IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 30-11-2012

CORAM

THE HONOURABLE MR.JUSTICE V.DHANAPALAN

W.P.Nos.23113,22674,22675,22703,22704,22705,22741,22745,22789,
22790,22791,22049,21735,22425,22426,22427,22458,22459,22512,22513,
22514,22531,22532,22577,22356,22357,22354,22355,21773,22071,22174,
22175,22186,22187,22796,22797,22798,22799,22456,22457,22533,22548,
22549,22550,22551,22574,22575,23318,23319,23320,23321,23548,23516,
23718,23719,23564,23565,23566,23567,23568,23569,23671,24202,24212,
22911,23182,24037,24054,24591,24376,24360,24282,25058,23006,23132,
23135,23179,23180,23181,23547,22970,24390,24471,24477,24605,25207,
25208,23015,25063,25064,25065,25066,25111,25112,25113,25114,25234,
25235,25286,26232,25663,25446,25511,25531,25357,25358,24266,24317,
26940,26941,26863,27526,27527,27528,27655,27559,27773,28148,28307
AND 29274 OF 2012.

W.P.No.23113 OF 2012 :

Kamakshi Lamipack Private Limited,
rep.by its Director,
No.68 (40) 2nd Main Road,
Ambattur Industrial Estate,
Chennai-600 0058. .. Petitioner

-vs-

1. The Government of Tamil Nadu,
rep.by its Secretary to Government,
Energy Department, Fort St.George,
Chennai-600 009.

2. Tamil Nadu Generation & Distribution
Corporation Limited (TANGEDCO),
represented by its Chairman & Managing Director,
144, Anna Salai,
Chennai-600 002.

3. The Tamil Nadu Transmission
Corporation Limited (TANTRANSCO),
represented by its Chairman & Managing Director,
144, Anna Salai,
Chennai-600 002.

4. The Chief Financial Controller/Revenue,
Accounts Branch, Revenue Division,
Tamil Nadu Generation & Distribution
Corporation Limited (TANGEDCO),
144, Anna Salai,
Chennai-600 002.

5. Tamil Nadu Electricity Regulatory Commission (TNERC),
represented by its Secretary,
19/A, Rukmani Lakshmipathy Salai,
(Marshalls Road), Egmore,
Chennai-600 008.

6. The Superintending Engineer,
Chennai Electricity Distribution Circle,
(CEDC) West, Anna Nagar,
Chennai-40.

7. Deputy Financial Controller,
Chennai Electricity Distribution Circle,
(CEDC) West, Anna Nagar,
Chennai-40. .. Respondents

For petitioner : Mr.N.L.Rajah
for Mr.R.Saravanakumar

For respondent 1 : Mr.A.Navaneethakrishnan,
Advocate General,
for Ms.V.M.Velumani,
Spl.Govt.Pleader.

For respondents 2,3,4,6 & 7 : Mr.P.H.Arvind Pandian,
Addl.Advocate General,
assisted by Mr.G.Vasudevan.

COMMON ORDER

All these Writ Petitions have been filed, praying for issuance of a writ of certiorarified mandamus, to call for the records relating to G.O.(Ms) No.79, Energy (C.3) Department, dated 11.07.2012, issued by the first respondent, culminating in the Circular Memo of the second respondent vide No.CFC/Rev/FC/Rev/AS-3/D.No./12/dated 12.07.2012, quash the same and consequently forbear the respondents from in any manner levying, demanding and/or collecting Cross Subsidy Charges from the petitioners for procuring energy from the third party sources so long as the Restriction and Control (R&C) measures imposed by the respondents are in force.

2. Since all these Writ Petitions subsume a common question of law, they are being disposed of in common. For the sake of disposal, let me take the facts in W.P.No.22186 of 2012.
2.1. The petitioner viz., Indus Steels and Alloys Limited, is a company engaged in steel products. It has a High Tension Electricity Supply connection bearing HT SC No.2225, sanctioned by the respondents. The Government of Tamil Nadu, in exercise of its powers under Section 38 of the Electricity Supply Code, vide proceedings dated 22.10.2008, issued directions to the second respondent for imposing restrictions on the consumption of power by HT consumers. These directions imposed a cut of 40% on HT industrial and commercial consumers. In the same letter dated 22.10.2008, the Government directed to reduce the demand charges proportionately to the consumers whose demand and consumption have been restricted to the extent of 40% per month. Based on the said directions, the second respondent imposed 40% demand and energy cut on the base demand and base consumption on and from 01.11.2008 onwards and consequently demand quota and energy quota have been revised. Only on the introduction of power cut from 01.11.2008, to meet out the shortage of power to the extent of 40%, the petitioner and other HT industries obtained power through third party sources.

2.2. Since the second respondent/TNEB was not in a position to supply electricity, it did not take any steps for levy of cross subsidy surcharges, but, on the other hand, it approached the fifth respondent/TNERC, in short, "the Commission", for considering suspension of cross subsidy surcharge for third party sale as per Section 42 (2) of the Electricity Act,2003. The said request of TNEB was accepted by the fifth respondent/Commission, observing that for relinquishment of a right to levy Cross Subsidy Surcharge, no permission was necessary. Subsequently, the first respondent had issued G.O.Ms.No.10, Energy (C3) Department, dated 27.02.2009, inter alia, temporarily waiving Cross Subsidy Surcharges. From December 2008 till November 2010, the second respondent had not levied, demanded or collected Cross Subsidy Surcharge. However, on 26.11.2010, the second respondent issued a communication, in and by which the Director/Finance of the second respondent directed all its Superintending Engineers to collect Cross Subsidy Surcharge. As the said communication was unlawful, illegal and unsustainable, the same came to be challenged before this Court by several consumers. Interim orders were granted by this Court restraining the second respondent from levying, demanding and/or collecting Cross Subsidy Surcharge. Subsequent to the filing of the Writ Petitions before this Court and the orders granted thereon, the second respondent issued two letters, dated 06.12.2010 and 21.12.2010, in an attempt to clarify the impugned communication and the same are also placed before this Court. During the pendency of the Writ Petitions, an amended circular in Circular Memo No.Dir/O/SE/LD/\&GO/E1/ABT/F Interstate/D 3144/11, dated 08.02.2011 was issued by the third respondent, stating "For the HT consumers who purchase power up to their sanctioned demand from power exchanges, traders and generators, the relevant cross subsidy surcharge as per clause 6.5 of TNERC Order No.2, dated 15.05.2006, are temporarily waived until Restriction & Control measures are lifted." In view of the above amended circular, dated 08.02.2011, issued by the third respondent, the demand of cross subsidy surcharge was set aside by this Court and vide the order dated 17.02.2011, this Court directed TANGEDCO/TNEB authorities to adjust the amount, if any, paid by the HT consumers towards cross subsidy surcharge, in the future current consumption bills.

2.3. In the meantime, the Chief Engineer/Commercial of the second respondent issued a memo No.CE/Comml/EE/DSC/F.Power Cut/D.39/2012, dated 25.02.2012, introducing Additional Restriction and Control Measures on HT industrial and commercial services. Further, on 29.02.2012, the Chief Engineer of the second respondent issued another memo No.CE/Comml/EE/DSM/F.Power Cut/D.48/12 prohibiting purchase of third party power as well as exchange power during power holidays and load shedding period and further prohibiting banked wind energy adjustment up to 31.03.2012. Under the provisions of the Electricity Act, the power to impose R&C measures on a licensee in respect of power supplied to its consumers vests with the appropriate Commission.

Likewise, in respect of Open Access consumers, the power to regulate in any manner procurement of power by such consumers vests only with the appropriate Commission in terms of Section 42 of the Act. As those two memos were illegal, unconstitutional, issued without authority of law and jurisdiction, discriminatory and opposed to Section 23 of the Act, the same were challenged by several HT consumers before this Court and this Court restrained the respondents from enforcing the said two memos. On 27.03.2012, this Court disposed of the batch of writ petitions directing the second respondent to approach the fifth respondent within ten days with an appropriate application. Pursuant to the above orders passed by this Court, the second respondent filed M.P.No.10 of 2012 before the fifth respondent and on 30.03.2012, the fifth respondent has passed the Tariff Order No.1 of 2012 effective from 01.04.2012, determining the Cross Subsidy Surcharges.

2.4. When that be so, the first respondent issued the impugned G.O.Ms.No.79, Energy (C.3) Department, dated 11.07.2012, cancelling the temporary waiver of Cross Subsidy Surcharges, which waiver was given vide G.O.(Ms) No.10, Energy (C3) Department, dated 27.02.2009. Consequent to the issuance of the impugned G.O.by the first respondent, the second respondent, in order to give effect to the said G.O., issued the Circular Memo No.CFC/Rev/FC/Rev/AS-3/D.No./12/dated 12.07.2012, for levy of Cross Subsidy Surcharges. Aggrieved over the same, the petitioners have approached this Court by way of these Writ Petitions.

3. First respondent/State has filed a counter affidavit, inter alia, stating as under :
3.1. The Government of Tamil Nadu has issued the impugned G.O.(Ms) No.79, Energy Department, dated 11.07.2012, withdrawing the concession in G.O.Ms.No.10, Energy Department, dated 27.02.2009, as it is the competent authority in policy matters. The Government, as the owner of TANGEDCO, has the power to decide temporary waiver of Cross Subsidy Surcharge and has also the power to withdraw the same. TNERC has issued the tariff order including Cross Subsidy Surcharge in terms of clause 9.11.5 of the Order No.1 of 2012, dated 30.03.2012, effective from 01.04.2012, on 'Determination of Tariff for Generation and Distribution' and earlier Tariff Order No.2, dated 15.05.2006, under first and second provisos to sub-section (2) of Section 42 of the Electricity Act,2003. While the TNERC has fixed the Cross Subsidy Surcharge in the aforesaid Tariff Order, the State Government took a policy decision and directed the Tamil Nadu Electricity Board to waive the Cross Subsidy Surcharge temporarily vide G.O.Ms.No.10, Energy Department, dated 27.02.2009.

3.2. In view of the prevailing acute power shortage, the Government vide letter No.21, dated 22.10.2008, have issued orders implementing restrictions and control measures with effect from 01.11.2008. For High Tension industries and HT commercial consumers, 40% Demand and Energy cut has been imposed and in respect of Low Tension Current Transformer, Industrial and Commercial services, power cut of 20% has been imposed.

3.3. Considering the technical hardships in the load forecasting and the grid management, the loss of revenue estimated as Rs.200 to 250 crores per year towards the waiver of cross subsidy surcharge at the present level of tariff, the Government partially modified G.O.Ms.No.10, dated 27.02.2009, and issued G.O.Ms.No.79, dated 11.07.2012, cancelling the temporary waiver of cross subsidy surcharges. The levy of Cross Subsidy Surcharge as determined by the TNERC by TANGEDCO is in accordance with the rules and regulations and hence the same is not to be interfered with.
4. Respondents 2 and 3 have also filed a counter on similar lines with that of the first respondent and also stating that principle of natural justice is not a straightjacket formula to be adopted in every case and, in the cases on hand, the petitioners are not entitled to any notice, inasmuch as the Government have passed the impugned G.O., duly taking into account the reasons as stated therein. TANGEDCO is a public sector undertaking catering power to all consumers approximately 2.3 crores

including about 7,500 HT consumers. Now, TANGEDCO and TANTRANSCO are under financial crisis to fulfil the requirements of the consumers and therefore the impugned action of the Government, cancelling temporary waiver of Cross Subsidy Surcharges, is not to be faulted with.

5. Learned Senior Counsel and other counsel for the petitioners would, in one voice, contend that the impugned G.O.Ms.No.79, dated 11.07.2012, cancelling the waiver of Cross Subsidy Surcharge was passed only based on an application by TANGEDCO and, therefore, it is only an administrative order and cannot be said to be a policy decision of the Government. They would further contend that before passing the impugned order, no opportunity was afforded to the petitioners and hence it is a violation of principles of natural justice. In support of their contentions, the learned counsel would rely upon the following decisions :
(i) 2007 (5) SCC 447 (Southern Petrochemical Industries Co. Ltd. vs. Electricity Inspector & ETIO and Others)

"127. In MRF Ltd. v. Asstt. CST (2006) 8 SCC 702 wherein one of us (Katju, J.) was a member, Kasinka Trading (1995) 1 SCC 274, has also been held to be inapplicable where a right has already accrued; for instance, in a case where the right to exemption of tax for a fixed period accrues and the conditions for that exemption have also been fulfilled, the withdrawal of that exemption cannot affect the already accrued right.
128. In MRF Ltd., it was held that the doctrine of promissory estoppel will also apply to statutory notifications.
129. We may also notice an interesting observation made by Beg, J. in Madan Mohan Pathak v. Union of India (1978) 2 SCC 50, wherein the learned Judge in his concurrent judgment while striking down the Life Insurance Corporation (Modification of Settlement) Act, 1976, opined: (SCC p. 87, para 34)

34. Furthermore, I think that the principle laid down by this Court in Union of India v. Indo-Afghan Agencies Ltd. (1968) 2 SCR 366 can also be taken into account in judging the reasonableness of the provision in this case. It was held there (at SCR p. 385):
Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen.
In that case, equitable principles were invoked against the Government. It is true that, in the instant case, it is a provision of the Act of Parliament and not merely a governmental order whose validity is challenged before us. Nevertheless, we cannot forget that the Act is the result of a proposal made by the Government of the day which, instead of proceeding under Section 11(2) of the Life Insurance Corporation Act, chose to make an Act of Parliament protected by emergency provisions. I think that the prospects held out, the representations made, the conduct of the Government, and equities arising therefrom, may all be taken into consideration for judging whether a particular piece of legislation, initiated by the Government and enacted by Parliament, is reasonable.

130. We, therefore, are of the opinion that doctrine of promissory estoppel also preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved.

131. In view of the application of doctrine of promissory estoppel in the case of the appellants, their right is not destroyed and in that view of the matter although the scheme under the impugned Act is different from the 1939 Act and the 1962 Act and furthermore in view of the phraseology used in Section 20(1) of the 2003 Act, right of the appellants cannot be said to have been destroyed. The

legislature in fact has acknowledged that right to be existing in the appellants."

(ii) 2010 (2) LW 746 (K.Sakthi Rani vs. The Secretary of the Bar Council of Tamil Nadu and others)
"66. The other question to be decided is as to whether the petitioners are entitled to succeed on the basis of the principles of estoppel, acquiescence, legitimate expectation and equity. It is further to be seen that the impugned orders passed by the respondents would amount to nullify the degree obtained by the petitioners.

67. In order to appreciate the contention of the petitioners, certain factual aspects will have to be gone into.

68. At the time of joining the various law institutions, there was no express bar under the Advocates Act, 1961, or the rules made thereunder for the petitioners in joining the institutions. Even the prospectus of some of the Universities including that of Dr.Ambedkar Law University provides for the entry of the petitioners. The Bar Council of India has passed a Resolution in the year 2002 which was reiterated in 2007 permitting the persons like the petitioners with the Master's degree from the Open Universities to be enrolled as advocates in the State Roll. Based upon the said decision, the Bar Council of Tamil Nadu has also permitted the enrollment of candidates as advocates in the rolls.

69. Both the Bar Council of Tamil Nadu and Bar Council of India were aware of the fact that the petitioners and others like the petitioners were allowed entry into various law courses recognized by them. The persons identically placed like the petitioners got themselves enrolled till the year 2007 and no action has been taken against them. Even though Section 7(1)(g), (h) and (i) of the Act provides for supervisory control of the Bar Council of Tamil Nadu, the unintentional anamoly has not been looked into and redressed by the Bar Council of Tamil Nadu and Bar Council of India. ...

72. The principle of promissory estoppel is based upon equity. If by way of a representation or a conduct of one party, the other party was made to do and complete a work, then the former party is estopped by way of conduct from altering his position. In such an event, when a former party goes back on his promise, the Court will have to step in and grant the appropriate relief in order to mitigate the damages that would be caused to the party who acted upon the promise. There is a difference between a case in which a party has actually completed his part of obligation and in a case where a party is in the process of completion or taking preparation for completion. The principle of promissory estoppel will have more bearing in a case where a party has actually done his part. In other words, an action which has already been completed by a party, cannot be nullified by the other party when the said action was done based upon the promise.

73. It is well settled principles of law that the principle of promissory estoppel is applicable in all force to the Government and it its undertakings. The principle of promissory estoppel is based upon not only equity, but on honesty, good faith which is the basis of rule of law. As against the Government, a citizen cannot be expected to say that the Government has committed a mistake since a citizen is entitled to presume that the action of the Government is correct. If the Government makes a promise and the promiseee acts in reliance upon them and alter his position, then the Government should not go back upon the same. The law cannot acquire legitimacy and gain social acceptance unless in accords with the moral values of the society.

74. As observed earlier, the doctrine of promissory estoppel is based upon the equitable doctrine. Therefore, under those circumstances, a public authority having committed to the rule of law cannot claim immunity to the doctrine of promissory estoppel.

75. It is also well settled principles of law that the doctrine of promissory estoppel can even be applied in relation to the statute, more so when it is sought to be invoked against the Bar Council of India and Bar Council of Tamil Nadu and not against University Grants Commission. In the present case on hand, as observed earlier, the facts involved would clearly show that the petitioners are not at fault. On the other hand, the Bar Council of Tamil Nadu and Bar Council of India have allowed the persons who are identically placed like the petitioners to enter into the law course and complete and thereafter, enroll. Even the petitioners have been allowed to the law course and complete. ..."

(iii) 2011 (5) CTC 640 (CIPLA Ltd. vs. Union of India and others)
"51. All Government actions are meant to be performed by individual persons to further the objectives set down in the Constitution, the laws and the administrative policies to develop democratic traditions, social and economic democracy set down in the Preamble, Part III and Part IV of the Constitution. The intention behind the Government actions and purposes is to further the public welfare and the national interest. Public good is synonymous with protection of the interests of the citizens as a territorial unit or nation as a whole. It also aims to further the public policies. The limitations of the policies are kept along with the public interest to prevent the exploitation or misuse or abuse of the office or the executive actions for personal gain.

52. The public policy cannot be a camouflage for abuse of the power and trust entrusted with a Public Authority or public servant for the performance of public duties. Misuse implies doing of something improper. The essence of impropriety is replacement of a public motive for a private one. When satisfaction sought in the performance of duties is for mutual personal gain, the misuse is usually termed as corruption. The holder of a public office is said to have misused his position when in pursuit of a private satisfaction, as distinguished from public interest, he has done something which he ought not to have done.

53. It is well settled that public authorities must have liberty and freedom in framing policies. No doubt, the discretion is not absolute, unqualified, unfettered or uncanalised and judiciary has control over all executive actions. At the same time, however, it is well established that Courts are ill-equipped to deal with these matters. In complex social, economic and commercial matters, decisions have to be taken by Governmental Authorities keeping in view several factors, and it is not possible for courts to consider competing claims and conflicting interests and to conclude which way the balance tilts. There are no objective, justiciable or manageable standards to judge the issues nor such questions can be decided on a priori considerations.

54. The State and its instrumentality has also power to change policy. The executive power is not limited to frame a particular policy. It has untrammelled power to change, rechange, adjust and readjust the policy taking into account the relevant and germane considerations. It is entirely in the discretion of the Government how a policy should be shaped. It should not, however, be arbitrary, capricious or unreasonable. In other words, every action of a Public Authority must be based on utmost good faith, genuine satisfaction and ought to be supported by reason and rationale. It is, therefore, not only the power but the duty of the Court to ensure that all authorities exercise their powers property, lawfully and in good faith or for extraneous or irrelevant considerations, there is no exercise of power known to law and the action cannot be termed as action in accordance with law.

55. It is true, the Government has every power to frame policies in public interest, but such policies should not be arbitrary, capricious, unreasonable and violative of the provisions of the Acts and the Rules."

(iv) 2012 (6) SCC 502 (Brij Mohan Lal vs. Union of India and others)

"96. It is a settled principle of law that matters relating to framing and implementation of policy primarily fall in the domain of the Government. It is an established requirement of good governance that the Government should frame policies which are fair and beneficial to the public at large. The Government enjoys freedom in relation to framing of policies. It is for the Government to adopt any particular policy as it may deem fit and proper and the law gives it liberty and freedom in framing the same. Normally, the courts would decline to exercise the power of judicial review in relation to such matters. But this general rule is not free from exceptions. The courts have repeatedly taken the view that they would not refuse to adjudicate upon policy matters if the policy decisions are arbitrary, capricious or mala fide.

97. In bringing out the distinction between policy matters amenable to judicial review and those where the courts would decline to exercise their jurisdiction, this Court in Bennett Coleman & Co. v. Union of India21 held as under: (SCC p.834, para 125)
"125. " The argument of the petitioners that Government should have accorded greater priority to the import of newsprint to supply the need of all newspaper proprietors to the maximum extent is a matter relating to the policy of import and this Court cannot be propelled into the unchartered ocean of governmental policy."
"19. When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. While doing so the court must remain within its self-imposed limits. The court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonise qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers." (emphasis supplied)
98. We must examine the cases where this Court has stepped in and exercised limited power of judicial review in matters of policy. In Asif Hameed v. State of J&K22 this Court noticed that, where a challenge is to the action of the State, the court must act in accordance with law and determine whether the State has acted within the powers and functions assigned to it under the Constitution. If not, it must strike down the action, of course, with due caution. Normally, the courts do not give directions or advise in such matters. This Court held as under: (SCC p.374, para 19)
99. It is also a settled cannon of law that the Government has the authority and power to not only frame its policies, but also to change the same. The power of the Government, regarding how the policy should be shaped or implemented and what should be its scope, is very wide, subject to it not being arbitrary or unreasonable. In other words, the State may formulate or reformulate its policies to attain its obligations of governance or to achieve its objects, but the freedom so granted is subject to basic constitutional limitations and is not so absolute in its terms that it would permit even arbitrary actions.
100. Certain tests, whether this Court should or not interfere in the policy decisions of the State, as stated in other judgments, can be summed up as:
(I) If the policy fails to satisfy the test of reasonableness, it would be unconstitutional.
(II) The change in policy must be made fairly and should not give the impression that it was so done arbitrarily on any ulterior intention.
(III) The policy can be faulted on grounds of mala fides, unreasonableness, arbitrariness or unfairness, etc.
(IV) If the policy is found to be against any statute or the Constitution or runs counter to the philosophy behind these provisions.
(V) It is dehors the provisions of the Act or legislations.
(VI) If the delegate has acted beyond its power of delegation.
101. Cases of this nature can be classified into two main classes: one class being the matters

relating to general policy decisions of the State and the second relating to fiscal policies of the State. In the former class of cases, the courts have expanded the scope of judicial review when the actions are arbitrary, mala fide or contrary to the law of the land; while in the latter class of cases, the scope of such judicial review is far narrower. Nevertheless, unreasonableness, arbitrariness, unfair actions or policies contrary to the letter, intent and philosophy of law and policies expanding beyond the permissible limits of delegated power will be instances where the courts will step in to interfere with government policy.

103. The correct approach in relation to the scope of judicial review of policy decisions of the State can hardly be stated in absolute terms. It will always depend upon the facts and circumstances of a given case. Furthermore, the court would have to examine any elements of arbitrariness, unreasonableness and other constitutional facets in the policy decision of the State before it can step in to interfere and pass effective orders in such cases.
104. A challenge to the formation of a State policy or its subsequent alterations may be raised on very limited grounds. Again, the scope of judicial review in such matters is a very limited one. One of the most important aspects in adjudicating such a matter is that the State policy should not be opposed to basic rule of law or the statutory law in force. This is what has been termed by the courts as the philosophy of law, which must be adhered to by valid policy decisions.
105. The independence of the Indian judiciary is one of the most significant features of the Constitution. Any policy or decision of the Government which would undermine or destroy the independence of the judiciary would not only be opposed to public policy but would also impinge upon the basic structure of the Constitution. It has to be clearly understood that the State policies should neither defeat nor cause impediment in discharge of judicial functions. To preserve the doctrine of separation of powers, it is necessary that the provisions falling in the domain of judicial field are discharged by the judiciary and that too, effectively."
6. Conversely, learned Advocate General, appearing for the State, would contend that the Government, as the owner of TANGEDCO, has the power to decide temporary waiver of Cross Subsidy Surcharge and also to withdraw the same. According to him, TNERC has issued the tariff order including Cross Subsidy Surcharge in terms of clause 9.11.5 of the Order No.1 of 2012, dated 30.03.2012, effective from 01.04.2012, on 'Determination of Tariff for Generation and Distribution' and earlier Tariff Order No.2, dated 15.05.2006, under first and second provisos to sub-section (2) of Section 42 of the Electricity Act,2003 and when the TNERC has fixed the Cross Subsidy Surcharge in the said Tariff Order, the State Government took a policy decision and directed the Tamil Nadu Electricity Board to waive the Cross Subsidy Surcharge temporarily vide G.O.Ms.No.10, Energy Department, dated 27.02.2009. He would also submit that on account of waiver of cross subsidy surcharge, the Board incurred a loss of Rs.200 to 250 crores per year and, therefore, the Government partially modified G.O.Ms.No.10, dated 27.02.2009, and issued G.O.Ms.No.79, dated 11.07.2012, cancelling the temporary waiver of cross subsidy surcharges. He would further contend that principle of natural justice is not a straightjacket formula to be adopted in every case and, in the cases on hand, the petitioners are not entitled to any notice, inasmuch as the Government have passed the impugned G.O., duly taking into account the reasons as stated therein, and, as such, when the action of the first respondent is a policy decision, the same cannot be interfered with. Similarly, the learned Additional Advocate General appearing for TANGEDCO/TNEB would argue that the Courts have no power to interfere with the policy decision of the Government, involving public interest, or, for that matter, no notice need be given. They would cite the following authorities :
(i) (1984) 4 SCC 27 (Maharashtra State Board of Secondary and Higher Secondary Education vs. Paritosh Bhupeshkumar Seth) :

"12. Though the main plank of the arguments advanced on behalf of the petitioners before the High Court appears to have been the plea of violation of principles of natural justice, the said contention

did not find favour with the learned Judges of the Division Bench. The High Court rejected the contention advanced on behalf of the petitioners that non-disclosure or disallowance of the right of inspection of the answer books as well as denial of the right to ask for a revaluation to examinees who are dissatisfied with the results visits them with adverse civil consequences. The further argument that every adverse verification involves a condemnation of the examinees behind their back and hence constitutes a clear violation of principles of natural justice was also not accepted by the High Court. In our opinion, the High Court was perfectly right in taking this view and in holding that the process of evaluation of answer papers or of subsequent verification of marks under clause (3) of Regulation 104 does not attract the principles of natural justice since no decision-making process which brings about adverse civil consequences to the examinees is involved. The principles of natural justice cannot be extended beyond reasonable and rational limits and cannot be carried to such absurd lengths as to make it necessary that candidates who have taken a public examination should be allowed to participate in the process of evaluation of their performances or to verify the correctness of the evaluation made by the examiners by themselves conducting an inspection of the answer books and determining whether there has been a proper and fair valuation of the answers by the examiners. As succinctly put by Mathew, J. in his judgment in the Union of India v. Mohan Lal Kapoor1 it is not expedient to extend the horizon of natural justice involved in the audi alteram partem rule to the twilight zone of mere expectations, however great they might be. [SCC para 56, p. 863: SCC (L&S) p. 31]. The challenge levelled against the validity of clause (3) of Regulation 104 based on the plea of violation of natural justice, was therefore, rightly rejected by the High Court."

(ii) (1993) 3 SCC 499 (Union of India vs. Hindustan Development Corporation) :
"27. Of late the doctrine of legitimate expectation is being pressed into service in many cases particularly in contractual sphere while canvassing the implications underlying the administrative law. Since we have not come across any pronouncement of this Court on this subject explaining the meaning and scope of the doctrine of legitimate expectation, we would like to examine the same a little more elaborately at this stage. Who is the expectant and what is the nature of the expectation? When does such an expectation become a legitimate one and what is the foundation for the same? What are the duties of the administrative authorities while taking a decision in cases attracting the doctrine of legitimate expectation.
28. Time is a three-fold present: the present as we experience it, the past as a present memory and future as a present expectation. For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.

29. It has to be noticed that the concept of legitimate expectation in administrative law has now, undoubtedly, gained sufficient importance. It is stated that legitimate expectation is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action and this creation takes its place beside such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and in future, perhaps, the principle of proportionality. A passage in Administrative Law, Sixth Edition by H.W.R. Wade page 424 reads thus:
These are revealing decisions. They show that the courts now expect Government departments to

honour their published statements or else to treat the citizen with the fullest personal consideration. Unfairness in the form of unreasonableness here comes close to unfairness in the form of violation of natural justice, and the doctrine of legitimate expectation can operate in both contexts. It is obvious, furthermore, that this principle of substantive, as opposed to procedural, fairness may undermine some of the established rules about estoppel and misleading advice, which tend to operate unfairly. Lord Scarman has stated emphatically that unfairness in the purported exercise of a power can amount to an abuse or excess of power, and this seems likely to develop into an important general doctrine.
Another passage at page 522 in the above book reads thus:
It was in fact for the purpose of restricting the right to be heard that legitimate expectation was introduced into the law. It made its first appearance in a case where alien students of scientology were refused extension of their entry permits as an act of policy by the Home Secretary, who had announced that no discretionary benefits would be granted to this sect. The court of appeal held that they had no legitimate expectation of extension beyond the permitted time, and so no right to a hearing, though revocation of their permits within that time would have been contrary to legitimate expectation. Official statements of policy, therefore, may cancel legitimate expectation, just as they may create it, as seen above. In a different context, where car-hire drivers had habitually offended against airport byelaws, with many convictions and unpaid fines, it was held that they had no legitimate expectation of being heard before being banned by the airport authority.
There is some ambiguity in the dicta about legitimate expectation, which may mean either expectation of a fair hearing or expectation of the licence or other benefit which is being sought. But the result is the same in either case; absence of legitimate expectation will absolve the public authority from affording a hearing.
(emphasis supplied)

30. In some cases a question arose whether the concept of legitimate expectation is an impact only on the procedure or whether it also can have a substantive impact and if so to what extent. Attorney General for New South Wales v. Quin28 is a case from Australia in which this aspect is dealt with. In that case the Local Courts Act abolished Courts of Petty Sessions and replaced them by Local Courts. Section 12 of the Act empowered the Governor to appoint any qualified person to be a Magistrate in the new court system. Mr Quin, who had been a Stipendiary Magistrate in charge of a Court of Petty Sessions under the old system, applied for, but was refused, an appointment under the new system. That was challenged. The challenge was upheld by the appellate court on the ground that the selection committee had taken into account an adverse report on him without giving a notice to him of the contents of the same. In the appeal by the Attorney-General against that order before the High Court, it was argued on behalf of Mr Quin that he had a legitimate expectation that he would be treated in the same way as his former colleagues considering his application on its own merits. Coming to the nature of the substantive impact of the doctrine, Brennan, J. observed that the doctrine of legitimate expectations ought not to unlock the gate which shuts the court out of review on the merits, and that the courts should not trespass into the forbidden field of the merits by striking down administrative acts or decisions which failed to fulfil the expectations. In the same case Mason, C.J. was of the view that if substantive protection is to be accorded to legitimate expectations that would encounter the objection of entailing curial interference with administrative decisions on the merits by precluding the decision-maker from ultimately making the decision which he or she considers most appropriate in the circumstances.

35.....If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see

whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits, particularly when the element of speculation and uncertainty is inherent in that very concept. As cautioned in Attorney General for New South Wales case26 the courts should restrain themselves and restrict such claims duly to the legal limitations. It is a well-meant caution. Otherwise a resourceful litigant having vested interests in contracts, licences etc. can successfully indulge in getting welfare activities mandated by directive principles thwarted to further his own interests. The caution, particularly in the changing scenario, becomes all the more important."

(iii) (1995) 2 SCC 117 (State of Rajasthan vs. Sevanivatra Karamchari Hitkari Samiti) :
"23. In the instant case, the date 29-2-1964 in Rule 268-H under Chapter XXIII-A has not been taken out of hat. The Government had taken into consideration the need for a liberalised pension scheme for those government servants who were in service on 29-2-1964 and who would be retiring thereafter and the new liberalised pension scheme under Chapter XXIII-A was introduced w.e.f. March 1964.
24. It is not necessary to go into the question as to whether the liberalised benefit for pension should have also been accorded to the government servants retiring prior to 29-2-1964 because such exercise being a matter of policy decision for the executive, must be left to the consideration of the State Government. The wisdom in a policy decision of the Government, as such, is not justiciable unless such policy decision is wholly capricious, arbitrary and whimsical thereby offending the Rule of law as enshrined in Article 14 of the Constitution or such policy decision offends any statutory provisions or the provisions of the Constitution. Save as aforesaid, the Court need not embark on uncharted ocean of public policy."

(iv) (1996) 5 SCC 268 (P.T.R. Exports (Madras) Pvt. Ltd. vs. Union of India) :
"3. In the light of the above policy question emerges whether the Government is bound by the previous policy or whether it can revise its policy in view of the changed potential foreign markets and the need for earning foreign exchange? It is true that in a given set of facts, the Government may in the appropriate case be bound by the doctrine of promissory estoppel evolved in Union of India v. Indo-Afghan Agencies Ltd.1 But the question revolves upon the validity of the withdrawal of the previous policy and introduction of the new policy. The doctrine of legitimate expectations again requires to be angulated thus: whether it was revised by a policy in the public interest or the decision is based upon any abuse of the power? The power to lay policy by executive decision or by legislation includes power to withdraw the same unless in the former case, it is by mala fide exercise of power or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is a settled law that the court gives a large leeway to the executive and the legislature. Granting licences for import or export is by executive or legislative policy. Government would take diverse factors for formulating the policy for import or export of the goods granting relatively greater priorities to various items in the overall larger interest of the economy of the country. It is, therefore, by exercise of the power given to the executive or as the case may be, the legislature is at liberty to evolve such policies.
4. An applicant has no vested right to have export or import licences in terms of the policies in force at the date of his making application. For obvious reasons, granting of licences depends upon the policy prevailing on the date of the grant of the licence or permit. The authority concerned may be in

a better position to have the overall picture of diverse factors to grant permit or refuse to grant permission to import or export goods. The decision, therefore, would be taken from diverse economic perspectives which the executive is in a better informed position unless, as we have stated earlier, the refusal is mala fide or is an abuse of the power in which event it is for the applicant to plead and prove to the satisfaction of the court that the refusal was vitiated by the above factors.

5. It would, therefore, be clear that grant of licence depends upon the policy prevailing as on the date of the grant of the licence. The court, therefore, would not bind the Government with a policy which was existing on the date of application as per previous policy. A prior decision would not bind the Government for all times to come. When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The court, therefore, would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same. Equally, the Government is left free to determine priorities in the matters of allocations or allotments or utilisation of its finances in the public interest. It is equally entitled, therefore, to issue or withdraw or modify the export or import policy in accordance with the scheme evolved. We, therefore, hold that the petitioners have no vested or accrued right for the issuance of permits on the MEE or NQE, nor is the Government bound by its previous policy. It would be open to the Government to evolve the new schemes and the petitioners would get their legitimate expectations accomplished in accordance with either of the two schemes subject to their satisfying the conditions required in the scheme. The High Court, therefore, was right in its conclusion that the Government is not barred by the promises or legitimate expectations from evolving new policy in the impugned notification."

(v) MANU/TN/1644/1998 (Tamil Nadu Electrical Fittings and Choke Manufacturers vs. The State of Tamil Nadu and others) :
"22. ... The views taken by the administrative authorities will have to be given primary importance, unless the petitioner is able to show that the decision offends the Wednesbury test principle. Even regarding policy matters, the power of Court is not unrestricted. In a recent decision of the Supreme Court reported in MANU/SC/0044/1997: (1997) 9 SCC 495 (Krishnan Kakkanath vs. Government of Kerala and Ors.) in paragraph 36 of the judgment, Their Lordships considered this question in the context of Article 14 of the Constitution. It was held thus:
To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial whether a better or more comprehensive policy decision could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionality, Courts should avoid 'embarking on uncharted ocean of public policy'.

(vi) MANU/CG/0124/2007 (M.P. Lopik Vargiya Shaskiya Karamchari Snagh vs. The State of Madhya Pradesh, Now CG and Others) :
"7. The first question is about the doctrine of judicial review particularly with reference to the policy decision. In the matter of Asif Hameed and Ors. vs. State of Jammu and Kashmir and Ors., MANU/SC/0036/1989, the Apex Court held that although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. Legislature and executive, the two facets of people's

will, have all the powers including that of finance. Judiciary has no power over sword or the purse; nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits and if it is not so the Court must strike down the action. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on court's own exercise of power is the self-imposed discipline of judicial restraint. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers.
9. Therefore, it is clear that in welfare State like ours, unless the action/decision of the Government is unconstitutional or contrary to statutory provisions or arbitrary, irrational, or is abuse of power or discriminatory, the same cannot be interfered by High Court under writ jurisdiction under Article 226 of the Constitution of India and the supremacy of each of the three organs of the State, i.e. Legislature, executive and judiciary in their respective fields of operation needs to be emphasized.
10. It is not for the court to determine whether a particular policy or a particular decision taken in furtherance of that policy is fair. The court is only concerned with the manner in which the decision was taken. When it appears to the court that there was no colourable exercise of power or no question of bias or mala fide with regard to it, the court has no jurisdiction to interfere with policy decision of the Government. The High Court under its judicial review would not examine merits and demerits or the policy, particularly speaking, it is not normally within the domain of High Court to weigh the pros and cons of a policy or to assess it to test the degree of beneficial or equitable effect for the purpose of varying, modifying or annulling, based on however sound and good reasons, except on the exception of arbitrariness or violative of constitutional, statutory or any other provisions of law as indicated above. The court cannot compel the Government to change its policy.
14. Change in policy can defeat a substantive legitimate expectation if it can be justified on Wednesbury reasonableness. The decision maker has the choice in balancing the pros and cons relevant to the change in policy. The legitimate substantive expectation merely permits the court to find out whether the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made. The judgment whether public interest overrides substantive legitimate expectation of individuals will be for the decision maker who has made the change in policy and the courts will intervene in that decision only if they are satisfied that the decision is irrational or perverse."

(vii) (1986) 2 WLR 1 (Nottinghamshire County Council vs. Secretary of State for Environment :
"To sum it up, the levels of public expenditure and the incidence and distribution of taxation are matters for Parliament, and, within Parliament, especially for the House of Commons. If Parliament legislates, the courts have their interpretative role: they must, if called upon to do so, construe the statute. If a minister exercises a power conferred on him by the legislation, the courts can investigate whether he has abused his power. But if, as in this case, effect cannot be given to the Secretary of State's determination without the consent of the House of Commons and the House of Commons has consented, it is not open to the courts to intervene unless the minister and the House must have misconstrued the statute or the minister has to put it bluntly-deceived the House. The courts can properly rule that a minister has acted unlawfully if he has erred in law as to the limits of his power within the limits set by a statute. But, if a statute, as in this case, requires the House of Commons to approve a minister's decision before he can lawfully enforce it, and if the action proposed complies with the terms of the statute (as your Lordships, I understand, are convinced that it does in the present case), it is not for the judges to say that the action has such unreasonable consequences that the guidance upon which the action is based and of which the House of Commons

had notice was perverse and must be set aside. For that is a question of policy for the minister and the Commons, unless that has been bad faith or misconduct by the minister. Where Parliament has legislated that the action to be taken by the Secretary of State must, before it is taken, be approved by the House of Commons, it is no part of the judges' role to declare that the action proposed is unfair, unless it constitutes an abuse of power in the sense which I have explained; for Parliament has enacted that one of its Houses is responsible. Judicial review is a great weapon in the hands of the judges: but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power."

7. I have heard the learned Senior Counsel and the other counsel appearing for the petitioners; learned Advocate General appearing for the first respondent/State and the learned Additional Advocate General appearing for TNEB.

8. As already stated in the very first paragraph, the decision of the Government, cancelling temporary waiver of Cross Subsidy Surcharge and directing TANGEDCO to collect the Cross Subsidy Surcharge from HT consumers, in G.O.Ms.No.79, Energy (C.3) Department, dated 11.07.2012, has been called in question in all these Writ Petitions.

9. All these Writ Petitions require adjudication on three aspects viz., (1) Power of the Government in taking executive/policy decision; (2) Judicial Review (3) Fair play in decision making and Principles of natural justice. Therefore, let me now deal with them one after another.

9.1. Power of the Government in taking executive/policy decision:
9.1.1. In exercise of powers under Section 38 of the Electricity Supply Code, by a letter, dated 22.10.2008, the first respondent issued directions to the second respondent for imposing restrictions on the consumption of power by HT consumers. The said directions imposed a cut of 40% on HT industrial and commercial consumers. In the said letter, the Government also directed to reduce the demand charges proportionately to the consumers whose demand and consumption have been restricted to the extent of 40% per month, based on demand and base consumption on and from 01.11.2008 onwards and consequently demand quota and energy quota have been revised. Thereafter, the fifth respondent, namely, the Commission, by its order dated 07.09.2010, has permitted the consumers to avail third party power over and above the respondents' quota and up to the consumers' sanctioned demand without incurring excess demand and excess energy charges. The respondents have imposed power cut due to power shortage on the petitioners with a further direction to observe power holidays, which necessitated the purchase of power from third party power generators. Following the Government orders, the second respondent has taken restriction and control measures, in short, "R&C measures" and, thereafter, orders have been passed by the Commission in M.P.No.42 of 2008, setting out the R&C measures. In its order, the Commission frowned on the practice of TNEB approaching the first respondent/Government without approaching the Commission in respect of issues relating to R&C measures. The Commission asserted that under Section 23 of the Act, only the Commission has powers to impose R&C measures. In the petition filed by TNEB in M.P.No.43 of 2008, the Board sought for temporary relinquishment of the right to levy Cross Subsidy Surcharge for a period of six months or till the situation improved and R&C measures are withdrawn. The Commission disposed of the petition, stating that in respect of voluntary relinquishment of the surcharge, its approval was not necessary. Thereafter, under Section 11 of the Act, the first respondent issued G.O.Ms.No.10, dated 27.02.2009. Para 3 of the said G.O. is relevant for consideration which reads as under :
"3. In this connection, the Government has directed the Tamil Nadu Electricity Board to resort to purchase of power from within and outside the State as and when available. In view of the prevailing shortages, the Government has also taken the step of permitting private power producers in the State to avail of consumer within the State. As a special measure, keeping in view the restrictions

already imposed on such consumers, it has also been decided to temporarily waive cross subsidy surcharges which would be collectable from such consumers under normal circumstances. Keeping in view that the current power deficit is likely to persist during coming months, Government attaches highest priority to ensure that all power generating stations within the State should function at full capacity and make available all energy thus produced to the State grid, subject to conditions of existing supply commitments to Tamil Nadu Electricity Board and/or other consumers within the State."
9.1.2. Accordingly, the Government issued a notification waiving levy of cross subsidy surcharges in the said G.O.10, dated 27.02.2009. Taking into account the prevailing shortages, the Government has also taken the step of permitting private power producers in the State to avail of consumer within the State. Having regard to the present power shortage in the State and the likely increase in the power deficit during the coming summer months, the Government was of the view that the situation caused by the acute power shortage and the resultant hardship to the public is of such nature as to deem the situation to be an extraordinary circumstance which would justify invoking of Section 11 of the Act in the public interest. By the said G.O., the Tamil Nadu Electricity Board was directed to take measures to purchase surplus tradable power available from generators within the State as per procedures laid down for the purpose in the Act without detriment to the obligations and rights of such generators to supply to captive and other consumers and also to provide open access for sale of power by private generators to HT consumers within the State subject to other legal requirement in that regard being satisfied.

9.1.3. The Government, after careful examination, issued a notification, regarding the supply of power by private power producers to Tamil Nadu Electricity Board of consumers within the State. The said notification was issued under Section 11 with the following directions :
(1) All power generation units operating in Tamil Nadu shall operate and maintain generating stations to maximum capacity and Plant Load Factor (PLF) and
(2) All generations stations shall supply all exportable electricity generated to the State grid for supply to either Tamil Nadu Electricity Board, or to any other HT consumers within the State as per the regulations notified in this regard by the Tamil Nadu Electricity Regulatory Commission.

9.1.4. Admittedly, the benefit of the G.O.Ms.No.10 with regard to temporary waiver of cross subsidy surcharges has been availed by the petitioners. While so, now, the Government has taken a decision cancelling the waiver of cross subsidy surcharges and passed the order impugned in G.O.Ms.No.79, dated 11.07.2012, stating that TANGEDCO should always be in a position to provide a standby power to the HT consumers; the existing short term open access regulations and procedures facilitate the HT consumer to change over between the resources i.e., either from TANGEDCO or from outside sources; this infirm consumption pattern of the HT consumers puts much hardships in the load forecasting and grid management; at present, around 500 HT consumers are purchasing power maximum to the tune of 460 MW during peak hours and around 250 MW round the clock from power exchanges and local generators; if all the HT consumers tend to migrate to avail power from outside sources, the loss of revenue towards the waiver of cross subsidy surcharge at the present level of Tariff is estimated as Rs.200 to 250 crores for the period 2012-13.

9.1.5. In order to streamline the above and to reduce the revenue loss to the Board, the Chairman cum Managing Director, Tamil Nadu Generation and Distribution Corporation Limited has requested to cancel the G.O.(Ms) No.10, Energy (C3) Department, dated 27.02.2009, and to authorise the Tamil Nadu Generation and Distribution Corporation Limited to collect the cross subsidy surcharge (for the purchased quantum from outside) from the HT consumers who are not availing Tamil Nadu Generation and Distribution Corporation Limited quota power full or partially and power from the outside sources.

9.1.6. The Government accepted the request of TANGEDCO and passed an order in the impugned G.O.Ms.No.79, partially modifying the orders in G.O.Ms.No.10, cancelling the temporary waiver of cross subsidy surcharges and authorising the TANGEDCO to collect the cross subsidy surcharges. Aggrieved over such a decision of the Government, the petitioners are before this Court.

9.1.7. To examine the validity of the above Government orders, it is relevant to refer to the following provisions of law :
Section 11 :
"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."

Section 23 :
"23. Directions to licensees.—If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof.

Section 42 :
"42. Duties of distribution licensee and open access.—(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.
(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross-subsidies, and other operational constraints:
Provided that 1[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, 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.
(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing

non-discriminatory open access.

Section 108 :

"108. Directions by State Government.—(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.
(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final."

9.1.8. As per Section 11 (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. In this connection, "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. Sub-section (2) of Section 11 indicates that 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.

9.1.9. Section 23 contemplates Directions to licensees, as per which if the appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by order, provide for regulating supply, distribution, consumption or use thereof.
9.1.10. Section 42 defines the duties of distribution licensee and open access to the effect that it shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act; 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 further that the State Government shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt and where any person, whose premises are situated within the area of supply of a distribution licensee, not being a local authority engaged in the business of distribution of electricity before the appointed date, requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

9.1.11. Section 108 denotes directions by State Government, stating that in the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing and if any question arises as to

whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.

9.1.12. From the above stated factual and legal position, it is to be seen that the respondents have allowed certain rights to accrue in favour of the HT consumers, who are the petitioners herein, as a temporary measure. Thereafter, TANGEDCO has filed an application before the Commission in M.P.No.43 of 2008, which was disposed of by the Commission by its order dated 05.12.2008, which order reads as follows :
"Cross subsidy surcharge legitimately accrues to the distribution licensee in terms of the Electricity Act 2003 and the Intra-state Open Access Regulations, 2005 of the TNERC. Voluntary relinquishment of this surcharge does not require approval of the Commission. But, the relinquishment is subject to the condition that as and when the distribution licensee files a petition for tariff revision, the loss attributable to the relinquishment of cross subsidy surcharge shall not be reckoned by the Commission as a revenue loss to the licensee."

9.1.13. Thereafter, after considering compelling circumstances, involving acute power shortage and other courses faced by TANGEDCO, the Government has passed G.O.Ms.No.10, temporarily waiving cross subsidy surcharges. In view of the prevailing shortages, the Government has also taken the step of permitting private power producers in the State to avail of consumer within the State. As a special measure, keeping in view the restrictions already imposed on such consumers, it has also been decided to temporarily waive cross subsidy surcharges which would be collectable from such consumers under normal circumstances. Keeping in view that the current power deficit is likely to persist during coming months, Government attached highest priority to ensure that all power generating stations within the State should function at full capacity and make available all energy thus produced to the State grid, subject to conditions of existing supply commitments to Tamil Nadu Electricity Board and/or other consumers within the State. Having regard to the power shortage in the State and the likely increase in the power deficit during the coming summer months, the Government was of the view that the situation caused by the acute power shortage and the resultant hardship to the public is of such nature as to deem the situation to be an extraordinary circumstance which would justify invoking of Section 11 of the Act in the public interest. By the said G.O., the Tamil Nadu Electricity Board was directed to take measures to purchase surplus tradable power available from generators within the State as per procedures laid down for the purpose in the Act without detriment to the obligations and rights of such generators to supply to captive and other consumers and also to provide open access for sale of power by private generators to HT consumers within the State subject to other legal requirement in that regard being satisfied. From the said G.O., the petitioner companies have enjoyed the benefit of temporary waiver of cross subsidy surcharges and the same was in force till the impugned G.O.Ms.No.79 came to be passed.
9.1.14. From a reading of the impugned order, it is revealed that the existing short term open access regulations and procedures facilitate the HT consumer to change over between the resources i.e., either from TANGEDCO or from outside sources. It is also seen that the consumption pattern of the HT consumers puts much hardships in the load forecasting and grid management. At present, around 500 HT consumers are purchasing power maximum to the tune of 460 MW during peak hours and around 250 MW round the clock from power exchanges and local generators. If all the HT consumers tend to migrate to avail power from outside sources, the loss of revenue towards the waiver of cross subsidy surcharge at the present level of Tariff is estimated as Rs.200 to 250 crores for the period 2012-13. Considering the loss of revenue towards the waiver of cross subsidy surcharges, the second respondent/TANGEDCO has requested the Government to cancel the G.O.(Ms) No.10, Energy (C3) Department, dated 27.02.2009, and to authorise the Tamil Nadu Generation and Distribution Corporation Limited to collect the cross subsidy surcharge (for the purchased quantum from outside) from the HT consumers who are not availing Tamil Nadu Generation and Distribution Corporation Limited quota power full or partially and power from the

outside sources. Accordingly, the Government accepted the request of TANGEDCO and passed the impugned G.O.Ms.No.79, partially modifying the orders in G.O.Ms.No.10, cancelling the temporary waiver of cross subsidy surcharges and authorising the TANGEDCO to collect the cross subsidy surcharges. The relevant portion of the order reads as under :
"4.The Government after careful examination, accept the request of the Chairman cum Managing Director, Tamil Nadu Generation and Distribution Corporation Limited and in partial modification of the orders first read above, cancel the temporary waiver of cross subsidy surcharges. The Government also authorise the Tamil Nadu Generation and Distribution Corporation Limited to collect the cross subsidy surcharges (for the purchased quantum from outside) from the HT consumers who are not availing Tamil Nadu Generation and Distribution Corporation Limited quota power fully or partially and purchase power from the outside sources."

9.1.15. On an analysis of the legal position and the impugned orders, it could be seen that the decision taken by the first respondent is only on the request of the second respondent/TANGEDCO and the contents of the said Government Orders coupled with the contingency made out therein are all administrative in nature. Though it is pleaded that it is a policy decision, on a material consideration, it could be seen that the said orders are passed only on the request of the second respondent based on certain factors weighing with the respondent/TANGEDCO.

9.1.16. All Government Orders cannot be termed as policy decisions. If any decision is taken on a policy matter, the same shall be only subject to following certain procedure and approval by the Government in the manner as provided for. For instance, if the Government wants to take a policy on a particular matter, it is the normal procedure that there must be an approval by the Government through its cabinet.

9.1.17. In bringing out the distinction between policy matters amenable to judicial review and those where the courts would decline to exercise their jurisdiction, the Supreme Court in Bennett Coleman & Co. v. Union of India, 1972 (2) SCC 788, has held that when a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the Constitution and if not, the court must strike down the action. Even assuming as contended by the State that the impugned action is a policy decision, it is to be stated that the Supreme Court, in the said case, has held that : the Courts can interfere with the policy decisions of the State, if, the policy fails to satisfy the test of reasonableness; the change in policy must be made fairly and should not give the impression that it was so done arbitrarily on any ulterior intention; the policy can be faulted on grounds of mala fides, unreasonableness, arbitrariness or unfairness, etc.; if the policy is found to be against any statute or the Constitution or runs counter to the philosophy behind the provisions; if it is dehors the provisions of the Act or legislations; if the delegate has acted beyond its power of delegation. It is also asserted therein that unreasonableness, arbitrariness, unfair actions or policies contrary to the letter, intent and philosophy of law and policies expanding beyond the permissible limits of delegated power are the instances where the courts will step in to interfere with government policy.
9.1.18. Therefore, in the instant case, though the Government is empowered to take the impugned decision by virtue of executive power of the State, what all this Court emphasises is that it ought to have been done only in the manner as contemplated

9.2. Judicial Review :
9.2.1. A reading of the G.O.Ms.No.10 would make it vivid that there was a need for giving certain exemptions and based on the request of TANGEDCO, the Government had taken a decision to temporarily waive cross subsidy surcharges, taking into account various factors such as power shortage in the State, the likely increase in the power deficit during coming summer months and the

resultant hardship to the public. Now, the Government wanted to change the said decision by another Government Order viz., G.O.Ms.No.79, which is impugned in these Writ Petitions, again on the request of TANGEDCO/ the second respondent, to cancel the exemption or waiver of cross subsidy surcharges. In this regard, the submission of the State as well as the Department in their counter is that this Court is not empowered to interfere in policy matters, as the impugned action is one of public policy. Though the Government is empowered to take such a decision to change the position by cancelling the earlier waiver, the position stated in G.O.Ms.No.10 vis-a-vis the present one would clearly indicate that the circumstances have not changed and the restriction and control measures have not been lifted yet. Realising the situation, the Department would make a plea that the loss of revenue towards the waiver of cross subsidy surcharges is estimated at Rs.200 to 250 crores for the period 2012-2013 and hence the said waiver cannot be allowed to continue. If the said plea of the Department is acceded to, what about the commitment made by the Government for giving exemption or waiver in view of power shortage in the State, the likely increase in the power deficit during coming summer months and the resultant hardship to the public. It is not the case of the Department that the situation has now improved. The only point made by the Department for cancellation of waiver of cross subsidy surcharges is that there is a revenue loss. Had that been position, before going in for such a cancellation, it was equally important for the Department to look into the present scenario in respect of the power crisis and the other factors including the hardship of the petitioner companies. Therefore, it would have been proper for the authorities to arrive at a decision, had they taken a decision after putting the aggrieved parties to a reasonable opportunity and taking their views before proceeding further in the matter, which, from a reading of the impugned order as well as the stand of the respondents in their counter, is conspicuously absent.
9.2.2. More importantly, the Commission, in its order dated 05.012.2008, in M.P.No.43 of 2008 filed by TANGEDCO/Board, has made it clear that "voluntary relinquishment of Cross Subsidy Surcharge does not require approval of the Commission, but, the relinquishment is subject to the condition that as and when the distribution licensee files a petition for tariff revision, the loss attributable to the relinquishment of cross subsidy surcharge shall not be reckoned by the Commission as a revenue loss to the licensee." On that score as well, the reason given by TANGEDCO that the loss of revenue towards the waiver of cross subsidy surcharge at the present level of tariff is estimated at Rs.200 to 250 crores for the period 2012-2013, while requesting the Government to cancel the waiver of cross subsidy surcharge and acceptance of the same by the Government for cancelling the waiver of cross subsidy surcharge cannot be acceded to.

9.2.3. Of course, as contended by the learned Advocate General and also the learned Additional Advocate General placing reliance on various decisions cited supra, the Courts have no power to interfere with the policy decisions of the Government, involving public interest, and, for those matters, no notice need be given. Added to this, Section 108 states that in the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing and if any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final. However, to countenance the above contention and to attract the provision under Section 108, the decision taken by the executive should be in accordance with law.
9.2.4. Law is well settled that the power of judicial review in executive decisions is very limited. However, when the manner of taking such a decision and the procedure contemplated are not in conformity with the law, this Court can very well examine the issue. The principle of judicial review would apply to the exercise of executive powers by Government bodies in order to prevent arbitrariness or favouritism. The judicial power of review is also exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention and the other covers the scope of the court□s ability to quash an executive decision on its merits. These restraints bear the hallmarks of judicial control over executive action.

9.2.5. It is also a settled position of law that any act of the repository of power whether legislative or administrative or quasi-judicial is open to challenge if it is so arbitrary or unreasonable that no fair-minded authority could ever have made it. The concept of equality as enshrined in Article 14 of the Constitution of India embraces the entire realm of State action. It would extend to an individual as well not only when he is discriminated against in the matter of exercise of right, but also in the matter of imposing liability upon him. Equals have to be treated equally even in the matter of executive or administrative action. As a matter of fact, the doctrine of equality is now turned as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action. The executive action is to be just on the test of fair play and reasonableness.
9.2.6. The actions of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and the validity of such an action would be tested on the anvil of Article 14. While exercising the power under Article 226 the Court would be circumspect to adjudicate the disputes arising out of the actions depending on the facts and circumstances in a given case. The distinction between the public law remedy and private law field cannot be demarcated with precision. Each case has to be examined on its own facts and circumstances to find out the nature of the activity or scope and nature of the controversy.
9.2.7. Applying the above principles to the cases on hand, it is to be stated that when the petitioners have got a right accrued in their favour with regard to waiver of cross subsidy surcharges vide G.O.Ms.No.10, if they are to be deprived of such a right, they ought to be afforded an opportunity, which is conspicuously absent herein. Therefore, if the impugned action of the respondents is tested on the question of legality, it is to be asserted that the decision-making authority, namely, the first respondent has committed an error of law; breach of the rules of natural justice; illegality; irrationality and procedural impropriety. As such, the decision of the first respondent is liable to be interfered with by this Court by way of judicial review.
9.2.8. In judicial review, in the field of administrative law and the constitutional law, the Courts are not concerned with the merits of the decision, but with the manner in which the decision was taken or order was made. Judicial review is entirely different from an ordinary appeal. The purpose of judicial review is to ensure that the individual is given fair treatment by the authority or the tribunal to which he has been subjected to. It is no part of the duty or power of the court to substitute its opinion for that of the tribunal or authority or person constituted by law or administrative agency in deciding the matter in question. Under the thin guise of preventing the abuse of power, there is a lurking suspicion that the court itself is guilty of usurping that power. The duty of the court, therefore, is to confine itself to the question of legality, propriety or regularity of the procedure adopted by the tribunal or authority to find whether it committed an error of law or jurisdiction in reaching the decision or making the order. The judicial review is, therefore, a protection, but not a weapon. The court, with an avowed endeavour to render justice, applied principles of natural justice with a view to see that the authority would act fairly. Therefore, the grounds of illegality, irrationality, unreasonableness, procedural impropriety and in some cases proportionality has been applied, to test the validity of the decision or order, apart from its ultra vires, mala fides or unconstitutionality.
9.2.9. To determine whether a particular policy or a decision taken in furtherance thereof is in fulfilment of that policy or is in accordance with the Constitution or the law, many an imponderable feature will come into play including the nature of the decision, the relationship of those involved on either side before the decision was taken, existence or non-existence of the factual foundation on which the decision was taken or the scope of the discretion of the authority or the functionary. Supervision of the court, ultimately, depends upon the analysis of the nature of the consequences of the decision and yet times upon the personality of the authority that takes decision or individual circumstances in which the person was called upon to make the decision and acted on the decision itself.
9.2.10. A repository of power acts ultra vires either when he acts in excess of his power in the narrow sense or when he abuses his power by acting in bad faith or for an inadmissible purpose or

on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness. The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it, as held by the Supreme Court in Shri Sitaram Sugar Co. Ltd. v. Union of India, (1990) 3 SCC 223.
9.2.11. Therefore, it is manifestly clear that though the extent of executive power has been defined under Articles 162 of the Constitution, if executive orders are not in conformity with the Constitution or the provisions of the Act or the basic principles of natural justice, such orders are, in my considered view, certainly amenable to judicial review and when the same are subjected to challenge, the Courts can very well examine the position and fill up the lacunae, if any, left over by the executive in exercise of his powers or even nullify the said orders.

9.2.12. In the instant case also, an executive order has been passed by the first respondent, to meet the contingency of power shortage in the second respondent/TANGEDCO. It is no doubt, the Government is empowered either to afford or divest concession/exemption or in some cases it may go for extending the benefit also. But, the more important is, after affording such a benefit, when the Government wants to modify or cancel it, the petitioner companies, who had the benefit of the above concession or benefit, have to be necessarily put on notice or at least heard so as to elicit their views on discontinuance of the waiver of cross subsidy surcharges and, keeping in mind the said aspect and other factors, G.O.Ms.No.10 was passed granting waiver of cross subsidy surcharges. Equally, while reversing such a decision, the aspect of financial impact on the persons who have been extended the benefit has also to be taken note of. That could be done only by giving them a fair opportunity. Even though the TANGEDCO requested for cancellation of waiver of cross subsidy surcharges, fair play and reasonableness are the basic principles, which are enshrined under Article 14 of the Constitution, to be tested by the Government in the manner as provided before going for such a change, which fair play and reasonableness have not been followed. In all fairness, what is required is that the petitioner companies ought to have had their voice to the minimum extent as to the continuance of waiver or for asking for some kind of alternative. That opportunity has not been extended to the petitioners. Looked at from any angle, the manner of sudden change of cancellation of earlier order and passing the impugned G.O. by way of a modification will definitely give to this Court a clear impression that the authorities have not acted with fair play and reasonableness and that they acted in a sudden moment, which would be construed as an arbitrary exercise of power.

9.3. Fair-play in decision making and Principles of natural justice :
9.3.1. It is true, the Government, under the relevant provisions of law, is empowered either to allow temporary waiver of cross subsidy surcharges or to cancel the same with a direction to TANGEDCO to collect the cross subsidy surcharges, by issuing suitable directions in that regard. It is also a matter of fact in the given situation as to what would be the hardship faced by them both technically and financially and the extraordinary circumstances regarding acute power shortage. Keeping all those aspects in mind, the Government has issued G.O.Ms.No.10, temporarily waiving cross subsidy surcharges, by virtue of which, the petitioners have got certain rights accrued on them. When that being so, when the Government resorts to change or modify the existing state of affairs, all the stakeholders in that regard need to be put to notice. In other words, when the petitioners are enjoying the benefit of G.O.Ms.No.10 for quite a long time, the Government, all-of-a-sudden, changed its earlier order by substituting the impugned G.O.Ms.No.79, thereby cancelling the waiver of cross subsidy surcharges, stating certain extraordinary circumstances viz., the TANGEDCO should always be in a position to provide a standby power to the HT consumers; the existing short term open access regulations and procedures facilitate the HT consumer to change over between the resources i.e., either from TANGEDCO or from outside sources; the consumption pattern of the HT consumers puts much hardships in the load forecasting and grid management; around 500 HT

consumers are purchasing power maximum to the tune of 460 MW during peak hours and around 250 MW round the clock from power exchanges and local generators and that if all the HT consumers tend to migrate to avail power from outside sources, the loss of revenue towards the waiver of cross subsidy surcharge at the present level of Tariff is estimated as Rs.200 to 250 crores for the period 2012-13.

9.3.2. Power shortage is a matter of concern both for the petitioner companies and also the public at large. Therefore, the Government may look into various factors including the public interest and come to a decision to change or modify the earlier decision giving waiver of cross subsidy surcharges. But, at the same time, more important is to look into the position that when the respondents are going in for a change, there must be a notice of hearing for the parties who are going to be affected by the said change.
9.3.3. A thorough reading of the order impugned would indicate that there was no notice of hearing for the parties or any of the stakeholders involved in the matter and the decision arrived at by the Government for cancellation of temporary waiver of cross subsidy surcharges is only on the basis of request by the second respondent/TANGEDCO. Though the impugned decision of the Government to take away the waiver of cross subsidy surcharge may be in larger public interest, the fact that the parties who are availing the benefit as a right of accrual must know for what reasons the said benefit is cancelled or modified, must not be forgotten.

9.3.4. Hence, the principle of natural justice is required to be followed by the Government by affording the persons who are going to be affected by its decision. In the absence of any such procedure, the impugned order of the first respondent cannot be sustained.

10. Conclusion :
10.1. In the light of my above discussion and having considered the earlier decision of the Government in waiving the cross subsidy surcharge and such a benefit having been accrued on the petitioners from the year 2009 on wards, it is to be concluded that the situation, which prevailed in the year 2009, is the same as on today, as stated in the impugned order. That apart, in the petition filed by TNEB in M.P.No.43 of 2008 before the Commission, the Board sought for temporary relinquishment of the right to levy Cross Subsidy Surcharge for a period of six months or till the situation is improved and R&C measures are withdrawn. Hence, in the absence of any improvement in the situation or withdrawing of restriction and control measures, the Government peremptorily took a decision to cancel the waiver of cross subsidy surcharge, which cannot be sustained. Though the Government is empowered to take any such decision in its wisdom and domain, the same is subject to judicial review and, therefore, the only aspect to be looked into is, the fair play and reasonableness under Article 14 of the Constitution. As could be seen from the records, the said founding principles of fair play and reasonableness on the aspect of audi alteram partem are given a complete go-by by the respondents before taking the decision. As such, to that extent, this Court finds infirmity in the order impugned of the first respondent.

10.2. Accordingly, the order impugned in G.O.(Ms) No.79, Energy (C.3) Department, dated 11.07.2012, of the first respondent, culminating in the Circular Memo of the second respondent vide No.CFC/Rev/FC/Rev/AS-3/D.No./12/dated 12.07.2012, is set aside, remanding the matter for fresh consideration to follow the principle of audi alteram partem, that is to say, to have the views of the petitioners and all other stakeholders in order to take a decision in accordance with law.

10.3. Writ Petitions are allowed accordingly. No costs. Consequently, the connected M.Ps. are closed.

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