REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3902 OF 2006

PTC India Ltd. … Appellant(s)

versus

Central Electricity Regulatory Commission, thr. Secy. … Respondent(s)

with

Civil Appeal Nos. 4354/06, 4355/06, 2875/07, 7437/05, 7438/05, 2073/07, 1471/07, 2166/07, Civil Appeal No.2412 /2010 (D 9870/07) and Civil Appeal No. 2413/2010 arising out of S.L.P. (C) No. 22080/05.

J U D G M E N T

S. H. KAPADIA, J.

Delay condoned.

2. Leave granted.

3. In this batch of civil appeals, we are basically concerned with the doctrine and jurisprudence of delegated legislation.

QUESTIONS OF LAW:

4. The crucial points that arise for determination are: –

(i) Whether the Appellate Tribunal constituted under the Electricity Act, 2003 ("2003 Act") has jurisdiction under Section 111 to examine the validity of Central Electricity Regulatory Commission (Fixation of Trading Margin)

Regulations, 2006 framed in exercise of power conferred under Section 178 of the 2003 Act?

(ii) Whether Parliament has conferred power of judicial review on the Appellate Tribunal for Electricity under Section 121 of the 2003 Act?

(iii) Whether capping of trading margins could be done by the CERC ("Central Commission") by making a Regulation in that regard under Section 178 of the 2003 Act?

FACTS:

5. In this batch of civil appeals, appellants had challenged the vires of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 as null and void before the Appellate Tribunal for Electricity and had prayed for quashing of the said Regulations. The Tribunal, however, dismissed the appeals holding that its jurisdiction was restricted by the limits imposed by the parent Statute, i.e., the Electricity Act, 2003. By the impugned judgment, the Tribunal held that the appropriate course of action for the appellants is to proceed by way of judicial review under the Constitution.

6. In view of the importance of the question, the matter was referred by a three-Judge Bench of this Court to the Constitution Bench. While making

reference to the Constitution Bench, the question formulated was - "whether the Tribunal has jurisdiction to decide the question as to the validity of the Regulations framed by the Central Commission?" Basically, the matters involve interpretation of Sections 111 and 121 of the 2003 Act.

7. RELEVANT PROVISIONS OF THE 2003 ACT:

PART I
PRELIMINARY

Section 1. Short title, extent and commencement.-

(3) It shall come into force on such date as the Central Government may, by notification, appoint:

Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

Section 2 – Definitions.- In this Act, unless the context otherwise requires,--

(9) "Central Commission" means the Central Electricity Regulatory Commission referred to in sub-section (1) of section76;

(23) "electricity" means electrical energy-

(a) generated, transmitted, supplied or traded for any purpose; or
(b) used for any purpose except the transmission of a message;

(26) "electricity trader" means a person who has been granted a licence to undertake trading in electricity under section 12;

(32) "grid" means the high voltage backbone system of inter-connected transmission lines, sub-station and generating plants;

(33) "Grid Code" means the Grid Code specified by the Central Commission under clause (h) of sub-section (1) of section 79;

(34) "Grid Standards" means the Grid Standards specified under clause (d) of section 73 by the Authority;

(39) "licensee" means a person who has been granted a licence under section 14;

(44) "National Electricity Plan" means the National Electricity Plan notified under sub-section (4) of section 3;

(45) "National Load Despatch Centre" means the Centre established under sub-section (1) of section 26;

(46) "notification" means notification published in the Official Gazette and the expression "notify" shall be construed accordingly;

(47) "open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;

(52) "prescribed" means prescribed by rules made by the Appropriate Government under this Act;

(57) "regulations" means regulations made under this Act;

(59) "rules" means rules made under this Act;

(62) "specified" means specified by regulations made by the Appropriate Commission or the Authority, as the case may be, under this Act;

(64) "State Commission" means the State Electricity Regulatory Commission constituted under sub-section (1) of section 82 and includes a Joint Commission constituted under sub-section (1) of section 83;

(71) "trading" means purchase of electricity for resale thereof and the expression "trade" shall be construed accordingly;

(76) "wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62;

PART II
NATIONAL ELECTRICITY POLICY AND PLAN

Section 3 - National Electricity Policy and Plan

(1) The Central Government shall, from time-to-time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.

(4) The Authority shall prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years:

Provided that the Authority while preparing the National Electricity Plan shall publish the draft National Electricity Plan and invite suggestions and objections

thereon from licensees, generating companies and the public within such time as may be prescribed:

Provided further that the Authority shall--

(a) notify the plan after obtaining the approval of the Central Government;

(b) revise the plan incorporating therein the directions, if any, given by the Central Government while granting approval under clause (a).

PART III
GENERATION OF ELECTRICITY

Section 7 - Generating company and requirement for setting up of generating station.- Any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73.

Section 9 - Captive generation.- (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant,

shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.

Section 11 - Directions to generating companies.- (1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation:--For the purposes of this section, the expression "extraordinary circumstances" means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.

PART IV
LICENSING

Section 12 - Authorised persons to transmit, supply, etc., electricity- No person shall--

(a) transmit electricity; or

(b) distribute electricity; or

(c) undertake trading in electricity,

unless he is authorised to do so by a licence issued under section 14, or is exempt under section 13.

Section 14 - Grant of licence.-

The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person--

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader,

in any area as may be specified in the licence:

Section 15 - Procedure for grant of licence.-

(1) Every application under section 14 shall be made in such form and in such manner as may be specified by the Appropriate Commission and shall be accompanied by such fee as may be prescribed.

(6) Where a person makes an application under sub-section (1) of section 14 to act as a licensee, the Appropriate Commission shall, as far as practicable, within ninety days after receipt of such application,--

(a) issue a licence subject to the provisions of this Act and the rules and regulations made thereunder; or

(b) reject the application for reasons to be recorded in writing if such application does not conform to the provisions of this Act or the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard.

Section 16 - Conditions of licence.-

The Appropriate Commission may specify any general or specific conditions which shall apply either to a licensee or class of licensees and such conditions shall be deemed to be conditions of such licence:

Provided that the Appropriate Commission shall, within one year from the appointed date, specify any general or specific conditions of licence applicable to the licensees referred to in the first, second, third, fourth and fifth provisos to section 14 after the expiry of one year from the commencement of this Act.

PART V
TRANSMISSION OF ELECTRICITY

Section 26 - National Load Despatch Centre

(1) The Central Government may establish a Centre at the national level, to be known as the National Load Despatch Centre for optimum scheduling and despatch of electricity among the Regional Load Despatch Centres.

(2) The constitution and functions of the National Load Despatch Centre shall be such as may be prescribed by the Central Government:

Provided that the National Load Despatch Centre shall not engage in the business of trading in electricity

Section 34 - Grid Standards.-

Every transmission licensee shall comply with such technical standards, of operation and maintenance of transmission lines, in accordance with the Grid Standards, as may be specified by the Authority.

Section 37 - Directions by Appropriate Government.-

The Appropriate Government may issue directions to the Regional Load Despatch Centres or State Load Despatch Centres, as the case may be, to take such measures as may be necessary for maintaining smooth and stable transmission and supply of electricity to any region or State

Section 38 - Central Transmission Utility and functions.-

(1) The Central Government may notify any Government company as the Central Transmission Utility:

Provided that the Central Transmission Utility shall not engage in the business of generating of electricity or trading in electricity:

Provided further that the Central Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity of such Central Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 (1 of 1956) to function as a transmission licensee, through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

(2) The functions of the Central Transmission Utility shall be--

(a) to undertake transmission of electricity through inter-State transmission system;

(b) to discharge all functions of planning and co-ordination relating to inter-State transmission system with--

(i) State Transmission Utilities;

(ii) Central Government;

(iii) State Governments;

(iv) generating companies;

(v) Regional Power Committees;

(vi) Authority;

(vii) licensees;

(viii) any other person notified by the Central Government in this behalf;

(c) to ensure development of an efficient, co-ordinated and economical system of inter-State transmission lines for smooth flow of electricity from generating stations to the load centres;

(d) to provide non-discriminatory open access to its transmission system for use by--

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon as may be specified by the Central Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

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

Provided also that the manner of payment and utilization of the surcharge shall be specified by the Central Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

PART VI
DISTRIBUTION OF ELECTRICITY

Section 42 - Duties of distribution licensees and open access.-

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

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

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

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

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

Electricity (Amendment) Act, 2003 (57 of 2003) by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

Section 52 - Provisions with respect to electricity trader.-

(1) Without prejudice to the provisions contained in clause (c) of section 12, the Appropriate Commission may, specify the technical requirement, capital adequacy requirement and credit worthiness for being an electricity trader.

(2) Every electricity trader shall discharge such duties, in relation to supply and trading in electricity, as may be specified by the Appropriate Commission.

PART VII
TARIFF

Section 61 - Tariff regulations.-

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

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

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

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

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

(e) the principles rewarding efficiency in performance;

(f) multi-year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;

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

(i) the National Electricity Policy and tariff policy:

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

Section 62 - Determination of tariff

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for--

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

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

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for the promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

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

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with

interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

Section 63 - Determination of tariff by bidding process.-

Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

Section 64 - Procedure for tariff order.-

(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,--

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.

PART IX
CENTRAL ELECTRICITY AUTHORITY

Section 73 - Functions and duties of Authority.-

The Authority shall perform such functions and duties as the Central Government may prescribe or direct, and in particular to--

(a) advise the Central Government on the matters relating to the national electricity policy, formulate short-term and perspective plans for development of the electricity system and co-ordinate the activities of the planning agencies for the optimal utilisation of resources to subserve the interests of the national economy and to provide reliable and affordable electricity for all consumers;

(b) specify the technical standards for construction of electrical plants, electric lines and connectivity to the grid;

(c) specify the safety requirements for construction, operation and maintenance of electrical plants and electric lines;

(d) specify the Grid Standards for operation and maintenance of transmission lines;

(e) specify the conditions for installation of meters for transmission and supply of electricity;

(f) promote and assist in the timely completion of schemes and projects for improving and augmenting the electricity system;

(g) promote measures for advancing the skill of persons engaged in the electricity industry;

(h) advise the Central Government on any matter on which its advice is sought or make recommendation to that Government on any matter if, in the opinion of the Authority, the recommendation would help in improving the generation, transmission, trading, distribution and utilisation of electricity;

(i) collect and record the data concerning the generation, transmission, trading, distribution and utilisation of electricity and carry out studies relating to cost, efficiency, competitiveness and such like matters;

(j) make public from time-to-time the information secured under this Act, and provide for the publication of reports and investigations;

(k) promote research in matters affecting the generation, transmission, distribution and trading of electricity;

(l) carry out, or cause to be carried out, any investigation for the purposes of generating or transmitting or distributing electricity;

(m) advise any State Government, licensees or the generating companies on such matters which shall enable

them to operate and maintain the electricity system under their ownership or control in an improved manner and where necessary, in co-ordination with any other Government, licensee or the generating company owning or having the control of another electricity system;

(n) advise the Appropriate Government and the Appropriate Commission on all technical matters relating to generation, transmission and distribution of electricity; and

(o) discharge such other functions as may be provided under this Act.

Section 74 - Power to require statistics and returns.-

It shall be the duty of every licensee, generating company or person generating electricity for its or his own use to furnish to the Authority such statistics, returns or other information relating to generation, transmission, distribution, trading and use of electricity as it may require and at such times and in such form and manner as may be specified by the Authority.

Section 75 - Directions by Central Government to Authority.-

(1) In the discharge of its functions, the Authority shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing.

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

PART X
REGULATORY COMMISSIONS

Section 76 – Constitution of Central Commission.-

(1) There shall be a Commission to be known as the Central Electricity Regulatory Commission to exercise the powers conferred on, and discharge the functions assigned to, it under this Act.

Section 79 - Functions of Central Commission.-

(1) The Central Commission shall discharge the following functions, namely:--

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

(g) to levy fees for the purpose of this Act;

(h) to specify Grid Code having regard to Grid Standards;

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

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

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

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

(i) formulation of National Electricity Policy and tariff policy;

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

(iii) promotion of investment in electricity industry;

(iv) any other matter referred to the Central Commission by that Government.

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

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

Section 86 - Functions of State Commission.-

(1) The State Commission shall discharge the following functions, namely:--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) promotion of investment in electricity industry;

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

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

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

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

PART XI
APPELLATE TRIBUNAL FOR ELECTRICITY

Section 111 – Appeal to Appellate Tribunal.-

(1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity:

Provided that any person appealing against the order of the adjudicating officer levying any penalty shall, while filing the appeal, deposit the amount of such penalty:

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned adjudicating officer or the Appropriate Commission, as the case may be.

(5) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose

of the appeal finally within one hundred and eighty days from the date of receipt of the appeal:

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

(6) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the adjudicating officer or the Appropriate Commission under this Act, as the case may be, in relation to any proceeding, on its own motion or otherwise, call for the records of such proceedings and make such order in the case as it thinks fit.

PART XVIII
MISCELLANEOUS

Section 177 - Powers of Authority to make regulations.-

(1) The Authority may, by notification, make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

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

(a) the Grid Standards under section 34;

(b) suitable measures relating to safety and electric supply under section 53;

(c) the installation and operation of meters under section 55;

(d) the rules of procedure for transaction of business under sub-section (9) of section 70;

(e) the technical standards for construction of electrical plants and electric lines and connectivity to the grid under clause (b) of section 73;

(f) the form and manner in which and the time at which the State Government and licensees shall furnish statistics, returns or other information under section 74;

(g) any other matter which is to be, or may be, specified;

(3) All regulations made by the Authority under this Act shall be subject to the conditions of previous publication.

Section 178 - Powers of Central Commission to make regulations.-

(1) The Central Commission may, by notification make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

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

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

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

(c) the manner and particulars of notice under sub-section (2) of section 15;

(d) the conditions of licence under section 16;

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

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

(g) Grid Code under sub-section (2) of section 28;

(h) levy and collection of fees and charge from generating companies or transmission utilities or licensees under sub-section (4) of section 28;

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

(j) payment of transmission charges and a surcharge under sub-clause (ii) of clause (d) of sub-section (2) of section 38;

(k) reduction of surcharge and cross subsidies under second proviso to sub-clause (ii) of clause (d) of sub-section (2) of section 38;

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

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

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

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

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

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

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

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

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

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

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

(w) the manner of publication of application under sub-section (2) of section 64;

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

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

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

(za) the terms and conditions of service of the Secretary, officers and other employees of Central Commission under sub-section (3) of section 91;

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

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

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

(ze) any other matter which is to be, or may be specified by regulations.

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

Section 179 - Rules and regulations to be laid before Parliament.-

Every rule made by the Central Government, every regulation made by the Authority, and every regulation made by the Central Commission shall be laid, as soon as may be after it is made, before each House of the Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

Section 181 - Powers of State Commissions to make regulations.-

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

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

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

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

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

(d) the conditions of licence under section 16;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(x) electricity supply code under section 50;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 182 - Rules and regulations to be laid before State Legislature.-

Every rule made by the State Government and every regulation made by the State Commission shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House.

Section 183 - Power to remove difficulties

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published, make such provisions not inconsistent with the provisions of this Act, as may appear to be necessary for removing the difficulty:

Provided that no order shall be made under this section after the expiry of two years from the date of commencement of this Act.

> **(2)** Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

8. We also quote hereinbelow the impugned Notification dated 23.1.2006 fixing trading margin for inter-State trading of Electricity, which reads as follows:

> "CENTRAL ELECTRICITY REGULATORY COMMISSION
> NOTIFICATION
> New Delhi, the 23rd January, 2006
>
> No. L-7/25(5)/2003-CERC.- Whereas the Central Electricity Regulatory Commission is of the opinion that it is necessary to fix trading margin for inter-state trading of electricity.
>
> Now, therefore, in exercise of powers conferred under Section 178 of the Electricity Act, 2003 (36 of 2003), and all other powers enabling it in this behalf, and after pervious publication, the Central Electricity Regulatory Commission hereby makes the following regulations, namely:-
>
> **1. Short title and commencement.-**(1) These regulations may be called the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006.
>
> (2) These regulations shall come into force from the date of their publication in the Official Gazette.
>
> **2. Trading Margin.-** The licensee shall not charge the trading margin exceeding four (4.0) paise/kWh on the electricity traded, including all charges, except the charges for scheduled energy, open access and transmission losses.

Explanation:- The charges for the open access include the transmission charge, operating charge and the application fee.

A.K. SACHAN, Secy."

SCOPE AND ANALYSIS OF THE 2003 ACT

9. The 2003 Act is enacted as an exhaustive Code on all matters concerning electricity. It provides for "unbundling" of SEBs into separate utilities for generation, transmission and distribution. It repeals the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 ("1998 Act"), mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide ranging responsibilities with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination; the 2003 Act has distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc.

10. Section 3 of the 2003 Act requires the Central Government, in consultation with the State Governments and the Authority, to prepare National Electricity Policy as well as Tariff Policy for development of the

power system based on optimum utilization of resources. The Central and the State Governments are also vested with rule-making powers under Sections 176 and 180 respectively, while the "Authority" has been defined under Section 2(6) as regulation-making power under Section 177. On the other hand, the Regulatory Commissions are vested with the power to frame policy, in the form of regulations, under various provisions of the 2003 Act. However, the Regulatory Commissions are empowered to frame policy, in the form of regulations, as guided by the general policy framed by the Central Government. They are to be guided by the National Electricity Policy, the Tariff Policy as well as the National Electricity Plan in terms of Sections 79(4) and 86(4) after the 2003 Act (see also Section 66). In this connection, it may also be noted that the Central Government has also, in exercise of its powers under Section 3 of the 2003 Act, notified the Tariff Policy with effect from 6.1.2006. One of the primary objectives of the Tariff Policy is to ensure availability of electricity to consumers at reasonable and competitive rates. The Tariff Policy tries to balance the interests of consumers and the need for investments while prescribing the rate of return. It also tries to promote training in electricity for making the markets competitive. Under the Tariff Policy, there is a mandate given to the Regulatory Commissions, namely, to monitor the trading transactions

continuously and ensure that the electricity traders do not indulge in profiteering in cases of market failure. The Tariff Policy directs the Regulatory Commissions to fix the trading margin in a manner which would reduce the costs of electricity to the consumers and, at the same time, they should endeavour to meet the requirement for investments.

11. An "electricity trader" is defined under Section 2(26) to mean a person who has been given a licence to undertake trading in electricity under Section 12. Section 2(32) defines a "grid" as the high voltage backbone system of inter-connected transmission lines, sub-station and generating plants. Under Section 2(33), a "Grid Code" is defined as a code specified by the Central Commission under Section 79(1)(h), while under Section 2(34), "Grid Standards" are those specified by the Central Authority under Section 73(d). Under Section 2(47), "open access" is defined to mean the non-discriminatory provision for access to the transmission lines or distribution system or associated facilities given to any licensee or consumer or a person engaged in generation of electricity in accordance with the regulations specified. Section 2(62) defines the term "specified" to mean specified by regulations made by the Appropriate Commission or the Authority under the 2003 Act. Under Section 2(71), the word "trading" is defined to mean purchase of electricity for resale thereof.

12. Under the 2003 Act, power generation has been de-licensed and captive generation is freely permitted, subject to approval as indicated in Sections 7, 8 and 9 of the Act. However, under Section 12, a licence has been provided as a pre-condition for engaging in transmission or distribution or trading of electricity. Therefore, licensees are granted by the Appropriate Commission under Section 14 of the Act on applications made under Section 15. Section 16 provides power to the Appropriate Commission to specify any general or specific conditions which shall apply either to a licensee or to a class of licensees. Under Section 18, the Appropriate Commission is also vested with the power to amend the licence as well as to revoke it in certain stipulated circumstances, if public interest so requires (see Section 19). Under Section 23, the Appropriate Commission has the power to issue directions to licensees to regulate supply, distribution, consumption or use of electricity, if the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply and for securing the equitable distribution of electricity and promoting competition.

13. One of the most important features of the 2003 Act is the introduction of open access under Section 42 of the Act. Under the open access regime, distribution companies and eligible consumers have the freedom to buy

electricity directly from generating companies or trading licensees of their choice and correspondingly the generating companies have the freedom to sell.

14. Section 52 of the 2003 Act deals with trading of electricity activity. Under Section 52(1), the Appropriate Commission may specify the technical requirement, capital adequacy requirement and credit worthiness for being an electricity trader. Under Section 52(2), every trader is required to discharge its duties, in relation to supply and trading in electricity, as may be specified by the Appropriate Commission.

15. The standards of performance of licensee(s) may be specified by the Appropriate Commission under Section 57 of the Act.

16. The 2003 Act contains separate provisions for the performance of the dual functions by the Commission. Section 61 is the enabling provision for framing of regulations by the Central Commission; the determination of terms and conditions of tariff has been left to the domain of the Regulatory Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise

which is different and distinct from actual tariff determination in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for retail sale of electricity.

17. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the Appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the Appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions, viz, decision-making and specifying terms and conditions for tariff determination.

18. Section 66 confers substantial powers on the Appropriate Commission to develop the relevant market in accordance with the principles of competition, fair participation as well as protection of consumers' interests.

19. Under Sections 111(1) and 111(6) respectively, the Tribunal has appellate and revisional powers. In addition, there are powers given to the Tribunal under Section 121 of the 2003 Act to issue orders, instructions or directions, as it may deem fit, to the Appropriate Commission for the performance of statutory functions under the 2003 Act.

20. The 2003 Act contemplates three kinds of delegated legislation. Firstly, under Section 176, the Central Government is empowered to make rules to carry out the provisions of the Act. Correspondingly, the State Governments are also given powers under Section 180 to make rules. Secondly, under Section 177, the Central Authority is also empowered to make regulations consistent with the Act and the rules to carry out the provisions of the Act. Thirdly, under Section 178, the Central Commission can make regulations consistent with the Act and the rules to carry out the provisions of the Act. SERCs have a corresponding power under Section 181. The rules and regulations have to be placed before Parliament and the State Legislatures, as the case may be, under Section 179 and 182. The Parliament has the power to modify the rules/ regulations. This power is not

conferred upon the State Legislatures. A holistic reading of the 2003 Act leads to the conclusion that regulations can be made as long as two conditions are satisfied, namely, that they are consistent with the Act and that they are made for carrying out the provisions of the Act.

SUBMISSIONS:

On behalf of M/s Tata Power Trading Co. Ltd.:

21. On the scheme of the 2003 Act it was submitted by Shri Harish N. Salve, learned senior counsel, that, under the said Act the Central Commission and SERCs have to frame regulations as well as pass statutory orders. The Act uses the expression "fixed" in Sections 8, 19, 45 & 79; it uses the expression "determined" in the proviso to Section 9(2), Sections 20, 42, 47, 57, 61 and 67(2) and the word "specified" (i.e. by way of regulations) in Sections 13, 14, 15, 16, 17, 18(2), 28(4), 34, 36, 38, 41, 42, 45, 51, 52, 53, 57, 61 and 67(2) of the 2003 Act. Under the 2003 Act, according to the learned counsel, there are a series of provisions which expressly require the Commission to frame regulations on specific aspects. According to learned counsel, each of the said three expressions have to be interpreted by the terms and in the context of the scheme of the 2003 Act and not by a priori notions of administrative law. For example, Section 61 posits the framing of regulations by the Commission, which will subject to

the provisions of the 2003 Act, specify the terms and conditions for the determination of tariff. It is possible that such regulations may be licensee-specific or generic. At the same time, under Section 62 read with Section 64 refers to determination of tariff in accordance with the provisions of the Act for supply of electricity by Gencoms, transmission of electricity, wheeling and trading of electricity. Applying the Cynamide principle [1987(2)SCC720] of administrative law, such tariff Order would be characterized as delegated legislation yet under Section 111 of the 2003 Act it is made appealable to the Appellate Tribunal. According to the learned counsel, "price fixation" is ordinarily "legislative" and not "adjudicatory" in character and yet under the 2003 Act tariff fixation is by Order and subject to appeal under Section 111. According to the learned counsel, use of different expressions in the Act implies different meanings. For example, in Section 79 the expressions used are "regulate", "determine", "adjudicate", "specify" and "fix". Where the function of the Commission under Sections 79 and 86 require framing of regulations, the Act has used the expression "specified" as defined. Therefore, according to the learned counsel, the word "fix" in Section 79(1)(j) must mean to pass an appropriate order fixing trading margin which is further qualified by the Act saying "if considered necessary". In this connection, learned counsel further submitted that fixing

trading margin is same as price fixation and as such margin must be fixed by an Order and not by way of regulation. Hence, according to the learned counsel, regulations cannot be framed under Section 79(1)(j) and under Section 86(1)(j) of the 2003 Act.

22. On the interpretation of Sections 178(1) and 181(1) of the 2003 Act, learned counsel submitted that where rule making powers are enumerated and there is a general delegation of power to make rules to carry out the provisions of the 2003 Act, the enumeration does not detract from the generality of the power conferred is the principle which has to be read in the context of the scheme of the 2003 Act. In this connection it was submitted that under the Act the power to frame subordinate legislation to carry out the provisions of the Act are contained in Sections 176 and 180 on Central and State Governments; in Sections 178 and 181 where power to frame regulations is conferred on Regulatory Commissions and Section 177 where the power to frame regulations is conferred on CEA. Hence, when the Central Government invokes the rule making power under Section 176(1), it cannot make rules to determine tariff since that can be done only by the appropriate Commission by virtue of Section 61 read with Section 178(2)(s). A perusal of the scheme of the 2003 Act suggests that each and every provision of the Act where framing of regulations is contemplated has a

counter-part in one of the clauses as set out in Section 178(2). In any event, according to the learned counsel, where the Act requires the discharge of a function by a specific order, then a regulation cannot be framed to achieve that very purpose merely because there is a power to frame regulations. Therefore, according to the learned counsel, trading margin can be fixed only by an order under Section 79(1)(j) and 86(1)(j) and not by regulations.

23. On the powers of the Appellate Tribunal under Sections 111 and 121 of the 2003 Act, learned counsel urged, that, the said Tribunal was established as an expert second tier regulatory authority to review the actions of the Regulatory Commissions, including regulations framed by first tier regulatory bodies even in the absence of Section 121 of the 2003 Act. In this connection, learned counsel further submitted that the powers envisaged under Section 121 are distinct from the appellate and revisional powers under Section 111(3) and under Section 111(6). A plain reading of Section 121 establishes that the Tribunal has the power to issue orders, instructions and directions to guide the Commission in the due performance of its statutory function; that the said power to issue instructions, orders and directions would include the power to frame or modify the regulations made by the first tier regulatory authority, particularly in cases where the Tribunal is satisfied that the regulation framed is either not consistent with the

provisions of the Act or does not result in due performance of the duty or functions entrusted to the Commission under the 2003 Act. In the light of the provisions of Sections 111 and 121 of the 2003 Act, learned counsel urged, that, even in an appeal under Section 111 if the question of validity of delegated legislation arises, the tribunal can consider the vires and ignore a Rule which is ultra-vires the rule-making power. The fact that there is no power in the tribunal to annul the regulation cannot deny the power to statutory tribunal to ignore ultra vires subordinate legislation. Lastly, there is no need to read down Section 121 on a priori notion of classical administrative law that vires of the rules can only be challenged in the judicial review proceedings before a constitutional court.

On behalf of PTC India Ltd.

24. Shri Vikas Singh, learned senior counsel, submitted that fixation of trading margins under normal business conditions is intrinsically contradictory and harmful to power market functioning. In this connection, it was submitted that capping of trading margin does not in any manner whatsoever control the selling price of electricity sold to Discoms. Such capping of trading margin results in relegating the electricity traders to mere commission agents. The role of electricity traders is to play a dynamic role

of bringing in new products in the market which is beneficial to the consumers as well as Gencoms. However, the entire object of having electricity traders stand defeated by impugned capping of trading margins. According to the learned counsel, traders in electricity bring depth to the electricity markets. They make value additions and therefore interventions in trading by regulations should not be contrary to the letter and spirit of the Act [See Section 66]. According to the learned counsel, severe regulatory intervention like imposition of margin in a voluntary market should be resorted to only in cases of market failure. According to the learned counsel, on the basis of statistical data, the trading margin is not a return guaranteed to a trader and that the actual margin which the trader is getting is lower than the prescribed cap. According to the learned counsel, none of the above facts have been appreciated by the Central Commission in capping the margin as not to exceed 4.0 paise per kWh on the electricity traded.

25. On the question of law, learned counsel submitted that the right to appeal under Section 111 in respect of adjudicatory/administrative order cannot be defeated by colouring the decision as a regulation. In this connection learned counsel submitted that the rules/regulations framed by the executive under an Act are the law whereas regulations made by the statutory authority itself is not the regulation under which it functions, but

the regulation making itself is its function. In the former case, it is possible to argue that the Authority which is the creature of the Statute cannot question the vires of the statute, in the latter case, the Authority is not the creature of the Regulation framed by itself, hence the sanctity given to the former is far greater than the sanctity to the latter.

26. According to the learned counsel, that, the right to appeal is a substantive right and the same cannot be taken away by a device, i.e., by framing a regulation instead of simply passing an order as to denude the Appellant of its right of Appeal. In this connection, learned counsel urged that the Appellate Tribunal can hear the appeal against the regulation being the function of the Commission and can examine the sanctity of the regulation if the same is framed beyond the power of the commission to do so. In other words, if the Commission is entitled to adjudicate upon a matter, it does not have the authority under the Act to give its decision the colour of a regulation so as to denude the Tribunal of its authority under Section 111. According to the learned counsel, since the impugned regulation relegates the trading licensee to a commission agent the same is ultra vires Section 66 of the 2003 Act.

27. According to the learned counsel, under Section 79 the Commission is authorized only to fix the trading margin and since the impugned regulations

are purportedly made under Section 79 the said regulations are beyond the powers of the Central Commission and are, thus, ultra vires the 2003 Act.

28. Lastly, learned counsel for PTC adopted all the arguments of Shri Harish N. Salve, learned counsel for M/s. Tata Power Trading Company Ltd.

29. Shri Narasimha, learned counsel and Others broadly adopted the above arguments advanced on behalf of M/s. Tata Power Trading Company and PTC India Ltd., hence, the same need not be reproduced.

On behalf of CERC

30. After taking us through the provisions of the 2003 Act, the National and the Tariff Policies, learned Solicitor General of India submitted that the 2003 Act contemplates three kinds of delegated legislation:

(i) Under Section 176, the Central Government is empowered to make rules for carrying out the provisions of the Act. A corresponding power is given to the State Governments under Section 180.

(ii) Under Section 177, the CEA is empowered to make regulations consistent with the Act and the rules made under Section 176.

(iii) Under Section 178, the Central Commission may make regulations consistent with the Act and the rules generally to carry out the provisions of the Act. The corresponding power under Section 181 is conferred on SERCs.

31. The rules and the regulations have to be placed before the Parliament and the State Legislatures, as the case may be, under Sections 179 and 182 respectively. According to the learned counsel, even if the Rules have been laid before the Parliament and even if there is a resolution of the Parliament approving them, the validity of the Rules has to be declared by the Court as ultra vires the Act and invalid. According to the learned counsel, there is no power conferred upon the Appellate Tribunal under Section 111 to declare the regulations framed by the Central Commission as null and void. According to the learned counsel, Tribunals are creatures of the statute. They have no inherent power that exists in civil courts. Any power exercisable by the Tribunal has to be located in the statute under which it is formed. There is no authority for the proposition that under the Indian law, a statutory tribunal has the jurisdiction to deal with the validity of subordinate legislation and pronounce it as ultra vires. Of course, according to the learned counsel, it is open to the Parliament to expressly give to a

Tribunal the power to consider the validity of subordinate legislation. However, such conferment has to be express and unambiguous, which is not there in this case.

32. According to the learned counsel, the mere fact that Section 79(1)(j) uses the word "fix" and the mere fact that the other provisions use the word "specify" does not lead to the conclusion that the Central Commission could not have issued the Trading Margin Regulations 2006 as contended by the appellants herein. The learned counsel further urged that the general power to frame regulations is not limited or controlled by enumeration of topics on which regulations may be framed. In this connection, it was submitted that a holistic reading of the Act leads to the conclusion that regulations can be made as long as they are consistent with the Act and that they are made for carrying out the provisions of the Act. The Act recognizes the need to regulate trading in electricity [See Sections 52(2), 53(1)(a), 57, 60, 178(2)(d), (o), (p) and (y)].

33. Learned counsel further submitted that for the reasons mentioned herein there is no case made out by the Appellants to lift the veil over a fake regulation. The Central Commission had to initiate proceedings against 14 traders for non-compliance with licence conditions. Some traders were operating on high margins. Trading margin being the component of the final

price paid by the consumers required regulation to protect the consumers. Competition among traders to capture the surplus power for sale resulted in rising prices. Even with a trading margin of 4 paise/unit, traders can make handsome profits. For the above reasons, Commission thought it fit to make the impugned Regulations. It was further contended that the doctrine of colourable exercise of power was not applicable to decide the validity of subordinate legislation.

34. Learned counsel lastly submitted that the power of judicial review cannot be located in Section 121 of the Act. The power under Section 121 is different from the power under Section 111. According to the learned counsel, Section 121 empowers the tribunal to act only when the Commission is guilty of inaction in carrying out its statutory functions. The power to annul a legislative act cannot be read into Section 121. Even the High Court cannot direct the Legislature to enact a law and, therefore, such power cannot be read into Section 121. In order to entertain a challenge, directly or collaterally, the tribunal must have jurisdiction which must be conferred by the statute and since in the instant case tribunal is not vested with such a jurisdiction, it is not open to the Appellants to place reliance on some of the English Judgments. Thus, the Appellate Tribunal is not qualified to go behind a regulation as framed by CERC and to examine

whether it acted within the bounds of the statute while framing the regulation.

DETERMINATIONS:

35. On the above submissions, one of the questions which arises for determination is – whether trading margin fixation (including capping) under the 2003 Act can only be done by an Order under Section 79(1)(j) and not by Regulations under Section 178? According to the appellant(s) it can only be done by an Order under Section 79(1)(j), particularly when under Section 178(2) power to make regulations is co-relatable to the functions ascribed to each Authority under the said 2003 Act.

36. In every case one needs to examine the statutory context to determine whether a court or a tribunal hearing a case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or administrative act under it. There are situations in which Parliament may legislate to preclude such challenges in the interest of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.

37. On the above analysis of various sections of the 2003 Act, we find that the decision-making and regulation-making functions are both assigned

to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to *Professor Wade*, "between legislative and administrative functions we have regulatory functions". A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also part of administrative process resembling a judicial decision by a court of law. [See Shri Sitaram Sugar Co. Ltd. v. Union of India and Ors. reported in (1990) 3 SCC 223].

38. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of Tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "Tariff" as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/ fixation of tariff is done by the Appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the Appropriate Commission has to fix the tariff. This basic scheme equally applies to

subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow. In the case of M/s Narinder Chand Hem Raj and Ors. v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Ors. reported in (1971) 2 SCC 747, this Court has held that power to tax is a legislative power which can be exercised by the legislature directly or subject to certain conditions. The legislature can delegate that power to some other Authority. But the exercise of that power, whether by the legislature or by the delegate will be an exercise of legislative power. The fact that the power can be delegated will not make it an administrative power or adjudicatory power. In the said judgment, it has been further held that no court can direct a subordinate legislative body or the legislature to enact a law or to modify the existing law and if Courts cannot so direct, much less the Tribunal, unless power to annul or modify is expressly given to it. In the case of Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors. v. Union of India and Ors. reported in (1985) 1 SCC 641, this Court held that subordinate legislation is outside the purview of administrative action, i.e., on the grounds of violation of rules of natural justice or that it has not taken into account relevant circumstances or that it is not reasonable. However, a distinction must be made between delegation of legislative function and investment of discretion to exercise a particular

discretionary power by a statute. In the latter case, the impugned exercise of discretion may be considered on all grounds on which administrative action may be questioned such as non-application of mind, taking irrelevant matters into consideration etc. The subordinate legislation is, however, beyond the reach of administrative law. Thus, delegated legislation – otherwise known as secondary, subordinate or administrative legislation – is enacted by the administrative branch of the government, usually under the powers conferred upon it by the primary legislation. Delegated legislation takes a number of forms and a number of terms – rules, regulations, by-laws etc; however, instead of the said labels what is of significance is the provisions in the primary legislation which, in the first place, confer the power to enact administrative legislation. Such provisions are also called as "enabling provisions". They demarcate the extent of the administrator's legislative power, the decision-making power and the policy making power. However, any legislation enacted outside the terms of the enabling provision will be vulnerable to judicial review and ultra vires.

39. Applying the abovementioned tests to the scheme of 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories –

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

40. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is

empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a pre-condition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An Order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject matter of

challenge before the Appellate Authority under Section 111 as the levy is imposed by an Order/decision making process. Making of a regulation under Section 178 is not a pre-condition to passing of an Order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such regulation. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfil the objects of the 2003 Act. Applying this test to the present controversy, it becomes clear that one such area enumerated in Section 79(1) refers to fixation of trading margin. Making of a regulation in that regard is not a pre-

condition to the Central Commission exercising its powers to fix a trading margin under Section 79(1)(j), however, if the Central Commission in an appropriate case, as is the case herein, makes a regulation fixing a cap on the trading margin under Section 178 then whatever measures a Central Commission takes under Section 79(1)(j) has to be in conformity with Section 178. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j).

41. To elucidate, we may refer to the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004. The said Regulations have been made under Section 178 of the 2003 Act. Regulation 15 deals with various components of tariff. It includes Advance Against Depreciation ("AAD" for short). Regulations 21(1)(ii) and 38(ii) deal with computation of depreciation including AAD. Recently, this concept of AAD came for consideration before this Court in the case of **National Hydroelectric Power Corporation Ltd. v. CIT** reported in 2010 (1) SCALE 5. AAD was suggested by the Central Commission as part of the tariff in order to overcome the cash flow problems faced by Central Power Sector Utilities for meeting loan repayment obligations. The important point to be noted is that although under Section 61 of the 2003 Act the Central Commission is empowered to specify AAD as a condition for determination of the tariff, the Central Commission in its wisdom thought it fit to bring in the concept of AAD by enacting a regulation under Section 178 giving the benefit of AAD across the board to all Central Power Sector Utilities. In other words, instead of giving the benefit of AAD on a case to case basis under Section 61, the Central Commission decided to make a specific regulation giving benefit of AAD across the board to all Central Power Sector Utilities. There is one more reason why a regulation under Section

178 with regard to AAD had to be made by CERC. Under the 2003 Act, the Central Commission is empowered under Section 61 to include depreciation as an item in the computation of tariff. However, if the rate of depreciation envisaged by the Central Commission under the 2003 Act is different from the rate(s) of depreciation prescribed under Schedule XIV of the Companies Act, 1956 then such differential rate can be prescribed under the 2003 Act only by way of regulation under Section 178 of the 2003 Act which is in the nature of subordinate legislation. It is important to note that the Companies Act, 1956 constitutes a law applicable to companies. It prescribes the format of Balance Sheet in Schedule VI. It prescribes the requirements as to Profit and Loss account vide Part II of Schedule VI. It also prescribes the rates of depreciation vide Schedule XIV. If a different rate is required to be prescribed under the 2003 Act, then it could be done only by way of subordinate legislation, which is contemplated by Regulations framed under Section 178 of the 2003 Act. Similarly, profits earned by a trading company are not only required to be presented in the manner indicated under the Companies Act but it is also required to be computed under the Income-tax Act, 1961. If such profits/income of a trading company is required to be capped under the 2003 Act, it can only be done by a subordinate legislation made under Section 178 of the 2003 Act. Accrual of income/profit under the

Companies Act, 1956 or the Income-tax Act, 1961 can only be curbed by a regulation made under the authority of subordinate legislation or primary legislation. This is exactly what is sought to be achieved by the impugned Regulation.

42. One more citation may be noticed. Reserve Bank of India is a Regulator under the RBI Act, 1934 ("1934 Act"). Under the 1934 Act, RBI is empowered not only to regulate banks but also financial institutions, NBFCs etc.. Chapter III B of the 1934 Act deals with provisions relating to financial institutions and NBFCs receiving deposits from the public. Under Section 45JA of the 1934 Act, RBI is given the power to determine policy and issue directions to NBFCs and financial institutions in public interest or in order to regulate the financial system of the country. Section 45JA, however, is confined to Chapter III B. However, under Section 58, which falls in Chapter IV, dealing with general provisions, the Board of Directors of RBI are given the power to make regulations consistent with the 1934 Act to provide for all matters for which provision is necessary. The principle of "generality versus enumeration" is also applicable to Section 58 of RBI Regulations because under Section 58(2) there is a list of topics enumerated on which regulations could be made. In other words, Section 58 (1), (2) of the 1934 Act is similar to Section 178 (1), (2) of the 2003 Act. Recently,

before the Division Bench of this Court, the question arose, inter alia, as to the accounting treatment to be given by NBFCs accepting deposits from the public in the context of provision to be made for Non Performing Assets ("NPAs"). An Order was passed by RBI under Section 45JA of the 1934 Act stating that although provision for doubtful debts is required to be reduced from the assets' side of the balance sheet under the provisions of the Companies Act, 1956, for proper disclosure under the 1934 Act, such a provision should be shown in the balance sheet specifically on the liabilities' side. It is interesting to note that the Order was passed under Section 45JA which, as stated above, is part of Chapter III B of the 1934 Act, which chapter expressly deals with provisions relating to NBFCs. There was no regulation enacted under Section 58 on the topic, namely, NPAs. The point to be noted is, that there could be an Order/decision of a regulator under the Act even in the absence of regulations. RBI like CERC is a regulator under the 1934 Act. Under Section 45JA it is empowered to issue directions in contradistinction to its powers to enact regulations under Section 58 of the 1934 Act. Giving directions under Section 45JA need not be preceded by regulations made under Section 58, however, if in a given case, RBI/Board would have enacted a regulation on making of provision for NPAs under Section 58 then the Order of RBI under Section 45JA of the 1934 Act was

required to be in conformity with the said regulations. (See the judgment of this Court in the case of **M/s Southern Technologies Ltd. v. Joint Commissioner of Income Tax, Coimbatore** reported in 2010 (1) SCALE 329.)

43. The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of "general application", a Regulation stands on a higher pedestal vis-à-vis an Order (decision) of CERC in the sense that an Order has to be in conformity with the regulations. However, that would not mean that a regulation is a pre-condition to the order (decision). Therefore, we are not in agreement with the contention of the appellant(s) that under the 2003 Act, power to make regulations under Section 178 has to be correlated to the functions ascribed to each authority under the 2003 Act and that CERC can enact regulations only on topics enumerated in Section 178(2). In our view, apart from Section 178(1) which deals with "generality" even under Section 178(2)(ze) CERC could enact a regulation on any topic which may not fall in the enumerated list provided such power falls within the scope of 2003 Act. Trading is an activity recognized under the said 2003 Act. While deciding the nature of an Order (decision) vis-à-vis a Regulation under the Act, one needs to apply the test of general application. On the making of the impugned Regulations

2006, even the existing Power Purchase Agreements ("PPA") had to be modified and aligned with the said Regulations. In other words, the impugned Regulation makes an inroad into even the existing contracts. This itself indicates the width of the power conferred on CERC under Section 178 of the 2003 Act. All contracts coming into existence after making of the impugned Regulations 2006 have also to factor in the capping of the trading margin. This itself indicates that the impugned Regulations are in the nature of subordinate legislation. Such regulatory intervention into the existing contracts across-the-board could have been done only by making Regulations under Section 178 and not by passing an Order under Section 79(1)(j) of the 2003 Act. Therefore, in our view, if we keep the above discussion in mind, it becomes clear that the word "*order*" in Section 111 of the 2003 Act cannot include the impugned Regulations 2006 made under Section 178 of the 2003 Act.

44. We may usefully refer to some decisions relevant in the context.

45. In the case of **City Board, Mussoorie v. State Electricity Board and Ors.**, reported in AIR (58) 1971 Allahabad 219, the matter arose under Electricity (Supply) Act, 1948 ("1948 Act"). Under that Act, Grid Tariff had to be fixed from time to time under Section 46(1) "in accordance with any regulations made in that behalf". Under Section 79 of the 1948 Act, the

Board was also given the power to make regulations not inconsistent with the Act and the Rules made thereunder to provide for all or any of the matters enumerated therein. It was argued on behalf of the appellant that the regulations must exist before a Grid Tariff can be fixed. This argument was rejected by the High Court which held that there was nothing in the 1948 Act to suggest that existence of a regulation was a pre-condition to the determination of a grid tariff. It was held that under Section 46 of 1948 Act, the Board was given a wide discretion to frame the grid tariff depending upon various factors mentioned in the Act. According to the High Court, Section 46 of the Act was a standalone provision, therefore, the grid tariff could be fixed even in the absence of the regulations provided such fixation is not inconsistent with the 1948 Act. However, it was further observed that if the Board had made regulations under Section 79 then order framing the grid tariff under Section 46(1) had to conform to such regulations. This view stood affirmed by this Court in the case of **U.P. State Electricity Board, Lucknow v. City Board, Mussoorie**, reported in (1985) 2 SCC 16.

46. A similar question arose for determination by this Court in the case of **M/s Jagdamba Paper Industries (Pvt.) Ltd. and Ors. v. Haryana State Electricity Board and Ors.,** reported in AIR 1983 SC 1296. In that case, enhancement in the security for meters and for payment of energy bills came

to be challenged. It was argued on behalf of the appellants that the Board had not framed any Regulations under Section 79 of the 1948 Act for such enhancement. According to the appellants, the supply of electricity was controlled under an agreement between the Board and the appellants and therefore unilateral escalation of security charges by passing of an Order under Section 49 would be contrary to any acceptable notion of contract. It was contended that under Section 49(1) of the 1948 Act, the Board was conferred with statutory powers to determine the conditions on the basis of which supply had to be made. Therefore, without determining the conditions under Section 49(1), it was not open to the Board to unilaterally enhance the security charges contrary to the existing contract between the Board and the consumers. This argument was rejected by this Court which held that what apply to the tariff fixation would equally apply to the security. Section 49(1) of the 1948 Act clearly indicated that the Board may supply electricity to any person upon such terms and conditions as the Board thinks fit. It was held that since the contract between the consumer and the Board contemplated enhancement of security charges as a condition of supply of electricity, it was not open to the appellants to say that such enhancement cannot take place without regulations being framed under Section 79. This judgment is important from another angle also. It indicates that regulations

under Section 79 of 1948 Act were to be in the nature of subordinate legislation, therefore, all contracts had to be in terms of such regulations. In the present case also, if one examines the terms and conditions of the licences, power to fix trading margin is expressly contemplated by such terms. The said judgment further held that the Board is a statutory authority and has to act within the framework of the 1948 Act. If the act of the Board is not in consonance or in breach of some statutory provisions of law, rule or regulation, it is always open to challenge in a petition under Section 226 of the Constitution.

47. In the case of **Kerala State Electricity Board v. S.N. Govinda Prabhu and Bros. and Ors.**, reported in (1986) 4 SCC 198, the dispute was confined to the question concerning increase in the electricity tariff by the Board under the 1948 Act. The principal ground of challenge was that the Board had acted outside its statutory authority by formulating a price structure intended to yield sufficient revenue to offset not only the actual expenditure as contemplated by Section 59 of the 1948 Act but also expenditure not covered by that section. At this stage, we may point out that, in all these cases, the Supreme Court has considered tariff fixation, price fixation, security charges fixation at par. In that case, one of the submissions which found favour with the High Court, which accepted the submissions of

the consumer, while striking down the impugned notification, was that in the absence of specification by the State Government, it was not open to the Board to adjust the tariffs. What was found by the Supreme Court was that although the expenditure did not fall strictly within Section 59 of the 1948 Act, the actual expenditure stood incurred to avoid the loss. Therefore, the Supreme Court gave a schematic interpretation to the 1948 Act and it held that the State Electricity Board was obliged to carry on its business economically and efficiently and consequently such charges were admissible even though they did not fall strictly within the ambit of Section 59. On the question as to absence of specification by the State Government, this Court further held that the omission of the rule-making authority to frame rules cannot takeaway the right to factor in such expenses in the revised tariff structure. This judgment is one more case which indicates that making of regulations is not a pre-condition to the tariff fixation or price fixation or security charges fixation.

48. In the case of **Hindustan Zinc Ltd. etc. v. Andhra Pradesh State Electricity Board and Ors.** reported in (1991) 3 SCC 299, the main attack was to the upward revision of the tariffs for HT consumers in the writ petition before the High Court, inter alia, on the ground that the Board cannot generate a surplus in excess of the surplus specified under Section 59

of the 1948 Act. Section 59 of that Act gave power to the Board to lay down general principles for Board's finance. It was also contended that the tariff revision was made without prior consultation with the State Electricity Consultative Council as required by Section 16(5) of the 1948 Act. It was held by this Court that even in the absence of general principles being specified under Section 59 of that Act, it was open to the Board to generate a surplus in order to carry on the business in a more efficient and economic manner. Following the judgment in the case of S.N. Govinda Prabhu (supra), it was held that even in the absence of prior consultation with the State Electricity Consultative Council as required by Section 16(5), it was open to the Board which was vested with the power of tariff fixation to make an upward revision of tariff. In other words, specification by making rules or regulations was not a pre-condition for upward revision of tariff. It was observed that, if in a given case, it is found that such upward revision was arbitrary, then under the judicial review jurisdiction it was open to the courts to strike down such upward revision as arbitrary under Article 14. It was further observed that the "laying down procedure" before the Legislature was meant to effectively control the exercise of the delegated power of the Board, however, such laying down procedure will not make the impugned regulation immune from judicial review. (Also see the judgment of this

Court in Indian Express Newspapers (Bombay) Pvt. Ltd. and Ors. v. Union of India and Ors. reported in (1985) 1 SCC 641, paragraphs 75 to 79).

49. On the question of "generality versus enumeration" principle, it was further held in the case of Hindustan Zinc Ltd. (supra) that under Section 49(1) of the 1948 Act a general power was given to the Board to supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and the Board may for the purposes of such supply frame uniform tariffs under Section 49(2). The Board was required to fix uniform tariffs after taking into account certain enumerated factors. It was held that the power of fixation of tariffs in the Board ordinarily had to be done in the light of specified factors, however, such enumerated factors in Section 49(2) did not prevent the Board from fixing uniform tariffs on factors other than those enumerated in Section 49(2) as long as they were relevant and in consonance with the Act. To the same effect is the judgment of this Court in Shri Sitaram Sugar Co. Ltd. (supra). In that judgment also this Court held that the enumerated factors/topics in a provision do not mean that the authority cannot take any other matter into consideration which may be relevant. The words in the enumerated provision are not a fetter; they are not words of limitation, but they are words for general guidance.

50. One more aspect needs to be mentioned. The judgment of this Court in Shri Sitaram Sugar Co. Ltd. (supra) has laid down various tests to distinguish legislative from administrative functions. It further held that price fixation is a legislative function unless the statute provides otherwise. It also laid down the scope of judicial review in such cases.

51. Applying the above judgments to the present case, it is clear that fixation of the trading margin in the inter-State trading of electricity can be done by making of regulations under Section 178 of 2003 Act. Power to fix the trading margin under Section 178 is, therefore, a legislative power and the Notification issued under that section amounts to a piece of subordinate legislation, which has a general application in the sense that even existing contracts are required to be modified in terms of the impugned Regulations. These Regulations make an inroad into contractual relationships between the parties. Such is the scope and effect of the impugned Regulations which could not have taken place by an Order fixing the trading margin under Section 79(1)(j). Consequently, the impugned Regulations cannot fall within the ambit of the word "Order" in Section 111 of the 2003 Act.

52. Before concluding on this topic, we still need to examine the scope of Section 121 of the 2003 Act. In this case, appellant(s) have relied on Section 121 to locate the power of judicial review in the Tribunal. For that purpose,

we must notice the salient features of Section 121. Under Section 121, there must be a failure by a Commission to perform its statutory function in which event the Tribunal is given authority to issue orders, instructions or directions to the Commission to perform its statutory functions. Under Section 121 the Commission has to be heard before such orders, instructions or directions can be issued.

53. The main issue which we have to decide is the nature of the power under Section 121. In the case of **M/s Raman and Raman Ltd. v. State of Madras and Ors.** reported in AIR 1959 SC 694, Section 43A of Motor Vehicles Act, 1939, ("1939 Act"), as amended by Madras Act 20 of 1948, came for consideration before the Supreme Court. Section 43A conferred power on the State Government to issue "orders" and "directions", as it may consider necessary in respect of any matter relating to road transport to the State Transport Authority or a Regional Transport Authority. The meaning of the words "orders" and "directions" came for interpretation before the Supreme Court in the said case. It was held, on examination of the Scheme of the Act, that Section 43A was placed by the legislature before the sections conferring quasi-judicial powers on Tribunals which clearly indicated that the authority conferred under Section 43A was confined to administrative functions of the Government and the Tribunals rather than to their judicial

functions. It was further held that the legislature had used two words in the section: (i) orders; and (ii) directions. This Court further noticed that under the 1939 Act there was a separate Chapter which dealt with making of "rules" which indicated that the words "orders" and "directions" in Section 43A were meant to clothe the Government with the authority to issue directions of administrative character. It was held that the source of power did not affect the character of acts done in exercise of that power. Whether it is a law or an administrative direction depends upon the character or nature of the orders or directions authorized to be issued in exercise of the power conferred. It was, therefore, held that the words "orders" and "directions" were not laws. They were binding only on the Authorities under the Act. Such orders and directions were not required to be published. They were not kept for scrutiny by legislature. It was further held that such orders and directions did not override the discretionary powers conferred on an authority under Section 60 of the 1939 Act. It was observed that non compliance of such orders, instructions and directions may result in taking disciplinary action but they cannot affect a finding given by the quasi-judicial authority nor can they impinge upon the rules enacted by the rule-making authority. It was held that such orders and directions would cover only an administrative field of the officers concerned and therefore such

orders and directions do not regulate the rights of the parties. Such orders and directions cannot add to the considerations/topics prescribed under Section 47 of the 1939 Act on the basis of which an adjudicating authority is empowered to issue or refuse permits, as the case may be.

54. Applying the tests laid down in the above judgment to the present case, we are of the view that, the words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Tribunal. It is not possible to lay down any exhaustive list of cases in which there is failure in performance of statutory functions by Appropriate Commission. However, by way of illustrations, we may state that, under Section 79(1)(h) CERC is required to specify Grid Code having regard to Grid Standards. Section 79 comes in Part X. Section 79 deals with functions of CERC. The word "grid" is defined in Section 2(32) to mean high voltage backbone system of interconnected transmission lines, sub-station and generating plants. Basically, a grid is a network. Section 2(33) defines "grid code" to mean a code specified by CERC under Section 79(1)(h). Section 2(34) defines "grid standards" to mean standards specified under Section 73(d) by the Authority. Grid Code is a set of rules which governs the maintenance of the network. This maintenance is vital. In summer months grids tend to trip. In the absence of the making of the Grid Code in

accordance with the Grid Standards, it is open to the Tribunal to direct CERC to perform its statutory functions of specifying the Grid Code having regard to the Grid Standards prescribed by the Authority under Section 73. One can multiply these illustrations which exercise we do not wish to undertake. Suffice it to state that, in the light of our analysis of the 2003 Act, hereinabove, the words orders, instructions or directions in Section 121 of the 2003 Act cannot confer power of judicial review under Section 121 to the Tribunal, which, therefore, cannot go into the validity of the impugned Regulations 2006, as rightly held in the impugned judgment.

55. One of the contentions raised by Shri Shanti Bhushan, learned senior counsel appearing on behalf of Calcutta Electricity Supply Company Ltd. needs to be considered. It was contended on behalf of CESC Ltd. that under Section 111 of the 2003 Act, an appeal lies only against an Order by the Appropriate Commission and not against Regulations framed by CERC under Section 178 of the 2003 Act. It was contended that Regulations under Section 178 are framed in exercise of delegated power in which there was an element of legislative function. That, the Regulations framed by CERC are required to be laid before the Parliament under Section 179 of the 2003 Act. The said Regulations could be modified by the two Houses of the Parliament. In the circumstances, it was, therefore, contended that neither

Section 111 nor Section 121 would be deemed to have conferred any power on the Appellate Tribunal for Electricity to supervise or sit in judgment over the Regulations. To this extent, learned counsel supported the contentions of the learned Solicitor General, appearing on behalf of CERC (respondent no.1). Further, an interesting argument was advanced by the learned counsel, namely, that, Section 121 of the 2003 Act has not yet been brought into force. In this connection, reference was made to Section 1(3) of the 2003 Act as well as to the notification dated 10.6.2003 issued under Section 1(3) of the 2003 Act by which the Central Government had fixed 10.6.2003 as the date on which Sections 1 to 120 and Sections 122 to 185 were brought into force, however, Section 121 was not brought into force till Notification dated 27.1.2004, which brought into force Electricity (Amendment) Act 2003 (No.57 of 2003) came to be issued. According to the learned counsel, Section 4 of the Electricity (Amendment) Act, 2003 (No.57 of 2003) which was brought into force on 27.1.2004 merely provided for substitution of the original Section 121 with new Section 121, without issuance of a further notification under Section 1(3) of the original Electricity Act, 2003. According to the learned counsel, there is a difference between substituting a dormant Section in an Act and in bringing a substituted section into force which has not been done in this case and, therefore, Section 121, although

being part of the statute, is not brought into force, till today. To answer the above contention, we need to quote Section 1(3) and also Section 121 of the original Electricity Act, 2003 which was not brought into force though, as stated above, Sections 1 to 120 and Sections 122 to 185 were brought into force vide notification dated 10.6.2003:

> "**Section 1. Short title, extent and commencement. –**
>
> **(3)** It shall come into force on such date as the Central Government may, by notification, appoint:
>
> Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision."
>
> **"Section 121. Power of Chairperson of Appellate Tribunal**.- The Chairperson of the Appellate Tribunal shall exercise general power of superintendence and control over the appropriate Commission."

56. We also quote hereinbelow Sections 1 and 4 of the Electricity (Amendment) Act, 2003 (No.57 of 2003) which was brought into force on 27.1.2004:

> "**Section 1. (2)** It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Section 4. For Section 121 of the principal Act, the following Section shall be substituted, namely:-

> **"121. Power of Appellate Tribunal**
>
> The Appellate Tribunal may, after hearing the Appropriate Commission or other interested party, if any, from time to time, issue such orders, instructions or directions as it may deem fit, to any Appropriate Commission for the performance of its statutory functions under this Act."

57. As stated above, the Electricity (Amendment) Act, 2003 (No.57 of 2003) was brought into force by Notification dated 27.1.2004 which is reproduced hereinbelow:

"MINISTRY OF POWER
Notification
New Delhi, the 27th January, 2004

S.O.119(E). In exercise of the powers conferred by sub-section (2) of Section 1 of the Electricity (Amendment) Act, 2003 (57 of 2003), the Central Government hereby appoints the 27th January, 2004, as the date on which the provisions of the said Act shall come into force.

[F.No.23/23/2004-R&R]
AJAY SHANKAR, Jt. Secy."

58. In our view, there is no merit in the above contention advanced on behalf of CESC Ltd. At the outset, we may state that material brought on

record indicates that Section 121 of the original Electricity Act, 2003, quoted hereinabove, was never brought into force because some MPs expressed the concern that the power, under that section, conferred upon the Chairperson of the Appellate Tribunal, could lead to excessive centralization of power and interference with the day-to-day activities of the Commission by the Chairperson of the Tribunal. Therefore, Section 121 was amended by Electricity (Amendment) Act, 2003 (No.57 of 2003) which is also quoted hereinabove and which amendment Act came into force from 27.1.2004. In our view, by necessary implication of the coming into force of the Electricity (Amendment) Act, 2003 (No.57 of 2003) all provisions amended by it also came into force, hence, there is no requirement for a further notification under Section 1(3), particularly when Section 121 in its amended form has come into force w.e.f. 27.1.2004. In this connection, it may be seen that Section 121 of the original Act stood substituted by Amendment Act No.57 of 2003. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. Substitution is a combination of repeal and fresh enactment. [See: Principles of Statutory Interpretation by G.P. Singh, 11th Edn., p. 638]**.** Section 121 of the original Electricity Act, 2003 was never brought into force. It was substituted by new Section 121 by Amendment Act No.57 of 2003 which was brought into force by a

notification dated 27.1.2004. Substitution, as stated above, results in repeal of the old provision and replacement by a new provision. Applying these tests to the facts of the present case, we find that the Electricity (Amendment) Act, 2003 (No.57 of 2003) was brought into force by notification dated 27.1.2004. That, notification was issued under Section 1(2) of the Electricity (Amendment) Act, 2003 (No.57 of 2003). If one reads Section 1(2) of Electricity (Amendment) Act, 2003 (No.57 of 2003) with Notification dated 27.1.2004 issued under Section 1(2) of the amended Act, 2003, it becomes clear that on coming into force of the Electricity (Amendment) Act, 2003 (No.57 of 2003) all provisions amended by it also came into force. Hence, there was no requirement for a further notification under Section 1(3), consequently, Section 121 in its amended form came into force with effect from 27.1.2004.

59. <u>Summary of Our Findings:</u>

(i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which

enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.

(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is

expressly conferred on the Tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the Regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that the CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned notification dated 23.1.2006.

(vii) Section 121, as amended by Electricity (Amendment) Act 57 of 2003, came into force with effect from 27.1.2004.

Consequently, there is no merit in the contention advanced that the said section is not yet been brought into force.

Conclusion:

60. For the aforesaid reasons, we answer the question raised in the reference as follows:

> The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.

Our summary of findings and answer to the reference are with reference to the provisions of the Electricity Act, 2003. They shall not be construed as a general principle of law to be applied to Appellate Tribunals vis-à-vis Regulatory Commissions under other enactments. In particular, we make it clear that the decision may not be taken as expression of any view in regard to the powers of Securities Appellate Tribunal vis-à-vis Securities and Exchange Board of India under the Securities and Exchange Board of India Act, 1992 or with reference to the Telecom Disputes Settlements and

Appellate Tribunal vis-à-vis Telecom Regulatory Authority of India under the Telecom Regulatory Authority of India Act, 1997.

61. In view of our findings, we dismiss these appeals as having no merit with no order as to costs.

……CJI
(K. G. Balakrishnan)

…….J.
(S.H. Kapadia)

…….J.
(R.V. Raveendran)

…….J.
(B. Sudershan Reddy)

…….J.
(P. Sathasivam)

New Delhi;
March 15, 2010