Undertakings to the APDISTCOs in terms of Clause 3 of the Second Transfer Scheme, the Transferee shall be responsible for all contracts, rights, deeds, schemes, bonds, agreements and other instruments of whatever nature to which the AP TRANSCO was initially a party, subsisting or having effect on the effective date in the same manner as the AP TRANSCO was liable immediately before the effective date, and the same shall be in force and effect against or in favour of the Transferee and may be enforced effectively as if the Transferee had been a party thereto instead of the AP TRANSCO."

284. From the above it is seen that all contracts, obligations and debts entered or incurred by the Board with third parties before the transfer scheme became effective are kept in tact and they are deemed to have been incurred by the transferee and the TRANSCO cannot wriggle out of the same unilaterally.

285. In the light of the foregoing provisions of various statutes concerning the generation, transmission and supply of electricity, the directions given by the Government in G.O. Ms. No. 116 and G.O. Ms. No. 152 are statutory directions given u/s 41 of the Supply Act and the agreements entered into by the then Electricity Board pursuant to the policy directions are subsisting on the effective date and are enforceable as if the transferee had been a party thereto instead of the Board and are enforceable against the Corporation.

(4) India Thermal Power Ltd. Vs. State of M.P. and Others, , while considering the nature of the power purchase agreements entered into by the Madhya Pradesh Electricity Board with the Generating Companies, wherein the Board agreed to open a revolving letter of credit or letters of credit for payment of dues by it and also undertook to open Escrow Account to secure payment. The Honourable Supreme Court held "that merely because a contract is entered into in exercise of an enacting power conferred by a statute that by itself cannot render the contract a statutory contract. If entering into a contract containing prescribed terms and conditions is a must under the statute than that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it, which are statutory, then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of a mutual agreement between the parties. Therefore, the PPAs can be regarded as statutory only to the extent that they contain provisions regarding determination of tariff and other statutory requirements of Section 43-A(2) of the electricity (Supply) Act.

There is no dispute on the point that MOUs and PPAs are concluded contracts but to say that MOUs and PPAs are concluded contract is one thing and to say that under those contracts the appellants and other IPPs acquired a legal right and the MPEB incurred an enforceable obligation in respect of a providing an Escrow coverage is a different thing. The MOUs and IPPs while providing for payment of dues by MPEB has also at the same time made provisions for securing these payments. Apart from an undertaking by MPEB under those agreements an obligation is imposed upon MPEB to open a revolving letter of credit or letters of credit for payment of the dues. By way of further security it is provided in those contracts that Escrow Account shall be opened and maintained by MPEB to secure payment of the amount equal to 1.5 times the monthly bill. Those contracts also provide for a guarantee agreement with the State Government for payment of dues of MPEB. Thus the purpose of opening and maintaining an Escrow Account is to secure payment for the electricity to be supplied by the generating companies to MPEB. The Escrow Account is, therefore, really required to be opened at that stage and, therefore, it is provided in most of these contracts that the Escrow Account shall be opened at the time of the First Unit Commercial Operations Date.

286. Though Section 43A(2) of the Act was deleted by the Central Government in the year 2002, this judgment is relied upon to the extent that if the terms and conditions of the agreement are intended to give effect to the statutory provisions of the Act, the agreement has to be treated as a statutory agreement.

287. Accordingly, we hold that the agreements entered into by the Electricity Board are statutory and binding on the TRANSCO as well as the Commission and the Commission cannot either nullify or modify the concluded contracts in exercise of the alleged regulatory powers vested in it.

288. For any reason if the TRANSCO intends to wriggle out of the contractual obligation or if the TRANSCO intends to seek variation of the terms and conditions of the agreement stating that the wheeling charges provided for, in the agreement are not adequate, the courses open to TRANSCO would be either to raise a dispute before the arbitrator if the agreement provides for such a contingency or to approach a Civil Court seeking annulment of the agreement. But it cannot on its own wriggle out of the contractual obligations unilaterally. The licensee cannot even raise a dispute before the Commission u/s 11(3) of the Reforms Act, since the Commission can act as an arbitrator to adjudicate and settle the disputes arising between the licensees in accordance with the Regulations, but not otherwise. As the generating companies are not the licensees, the licensee cannot approach the Commission u/s 11(3) of the Act.

289. Further, as the MOUs are binding on the TRANSCO, it cannot approach the Commission to alter the wheeling charges unilaterally by making an application u/s 26 of the Act, which according to us do not cover the charges to be collected for using the properties of the licensee. To put it aptly, if the licensee cannot do this by itself in view of the binding nature of the agreement, it cannot seek to have it done by the Commission under the guise of tariff fixation. The well settled principle of law is that ''what cannot be done directly, cannot be done indirectly'' and such an act would amount to a colourable exercise of power offending Article 14 of the Constitution of India.

290. The other submission of the Commission that tariffs of the licensee under Sections 11, 14, 15 and 26 of the Reforms Act are to be determined on annual basis do not hold water since the use of transmission lines of the licensee are covered by agreements entered into between the licensee and the Generating Companies on specified terms even u/s 15(4) of the Reforms Act.

291. Nextly, the licensee contended that out of 41 developers who entered into agreements with the Electricity Board before the Reforms Act came into force, the agreements relating to five developers contain a clause that wheeling charges are to be fixed by the Commission and 36 agreements do not contain any clause with regard to collection of wheeling charges. It is also their case that 20 developers entered into agreements with the TRANSCO after the Act came into force and the agreements in relation to 17 developers contain a clause that wheeling charges have to be fixed by the Commission and three agreements do not contain such clause. Except stating in a bald manner neither the licensee nor the Commission placed the agreements before this Court, which do not contain a clause with regard to collection of wheeling charges or authorising the Commission to fix wheeling charges, more so in concluded contracts. On the other hand, we rejected the contention of the Commission that under G.O. Ms. No. 152 the Commission is empowered to fix the wheeling charges. Clause-6 of the said G.O. is otherwise. Assuming for the arguments'' sake that the MOUs do not contain any clause with

regard to collection of wheeling charges since we ruled that G.O. Ms. No. 152 and G.O. Ms. No. 116 are having the statutory flavour u/s 41 of the Supply Act, the Electricity Board and its successors-in-interest are bound by the policy decision of the Government. Accordingly, the said contention is also rejected.

292. Summing up the discussion, we hold that the agreements entered into by the erstwhile Electricity Board are statutory agreements under the policy directions of the Government and they are binding on the licensee as well as the Commission. At any rate, the Commission has no power to revise the wheeling charges under the guise of fixing tariff u/s 26 of the Act.

Whether the order of the commission runs counter to the policy of the Government:

293. Nextly, the Commission contended that even assuming mat the orders of the Government in G.O. Ms. No. 116 and G.O. Ms. No. 152 are considered to be policy directions, the Commission''s order revising the wheeling charges is not in conflict with Government orders incorporating the policy of the Government to the two categories of generators (i.e.,) Mini Power Plants and NEDCAP Projects. The incentives to these two categories of generators are for a limited period. As far as NEDCAP Projects are concerned, the incentive to collect wheeling charges at 2% in kind has come to an end by 17.11.2000 and subsequently there is no incentive. The wheeling charges now fixed by the Commission is for the period 1.4.2002 onwards. Had the Reforms Act not come into force, the State Government was entitled to re-fix the wheeling charges. Hence, the Commission to which Regulatory Powers of the Government have been transferred, can fix the wheeling charges afresh. In case of MPPs also it is only an incentive. G.O. Ms. No. 116 itself specifically stipulates that the tariff shall be ultimately fixed by the Commission. The Commission keeping in view the parameters in Section 11(1)(e) of the Reform Act, has decided to enhance the wheeling charges by exercising its regulatory power. Such a statement was made again without looking into the provisions of the G.O.

294. Under Clause 2 of the said G.O. it is stated that in the event of any breakdown in the generation company, an arrangement has to be made between the Board and the Generating Company for an uninterrupted power supply to the industrial load centers, from the grid system and for that purpose the generating companies have to enter into a contract with the Electricity Board to supplement power as a backup in the event of necessity. The modalities of such arrangement will have to be worked out between the generator and the State Electricity Board mutually.

295. Under Clause 4, it is stated that for the pricing arrangement, the Commission is empowered to fix price or tariff for that power supplied by the Board on behalf of the Generating Company. At the time of issuance of the G.O., constitution of Regulatory Commission and restructure of power sector were only under contemplation. In anticipation, such a clause was incorporated. Such a clause was made so that the sale of energy is always subject to fluctuations and the Board is

expected to raise the required revenues mainly by way of collection of tariff for the supply of energy, which is its principal activity as contemplated u/s 49 and under proviso to Clause 1 of Schedule VI of the Electricity Supply Act the charges can be enhanced once in an year.

296. The most important clause is Clause-6, which deals with the wheeling charges. It is useful to extract the same;

"6. wheeling of power will be made through A.P. State Electricity Board at the request of the generator at a rate to be finalized on mutual agreement with Andhra Pradesh State Electricity Board."

297. Without reference to this clause the Commission tried to justify its arbitrary action. Subsequently, the said G.O. was modified by issuing G.O. Ms. No. 152, dated 29.11.1995 permitting the Generating Company to identify its own consumers and for collection of wheeling charges in kind.

298. Under Clause 1, the Generating Companies are permitted to supply power to identified consumers;

299. Under Clause 2, after making a study of demand and after finalizing negotiations with the end consumers of power, prospective investors have to submit a report to the State Electricity Board. The Board after processing the same and clearing the project has to issue licences in conformity with the provisions of the Act, which are in operation at that point of time.

300. Under Clause 3, the power generators can supply the energy to their own identified consumers using the existing distribution network of the Electricity Board.

301. Under Clause 4, the Government made it clear that the wheeling charges for using the transmission network of the Electricity Board are to be collected in kind.

Power wheeling and purchase agreement :

302. We perused to the provisions of Modified Power Wheeling and Purchase Agreement, entered into between the A.P. State Electricity Board and RCL.

303. Clause 1.23; wheeled energy means delivered energy to be wheeled to the scheduled customer by the Board including any applicable wheeling charges.

304. Clause 1.24; wheeling means the use of Board''s transmission and distribution facilities for the transportation of electrical power and energy from the inter connection point of generation source to a recipient.

305. Clause 1.25; wheeling charges means, the consideration payable in kind deducted by the Board pursuant to Paragraph 2.4 below from the wheeled energy for providing firm wheeling service.

306. Article 2 deals with wheeling of energy.

"Article 2.4: As compensation for the provision of Firm Wheeling Service, the Board shall be entitled to deduct from the Wheeled Energy the applicable Wheeling Charges, which charges shall be fifteen per cent (15%) of the Wheeled Energy for Scheduled Consumers receiving power at a voltage of 132 KV and above, seventeen and one-half per cent (17.5%) of the Wheeled Energy for Scheduled Consumers receiving power at a voltage of less than 132 KV and greater than 11 KV and twenty per cent (20%) of the Wheeled Energy for Scheduled Consumers receiving power at a voltage of 11 KV. The Wheeling Charges payable under this Paragraph 2.4 shall be sole and exclusive consideration payable to the Board for the provision of Firm Wheeling Service."

307. Article 3 deals with purchase of unconsumed delivered energy at the inter connection point by the Board.

308. Article 3.3 states that no wheeling charges or other charges or assessments shall be levied by the Board on purchased energy.

309. Article 3.4 states that the sale price of the energy supplied by the Generating Company to its identified consumer has to be fixed on mutual agreement subject to approval of the Government.

310. From these clauses it is seen that when the energy generated by the Generating Company was not consumed by its identified consumer, the Board has to purchase the unconsumed delivered energy and since the Board is using that portion of energy generated, the generating companies are exempted from paying any wheeling charges to that portion of energy and the price of energy agreed between the generator and the consumer has to be approved by the Government but not by the Board or the Commission, which stepped into its shoes after its constitution under the Reforms Act.

311. Article 8 - the agreement entered into shall continue to be in force from the date of execution, until the thirtieth (30th) anniversary of the Date of Completion and the agreement may be renewed for such further period of time on such terms and conditions as may be mutually agreed upon by the parties.

312. Article 10 deals with represents and warrants and it is useful to extract the warranty given by the Board to Generating Company, which was already referred while considering the issue whether PPAs are statutory contracts and are binding on A.P. TRANSCO and the Commission.

"Under Article 10(2) the Board represents and warrants to the company that;

(v) The Board is a statutory corporation duly organized and validly existing under laws of India and has all requisite legal power and authority to execute this Agreement and to carry out the terms, conditions and provisions applicable to it hereunder;

(vi) This Agreement constitutes the valid, legal and binding obligation of the Board, enforceable in accordance with the terms hereof, except as enforceability may be limited by applicable bankruptcy, insolvency, moratorium or other similar laws affecting creditors'' rights generally and to the extent that the remedies of specific performance, injunctive relief and other forms of equitable relief are subject to equitable defenses, the discretion of the Court before which any proceeding therefore may be brought, and the principles of equity in general;

(vii) There are no actions, suits, or proceedings pending or to Board''s knowledge, threatened against or affecting the Board before Court or administrative body or arbitral tribunal which might materially adversely affect the ability of the Board to meet and carry out its obligations under this Agreement; and

(viii) The execution and delivery of this Agreement by the Board has been duly authorized by all requisite action, and will not contravene any statute or regulation applicable to the Board or any provision of, or constitute a default under, any agreement or instrument to which the Board is party or by which it or its property may be bound."

313. From the clauses of the Agreement extracted above, it is seen that the Board made the Generating Company to believe, that the Board is competent to enter into the agreement under Clause 10(ii) and under Clause 10(iv) the 3oard gave a warranty that the agreements do not contravene any statute or regulation etc. From other clauses of the agreement, it is seen that the agreement will be in force for a period of 30 years from the date of Agreement and the Board has to collect charges for wheeling energy developed by the Generating Company to its identified consumer.

314. Under Article 2.4 of the Agreement the last words are as follows:

"the wheeling charges payable under this Paragraph 2-4 shall be the sole and exclusive consideration payable to the Board for the provision of Firm Wheeling Service.''

315. All other agreements entered into between the Board and the Generating Company is on the same lines and nowhere we find a provision in the Agreement that the Commission is entitled to fix the wheeling charges or the wheeling charges can be revised either by the licensee or the Commission during the subsistency of the agreement.

316. Nextly, the respondent contended that even otherwise, the State Government by its Lr.No.5983/Pr.II./2000, dated 3.4,2001 addressed to the Secretary of the Commission while expressing the view that the third-party sales by the Mini Power Plants should be honoured, observed that the Commission may fix appropriate wheeling/transmission charges taking into account the loss of cross subsidization, HT industrial revenue sustained by the A.P.TRANSCO on account of such third-party

sales.

317. We have gone through the letter referred by the respondents. The main issue clarified in this letter is that keeping the spirit behind the establishment of the Mini Power Plants, the Government desires that the third-party sales to HT industrial consumers should be honoured while entering into MOUs with the new Generating Companies which are going into production. Of course, the letter states that while retaining third-party sales provision with the Mini Power Plants, the Commission may fix appropriate wheeling/transmission charges, taking into account the loss of cross subsidization, HT industrial revenue, foregone by the AP TRANSCO on account of such third-party sales.

318. We are rather unable to understand how the licensee could sustain loss due to cross subsidization since the subsidy given to various categories of end consumers and why the Generating Companies have to bear that loss while paying service charges for wheeling the energy generated by them to their consumers through the transmission lines of the licensee.

319. Nextly, as per this letter the A.P. TRANSCO is deprived of the revenues due to the sale of power by the Generating Companies to H.T. consumers, which is obviously incorrect, for the reason that the Mini Power Plants were established at the instance of the Government, having failed to generate the required energy to bridge the gap between the growing demand and supply, and as per the scheme these developers of generation can only sell the energy produced by them to HT consumers only and not to any other category of consumers. Further the rate at which the Generating Company has to sell the energy to its consumers has to be not only approved by the Government but the rate shall always be higher than the rate at which the AP TRANSCO or DISCOMS, are selling the energy to HT consumers. Hence, it cannot be said that the TRANSCO is incurring any losses due to sale of energy by the Generating Companies to the identified H.T. consumers.

320. We have no hesitation to hold that the whole exercise was made by the respondents to bring the Generating companies established mostly with the public monies to a grinding halt, since the efforts made by the Commission to compel the Generating Companies to sell the power to AP TRANSCO, received a set back by virtue of the orders of this Court, forgetting the very purpose for which the Commission is established (i.e.,) to improve the financial health of the licensee by providing competitiveness and efficiency between the licensee and the private Generating Companies with the social object of ensuring a fair deal to the consumers and ultimately to transfer the transmission and supply of electricity to private companies. By this act, the Commission tried to give a seal of approval for the mis-management, corruption, nepotism and faulty policy decisions taken by the 2nd respondent and tried to throw these companies into irrecoverable financial losses. Hence, we hold that collection of wheeling charges for transmitting the energy generated by the Generating Companies being a policy matter, the policy

directions given by the Government u/s 78-A of the Supply Act anterior to the Act are not only saved, but are also binding both on the licensee as well as the Regulatory Commission. We move forward one step further and hold that even after the Act came into force, the role of the Commission is only advisory with regard to electricity generation and its transmission and the State Government alone has to take decision in fixing the wheeling charges, since the over all planning and co-ordination concerning the electricity in the State solely rests with the Government since the State Government alone is competent to take a decision with regard to incentives or concessions to be given to attract private agencies to establish Generating Companies for production of the energy that is required to bridge the gap between the supply and the growing demand, more so, in consonance with the National Policy adumbrated for the entire country. On the other hand, the letter of the Government dated 20.10.1999 categorically stated that the Regulatory Commission cannot interfere with the validity and operability of the said two G.Os during the period of their currency with regard to non-conventional energy developers. The same principle applies mutatis mutandis to the agreements entered into with the mini power plants.

321. Secondly, the collection of wheeling charges to our mind cannot be called as an incentive and it is only a charge payable by the Generating Company for using the transmission lines of the licensee in accordance with the parameters given in Fifth Schedule to Supply Act for fixing the wheeling charges. Even assuming for arguments sake it is an incentive, the same shall be in force during the subsistence of the contract.

322. Thirdly, both the policy directions as well as the statutory provisions of the Acts specifically states that the charges for wheeling the energy will have to be fixed on mutual agreement, but not unilaterally either by the Commission or by the Licensee. Since we have already taken the view that collection of wheeling charges is a policy matter and the Commission cannot fix the wheeling charges, even if the incentives given by the Government comes to an end, the State Government alone has to take a decision in the matter u/s 12 of the Reforms Act.

Whether wheeling charges includes revenues mentioned in Section 26 of the Act:

323. The sheet anchor of the contention of the Commission is that the word ''tariff defined under explanation (b) to Section 26 of the Act is wide enough to take all charges for which services are rendered and since wheeling is a service rendered by the licensee, the Commission is well within its powers to fix the wheeling charges. The Commission also admitted that while approving the revenues and tariffs of the licensee, it is bound by the financial principles and their applications contained in Schedule-VI of the Electricity Supply Act.

324. Before appreciating the contention of the Commission we make it clear that we are not entering into the controversy whether a Generating Company is involved in

transmission or supply of electricity and whether it has to obtain a licence u/s 15 or exemption u/s 16 of the Reforms Act as contended by the Commission, since the issue is pending adjudication before the Supreme Court.

325. Coming to the contentions raised by the Commission, first we would like to refer the provisions of the Reforms Act. Admittedly, Reforms Act is prospective in operation.

326. Section 2(d), "licence" means a licence granted u/s 15 of this Act;

327. Section 2(e), "licensee" or "licence holder" means a person licensed u/s 14 of the Act to transmit or supply energy including AP TRANSCO;

328. Section 2(p), "transmit" in relation to electricity, means the transportation or transmission of electricity by means of a system operated or controlled by a licensee which consists, wholly or mainly, or extra high voltage and extra high tension lines and electrical plant and is used for transforming and for conveying and/or transferring electricity from a generating station to a sub-station, from one generating station to another or from one sub-station to another or otherwise from one place to another;

329. u/s 11(1)(e) of the Act, the Commission is entitled to regulate the transmission and supply of electricity to the consumers and in exercise of that power, the Commission is given the power to prescribe the terms and conditions for the determination of licensee''s revenues to achieve the object underlying the enactment of the Act with the ultimate aim of supplying electricity to the consumers at reasonable and fair rates.

330. u/s 13 of the Act, the A.P. TRANSCO is incorporated under the provisions of the Supply Act with the principal objective of engaging in the business of procurement, transmission and supply of electric energy.

331. u/s 13(2) subject to the powers of the State Government under Sub-section (1), the A.P. TRANSCO shall be the principal company to undertake all planning and co-ordination in regard to transmission; undertaking their works connected with transmission, determining the electricity requirements in the State in coordination with the Generating Companies, State Government, the Commission, the Regional Electricity Boards, and the Central Electricity Authority; the operation of the power system.

332. Under Sub-section (3), the AP TRANSCO shall own the extra high voltage transmission system and shall be responsible for the transmission system operation and shall operate the power system in an efficient manner.

333. Under Sub-section (5) the AP TRANSCO has to discharge such powers and perform such duties and functions of the Andhra Pradesh State Electricity Board including those under the Indian Electricity Act, 1910 and the Electricity (Supply) Act,

1948 or the rules framed thereunder as the Commission may specify in the licence and it shall be the statutory obligation of the AP TRANSCO to undertake and duly discharge the powers, duties and functions so assigned.

334. u/s 15, any person involved in transmitting or supplying electricity in a specified area has to obtain a licence from the Commission.

Section 15(4).--Without prejudice to the generality of Sub-section (3), the conditions included in a licence by virtue of that sub-section may require the licensee among other things to,--

(a) enter into agreements on specified terms with other person for the use of any electric lines, electrical plant or plants and associated equipment operated by the licensee;

(h) obtain the approval of the Commission of such things that are required under the licence conditions or for deviation from the same;

(i) notify the Commission of any scheme that he is proposing to undertake including the schemes in terms of the provisions of the Electricity (Supply) Act, 1948;

(j) purchase power in an economical manner and under a transparent power purchase process; and

(k) supply in bulk to other licensees or to customers.

(5) Without prejudice to the generality of Sub-section (3), the conditions included in a licence granted by the Commission may require the holder of such a licence to establish a tariff or to calculate its charges from time to time in accordance with the requirements prescribed by the Commission.

335. u/s 23 of the Reforms Act, the rights and liabilities of the Electricity Board immediately before the effective date shall vest in the State Government, which in turn shall re-vest them in the A.P. TRANSCO and Generating Company in accordance with the Transfer Scheme formulated by the State Government.

336. Under Sub-section (3), the State Government may, by notification specify the rights and powers exercisable by the Board under the Electricity ''(Supply) Act, 1948 shall vest in the A.P. TRANSCO or Generating Company for discharge of the functions and duties which the Board was discharging earlier. The Transfer Scheme to be published shall define the property, interest in property, rights and liabilities to be allocated under Sub-section (6)(b) and to provide any rights or liabilities specified or described in the scheme shall be enforceable by or against the transferor or the transferee.

337. u/s 26(1) the licensee has to indicate the expected aggregate revenues from charges, which it is permitted to recover pursuant to the terms of its licence and expected cost of service as per the guidelines issued by the Commission and submit

the same for the approval of the Commission.

338. u/s 26(1)(2) of the Reforms Act, the Commission has to approve the yearly budget of the licensee including the charges to be collected from the licensee from various end users and every year the licensee has to provide information to the Commission in a format at least three months before the commencement of the financial year, its proposal with regard to revenues that are to be raised on the expenditure to be incurred by the licensee. Elaborate procedure was prescribed in that Act.

339. It is useful to extract Sub-sections (2) and (3) of Section 26 of the Reforms Act:

"26(2).- The Commission shall subject to the provisions of Sub-section (3) be entitled to prescribe/ the terms and conditions for the determination of the licensee''s revenue and tariffs by regulations duly published in the Official Gazette and in such other manner as the Commission considers appropriate.

Provided that in doing so the Commission shall be bound by the following parameters:-

(a) the financial principles and their applications provided in the Sixth Schedule to the Electricity (Supply) Act, 1948 read with Sections 57 and 57A of the said Act,

(b) the factors which would encourage efficiency, economic use of the resources, good performance, optimum investments performance of licence conditions and other matters which the Commission considers appropriate keeping in view the salient objects and purposes of the provisions of this Act; and

(c) the interest of the consumers.

340. Admittedly, the financial principles enunciated in Sixth Schedule to the Electricity (Supply) Act is traceable to Section 49 of the Supply Act, whereunder the Board has to frame tariff for supply of electricity to any person and the guiding principles to be taken into consideration for fixation of uniform tariffs were prescribed under Sub-section (2) of the Act.

341. u/s 57 of the Supply Act, the provisions of the Sixth Schedule shall be deemed to be incorporated in the licence of every licensee. In fact, under the terms and conditions of the agreement for supply of electrical energy to H.T. consumers, the consumer who is supplied with electrical energy has to enter into an agreement, proforma given in Appendix-III.

342. Under Clause 7 of the agreement, though minimum period is prescribed as five years from the date of agreement, under Clause 9 the consumer is bound by and shall pay the Board maximum demand charges, energy charges, surcharges, meter rents and other charges, If any, in accordance with the tariffs applicable and the terms and conditions of supply prescribed by the Board from time to time for the particular class of consumers to which the consumer belongs.

343. Under Clause 10 of the agreement, the Board reserved the unilateral right to vary, from time to time, tariffs, scale of general and miscellaneous charges and the terms and conditions of supply under this agreement by special or general proceedings and in particular, to enhance the rates chargeable for supply of electricity according to exigencies. To the same effect is the agreement for L.T. consumers prescribed in Appendix-IV.

344. u/s 57A, the State Government may if satisfied, that the licensee has failed to comply with any of the provisions of the Sixth Schedule (i.e.,) the Board at that time shall constitute a Rating Committee to examine the licensees'' charges for the supply of electricity and to make recommendations in that behalf to the State Government.

345. u/s 26(10) of the Reforms Act, it is made clear that no Rating Committee shall be constituted as contemplated u/s 57A and that responsibility was entrusted to the Commission. But the functions of the Rating Committee have to be discharged by the Commission and see that the licensee comply with the provisions of their licences regarding their charges for the sale of electricity (both wholesale and retail) and for the connection to and use of their assets or systems in accordance with the provisions of this Act. While prescribing the terms and conditions for determination of the licensees'' revenues and tariff, the Commission is bound to keep in mind the factors which would encourage efficiency, economic use of the resources, good performance etc., keeping in view the salient objects and purposes of the provisions of the Act and the interest of the consumers.

"Section 26(3).-Where the Commission, departs from factors specified in the Sixth Schedule of the Electricity (Supply) Act, 1948 while determining the licensees'' revenues and tariffs it shall record the reasons therefore in writing."

346. Under Sub-cause (4), any methodology or procedure specified by the Commission under Sub-sections (1), (2) and (3) above shall be to ensure that the objectives and purposes of the Act are duly achieved.

347. Under Sub-section (5) the licensee shall furnish information to the Commission for the format specified by the Commission at least three months before the ensuing financial year and the Commission shall notify the licensee''s either it accepts to the tariff proposals and revenue calculations, or its disapproval and in case of disapproval the Commission has to give reasons why the Commission considers that the licensee''s calculations does not comply with the methodology or procedures specified in its licence and either propose a modification or an alternative calculation of the expected revenue from charges, which the licensee shall accept.

348. Under Sub-clause (6) each holder of a supply licence shall publish in the daily newspaper having circulation in the area of supply and make available to the public on request the tariff or tariffs for the supply of electricity within its licensed area and

such tariff or tariffs shall take effect only after seven days from the date of such publication.

349. Under Sub-section (7) (a) the tariff approved by the Commission shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer''s load factor or power factor, the consumer''s total consumption of energy during any specified period, or the time at which supply is required; or paying capacity of category of consumers and need for cross-subsidisation;

350. Under Sub-section (7)(b), the tariff so fixed shall be just and reasonable so as to promote economic efficiency in the supply and consumption of electricity;

351. Sub-section (7) (c) shall satisfy all other relevant provisions of this Act and the conditions of the relevant licence.

352. Under Sub-section (8) the Commission also shall endeavour to fix tariff in such a manner that, as far as possible, similarly placed consumers in different areas pay similar tariff;

353. Under Sub-section (9), a detailed procedure is prescribed for fixation of tariff viz., (1) the tariff fixed shall ordinarily be once in a financial year except in respect of any changes expressly permitted under the terms of any fuel surcharge formula prescribed by regulations; (2) the licensee shall provide details of the proposed tariff etc., to the Commission at least three months before the proposed date for implementation of that tariff together with such other information as the Commission may require to determine whether the tariff etc., would satisfy the provisions of Sub-section (7). If the Commission considers that the proposed tariff by the licensee does not satisfy any of the provisions of Sub-section (7), it shall within 60 days of receipt of all the information which it required, and after consultation with the Commission Advisory Committee and the licensee, notify the licensee that the proposed tariff is unacceptable to the Commission and it shall provide to the licensee an alternative tariff or amended tariff which shall be implemented by the licensee.

354. All the provisions of Section 26 to our mind relate to the fixation of charges/ tariff for supply of electrical energy to the consumers, which is the principal business activity of the licensee and the manner of imposition of fines and penalties for violation of the provisions of the Act, the regulation of the properties, assets and interest in the properties used for or in connection with the electricity industry, separate regulations have to be framed by the Commission u/s 54(j) & (k) of Section 54 of the Act. Hence, to our mind collection of charges for transmitting the electrical energy produced by the Generating Company to its consumers, by the licensee do not fall u/s 26 of the Act. Section 22(1)(a) and (b) of the Electricity Regulatory Commission Act (Central Act) makes a clear distinction between the determination and collection of tariff for the supply of electricity and the tariff payable for the use of transmission facilities in the manner provided u/s 29 of that Act.

355. But the Commission tried to justify its action by relying on the explanations to this Section, which are extracted hereunder:

Explanation:- In this section,--

(a) "the expected revenue from charges" means the total revenue which a licensee is expected to recover from charges for the level of forecast supply used in the determination under Sub-section (5) above in any financial year in respect of goods or services supplied to customers pursuant to a licensed activity; and

(b) "tariff" means a schedule of standard prices or charges for specified services which are applicable to all such specified services provided to the type or types of customers specified in the tariff notification.

Forgetting the fact that the word used in these explanations "customer". Explanation (a) deals with the recovery of charges for the level of forecast supply used in the determination under Sub-section (5), which deals with the fixation of tariff for the supply of electricity. The said position is further amplified under Sub-sections (6), (7) and (8) of Section 26 of the Act. Even the "tariff mentioned in Explanation-B is referable to the charges for specified services provided to the type or types of customers specified in the tariff notification. Admittedly, the Generating Companies cannot be termed as customers.

356. Even assuming that collection of charges falls under tariff for specified service, u/s 26(1) of the Reforms Act the budgetary proposals should contain the revenues derived from the principal business of the licensee (i.e.,) procurement, transmission and supply of electricity energy and non-budgetary tariff like collection of wheeling charges, imposition of fines. Since the licensee has to submit the proposals with regard to the estimated revenues and the estimated expenditure every year, naturally they have to show in the proposals not only the revenues that are likely to be derived from its principal business activity, but also the estimate of other expected non-revenue charges and the estimated expenditure to arrive at the net revenue requirement for that year. This fact is also evident from paragraph 9.12.A of the impugned order dealing with the cash component of the wheeling charges. This position is amplified by Section 54 of the Reforms Act, whereunder the Commission is expected to frame regulations on the matters specified in Section 54(2). While Sub-section (2)(g) deals with the method and manner of determination of licensee''s revenues, (2)(j) deals with the amount of fines and penalties to be imposed, (2)(k) deals with regulation of the properties etc., used for or in connection with the electricity industry in the State. Hence, under any stretch of imagination, the tariff referable in ''explanation'' cannot be referable to revenues, which it is expected to collect from its principal business.

357. u/s 32(2) of Part X of the Reforms Act, the Commission has to constitute a Committee of not less than 15 and not more than 21 persons in consultation with the State Government representing various interests in the electricity trade to

advice the Commission on major questions of policy, relating to the electricity industry in the State.

358. Regulation No. 1 dated 17.6.1999 is framed by the Commission constituting the Advisory Committee and specifying its functions.

359. Under Clause 2, the Commission to be constituted as a Broad based one includes representatives of Generating Companies operating in the State.

360. Under Clause 3.1.1 the main functions of the Advisory Committee is to advise the Commission on major questions of policy, relating to the electricity industry in the State and under Clause 3.3 to advise the Commission in a General Tariff Proceedings pursuant to Section 26(9) of the Act. But neither the impugned order discloses that the Commission consulted its Advisory Committee nor the Commission placed any evidence before this Court that it consulted the Advisory Committee before passing the impugned order.

361. u/s 54(1) of the Reforms Act, the Commission has to frame regulations by notification in the Official Gazette for proper performance of its functions under the Act.

362. u/s 54(2) of the Reforms Act, without prejudice to the generality of the provisions of Sub-section (1), the Commission has to make regulations on the following matters, to the extent of relevancy they are referred.

(a)(i) administration of the affairs of the Commission, (ii) the exercise of its administrative, quasi-judicial and judicial powers including arbitration and (iii) procedure for summoning and holding of the meetings of the Commission the times and places at which such meetings shall be held, the conduct of the business thereof.

(c) (i) determination of the functions to be assigned to the licensees and others involved in the generation, purchase, transmission, distribution and supply of electricity; (ii) the manner in which such functions shall be discharged; and (iii) the procedure and code to be adopted in regard to power system and electric supply lines;

(e) the duties, powers, rights and obligations of the licensee;

(f) .....

(g) method and manner of determination of licensee''s revenues, tariff fixation, the matters to be considered in such determination and fixation;

(h) the constitution of the Commission Advisory Committee;

(i) .....

(j) (i) the amount of fines and penalties to be imposed for violation of provisions of the Reforms Act; (ii) the method and manner of imposition of fines and penalties and collection of the same;

(k) the regulation of the properties, assets and interest in the properties used for or in connection with the electricity industry in the State;

(l) any other matter which is required to be or may be prescribed by regulations;

363. Under Rule 2(e) of the A.P.E.R. Transfer Scheme Rules, 1999 assets include transmission and distribution system.

364. The Commission has not chosen to frame regulations on any of the above matters except relating to the Conduct of Business Regulations, 1999. The Counsel appearing either for the Commission or TRANSCO did not bring to our notice any Regulations made by the Commission as contemplated above, consequently publication of the regulations in the Official Gazette does not arise.

365. Though Section 57A of the Supply Act was repealed u/s 56(3) of the Act, by virtue of the proviso to Section 26(2) of the Act, Section 57 of the Supply Act with its Schedule (i.e.,) Sixth Schedule prescribing the financial principles and their applications for fixing the charges for supply of electricity to end consumers is saved.

366. Under Table of contents of the licence granted to the licensee by the Commission, Item 20 under Part-IV deals requirement to offer terms for use of system and connection of system and Item 22 under Part-VI deals calculation of revenues and tariffs.

367. Under Clause 5.1.2 of the licence issued by the Commission to the TRANSCO u/s 15 of the A.P. Electricity Reforms Act, 1998, the Licensee shall not commence any new provision of services to third parties for the transportation of electricity through the licensee''s Transmission System, except with the general or special approval of the Commission.

368. Under Clause 5.1.4 of the licence, while the Licensee has to purchase the energy required for the bulk supply in an economical manner and under a transparent power purchase or procurement process and in accordance with the Regulations, guidelines, directions made by the Commission from time to time,

369. Under Clause 5.1.5 of the licence, the Licensee cannot engage in any other business without the permission of the Commission unless it is likely to result in the gainful employment of the assets and infrastructure comprising the Transmission System and further subject to the conditions mentioned therein including keeping separate books of accounts for other business activities, as if they were carried on by a separate company, so that the revenues, costs, assets, liabilities, reserves and provisions of, or reasonably attributable to, such other business activities are

separately identifiable from those of the Licensed Business.

370. From the terms and conditions of the licence, it is seen that the principal business activity of the Licensee is being procurement, transmission and bulk supply of electrical energy within the area of supply and the transportation of electricity generated by third parties through its transmission system is altogether different business and the same is intended to put its transmission system for gainful use of the assets and infrastructure on mutually agreed terms and conditions, of course, subject to approval of the Commission and for that activity separate account books and records are expected to be maintained.

371. From the above discussion, Section 15(4) read with Clauses 5.1.2 and 5.1.5 of the licence makes it very clear that the transmission system owned by the licensee if put to gainful use, it shall be treated as other business activity unconnected with its principal activity and the licensee can enter into an agreement with the Generating Companies for use of its electrical lines etc., on specified terms after obtaining approval of the Commission for the agreements that are going to be entered into by the TRANSCO with the Generating Companies after constitution of the Commission and the accounts and other records pertaining to that business have to be maintained separately.

372. Likewise, under Sub-section (3) if the Commission wants to depart from the factors specified in Sixth Schedule while determining the licensee''s revenues and tariff, it has to record the reasons therefore in writing. Even that was not done in this case.

373. Though certain provisions of the Electricity Act and Supply Act are made not applicable to the extent specific provisions are made in this Act, u/s 57 of the Act, the powers, rights and functions of Regional Electricity Authority, the Central Electricity Authority, the Central Government and authorities other than the State Electricity Board, the State Government under the two acts and the rules framed thereunder remained unaffected and they continued to be in force.

374. The Commission admits that while approving the revenues and tariffs of the licensee, it is bound by the financial principles and their applications as envisaged u/s 57 read with Schedule-VI of Electricity Supply Act, which are applicable for fixation of tariff for supply of energy to the consumers, whereas charges to be collected for use of transmission system of a licensee by a Generating Company has to be fixed u/s 41 of the Supply Act and as per the guidelines provided in Schedule-V of the Act. Thus from the provisions of Supply Act, it is seen that a clear distinction is made between the tariff to be collected for supply of electricity to various categories of consumers and the charges to be collected for wheeling the energy through the transmission lines of the licensee.

375. Even in this Reforms Act a separate provision is made in Section 15(4) of the Reforms Act similar to that of Section 41 of the Act for collection of charges for

transmitting the energy through the electric lines of the licensee on special terms may be with the approval of the Commission and regulations specifying principles applicable in fixing the wheeling charges have to be framed u/s 54 of the Act. Since a specific provision is made for transmission of electricity on specified terms u/s 15(4) of the Reforms Act, the Commission cannot levy wheeling charges in exercise of its powers u/s 26 of the Act

376. In fact, from the tariff order for the year 2002-2003 both the Commission as well as the licensee treated the income on wheeling charges as non-tariff income (i.e.,) outside the purview of Section 26 of the Act, as seen from 510 to 512, which is extracted hereunder:

"Non-Tariff and Other Income

510. The Licensee''s projections and the Commission''s approved amounts there against are as indicated below:

Table No. 89

(Rs.Crores)

| | APCPDCL | APERC |
|---|---|---|
| Wheeling Charges | 0.00 | 70.00 |
| Non-Tariff Income | 155.79 | 184.17 |
| Total | 155.79 | 254.17 |

511. Non-Tariff Income includes Customer Charges of Rs. 28.38 Crs. Wheeling charges of Rs. 70.00 Crs has been arrived at by taking the quantum of energy estimated to be wheeled (1400 MU) at the Commission''s approved rate of 50 paise per Kwh for FY 2002-03.

Aggregate Revenue Requirement

512. The Aggregate Revenue Requirement works out to Rs. 3317.07 Crs as against Rs. 3620.12 Crs projected by the Licensee as detailed in the Table Below:

Table No.90

| | (Rs Crores) |
|---|---|
| Total Expenditure | 3,560.33 |
| Reasonable Return | 10.91 |
| Minus: Non-Tariff and Other Income | 254.17 |
| Total Net Aggregate Revenue Requirement | 3,317.07 |

377. Likewise, while arriving at net-revenue requirement for levying wheeling charges in para 9.12(a) of the impugned order, the non-tariff income including wheeling charges at Rs. 529.86 was deducted from the gross revenue required towards the cost of network.

378. For all these reasons, we hold that collection of charges for wheeling the energy generated by the Generating Companies to its consumers do not fall u/s 26 of the Reforms Act, as contended by the Commission, and at any rate the action of the Commission in revising the wheeling charges without consulting the Advisory Committee vitiates the whole proceedings.

Whether collection of wheeling charges - an annual exercise :

379. Nextly, the Commission started contending that like fixation of the charges for supply of electricity to the end consumers, the wheeling charges also have to be fixed every year. Such a contention was made without looking into the provisions of Reforms Act as well as the Sixth Schedule under the Supply Act.

380. u/s 26(5) of the Act, every licensee has to provide to the Commission in a format the expected aggregate revenue at least three months before the ensuing financial year with full details of its calculation for that financial year. u/s 26(9) no tariff or part of any tariff required by Sub-section (6) (i.e.) tariff for the supply of electricity within the licensed area may be amended more frequently than once in any financial year ordinarily except in respect of any changes expressly permitted under the terms of any fuel surcharge formula prescribed by regulations u/s 57 read with Sixth Schedule of the Supply Act.

381. Whereas under the policy of the Government as well as Section 15(4) of the Reforms Act, the licensee has to enter into agreement on specified terms with the

third parties for the use of electrical lines etc., of course, after obtaining prior approval of the Commission after the Reforms Act came into force. Hence, it is preposterous to contend that charges for wheeling the energy can be revised every year tike a tariff for sale of energy. Accordingly, we hold that the TRANSCO has to finalise the terms of the agreement including the period of agreement in consultation with the Generating Companies, keeping the national policy of allowing attractive return on investment by private enterprises but not annually as contended by the Commission.

Whether the principle of promissory estoppel applies to the facts of the case on hand:

382. The leading case on the promissory estoppel is in Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., . The Financial Corporation contended that even if there is a concluded contract between the parties about grant and acceptance of loan, the failure of Corporation to carry out its part of the obligation may amount to breach of contract, for which a remedy lies elsewhere but a writ of mandamus cannot be issued compelling the Corporation to specifically perform the contract. Repelling this contention of the Corporation their Lordships of the Supreme Court held as follows:

"8. .....It is too late in the day to contend that the instrumentality of the State which would be ''other authority'' under Article 12 of the Constitution can commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by the breach of contract may sue for damages but cannot compel specific performance of the contract. It was not disputed and in fairness to Mr. Bhatt, it must be said that he did not dispute that the Corporation which is set up u/s 3 of the State Financial Corporations Act, 1951 is an instrumentality of the State and would be ''other authority'' under Article 12 of the Constitution. By its letter of offer dated July 24, 1978 and the subsequent agreement dated February 1, 1979 the appellant entered into a solemn agreement in performance of its statutory duty to advance the loan of Rupees 30 lakhs to the respondent. Acting on the solemn undertaking, the respondent proceeded to undertake and execute the project of setting up a 4 Star Hotel at Baroda. The agreement to advance the loan was entered into in performance of the statutory duty cast on the Corporation by the statute under which it was created and set up. On its solemn promise evidenced by the aforementioned two documents, the respondent incurred expenses, suffered liabilities to set-up a hotel. Presumably, if the loan was not forthcoming, the respondent may not have undertaken such a huge project. Acting on the promise of the appellant evidenced by documents, the respondent proceeded to suffer further liabilities to implement and execute the project. In the backdrop of this incontrovertible fact situation, the principle of promissory estoppel would come into play. In Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, , this Court observed as under:

"The true principle of promissory estoppel, therefore seems to be that where one party has by his words of conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not."

9. Thus the principle of promissory estoppel would certainly estopped the Corporation from backing out of its obligation arising from a solemn promise made by it to the respondent."

383. Their Lordships further held in para 12 of the Judgment that "Now if appellant entered into a solemn contract in discharge and performance of its statutory duty and the respondent acted upon it, the statutory corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct, to the respondent. In such a situation, the Court is not powerless from holding the appellant to its promise and it can be enforced by a writ of mandamus directing it to perform its statutory duty. A petition under Article 226 of the Constitution would certainly lie to direct performance of a statutory duty by ''other authority'' as envisaged by Article 12."

384. In Pawan Alloys and Casting Pvt. Ltd, Meerut v. U.P. State Electricity Board, (1997) SCC 251, the U.P. State Electricity Board in exercise of its powers u/s 49 of Supply Act issued three notifications dated 29.10.1982, 13.7.1984 and 28.1.1986 whereunder a promise was held out to the new industrialists seeking to establish industries in different parts of the State of Uttar Pradesh, that on the charges of electricity consumed by them they will be given 10% rebate for a period of three years from the date of commencement of supply of electricity to them for the first time and the said concession was withdrawn.

385. One of the contentions raised before the Supreme Court was "whether the respondent-Board on the doctrine of promissory estoppel was liable to be restrained from enforcing the impugned notification dated 31.7.1986 against the appellants so far as the unexpired period of three years available to them under earlier notifications granting development rebate was concerned". Answering the above issue their Lordships of the Supreme Court in para 10 observed as follows:

"10. It is now well settled by a series of decisions of this Court that the State authorities as well as its limbs like the Board covered by the sweep of Article 12 of the Constitution of India being treated as "State" within the meaning of the said Article, can be made subject to the equitable doctrine of promissory estoppel in

cases where because of their representation the party claiming estoppel has changed its position and if such an estoppel does not fly in the face of any statutory prohibition, absence of power and authority of the promisor and is otherwise not opposed to public interest, and also when equity in favour of the promisee does not outweigh equity in favour of the promisor entitling the latter to legally get out of the promise."

Having reviewed the case law on the aspect, their Lordships held that "Suffice it to say at this stage that if a statutory authority or an executive authority of the State functioning on behalf of the State in exercise of its legally permissible powers has held out any promise to a party, who relying on the same has changed its position not necessarily to its detriment, and if this promise does not offend any provision of law or does not fetter any legislative or quasi-legislative power inhering in the promisor, then on the principle of promissory estoppel the promisor can be pinned down to the promise offered by it by way of representation containing such promise for the benefit of the promisee."

386. On the facts of the case, since notification was issued u/s 49 of the Electricity (Supply) Act pursuant to the directions issued by the State Government u/s 78-A of the Act to give effect to incentive scheme for the new industries, the Honourable Supreme Court held that "notifications constituted promise or representation to the new industries held out by the Board, as an instrumentality of the State, in its commercial interest to attract more consumers of electricity - When acting upon such promise or representation the new industries were established by spending huge money thus altering their position irretrievably, the Board would be bound by the principle of promissory estoppel not to resile from its promise or representation before expiry of the period of three years -Board failed to substantiate the grounds for non-applicability of the principle of promissory estoppel.

387. Nextly, their Lordships having observed that the State Government, which is concerned with development of industries in the State with a view to give a fillip to new industries puts forward a scheme of incentives to new industries, as a part of this package it can issue appropriate directions to the Board, its limb, u/s 78-A of the Act to make this incentive available to new industries to be established in the region covered by the Board''s supply network of electric power. It is precisely what is done by the Board at the behest of the State Government. No estoppel is required to be pleaded against the State as the latter has not issued any notification holding out such a promise. Nor has the State gone back upon it. We must, therefore, examine the challenge of the appellants on the question of promissory estoppel against the Board only from this aspect

388. Having considered the ambit of Section 49 of the Act and the notifications issued on the earlier occasion and the impugned notification dated 31.7.1986 whereunder Clause-17 of the notification dated 28.1.1986 was withdrawn deleting first part of item 8 under the heading "Incentive to new industry" i.e., A development

rebate of 10 per cent on the amount of the bill pertaining to the energy charges as computed under Items 4 and 7, above, will be given to a new industrial unit for a period of three years from the date of commencement of supply. This rebate will also be admissible for the unexpired period of three years to these existing industrial units, which have not completed three years on 1.2.1986 from the date of commencement of supply. This development rebate, however, shall not be allowed to the Central/State Government departments.

389. In para 24 of the judgment, their Lordships of the Supreme Court further held that "it cannot be held on the clear recitals found in the aforesaid three notifications issued by the Board that no representation whatsoever guaranteeing 10% rebate on electricity consumption bills could be culled out from these notifications. We, therefore, agree with the finding of the High Court on Issue No. 1 that by these notifications the Board had clearly held out a promise to these new industries and as these new industries had admittedly got established in the region where the Board was operating, acting on such promise, the same in equity would bind the Board. Such a promise was not contrary to any statutory provision but on the contrary was in compliance with the directions issued u/s 78-A of the Act. These new industries which got attracted to this region relying upon the promise had altered their position irretrievably. They had spent large amounts of money for establishing the infrastructure, had entered into agreements with the Board for supply of electricity and, therefore, had necessarily altered their position relying on these representations thinking that they would be assured of at least three years'' period guaranteeing rebate of 10% on the total bill of electricity to be consumed by them as infancy benefit so that they could effectively compete with the old industries operating in the field and their products could effectively compete with their products. On these well-established facts the Board can certainly be pinned down to its promise on the doctrine of promissory estoppel."

390. From the above, it is seen that where one party by his words or conduct made to the other a clear and unequivocal promise and the same do not offend any provision of law or does not fetter any legislative or quasi-legislative power, which is likely to create a legal relationship between the promissory and the promisee and the other party acted upon, the solemn promise given by the authority, would be binding on the party who made the promise and it would be pinned down to its promise on the principle of promissory estoppel and this would be so irrespective of the fact whether there is any pre-existing relationship between the parties or not.

391. Not only the State but also the authorities falling under Article 12 of the Constitution can be subjected to equitable doctrine of promissory estoppel in cases where party acted upon, the representation made by the authority and changed his position irretrievably if such estoppel does not contravene any statutory provision. To put it aptly, that no estoppel can be pleaded against a statute, otherwise, the plea of estoppel is very much available to the party who altered his position on the

solemn promise held by the statutory authority.

392. Keeping the above principles, if we look at the facts of the case, way back in 1991 the Government for reasons which were already dealt with elaborately, while dealing with the issue "whether Regulatory Commission constituted under the State Act is having power to levy wheeling charges" decided to invite private enterprises to establish power generation units by offering several incentives, which are expected to sell the power generated by these companies to the State owned Electricity Boards initially. Subsequently, they were even allowed to sell the power to identified consumers with the consent of the State Government. In fact, the Government of India in Notification dated 30th March, 1992 issued u/s 43A(2) of the Electricity Supply Act, 1948 prescribing guidelines for fixation of tariff for sale of electrical energy by the Generating Companies either to the Board or to the other persons. Under this notification not only a two-part tariff structure was provided for recovery of the annual fixed charges with 16% return on equity and at 68.5% of the Plant Load Factory. Under Clause 3.1 of the said notification, the tariff for the sate of electricity by a Generating Company to a Board may also be determined in deviation of the norms, other than the norms regarding operation and Plant Load Factor. To give effect to the National Policy, both Electricity Act as well as Supply Act were amended by Act 50 of 1991, dated 27th September, 1991 specified in this notification subject to the conditions specified therein. Falling in line with the national policy of allowing private sector to establish power generation plants, the Government of Andhra Pradesh issued G.O. Ms. No. 116, Energy (Power-1) Department, dated 5.8.1995 for establishment of Mini Power Plants of capacity of 30 MW, in private sector in industrial load centres. As per the G.O. the Government opted for establishment of Mini Power Plants of 30 MW. capacity to avoid delay in getting permissions from the Central Electricity Authority and nodal agency etc., and to see that the power plants comes into operation quickly without much delay. Clause 6 of the G.O. says that wheeling of power will be made through, A. P. State Electricity Board at the request of the generator at a rate to be finalised on mutual agreement. Clause-9 says that this scheme will not be subject to any binding procedure. The policy of the Government will be published for the benefit of the prospective generators and consumers. Subsequently in consultation with the then Electricity Board the Government issued G.O. Ms. No. 152, Energy (Power-I) Department, dated 29.11.1995 whereunder they have categorically stated that the power plants have to pay wheeling charges in kind as per the rates specified in Clause 4. It is also made clear in Clause 8 of the G.O. the Mini Power Plant developers of the power shall necessarily sell power to the consumers above the Board''s High Tension tariff rate. We have already held that these G.Os were issued u/s 78-A of the Supply Act and all the agreements entered into between the Board and Generating Companies are statutory agreements. In fact, under the agreements entered into the Board has given a warranty that it is having power and competence to enter into the memorandum of understanding. We have also

extracted various provisions of the Act, the Transfer Rules relating to Transfer Schemes in favour of A.P. TRANSCO and DISCOMS and held that all the existing contracts entered into by the Electricity Board and the liabilities incurred by it are saved and the successor-in-interest (i.e.,) A.P. TRANSCO as well as the Commission are bound to follow the same. In fact, it was not their case that there is any provision either in the Act or in the Rules made thereunder that the earlier agreements were annulled or the Commission was given power to annul the agreements. But unfortunately the Commission by holding that its powers are not only adjudicatory, but pro-active and it is not bound by the policy directions given by the Government as well as the agreements entered into by the then Electricity Board.

393. From the above, it is seen that the Government as well as the Electricity Board made not only several promises, but also entered into agreements with the Generating Companies that giving effect to the promises made by them, whereunder the period of agreement was also mentioned in all the agreements. That apart, we have also held that the State Commission constituted under Electricity Regulatory Commission Act, 1998 is alone competent to fix the wheeling charges payable by the Generating Companies for using die transmission lines of the licensee. We have also held that under the provisions of the Reforms Act, the Commission is not competent to reopen the concluded contracts and revise the wheeling charges as the same falls in the realm of policy matters on which the Government alone is competent to take decisions and the role of the Commission is only advisory. Hence, we have no hesitation in holding that the principle of promissory estoppel applies to the facts of the case with all the force and the Commission as well as the licensee or the State Government wherever it relates to general policy matters u/s 56(3) (I) and (V) of the Reforms Act have stepped into the shoes of the Board are pinned down to the promise held out by them since the same do not contravene the provisions of any statute. On the other hand, the promise held out by the authorities is protected by the statute and they were made binding on the successors-in-interest under the provisions of the Reforms Act and the Transfer Scheme Rules.

394. The contention of the Commission that the promissory estoppel can neither be claimed by the Generating Companies nor can be pleaded in the larger interests have no substance in view of our findings on various issues that cropped up for consideration in these batch of cases. The entire fiasco in this case is the result of thinking of the Commission that there are no fetters in exercise of its powers under the Act and the Generating Companies for the sin of using the transmission lines of the licensee have to bear the distribution losses and incurred at the DISCOM level like faulty meter readings, theft of energy etc., and the network charges of the licensee like wages of its employees, legal charges etc., is highly perverse.

Legitimate expectations:

395. Arbitrariness, unreasonableness in the actions of the democratic institutions under the Constitution offends Article 14 of the Constitution. The entire constitutional edifice revolves round on the principle that every citizen to be treated fairly in his interaction with the State and its instrumentalities. The State and its instrumentalities should give due weight to the reasonable or legitimate expectations of the persons likely to be affected by their decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case.

396. In a case reported in Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , the respondent questioned the action of the appellants in trying to dispose of the damaged rice pursuant to negotiations by rejecting the highest tender of the respondent on the ground that higher bid was obtained in negotiations as arbitrary and violative of Article 14 of the Constitution.

397. Their Lordships of the Supreme Court held that "in contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is ''fairplay in action''. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review."
"8. ..... Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant''s perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

398. From the facts of the case on hand, all the Generating Companies acting on the representation made by the State as well as the then State Electricity Board

established Generating Companies in private sector by raising loans from the financial institutions both at the Central and the State level and by this arbitrary action if the Commission alters the position of the Generating Companies in violation of the promise held out by the Government and revise the wheeling charges on an imaginary and unrealistic grounds, which amounts to collecting about 56.8% of the power generated by the Generating Companies and if the wheeling charges are to be collected in kind will amount to unfair exercise of the power and abuse of the power vested in it. On this ground also the impugned order is liable to be set aside. Since the Generating Companies altered their position to their disadvantage, it amounts to breach of legitimate expectation that has been created in the minds of the Generating Companies by the promises made by the State Government as well as the Electricity Board. On this ground also the action of the Commission cannot be sustained.

Joint application:

399. The A.P. TRANSCO while submitting tariff proposals for the financial year 2001-2002 claimed Rs. 1/- in cash per kwt of electricity for wheeling the energy generated by the Generating Companies by contending that the wheeling charges received by it in kind are substantially lower than the expenditure incurred by it for wheeling the energy.

400. In para 143 of the Tariff Order for 2001-2002 dated 24.3.2001 the Commission held that issues relating to setting appropriate transmission/distribution, wheeling charges are complex in nature and require proper consideration and the Commission will consider the issues of appropriate transmission/distribution of wheeling charges in a separate proceeding.

401. Subsequently, the TRANSCO along with the Distribution Companies filed a joint application on 8.10.2001 again seeking a revision of wheeling charges for the financial year 2001-2002 by stating that on 17.1.2001, the TRANSCO filed a combined bulk supply and transmission tariff proposals for the DISCOMS also for the year 2001-2002 since A.P. TRANSCO is the exclusive transmitter and bulk supplier of energy procured by the DISCOMS.

402. In this application they stated that they proposed to share the wheeling charges with the DISCOMS in the following proportion as seen from Clause-10(g) collected from the Generating Companies.

| | |
|---|---|
| AP TRANSCO | DISCOM |

| | | |
|---|---|---|
| Wheeling at 132 KV | 100% | 0% |
| Wheeling at 33 and 11KV | 25% | 75% |

403. We have already taken the view that the Commission cannot take into consideration the system losses incurred by DISCOMS for levying the wheeling charges. In fact, the TRANSCO in its first application claimed the proposed wheeling charges exclusively for it. It is only on 8.10.2001 a joint application was filed by the TRANSCO as well as the DISCOMS stating that the TRANSCO filed a combined bulk supply and transmission tariff proposals for DISCOMS also.

404. In this context we have to see whether a joint application by these two companies are maintainable in law or not. Admittedly, while the TRANSCO obtained licence for engaging in the business of procurement, transmission and supply of electric energy, the DISCOMS obtained separate licence for carrying on business of distribution and retail supply of electricity to the end consumers.

405. u/s 22 of the Act, every licensee shall, unless expressly exempted by the licence, prepare and render to the Commissioner every year on or before the date specified in the licence, an annual statement or statements of accounts of its undertaking and of each separate business unit as specified in the licence so on and so forth.

406. u/s 26(1) of the Reforms Act, the holder of each licence has to submit tariff proposals independently. u/s 26(5) of the Act, every licensee shall provide to the Commission in a format as specified by the Commission at least 3 months before the ensuing financial year full details to its calculation for that financial year of the expected aggregate revenue from charges etc.

407. Under Sub-section (6) each holder of a supply licence shall publish in the daily newspaper having circulation in the area of supply and make available to the public on request the tariff or tariffs for the supply of electricity within its licensed area.

408. The above provisions will clearly indicate that the TRANSCO as well as the DISCOMS are two different and distinct entities and they have to submit their tariff proposals separately. Hence, it is difficult to hold that a joint application by TRANSCO or DISCOM is either maintainable in law or contemplated under the provisions of the Act. ''

Principles of natural justice:

409. u/s 10(7) of the Act, the Commission in discharge its functions is entitled to and shall consult to the extent the Commission considers appropriate from time to time such persons or group of persons who may be affected or are likely to be affected by the decision of the Commission.

410. u/s 32 read with Regulations, the Commission has to consult the Commission Advisory Committee constituted for the purpose on all major questions of policy relating to the electricity industry in the State including fixation of general tariff.

411. Under Regulation 10, the Commission shall not pass any order revising the admission without giving the party concerned an opportunity of being heard.

412. Under Regulation 11, the Commission admits the petition, it has to give the orders that are necessary for service of notice to the respondents and other affected or interested parties for filing of replies, rejoinder in opposition or in support of the petition in such form as the Commission may direct.

413. Regulation 7(2)(i) all matters which the Commission is required under the Act would undertake and discharge through hearings shall be done through hearing in the manner specified under the Act and the regulations.

414. Sub-section (ii) all matters effecting the rights or interests of the licensee or any other person or class of persons shall be undertaken and discharged through hearing in the manner specified in these Regulations. The Commission may provide otherwise for reasons to be recorded in writing.

415. We have already held that the functions of the Commission are akin to the functions of a Civil Court under Common Law. In the counter filed by the licensee in CMA No. 1214 of 2002 seeking the vacation of the interim order, it is stated that public notice issued was published in Eenadu and Hindu on 25th January, 2002 inviting objections from the public and affected parties on tariff proposals for the year 2002-2003 including wheeling charges also. So separate notice for wheeling charges for the years 2002-2003 is not at all required.

416. Firstly, either the application filed by the TRANSCO in January, 2001 and the joint application filed by TRANSCO and DISCOM in August, 2001 relate to the financial year 2001-2002, but not for the financial year 2002-2003. The licensee in his counter stated that since a public notice was issued in Eenadu and Hindu on 25th January, 2002 inviting objections from public and affected parties on tariff proposals in the year 2002-2003, which includes wheeling charges also, no separate notice for wheeling charges for the year 2002-2003 need be issued. Again the licensee has forgotten the fact that the Commission was considering the Joint Application filed by the licensee and DISCOMS in August, 2001, but not the tariff proposals submitted by the licensee for the year 2002-2003. In fact, the tariff proposals submitted by the licensee for 2002-2003 no revision of wheeling charges was claimed by the licensee. Hence, the public notice issued on the tariff proposals for the year 2002-2003 cannot

be considered as a public notice inviting objections from the Generating Companies with regard to fixation of wheeling charges on the joint application filed by the TRANSCO as well as DISCOMS. But the Commission in para 4.2 of the impugned order stated that public hearings were held on fixation of wheeling charges.

417. The Commission has also forgotten the fact that it was considering the Joint Application filed by the licensee and DISCOMS in August, 2001, but not the tariff proposals submitted by the licensee for the year 2002-2003. In fact, the licensee did not propose any revision of the wheeling charges. Having rejected the proposal of the licensee for the year 2001-2002 revised the wheeling charges for 2002-2003 without there being an application to that effect from the licensee by taking into consideration the budget proposals submitted by the license for 2002-2003.

418. Since the wheeling charges payable by the Generating Companies have to be fixed by mutual agreement, the question of public hearing may not arise. Be that as it may, in the so-called public hearing some representatives of the left parties seemed to have appeared before the Commission and contended that the charges for wheeling the energy has to be fixed at Rs. 2/- per unit (i.e.,) double than what the licensee claimed. We have no hesitation to hold that these individuals may not be knowing for what purpose the charges are being collected and in what way the TRANSCO is incurring losses for wheeling the energy developed by these Companies to their consumers through transmission lines of the licensee.

419. In support of their action in acting upon the representation of the staff, a Judgment of this Court rendered in S. Bharat Kumar and others Vs. Government of Andhra Pradesh and others, while considering the principles of natural justice to be followed under the A.P. Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, a Division Bench of this Court held "that the Commission acted very fairly by affording opportunities to the consumers or their representative bodies to voice their objections and in dealing with their objections both legal and factual. The Commission went to the extent of deploying its staff to project the case of the consumer more effectively by way of checking up the data etc., having due regard to the handicaps faced by the consumers in such technical exercise. The deployment of staff to assist the statutory Committees holding public enquiries for the purpose of rate fixation is not uncommon. The role played by the staff far from being prejudicial to the interests of consumers proved to be to their advantage. No prejudice whatsoever was caused on account of staff participation."

420. This is a case relating to fixation of general tariff for supply of electricity to the consumer. Their Lordships might have satisfied with the way the staff presented the case of the consumer before the Commission. But in the case on hand, we are thoroughly dissatisfied the way the staff of the Commission acted.

421. The misconceived advise and presentations of the staff before the Commission resulted in passing the impugned order by the Commission, which did not stand to

the judicial scrutiny though considerable amounts have been spent by the Commission as well TRANSCO towards legal expenses.

422. Be that as it may, though the Commission is entitled to make modification or alternative calculation of the expected revenue from charges u/s 26(5)(b)(ii) of the Act, any modification or alternative calculation can be suggested by the ommission only after giving opportunity to the affected persons or group of persons to raise their objections for the proposal and after consultation of the Commission''s Advisory Committee. It is not the case of the Commission that either it consulted the Advisory Committee before revising the wheeling charges or gave an opportunity to the Generating Companies to raise their objections on the alternative proposal made by the Commission on the representation of its staff suggesting alternative tariff. On this ground also the order cannot be sustained.

Subsidies:

423. From Table No. 106 at page No. 196 of the Tariff Order for 2002-2003, it is seen among others, an amount of Rs. 96.22 crores are being given as subsidy to Rural Electrical Co-operative Societies (RESCOs) and at para 571 at page 206 it is seen that while the cost to supply electricity to these societies is estimated at Rs. 2.41 ps/unit and they are being supplied energy at Rs. 0.32 ps. per kWh and the RESCOs are selling the energy to the consumers at the rate fixed by the Commission. On seeing this, by order dated 17.7.2002 this Court called for the particulars of Rural Electrical Co-operative Societies by directing the Government to file an affidavit specifying the purport and intention of establishing these Societies and supplying the power at such a concessional rate. From the affidavit filed by the Chief Engineer (Commercial), A.P. TRANSCO, it is seen that there are nine RESCOs in various parts of the State and an amount of Rs. 4,041.59 lakhs is due from these Societies as on 1.4.2002 and they are serving some Mandals in few Districts. According to the deponent, these Societies are floated with the objective of achieving rapid electrification in rural areas so as to keep pace with the growing demand of power for harnessing ground water and to increase agricultural production and also for development of cottage and village industry. It is also their case that agricultural sector consumes 70% to 80% of the consumption and these societies are functioning with the financial assistance provided by Rural Electrification Corporation Limited through the State Government under the guarantee of concessional rates of interest. RESCOs are licensed to supply electricity to consumers as any distribution companies. The lines are to be maintained by the DISCOMs.

424. From the above it is seen that the State Government has given guarantee for the loans advanced by the Rural Electrification Corporation Limited, New Delhi at concessional rates of interest and practically there is no difference between the functions of RESCOs and DISCOMs and the electricity is being transmitted through the electrical lines maintained by the DISCOMs. If there is any truth in the averment made by the licensee that to achieve rapid electrification and to harness ground

water apart from increasing agricultural production so on and so forth, this type of Societies have to be floated in every part of the State. It is not the case of the licensee that DISCOMs are not serving the rural areas or the rural areas where RESCOs are not there are not catered with power supply.

425. From para 571 at page 206 of the Tariff Order it is seen that while the cost of supply of energy to the Societies worked out to Rs. 2.41 Ps. The energy is being sold to these Societies at 0.32 paise and though the deponent is silent with regard to the sale of energy to the consumers, across the Bar, the licensee has stated that these Societies are also supplying the electricity to the consumers at the rates fixed by the Commission to various categories of consumers. If that is the case why these Societies are to be continued and why the Government should subsidize the cost of energy supplied to these Societies in crores of rupees at the cost of the tax-payer is not known. We hope and trust that the Government and the Commission shall take a decision whether it is desirable to continue these societies by providing subsidy running into crores.

426. From the table it is also seen that the Government is providing subsidies for L.T. Agriculture 837.39, H.T. Agriculture 2.86 and Agriculture 7.65 crores.

427. We repeatedly enquired the Counsel appearing for the TRANSCO whether any figures are available with the licensee with regard to consumption of electricity by the agricultural sector. The answer was an emphatic no. But the Government was giving crores of rupees to the TRANSCO towards subsidy for the electricity alleged to have been consumed by the farmers of this State.

Conclusion:

428. In the result, the Appeals as well as the Writ Petitions are allowed and the order of the Commission in O.P. No. 510 of 2001 and batch, dated 24th March, 2002 is set aside as illegal, arbitrary, unreasonable and capricious, viewed from any angle in the matter. Consequently, the 2nd respondent licensee is directed to return the bank guarantees furnished by the Generating Companies from time to time under the orders of the Supreme Court in SLP(C) No. 9535 of 2002, dated 9th May, 2002.

429. In the normal course, this is a fit case where the petitioners have to get their costs in contesting the order of the Commission, but again that brunt has to be borne by the consumer from whom it will be transmitted to the tax-payer of this country. Keeping this in view we are not awarding any costs.

430. We place on record the assistance rendered by Mr. Goolam Vahanvati, Senior Counsel and Advocate General, State of Maharashtra who lead the arguments in this batch and the Counsel from other States who appeared in these cases as well as Mr. C. Kodanda Ram, Mr. K. Gopal Choudary - a Technocrat turned Advocate, Mr. B. Adinarayana Rao of this Court appearing for the petitioners/appellants and Mr. P. Sriraghuram appearing for the Commission, who rendered invaluable assistance in

adjudicating the lis between the parties.