

In the Appellate Tribunal for Electricity
New Delhi
(Appellate Jurisdiction)

Review Petition No. 17 of 2016
IN
Appeal No. 181 of 2015

Dated: 24th November, 2017

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member

In the matter of

**Byrnihat Industries Association,
13thMile, Tamulikuchi, Byrnihat,
Ri-Bhoi District, Nongpoh,
Meghalaya – 793101**

... Appellant

Versus

**i. Meghalaya State Electricity Regulatory
Commission
New Administrative Building, 1st Floor,
Left Wing, Lower Lachumiere,
Shillong- 793001,
Meghalaya**

...Respondent No.1

**ii. Meghalaya Power Distribution Company
Limited (MePDCL)
Integrated Office Complex, LumJingshai,
Short Round Road, Shillong- 793001
Meghalaya**

...Respondent No.2

Counsel for the Appellant(s) :

**Mr. Rajiv Yadav
Mr. Aamir Zafar Khan**

Counsel for the Respondent(s) :

**Mr. Buddy A. Ranganadhan
Mr. D.V. Raghu Vamsy
Ms. Aditi Sharma for R.1**

Mr. Sakie Jakharia for R.2

ORDER

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. This Review Petition is being filed by M/s Byrnihat Industries Association(hereinafter referred to as the “**Review Petitioner/Appellant**”) under Section 120 of the Electricity Act, 2003 (“ **the Act**”) for review of the judgment dated 26.05.2016 (“**Impugned Judgement**”) of this Tribunal passed in Appeal No. 181 of 2015 filed by the Appellant, on the issue that this Tribunal has dealt only one aspect of determination of Cross Subsidy Surcharge (“**CSS**”) and has not dealt with the other issues and contentions raised by the Appellant on CSS before this Tribunal.
2. This Tribunal vide judgement dated 26.5.2016 in Appeal No. 181 of 2015 has upheld the order dated 31.3.2015 (“**Impugned Order**”) passed by the Meghalaya State Electricity Regulatory Commission (hereinafter referred to as the ‘**State Commission**’) in Petition filed by Respondent No. 2 regarding Annual Revenue Requirement (ARR) and tariff of the Respondent No. 2 for the year FY 2015-16 and truing up exercise for the financials of the Respondent No. 2 for FY 2011-12.
3. This Review Petition is limited to the decision of this Tribunal upholding the decision of the State Commission on determination of CSS for the year 2015-16. The Review Petitioner has contended that it argued before this Tribunal and also made written submissions on

the nature and rationale of CSS and that CSS is compensatory in nature and not as a penalty on the Open Access Consumers.

4. We have heard at length the learned counsel for the Review Petitioner and learned counsel for the Respondents and considered their arguments and written submissions. Gist of the same is discussed hereunder;

a) The learned counsel for the Review Petitioner has made the following arguments, submissions for our consideration.

i. In terms of Section 42 (2) of the Act the purpose of CSS is to meet the current level of cross subsidy in the system. CSS is compensatory in nature and not a penalty on Open Access (OA) consumers.

ii. Hon'ble Supreme Court in its judgement in case of Sesa Sterlite v. Orissa Electricity Regulatory Commission (2014) 8 SCC 444 has reiterated and settled the rationale of CSS. The Hon'ble Court has held that CSS being compensatory in nature cannot be a penalty and cannot exceed the actual cross subsidy itself. CSS is to compensate for loss in recovery of cross subsidy to the licensee as against that category of consumer continued to take power from the licensee.

iii. The Review Petitioner has relied on the definition of the term 'compensation' in P Ramanatha Aiyar's The Law Lexicon which is reproduced below:

“ The expression ‘compensation’ means ‘just equivalent of what the owner has been deprived of; Jeejebhoy v Asst. Collector, Thana, AIR 1965 SC 1096

.....

The word ‘compensation’ connotes equivalency which adequately remunerates for a loss or deprivation, or for a service rendered, though under a statutory definition, it may indicate not what constitutes, but what by the Legislature is treated as equivalent. Commissioner of Income Tax v. Dr. Sham Lal Narula, AIR 1963 Pun 411, 414”

- iv. The State Commission in the Impugned Order has determined the cross subsidy of EHT consumers as 10% and HT consumers as 18%. The State Commission in the Impugned Order proceeded on the basis of Average Billing Rate (ABR) instead of tariff of that category which was challenged before this Tribunal and has been upheld by this Tribunal. On this basis the State Commission has determined Rs. 6.37/unit tariff for EHT, Rs. 6.86/unit tariff for HT consumers and overall ABR (cost of supply) of Rs. 5.78/unit. The cross subsidy calculated also uses these figures for working out cross subsidy percentage.
- v. In terms of above the cross subsidy for EHT consumers works out to 59 paise/unit and for HT consumers works out to 108 paise/unit which is difference between ABR (tariff) and cost of supply and it exactly meets the benefit of subsidy at 10% & 18% respectively against the cost of supply. This is the cross subsidy in the tariff which is at the maximum to be compensated by means of CSS as per

Sesa Sterlite judgement. In this background the determination of CSS at Rs 1.51/unit for EHT and Rs. 1.41/unit for HT is erroneous and is liable to be set aside for being penal in nature. There is no basis for CSS being determined at a substantially higher level than the cross subsidy which would result in CSS being penal in nature.

- vi. This Tribunal in the Impugned Judgement has erroneously observed that *“the State Commission has adopted the provisions of National Tariff Policy (“NTP”) and its formula for Cross Subsidy Surcharge (“CSS”) while deciding CSS amount for FY 15-16”*. The said premise of this Tribunal appears to be on the basis of observations of the State Commission in the tariff order to the effect that *“the Commission is following NTP formula for FY 2015-16”*. However, this is factually erroneous as the formula for calculation of CSS as per NTP has not been followed in the tariff order. The State Commission has also not put any calculations or analysis for computation of CSS based on NTP formula and directly concluded on the figures of CSS for EHT and HT consumers.

The formula provided in NTP under Clause 8.5.1 is as below:

$$S = T - [C (1 + L/100) + D]$$

Where S is the surcharge

T is the Tariff payable by the relevant category of consumers;

C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power

D is the Wheeling charge

L is the system Losses for the applicable voltage level expressed as a percentage

The Review Petitioner has alleged that the State Commission has wrongly computed the element 'C' of the formula by excluding power purchase from Agartala Gas Turbine Power Project which falls in highest 5% power purchase cost of the Respondent No. 2. Accordingly, the Review Petitioner has calculated 'C' as Rs. 4.07/unit instead of Rs. 3.97/unit calculated by the State Commission. The Review Petitioner has also submitted that the State Commission for computation of element 'T' has not taken into account the higher 'Load Factor' and 'Power Factor' that is typically maintained by the EHT/HT consumers. Considering 'C' and 'T' calculated by the Review Petitioner, it has arrived at CSS of Rs. 0.99/unit for EHT and Rs. 0.66/unit for HT consumers as against Rs. 1.51/unit for EHT & Rs. 1.41/unit for HT consumers computed by the State Commission.

- vii. On the issue of non-consideration of Load Factor for computation of 'T', the Review Petitioner has relied on the judgement dated 2.12.2013 of this Tribunal in case of Reliance Infrastructure Ltd. v. Maharashtra Electricity Regulatory Commission & Ors in Appeal No. 178 of 2011

wherein emphasis has been placed on consideration of Load Factor for determination of CSS as per NTP formula.

- viii. The above issue was also raised by the Appellant before this Tribunal in the Appeal and the same has not been dealt with and there is no finding of this Tribunal on this issue. The issue raised was that CSS being compensatory in nature can't be determined substantially higher than cross subsidy which would result in CSS being penal in nature.
- ix. The Review Petitioner has pleaded that an issue though raised having not been dealt with is an error apparent on face of the record and remedy in such cases is for review. Accordingly, it has preferred the present Review Petition before this Tribunal. Further, the State Commission and this Tribunal have dealt with the concept of ABR, but not have given any methodology or working how ABR is to be worked out and how the same would be tariff for the purpose of CSS determination. This Tribunal has also held that there are no computational details in the Impugned Order passed by the State Commission and the same have been upheld without examining the correctness of the same. This is also an error apparent on the face of the record. The Review Petitioner has denied that present petition is not an appeal in disguise.

- x. The State Commission's reliance on the judgement of this Tribunal in case of Indian Hotel and Restaurant Association v. MERC (Appeal No. 294 of 2013) is grossly misplaced as the same cannot be cited to bestow an 'extractive element' on CSS over and above compensatory element. The judgement in case of Indian Hotel has also been quoted out of context and is not applicable to present case.

- b) The learned counsel for the Respondents has made the following arguments, submissions for our consideration.
 - i. The Review Petition is not maintainable as the Review Petitioner is seeking rehearing on the issue of CSS in guise of this Review Petition. The proceedings in this petition is to be confined to the scope and ambit of Order 47 Rule 1 of the Code of Civil Procedure. The principles of a review have been detailed out in this Tribunal's judgement dated 17.11.2016 in RP No. 13 of 2016 in Appeal No. 244 & 246 of 2015 in case of Tata Power vs. MERC and the same can be relied. The State Commission has also relied on the judgement of Hon'ble Supreme Court in case of Kamlesh Verma v. Mayawati & Ors (2013) 8 SCC 320 which deals with the maintainability of a review.

 - ii. The Review Petitioner has not satisfied any ground which defines the scope of review of the Impugned Judgement and has failed to point out any error on the face of the

record and has also not shown any sufficient cause for review.

- iii. Even if CSS being compensatory in nature, this Tribunal has held that there is no principle that the CSS cannot be higher than cross subsidy. This Tribunal vide judgement dated 2.12.2013 in Appeal No. 178 of 2011 has held that CSS is not only to compensate the licensee for the loss of cross subsidy, it is also to compensate the remaining consumers of the licensee who have not taken OA. Further, this Tribunal vide judgement dated 26.11.2014 in Appeal No. 294 of 2013 and batch in similar circumstances where the appellants too argued that CSS cannot be more than cross subsidy has held that CSS can be higher than the cross subsidy.
- iv. The Review Petitioner has been repeatedly asking the State Commission to use the formula for computation of CSS as stipulated in National Tariff Policy (NTP). The State Commission has applied the same and now the Review Petitioner is contending that the same has been applied incorrectly. Further, the cross subsidy determined by the State Commission for EHT and HT consumers is within +/- 20% which is a statutory mandate. The CSS worked out is in accordance with the formula specified in the NTP and once it is done, it is covered under this Tribunal's judgement in case of Hotel and Restaurant Association which stipulates determination of CSS in accordance with law. The State Commission has applied

the NTP formula correctly and the elements of formula have been correctly used and the CSS so computed either high or low is immaterial.

- v. The issue of CSS being compensatory or penal is immaterial, as this Tribunal has decided the Appeal based on the submissions made by the parties during the hearing on which Impugned Judgement is passed. This Tribunal in the Impugned Judgement has held that the CSS is lower than cross subsidy of HT and EHT category and as such there is no question of it being penal in nature.

- vi. The State Commission in compliance to NTP has compared the tariff of different categories of consumers with average cost of supply (pooled cost of supply of energy received from different sources) to indicate that the limit of +/- 20% of tariff has been achieved in order to ascertain that tariff of particular category of consumer does not exceed 120% of the average cost of supply. The average cost of supply is not the same as cost of supply to a particular category of consumers. The Review Petitioner is calculating the difference between tariff realization from a particular category of consumer and cost of supply to that consumer. This is wrong and misleading and this cannot be used to calculate CSS. The Review Petitioner has sought to compare the ABR (tariff) of the category with the overall average billing rate to arrive at the figure of cross subsidy. Besides CSS is the difference between tariff applicable to the relevant category of consumers and that

of the cost of distribution to the consumers of the applicable class. The Review Petitioner has contended that cross subsidy is to be calculated on average cost of supply which is the average cost incurred by the licensee for diverse mix of consumers availing supply at different voltages and for different purposes. Accordingly, there is no basis at all to arrive at CSS of Rs 0.59/unit for EHT and Rs. 1.08/unit for HT categories of consumers as submitted by the Review Petitioner. The CSS determined by the State Commission is not penal in nature.

5. After having a careful examination of all the aspects brought before us in this Review Petition and perusal of Impugned Judgment dated 26.5.2016, we find that all the issues brought before us in this Review Petition have been dealt with in detail in our judgment dated 26.5.2016 and the Review Petitioner is trying to seek re-hearing/re-argue the original matter.
6. In this Review Petition the Review Petitioner has also presented another set of calculation of CSS for EHT/HT consumers but different from that submitted during the hearings in the Appeal. The same is compared as below:

Element of CSS		T	C	L	D	CSS
In Appeal	EHT	5.40	4.07	4%	0.73	0.4372
	HT	5.64	4.07	6%	1.24	0.0858
This Petition	EHT	5.95	4.07	4%	0.73	0.99
	HT	6.22	4.07	6%	1.24	0.66

The State Commission has used the value of 'T' as Rs. 6.37/unit for EHT and Rs. 6.86/unit for HT consumers and the value of 'C' as Rs. 3.97/unit for EHT and HT consumers for arriving at CSS. The Review Petitioner still seems to be confused about the calculations of the elements 'T' & 'C' used in calculation of CSS. By changing the value of 'T' now by the Review Petitioner it will lead to further increase in CSS as contended in the Appeal. However, the factual position remains same as during the course of hearing in the Appeal. This Tribunal based on the submissions made by the Appellant and the Respondents upheld the decision of the State Commission in calculation of CSS in the Impugned Order. The relevant para in the Impugned Judgement is reproduced below:

“20. On examining the submissions made by State Commission regarding computation of CSS and the relevant findings in its Impugned Order, we have found that the value of “T” and “C” as used by State Commission in its of the Impugned Order is in line with the formulation specified in the National Tariff Policy and the cross subsidy surcharge specified by State Commission as Rs. 1.51 per unit for EHT category and Rs. 1.41 per unit for HT category is in order.”

From the above findings of this Tribunal it is evident that this Tribunal before arriving at the above decision has examined in depth the submissions made by the State Commission and has found that value of 'T' & 'C' used in calculation of CSS is in line with NTP.

The said computed CSS by the State Commission based on the provisions of law can't be said to be penal in nature. The CSS is

compensatory in nature and is applicable to the relevant category of the consumers.

7. The Review Petitioner has also relied on various judgements of Hon'ble Supreme Court & this Tribunal and definition of 'compensation'. We have gone through the said judgements and we find that the judgements quoted by the Review Petitioner either already have been dealt with in the Impugned Judgement or do not have relevance based on the facts and circumstances of the case of the matter in hand.
8. Accordingly, the Review Petitioner has failed to establish any error apparent on the face of record or any sufficient reason necessitating the review of the Impugned Judgment. Hence, it is not possible for us to entertain this Review Petition. Accordingly, the Review Petition is dismissed.
9. Pronounced in the Open Court on this **24th day of November, 2017.**

(I.J. Kapoor)
Technical Member

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REPORTABLE/NON-REPORTABLE

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(Mrs. Justice Ranjana P. Desai)
Chairperson