

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

Appeal no. 181 of 2015

Dated: 26th May, 2016

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

In the matter of

- 1. Byrnihat Industries Association
13th Mile, Tamulikuchi, Byrnihat,
RiBhoi District, Nongpoh,
Meghalaya- 793101**

... Appellant

Versus

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

...Respondent No 1

- 2. Meghalaya Power Distribution Company Limited
Integrated Office Complex
LumJingshai, Short Round Road
Shillong- 793001
Meghalaya**

...Respondent No 2

**Counsel for the Appellant(s): Mr. M. G. Ramachandran
Mr. Anand K. Ganeshan
Mr. Sandeep Rajpurohit**

**Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Mr D.V. Raghu Vamsy for R-1**

**Mr. S. B. Upadhyay, Sr Adv.
Ms. Sakie Jakharia**

Mr. Kaustav P. Pathak
Mr. Anisha Upadhyay for R-2

JUDGMENT

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

1. The present Appeal is being filed by Byrnihat Industries Association (**hereinafter referred to as the “Appellant”**) under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 31.03.2015 passed by the Meghalaya State Electricity Regulatory Commission (**hereinafter referred to as the “State Commission”**) in the Petition filed by Respondent No. 2, Meghalaya Power Distribution Company Limited (hereinafter called **“Distribution Company”**) on 22.12.2014, whereby the State Commission has fixed the Annual Revenue Requirement (ARR) and tariff of the Respondent No. 2 for the year FY 2015-16 and also completed truing up exercise for the financials of the Respondent No. 2 for FY 2011-12.
2. The Appellant is a society registered under the Meghalaya Societies Registration Act, 1983 having its registered Office at Byrnihat, Ri-Bhoi District, Meghalaya. The Appellant was formed by the different industrial units for the welfare, better functioning of its units. The Appellant regularly participates in the proceedings related to determination of ARR and tariff by the State Commission and also takes up the other issues concerning its Members.

3. The Respondent No.1 is the Electricity Regulatory Commission for the State of Meghalaya exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.
4. The Respondent No.2 is the electricity Distribution Company in the State of Meghalaya and supplies power to the members of the Appellants Association.
5. Aggrieved by the Order dated 31.03.2015 passed by the State Commission, the Appellant has preferred the present appeal on following grounds:
 - a) The State Commission passed the Impugned Order on 31.03.2015 conducting the truing up for FY 2011-12 and passing on an additional financial burden of Rs. 85.53 crores to the consumers in the State without hearing any party on the aspect of truing up.
 - b) Completely erroneous calculation of the cross-subsidy surcharge without giving any computation but only the final number;
 - c) Non adherence to the loss reduction targets which had been set by the State Commission itself in the earlier years;
 - d) Allowing the Distribution Company to sell surplus power at Rs. 3.25 per Kwh even though the average cost of supply is more than that and passing on the burden of this exercise on to the consumers in the State.
 - e) Approving the Administrative & General Expenses at Rs. 55 crores including the pension payment;

- f) Wrong calculation of interest on loan for the control period i.e. 2015-16 to 2017-18 without the Distribution Company submitting the opening loan figure at the end of FY 2014-15;
- g) Wrong estimation of non-tariff income;
- h) Wrong recording that the Appellant objected to KVah Billing. The Appellant only stated that the effect of implementation of the KVah billing should reflect in the books of the Distribution Company;

6. Facts of the present Appeal:

- a) On 22.12.2014 the Distribution Company filed a petition for Annual Revenue Requirement (ARR) for MYT period 2015-16 to 2017-18 and seeking tariff determination for FY 2015-16.
- b) The State Commission admitted the ARR and tariff petition on 02.01.2015 and directed the Distribution Company to give public notice on the ARR and tariff petition.
- c) The Respondent No. 2 filed a petition for truing up of its financials for FY 2011-12 on 09.03.2015.
- d) The State Commission conducted a Public hearing on 9th and 10th March 2015 in respect of the Respondent No. 2's ARR and Tariff Petition. On the same day, the State Commission passed an Order admitting the Truing Up Petition for FY 2011-12 calling for replies within 10 days. For which the objections on the true up petition were filed by the Appellant on 07.04.2015.

e) The State Commission passed the Impugned Order on 31.03.2015 whereby conducting the truing up for FY 2011-12 in addition to the Tariff fixation for FY 2015-16 on 31.03.2015 without hearing any party on the aspect of truing up. Aggrieved by the Impugned Order dated 31.03.2015, the Appellant has filed this Appeal.

7. We have heard at length Mr. M G Ramachandran, the learned counsel for the Appellant and Mr. Buddy Ranganadhan, learned counsel for the State Commission and Mr. S. B Upadhyay, learned counsel for Respondent No. 2 and considered the arguments put forth by the rival parties and their respective written submissions on various issues identified in the present Appeal.

8. On the specific issues raised in the present Appeal, the learned counsel for the Appellant has made the following submissions for our considerations;

A. RE: TRUING UP OF FY 2011-12 WITHOUT PUBLIC NOTICE

The State Commission has acted in violation of Section 86 (3) of the Electricity Act, 2003 by not maintaining transparency in the process adopted by it for truing up of the financials of the distribution company for FY 2011-12. The additional financial burden on account of the truing up for FY 2011-12 passed on to the consumers in the State of an amount of Rs. 85.53 crores has been done by the State Commission without holding any hearing on the true up petition filed by the Respondent No. 2 or considering the comments of any of the stakeholders.

B. RE: CROSS SUBSIDY SURCHARGE

- i) The State Commission erred in determining the cross subsidy surcharge as Rs. 1.51 per unit for EHT consumers (132 KV) and Rs. 1.41 per unit for HT consumers (33 KV) for financial year 2015-16 without giving any computation or calculation in the Impugned Order, making the cross subsidy surcharge prohibitively high and making open access unaffordable for the members of the Appellant.
- ii) The State Commission has allegedly calculated the cross subsidy surcharge based on the formula mentioned in the National Tariff Policy, which is as under -

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

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

However, there is no clarity as to what are the figures which have been used by the State Commission in the formula mentioned in the National Tariff Policy which have led to the cross subsidy surcharge

being determined as Rs. 1.51 per unit and Rs. 1.41 per unit for EHT consumers and HT consumers respectively for FY 2015-16.

- iii) The Appellant has also computed the cross subsidy surcharge as per the formula mentioned in the National Tariff Policy. The details of the computation are as under –

(a) CALCULATION FOR EHT (132 KV)

'T' or the tariff determined by the State Commission is Rs.5.40/kwh

'C' or the Power purchase cost of top 5% costliest procurement which has been computed based on the approved cost of Rs.539.78 Cr towards purchasing of 2178 MU electricity and the Per Unit cost is coming Rs.4.07/kwh for top 5% costliest procurement of 108.9 MU as per Table 7.19 of the Impugned Order.

The system losses at 132 KV approved by the State Commission is 4%.

'D' or the wheeling charges qua the 132 KV consumers is the transmission charges as approved for the 132 KV system which works out to Rs. 0.73/Kwh as per Tariff Order dated 31/03/2015 passed by the State Commission for the transmission company.

Thus, the cross subsidy surcharge will be as under -

PARTICULARS	DESCRIPTION	132 KV
T	TARIFF	Rs. 5.4/kwh
C	POWER PURCHASE COST OF TOP 5%	Rs. 4.07/kwh
L	TRANSMISSION LOSS	4%
D	WHEELING CHARGE	Rs. 0.73/kwh
S	CROSS SUBSIDY SURCHARGE	Rs. 0.4372/kwh
	$S = T - [C (1 + L/100) + D]$	

As against the above calculation of Rs 0.4372 per unit, the State Commission has fixed the cross subsidy surcharge as Rs. 1.51 per unit.

(b) CALCULATION FOR HT (33 KV)

'T' or the tariff determined by the State Commission is Rs.5.64/kwh .

C' or the Power purchase cost of top 5% has been computed based on the approved cost of Rs.539.78 Cr towards purchasing of 2178 MU electricity and the Per Unit cost is coming Rs.4.07/kwh for top 5% costliest procurement of 108.9 MU.

The system losses at 33 KV as approved by the State Commission is 6%.

'D' or the wheeling charges qua the 33 KV consumers works out to Rs 1.24/Kwh

Thus, the cross subsidy surcharge will be as under –

PARTICULARS	DESCRIPTION	33 KV
T	TARIFF	Rs. 5.64/kwh
C	POWER PURCHASE COST OF TOP 5%	Rs. 4.07/kwh
L	TRANSMISSION LOSS	6%
D	WHEELING CHARGE	Rs. 1.24/kwh
S	CROSS SUBSIDY SURCHARGE	Rs. 0.0858/kwh
	$S = T - [C (1 + L/100) + D]$	

As against the above calculation of Rs 0.0858 per unit, the State Commission has fixed the cross subsidy surcharge as Rs. 1.41 per unit.

C. RE: DETERMINATION OF AT&C LOSSES FOR FY 2015-16

- (i) The State Commission, in the previous tariff orders had approved the following trajectory for loss reduction –

Particulars	2013-14	2014-15	2015-16
Distribution losses	25%	24%	23%
Commercial losses	1.50%	1.50%	1.50%
Collection efficiency	98.50%	99%	99.50%
AT&C losses	24.64%	21.79%	20.40%

However, while fixing the AT & C loss at 24.64% for the Respondent No. 2 for FY 2015-16, the State Commission has completely ignored the above trajectory and rewarded the Respondent No. 2 for not

adhering to the above. This approach is completely against the consumer interest

- (ii) The State Commission has ignored that it had directed the distribution company to reduce 1.5% of commercial losses each year which translates into 32 million units of additional sales which when multiplied by the average billing rate of Rs. 5.36 per unit leads to an additional revenue of Rs. 17 crores.

D. RE: REVENUE FROM SURPLUS ENERGY

- (i) The State Commission erred in assuming that the surplus energy with the distribution company will be sold at Rs. 3.25 per unit as against the average cost of supply which works out to Rs 5.78 per unit, leading to revenue from surplus energy of Rs. 186.5 crores.
- (ii) The State Commission failed to appreciate that the distribution company cannot be allowed to sell power at a rate lesser than the average cost incurred by it to supply power to all the consumers within the state. This would mean that the consumers in the State would be cross subsidising the sale of surplus power by the distribution company. This is only burdening the existing consumers and it would be better for the distribution company to surrender the surplus power rather saddle the consumers with the lower rates of revenue from sale of surplus power.

E. RE: ADMINISTRATIVE AND GENERAL EXPENSES (A & G EXPENSES)

- (i) The State Commission erred in allowing the pension payments as part of the A & G Expenses. The State Commission has in earlier tariff orders held that the terminal payment to be made is the responsibility of the State Government of Meghalaya and cannot be passed on to the consumers of the distribution company .
- ii) The State Commission has not appreciated that the payment of terminal benefits for pensioners/family pensioners is the responsibility of the pension trust or the Government of Meghalaya. Either the Trust should have been established or the State Government should have been made responsible for discharging the liability towards terminal benefits.

F. RE: NON TARIFF INCOME

The State Commission has erred in estimating the non-tariff income at only Rs. 58 crores without any basis, which is much lesser than the non tariff income even for the previous year. In the year 2012 - 13 the actual non tariff income was Rs. 78 crores and for FY 2011 -12 the same was Rs 110.74 crores. This has led to an under estimation of nontariff income and increase of the ARR which is being recovered from the consumers in the state through tariff.

G. RE: INTEREST ON LOAN

- i) The State Commission erred in approving the interest and finance charges as Rs 12.44 Cr, Rs 15.81 Cr and Rs19.17 Cr for FY 2015-16; FY 2016-17 and FY 2017-18 respectively while itself noting that the details of opening balance of loan are not in conformity with the submissions of the distribution company and no actual closing balance has been provided by the distribution company.

- ii) The State Commission in the absence of data has simply taken Rs. 92.74 crores as the opening balance of loan which will be closing balance of loan approved by the State Commission for FY 2014 - 15. However, even the said figure had been derived from the opening balance of loan for FY 2014 - 15 of Rs. 124 crores which was also an assumption having no factual basis. The consumers in the State cannot be asked to pay for the mistakes of the distribution company year on year and some correct methodology will have to be promulgated by the State Commission instead of proceeding on adhoc figures

H. RE: MERITS ON THE TRUING UP FOR FY 2011-12

- i) The State Commission has not even understood the concept of truing up in the proper perspective. The State Commission failed to appreciate that merely because the audited accounts indicate that expenses have been incurred is not a reason for allowing such expenses in the truing up proceedings. In this regard, the State Commission has failed to appreciate the ratio laid down by this Tribunal in various Judgments and culminated in the Judgment dated

13/01/2011 in Appeal No. 177 of 2009 (KSEB v KSERC) as under –

"20. At the outset; it shall be stated that the State Commission while examining the accounts is not bound by the audited . accounts. The, accounts may be genuine as per the Auditor's Report. But it is the State Commission which .has to examine the accounts to ascertain the performance of the licensee in relation to the desirability of the expenditure in the interest of the consumers. This point has already decided by the Judgment of this Tribunal in Appeal No. 94 of 2008 as well as the decision of Hon'ble Supreme Court in West Bengal Electricity Regulatory Commission vs; CESC Ltd. (2002) (8)SCC 715.

21. Let us refer to the relevant observations made by this Tribunal in Appeal No. 94 of 2008:

"In the truing up process the actual expenditures are examined and the expenditure with various heads are trued up. So far as the effect of audit concerned, it establishes the genuineness of accounts and expenditure incurred. The Commission has to allow only as much expenditure as pass through as meets the targets set by it or is found to be prudent and necessary"

22. This decision was given by this Tribunal on the strength of the ratio decided by Hon'ble Supreme Court We will now refer to the relevant observations made by the Hon'ble Supreme Court in the decision referred in (2002) (8) SCC 715.

"In this process, the Commission, in our opinion, is not bound by the Auditors' Report There may be any number of instances where an amount may be genuine and may not be questioned,

yet the same not reflect good performance of the company or may not be in interest of the consumers. Therefore, there is an obligation on the Commission to examine the accounts of the company which may be genuine and unchallenged on that count still in the light of the above requirements of Section 29(2) (g) to (h). In the said view of the matter admitting that there is no challenge to the genuineness of the accounts, we think on this score also the accounts of the company are not ipso facto binding on the Commission."

23. The above observations would reflect the ratio decided by Hon'ble Supreme Court. What is to be seen in this Appeal where each item of expenses allowed or disallowed by the State Commission is correct or not in the facts of the case and the materials placed before of the Commission."

- ii) The State Commission erred in merely allowing the expenses incurred under all heads including Repair & Maintenance Expenses, Administrative & General Expenses, Interest & Finance Charges etc only on the basis that the audited accounts reflect that such expenditure has been incurred. The incurring of an expenditure does not prove its prudence and the State Commission has to separately conduct a prudence check.
- iii) The State Commission failed to distinguish between controllable and uncontrollable factors in the truing up proceedings despite the State Commission notifying the Meghalaya State Electricity Regulatory Commission (Determination of Tariff) Regulations, 2011 Meghalaya State Electricity Regulatory Commission(Multi Year Tariff) Regulations, 2014 providing as under-

TARIFF REGULATIONS 2011 -

"15. Review and Truing-Up

- (1) The Commission shall undertake a 'Review' of the expenses and revenues approved by the Commission in the Tariff Order. While doing so, the Commission shall consider variations between approvals and revised estimates/pre-actuals of sale of electricity, income and expenditure for the relevant year and permit necessary adjustments / changes in case such variations are for adequate and justifiable reasons. Such an exercise shall be called 'Review"*
- (2) After audited accounts of a year are made available, the Commission shall undertake similar exercise as above with reference to the final actual figures as per the audited accounts. This exercise with reference to audited accounts shall be called "truing-Up".*
- (3) The generating company or the licensee, as the case may be, shall make an application before the Commission, for 'truing up' of ARR of the previous year by 30th September of the following year", on the basis of audited statement of accounts and the Audit Report, thereon. The generating company or the licensee shall get their accounts audited within a specified time frame, either by the Comptroller & Auditor General of India or by a Statutory Auditor drawn from the panel of Statutory Auditors approved by the Comptroller & Auditor General of India, from time to time, to enable them to file the application for 'truing up' within the specified date, that is 30th September of the following year.*

- (4) *In case the generating company or the licensee as the case may be, fails to make an application for truing-up of the ARR of previous year by 30th September of the following year, the Commission may, undertake suo-moto 'truing up' of the ARR of previous year and direct the generating company or the licensee as the case may be to produce such data as it may direct*
- (5) *The surplus of revenue of any year as a result of review and truing up exercises shall be adjusted in the manner prescribed by these regulations.*
- (6) *While approving such expenses/revenues to be adjusted in the future years as arising out of the review and / or truing up exercises, the Commission may allow the carrying costs as determined by the Commission of such expenses/revenues. Carrying costs shall be limited to the interest rate approved for working capital borrowings.*
- (7) *For any revision in approvals, the generating company or the licensee would be required to satisfy the Commission that the revision is necessary due to conditions beyond its control.*

MYT REGULATIONS 2014

"11 Truing Up

- 11.1 *Where the Aggregate Revenue Requirement and expected revenue from tariff and charges of a Generating Company or Transmission Licensee or Distribution Licensee is covered under a Multi-Year Tariff framework, then such Generating Company or Transmission Licensee or Distribution Licensee,*

as the case may be, shall be subject to truing up of expenses and revenue during the Control Period in accordance with these Regulations.

11.2 The Generating Company or Transmission Licensee or Distribution Licensee shall file an Application for Truing up of the previous year and determination of tariff for the ensuing year, within the time limit specified in these Regulations:

11.3 Provided that the Generating Company or Transmission Licensee or Distribution Licensee, as the case may be, shall submit to the Commission information in such form as may be prescribed by the Commission, together with the Audited Accounts including audit report , by CA&G, extracts of books of account and such other details as the Commission may require to assess the reasons for and extent of any variation in financial performance from the approved forecast of Aggregate Revenue Requirement and expected revenue from tariff and charges:

11.4 Provided further that once the Commission notifies the Regulations for submission of Regulatory Accounts applications for tariff determination and truing up shall be based on the Regulatory Accounts.

11.5 The scope of the truing up shall be a comparison of the performance of the Generating Company or Transmission Licensee or Distribution Licensee with the approved forecast of Aggregate Revenue Requirement and expected revenue from tariff and charges and shall comprise of the following:

a) a comparison of the audited performance of the applicant for the previous financial year with the approved forecast for such

previous financial year, subject to the prudence check including pass-through of impact of uncontrollable factors,'

- b) Review of compliance with directives issued by the Commission from time to time;*
- c) Other relevant details, if any.*

11.6 In respect of the expenses incurred by the Generating Company, Transmission Licensee and Distribution Licensee during the year for controllable and uncontrollable parameters, the Commission shall carry out a detailed review of performance of an applicant vis-a-vis the approved forecast as part of the truing up .

11.7 Upon completion of the truing up under Regulation 11.4 above, the Commission shall attribute any variations or expected variations in performance for variables specified under Regulation 12 below, to factors within the control of the applicant (controllable factors) or to factors beyond the control of the applicant (uncontrollable factors):

Provided that any variations or expected variations 'in performance for variables other than those specified under Regulation 12.1 below shall be attributed entirely to controllable factors.

12 Controllable and uncontrollable factors

12.1 For the purpose of these Regulations, the term "uncontrollable factors" shall comprise of the following factors, which were beyond the control of the applicant, and could not be mitigated by the applicant:

- a) Force Majeure events;*

- b) *Change in law, judicial pronouncements and Orders of the Central Government, State Government or Commission;*
- c) *Variation in the price of fuel and / or price of power purchase according to the FPPPA formula approved by the Commission from time to time;*
- d) *Variation in the number or mix of consumers or quantities of electricity supplied to consumers:*
- e) *Provided that where there is more than one Distribution Licensee within the area of supply of the applicant, any variation in the number or mix of consumers or in the quantities of electricity supplied to consumers within the area served by two or more such Distribution Licensees, on account of migration from one Distribution Licensee to another shall be attributable to controllable factors:*

Provided further that if any consumer or category of consumers within the area of supply of the applicant is eligible for open access under subsection (3) of Section 42 of the Act, then any variation in the number or mix of such consumers or quantities of electricity supplied to such eligible consumers shall be attributable to controllable factors,'

- f) *Transmission loss*
- g) *Variation in market interest rates;*
- h) *Taxes and Statutory levies;*
- i) *Taxes on Income:*

Provided that where the applicant or any interested or affected party believes, for any variable not specified above, that there is a material

variation or expected variation in performance for any financial year on account of uncontrollable factors, such applicant or interested or affected party may apply to the Commission for inclusion of such variable at the Commissions discretion, under this Regulation for such financial year,

12.2 Some illustrative variations or expected variations in the performance of the applicant which may be attributed by the Commission to controllable factors include, but are not limited to, the following:

- a. Variations in capitalisation on account of time and/or cost overruns/ inefficiencies in the implementation of a capital expenditure project not attributable to an approved change in scope of such project, change in statutory levies or force majeure events;*
- b. Variation in Interest and Finance Charges, Return on Equity and Depreciation on account of variation in capitalisation as specified in clause (a) above;*
- c. Variations in technical and commercial losses of Distribution Licensee;*
- d. Variations in performance parameters;*
- e. Variations in working capital requirements;*
- f. Failure to meet the standards specified in the Meghalaya State Electricity Regulatory Commission (Standard of Performance) Regulations, 2012, except where exempted in accordance with those Regulations;*
- g. Variation in operation & maintenance expenses;*

h. Variation in Wires Availability.

2 Though the above Regulations were notified for the subsequent period, the principle to be followed in truing up remains to be the same.

I) RE: KVAH BILLING

The State Commission erred in recording in the Impugned Order that the Appellant objected to KVAh billing. The Appellant only stated that since in the State of Meghalaya KVAh billing had been implemented for so many years, the effect of it must be reflected in the books of the Distribution Company. However, the effect and impact of KVAh billing is not clear and the Distribution Company must be directed to place on record the effect of such a change in the methodology in billing.

9. QUESTIONS OF LAW

As per the Appellant, the following questions of law arise in the present appeal:

- a. Whether the State Commission has followed Section 86 (3) of the Electricity Act, 2003 of ensuring transparency in truing up of financials of the Distribution Company for FY 2011-12 without there being any public notice and public hearing on the said petition?**
- b. Whether the State Commission is correct in making the true up proceedings mechanical by simply allowing the claims of the Distribution Company on all aspects based on the**

Statement of Accounts?

- c. Whether, in truing up proceedings, the State Commission is not mandated to go into controllable and uncontrollable parameters and give reasons for allowing additional expenses except that such expenses have been incurred by the Distribution Company?**
 - d. Whether a statutory authority such as the State Commission acted in a proper manner by handing over a copy of the truing up petition to the Appellant in the public hearing on the tariff petition on 09/03/2015 and calling for comments and thereafter decide the true up petition unilaterally and without considering the objections of the Appellant?**
 - e. Whether the State Commission can simply determine the cross subsidy surcharge at Rs. 1.51 per unit for EHT and Rs. 1.41 per unit for HT stating that the formula in the National Tariff Policy has been followed but without giving any details whatsoever and without there even being a computational table?**
10. Though several distinct issues have been raised by the Appellant in the Appeal as above, however, during the course of proceedings before us, we observed that the issue of determination of Cross Subsidy Surcharge (CSS) for EHT (132 KV) consumers and HT (33 KV) consumers applicable for the FY 2015-16 as notified by the State Commission in the Impugned Order is the main issue under dispute. The issue thus emerged for our consideration is as below:

Whether the State Commission can simply determine the cross subsidy surcharge at Rs. 1.51 per unit for EHT and Rs. 1.41 per unit for HT stating that the formula in the National Tariff Policy has been followed but without giving any details whatsoever and without there even being a computational table?

11. The learned counsel for the Appellant has made following arguments in addition to those mentioned above on the issue of Cross Subsidy Surcharge for our consideration
 - a. The State Commission has claimed in the Impugned Order that it has calculated the cross subsidy surcharge based on the formula mentioned in the National Tariff Policy, which was being demanded by the open access consumers and the Appellant before the State Commission for the past several years.
 - b. However, there is no clarity as to what that the figures which have been used by the State Commission in the formula mentioned in the National Tariff Policy which have led to the cross subsidy surcharge being determined as Rs. 1.51 per unit for EHT and Rs. 1.41 per unit for HT.
 - c. As per Appellant's calculations, the cross subsidy surcharge has been claimed as three times for EHT (132 KV) and multiple times for HT (33 KV) of what it actually should be and the open access consumers are suffering hugely because of this erroneous calculation.
 - d. The State Commission has taken the position that 'T' would include both demand and energy charges and therefore, the Appellant's computation is wrong. In the computation of the

Appellant, the demand charges were not included as a part of 'T' as in Meghalaya, at the relevant time, open access consumers were required to surrender the existing contract demand to the extent of the open access quantum. Even if demand charges are factored in the computation of 'T', the cross subsidy surcharge calculation cannot be possible to the extent stated by the State Commission.

- e. The calculation given by the State Commission is wrong and misleading since the State Commission has taken the Average Billing Rate of Rs. 6.37 per unit for EHT consumers and Rs. 6.86 per unit for HT consumers. Further, the top 5 % power purchase cost taken by the State Commission at Rs. 3.97 per unit is also wrong. The correct figure is Rs. 4.07 per unit.
- f. The State Commission cannot follow a hybrid methodology, namely follow the National Tariff Policy formula, but take the Tariff or 'T' as the Average Billing Rate.

12. The learned counsel for the State Commission has made following arguments on the issue of Cross Subsidy Surcharge for our consideration;

- a) That the mere fact that the computation of cross-subsidy surcharge is not detailed in the Impugned Order, does not mean that there is no computation or that the computation is incorrect. In the impugned Order, the Respondent Commission has detailed its philosophy for determining the cross-subsidy surcharge, and has stated that the calculation has been done in accordance with the Formula stipulated in the Tariff Policy. The Respondent Commission has computed the cross-subsidy

surcharge correctly, in accordance with the Formula stipulated in the Tariff Policy, as explained below:

The Formula for computing cross-subsidy surcharge, as stipulated in the Tariff Policy, is as under:

$$\text{CSS} = T - [C * (1 + L/100) + D]$$

Where,

- CSS is the Cross Subsidy Surcharge for the relevant year
- T is the Tariff payable by **the relevant category of consumers for the relevant year;**
- C is the weighted average cost of power purchase of the top 5% at the margin, excluding liquid fuel-based generation and renewable power for the relevant year
- D is the Wheeling Charge for the relevant year
- L is the system Losses for the applicable voltage level, expressed as a percentage. "

b) The computation of cross-subsidy surcharge in accordance with the above Formula is explained below:

Particulars	Description	Units	(132 kV)	(33 kV)
T	Tariff (equivalent to ABR)	Rs/kWh	6.37	6.86
C	Power Purchase Cost of Top 5%	Rs/kWh	3.97	3.97
L	Loss	%	4%	6%
D	Wheeling Charge	Rs/kWh	0.73	1.24
S	Cross-subsidy Surcharge	Rs/kWh	1.51	1.41

- c) Each of the elements of the formula have been drawn from the approved numbers in the Tariff Order itself.
- The value of "T" being the Average Billing Rate (ABR) is to be considered.

- The value of "C" is derived from the approved Power Purchase stack as contained in the Tariff Order as per Table 7.19 of the Order).
 - There is no dispute on the other elements of "L" and "D".
 - As can be seen from the above computation, the Respondent Commission has correctly computed the cross subsidy surcharge for EHT consumers and HT consumers.
- d) Further, it is submitted that the Appeal of the Appellant is founded on two completely incorrect premises, namely:
- i. The CSS is computed for the Appellant and not for the "category of consumers"; and
 - ii. The "T" in the Tariff policy formula is only the variable charge and does not include the fixed charge. This is clear from the Appeal where the Appellant has taken the "T" (Tariff) as Rs 5.40 for EHT which is only the variable charge and that too in Rs/KVAh not Rs/KWH. The same has been done for HT consumers as well. This is a fundamental and incurable error in the appeal.
 - iii. The Appellant has, in its Rejoinder (and in its submissions), sought to get over this error by now adding the variable charge of Rs 5.40 with the derivation of the fixed cost of Rs 0.24 (Demand Charge) into kwh on the basis of a Power Factor of 1 to arrive at its effective tariff. This is equally fundamentally erroneous for two reasons, namely:-
 - a) The variable charge is in "KVA", not in "Kwh". The fixed charge is derived in "KWh". There can be no conceivable basis for arithmetically adding a "KVA" number with a "KWh" number; and

- b) The Appellant has proceeded on a Power Factor of 1. This is equally fundamentally erroneous since the "T" under the Tariff Policy Formula is tariff for the category of consumers not for an individual consumer. Simply because the Appellant's Power Factor is 1, that does not mean that the same Power Factor of 1 holds good for the category as a whole.
- iv. It is the settled law of this Tribunal that the CSS under the National Tariff Policy Formula has to be computed on the basis of "T" being the Average Billing Rate for the category of consumers. In the Tariff Policy Formula, 'T' is the Tariff payable by the relevant category of consumers. The Tariff has two components, viz., Fixed/Demand charge and Energy Charge, and hence, for the purpose of calculating the cross-subsidy surcharge, the Respondent Commission (as well as other Regulatory Commissions around the country) are considering the Average Billing Rate in Rs/KWh terms for the respective category as 'T', as it reflects the effective combination of fixed/demand and energy charges payable by that category of consumers.

This is necessary for a different reason as well. Though the other components of the Formula, viz., power purchase cost, Wheeling Charges, etc., have been considered in Rs/kWh terms. It is only obvious that the element "T" has to be taken in Rs/KWh. This is possible for the "category of consumers" only when the ABR for the category is taken.

- v. This has been elaborately explained and settled by the Appeal No. 178 of 2011 decided vide judgment dated 02.12.2013 titled Reliance Industries Ltd v/s Maharashtra Electricity Regulatory Commission. The relevant portion is extracted hereunder:-

" .. 8. We shall now take up each of the above issues one by one. Before we attempt to address each of the above issues, it would be profitable to explain the steps that are required to be taken to fix the Tariff and CSS. These are:

- **Category wise expected sale** to each of the category of consumer is estimated on the basis of previous year consumption and CAGR computed using historical data.
- Sum of expected category wise sale is the total sale of power by the Distribution Licensee during the year. Let it be 'SoP'.
- Estimated transmission and distribution losses are added to total sale of power to consumers. Let it be 'PP'.
- Cost of power purchase is calculated on the basis of tariff for each of the sources available and selected based on merit order to meet the power purchase requirement of Distribution Licensee. Let it be 'CoPP',
- Other elements of tariff such as RoE, Interest on loan, Interest on working capital, O&M charges, Depreciation etc are also determined on the basis of norms specified in relevant regulations. Sum these charges is Wheeling Charges. Let these be 'WC'
- Sum of power Purchase cost (CoPP) and Wheeling Charges (WC) is the ARR of the Distribution Licensee.
- **Since category wise sale of power has already estimated, expected revenue from such sale is estimated from current tariff. Let it be 'RCT' (Revenue from current tariff).**
 - Difference between ARR and RCT is the gap in revenue.
 - The GAP so arrived at is filled up by redesigning the category wise tariff.
 - **CSS is the difference between the tariff for category of consumer and the cost of supply. CSS is determined by using the figures of Tariff (T) for the year in question and cost of power purchase (C) in that year.**

- *Tariff of subsidising consumers is generally in two parts i. e. fixed charges and energy charges. Therefore, the term tariff is the effective tariff for that category of consumers.*
- *Since fixed charges remain constant irrespective of consumption by the consumer, the effective tariff varies and gets reduced with increase in consumption as can be seen from following illustration:*
 ...
 ...
- *Let us assume fixed charges at Rs 200 per kVA of contract demand and energy charges at Rs 5 per unit. Effective tariff for a consumer having*
- **Effective tariff shown in last col is also known as Average Billing Rate (ABR) for that particular consumer. ABR for a consumer category is determined by dividing total expected revenue from the category by total expected sale to that category** (Tribunal's judgment dated 30.5.2011 in Appeal No. 102 of 2010 and Batch-Odisha case). Mathematically, it can be represented as:

ABR of a category of consumer = Total Expected Revenue from a category/Total Sale of power to that category."

- e) The Appellant has sought to distinguish the aforesaid judgment as having been delivered in the peculiar facts of that case. For this purpose, the Appellant seeks to rely on paras 44, 45 and 46 of the said judgment. The said submission is completely erroneous since:-
- i) The aforesaid para 8 of that Judgment has explained the principle and laid down its dicta as a principle to be followed. The principle of ABR is not dependent upon the findings of fact in that case.
 - ii) The aforesaid para 8 was specifically rendered, in the words of this Tribunal, " .. Before we attempt to address each of

the above issues .. ". Hence the said principle laid down was the fundamental principle of CSS determination in the light of which the issues raised in that matter on the peculiar facts therein were decided.

- iii) The only effect of the peculiarity of the facts of that case was on what value is to be ascribed to "T" in the computation of ABR. Not on whether "T" is the ABR or not.
- iv) This is eminently clear from para 45 of the Judgment itself (which the Appellant itself relies on). The said para reads as under:-

*".. 45. While passing the tariff order for FY 2009-10 the State Commission must have the figures for expected revenue from every category and sale to such category. The State Commission was expected to use the figures approved in the tariff order for the FY 2009-10 to arrive at **Average Billing Rate or effective Tariff** during the relevant year . . . "*

- v) The said portion makes it clear that even on the facts of that case, what was directed to be done was to arrive at the Average Billing Rate or Effective Tariff. This is further re-affirmed in paras 46 and 47 of the said Judgment.
- f) The Appellant has also sought to contend, relying on the Sesa Sterlite Vs OERC Judgment ([2014] 8 SCC 444) of the Hon'ble Supreme Court that since CSS was a compensatory charge, the CSS could not be more than the Cross Subsidy (CS) of that category. The said submissions are also wrong, inter alia, since:-

- i. Factually, the CSS in this case is lower than the Cross Subsidy of the HT and EHT category;
- ii. There can be no quarrel with the proposition that CSS is a compensatory charge to the Discom (as held by the Hon'ble Supreme Court). In fact, that principle had been accepted even by the Tribunal, in several judgments earlier. However, as has also been held by this Tribunal, CSS is not only to compensate the Discom for the loss of cross subsidy, it is also to compensate the remaining consumers of the Discom who have not taken open access. This has also been so held in the aforesaid Judgment dt 2-12-2013 in Appeal No. 178 of 2011 (supra) in "Summary of Findings" Para II, in the following terms:-

*" . . . If The contention of the State Commission that Tariff Policy provide that the CSS should not be so enormous to suffocate the Competition is misplaced. The Act mandated the State Commission to determine the CSS to meet the requirement of current level of cross subsidy. **We have to keep in mind that the CSS is paid by the subsidizing consumers only. This Tribunal in catena of cases has held that CSS is compensatory in nature. It is meant for to compensate the loss suffered by the remaining subsidized low-end consumers.** Thus, in the scenario of mass changeover of consumers, the CSS has also to be such that exodus of subsidizing consumers does not load the remaining low end consumers heavily. **The State Commission has to balance the interest of all the consumers, the plea taken by the State Commission in Appeal No. 132/2011 and accepted by this Tribunal in its judgment.** The above submission of the State Commission also suggests that it has attempted to suppress the CSS artificially ... "*

- iii. In another Judgment dated 26-11-2014 in Appeal No. 294 of 2013 and batch titled Indian Hotels and Restaurant Assn Vs MERC at para 43-45 thereof, this Hon'ble Tribunal has held that the CSS can be higher than the CS in the following terms:-

other than power purchase are generally included in the Wheeling Charges. The Cross Subsidy Surcharge then computed

" ...43. Fixed costs of the Distribution Licensees other than power purchase are generally included in the Wheeling Charges. The Cross Subsidy Surcharge then computed using the Tariff Policy formulae would not thus include such fixed costs. However, in case, the Wheeling Charges do not contain certain fixed cost of the distribution licensee then the same gets recovered by way of Cross Subsidy Surcharge as in the Tariff Policy Formula. The wheeling charges are to be subtracted from the tariff payable by various categories of consumers which include such fixed costs. The State Commission, in fact adopted the Cross Subsidy Surcharge formula specified in the tariff policy. Therefore, such fixed cost is recovered through Cross Subsidy Surcharges instead of wheeling charges. Since the fixed cost of distribution licensee other than power purchase cost would be recovered by the Distribution Licensee either by way of wheeling charges or Cross Subsidy Surcharges, therefore, as per the tariff policy, the additional surcharge is limited to stranded cost of power purchase only otherwise it would amount to double recovery of fixed cost from the migrating consumers.

44. Where the cross subsidy surcharge is higher than the cross subsidy, it is a result of the reflection of such fixed costs in the tariff.

45. It is true that there may be cases where the cross subsidy surcharge is lower than the cross subsidy. Such a situation would arise when the marginal cost of power purchase is higher than the sum of the other costs . . . "

Interestingly, this finding was rendered in that case where the argument of the Appellants there too was that CSS is a compensatory charge for the Discom and CSS cannot be higher than CS.

- f) On the Appellants issue of a high level of CSS, this Tribunal in Appeal No. 294 of 2013 and batch titled Indian Hotels and Restaurant Assn V s MERC decided vide judgment dated 26.11.2014 and para 60 of the same being relevant is reproduced below;

" .. 60. The above observation of this Tribunal would indicate that if the exercise of determination of Cross Subsidy Surcharge is in accordance with the law, then the consequences are irrelevant The law requires the payment of cross subsidy surcharge which has been determined in accordance with the law ... "

- g) It is further submitted that the Appellant has been repeatedly asking for application of the Tariff Policy Formula for computation of the cross-subsidy surcharge, and when the Respondent Commission has adopted the Formula for the current year in question, the Appellant is attempting to calculate the cross-subsidy surcharge incorrectly, as the correct calculation is resulting in a higher cross-subsidy surcharge. Such an approach ought not to be allowed.

13. The learned senior counsel for the Respondent No 2 has made following arguments on the issue of Cross Subsidy Surcharge for our consideration.

The primary grounds on which the Appellant has challenged the Cross-Subsidy Surcharge as determined in the Impugned Order is :-

- a) That the State Commission has erred in determining cross subsidy surcharge in view of the following:

For EHT Consumers:

- (i) It is the contention of the Appellant that the factor "T" being Tariff, that ought to have been considered in the formula for cross subsidy surcharge were as follows: Rs 5.4/KVAH (Energy Charge) instead of Rs. 6.37/ kWh (Average Revenue) as considered by the State Commission.
- (ii) It has been further contended that the factor C being the Power Purchase Cost of Top 5% ought to be 4.07
- (iii) Effectively the Cross Subsidy Surcharge for EHT Consumers ought to have been 0.4372 instead of Rs. 1.51 per unit as determined by the State Commission.

For HT Consumers

- i. It is the contention of the Appellant that the factor 'T' being Tariff, that ought to have been considered in the formula for cross subsidy surcharge were as follows:
- ii. Rs 5.64 per KVAH (Energy Charge) instead of Rs. 6.86 /kWh (Average Revenue) as considered by the State Commission.
- iii. It has been further contended that the factor C being the Power Purchase Cost of Top 5% ought to be 4.07
- iv. Effectively the Cross Subsidy Surcharge for EHT Consumers ought to have been 0.0858 instead of Rs. 1.41 per unit as determined by the State Commission.

- b) It is pertinent that the question before this Tribunal is only limited as to what ought to be the value of 'T' and 'C' in determination of cross subsidy surcharge as per National Tariff Policy i.e. **“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. ”

"On the issue of factor T"

- i. It is submitted that the value of T as applied in the Impugned Order in determination of Cross Subsidy Surcharge is as approved in the said Impugned Order (Table 7.58)
- ii. The State Commission has computed T on the basis of average billing rate of the consumer category which is based on the principle explained in details in this Tribunal's Judgment dated 2.12.2013 in Appeal no. 178 of 2011. It is pertinent that the methodology specified in the said order was in fact a principle laid down for arriving at factor "T" in determination of Cross Subsidy Surcharge.
- iii. It is further pertinent to submit here that contrary to the submissions of the Appellant, the Cross Subsidy Surcharge in the present case is lower than the Cross Subsidy of HT and EHT

consumers and hence no case of onerous or excessive Cross Subsidy has been made out.

"On the issue of value of C"

- i. The value of 'C' as applied in the impugned order in determination of Cross Subsidy Surcharge is as approved in the said Impugned Order (Table 7.19)
- ii. In this regard the Appellant has sought to supply its own computation of factor "C" .
- iii. In its own calculation of the Appellant, 5% of the total energy volume is 108.9 MU

Approved Power Purchase Volume	2178	MU
Approved Power Purchase Cost	539.78	Rs in Cr.
5% of total energy volume	108.9	MU

Thereafter the Appellant proceeded to calculate top costliest sources by taking into account 5% of the costliest sources of power as indicated in said Table 7.19 of the Impugned Order. The calculation of the Appellant is erroneous as:

The Appellant has taken into account energy volume from AGTPP C-cycle which is contrary to the formula in the tariff policy which provides the following in relation to factor "C"

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

- iv) Therefore in order to consider the top 5 % at the margin only the weighted average cost of top 108.9 MU of the following sources is to be considered as indicated below:

Name of Source	Average Cost	Volume	Amount
	Rs/kWh	MU	Rs. Cr
Doyang HEP	4.47	23	10.27
NTPC Farakka	3.93	28	11.01
Kahalgaon I	3.91	15	5.87
Kahalgaon II	3.76	42.90 (approved volume 75)	28.18
Total		108.9	43.27
Weighted Average	Rs 3.97/kwh		

Therefore, neither of the contentions of the Appellant regarding the factor 'T' nor factor 'C' are sustainable and has no merit at all.

- c) During the pendency of this present Appeal, the Appellant filed an application for early hearing on 9.02.2016 stating therein that the main grievance of the Appellant in the present appeal is, wrong calculation of cross subsidy surcharge for financial year 2015-16 without giving any computation or calculation in the Impugned order.

The specific ground for early hearing as stated therein is:

"12. However, the Appellant and its members are suffering month on month because the open access consumer are being billed the cross subsidy surcharge at Rs. 1.51 per unit (EHT) instead of 44 paise, and Rs. 1.41 per unit (HT) instead of 9 paise (approximately)."

This submission was made completely ignoring the order dated 8.01.2016 passed by the Hon'ble Supreme Court in CA No. 181 of 2016 where the Appellant was directed to deposit payment towards Cross Subsidy Surcharge, which payment was subject to the outcome of the Appeal pending before the Hon'ble Supreme Court.

d) In this context the following factual matrix is relevant:

Date	EVENT
31.03.2015	The impugned order was passed by State Commission for ARR of Distribution & Retail Tariff for FY 2015-16. In the said Impugned Order, State Commission has determined cross subsidy surcharge in accordance with the formula provided in the National Tariff policy
30.05.2015	The present Appeal was filed by Byrnihat Industries Association / Appellant)
02.07.2015	The High Court of Meghalaya passed Judgment in Writ Petition no. 356/2012 titled Byrnihat Industries Association & Anr. Vs. State of Meghalaya where the Answering Respondent was Respondent no. 3. In the said Writ Petition the Appellant / Petitioner therein had challenged the legality of Regulation 23 (Wheeling Charges) and Regulation 24 (Cross Subsidy Surcharge) of the Meghalaya State Electricity Regulatory Commission (Terms & Conditions of Open Access) Regulations, 2012 (hereinafter "MSERC

Open Access Regulation") as well as consequential tariff order dated 21.08.2012 passed by the State Commission. Regulation 24 on Cross- Subsidy Surcharge and the order dated 21.08.2012 were challenged on the basis that the formula specified in the National Tariff Policy was not followed.

The Hon'ble High Court of Meghalaya passed the Judgment dated 2.07.2015 in the Writ Petition 356 of 2012 wherein the Hon'ble High Court held the following:

"26. For the foregoing discussions, this Court is of the considered view that the members/ industrial units of the petitioner association are not liable to pay cross-subsidy surcharge in the given case and also that Regulations 23 and 24 of the impugned MSERC (Terms and Conditions of Open Access) Regulations, 2012 and the impugned subsequent tariff order dated 21.8.12 are liable to be quashed and set aside. Thus Regulations 23 and 24 of the MSERC (Terms and Conditions of Open Access) Regulations, 2012 and the subsequent tariff order dated 21.08.2012 are hereby quashed and set aside. For the ends of justice, cross- subsidy surcharge paid under the MSERC (Terms and Conditions of Open Access) Regulations, 2012 and the said tariff order dated 21.08.2012 by the members of the petitioner association from the date of filing this writ petition i. e. December, 2012 be refunded to the respondents within a period of six months from the date of receipt of a certified copy of this judgment and order or the amount of

	<i>cross-subsidy surcharge collected from the members of the petitioner association from the date of filing of this writ petition which are to be refunded under this judgment and order may be adjusted to the future tariff i. e. electricity tariff to be paid by the members of the petitioner association in installment. "</i>
Aug 2015	<i>State Commission challenged the said Judgment dated 2.07.2015 before the Hon'ble Supreme Court by way of Special Leave Petition bearing no. 31390/15.</i>
08.01.2016	<p>The Supreme Court after granting leave was pleased to pass the following. orders in the said SLP 31390 of 2015:</p> <p><i>"Impugned Judgment and order challenged in this appeal is stayed during pendency of the appeal. The concerned authorities are permitted to collect the cross subsidy surcharge from first respondent Members under the Impugned Regulations if the distribution licensee will be in a position to supply power to first respondent in accordance with the National Electricity Policy and the National Tariff Policy. First Respondent Members are directed to deposit payment towards the cross subsidy surcharge, which payment shall be subject to outcome of the instant appeal. If the challenge made by the appellant fails, then the amount that will be paid by the first respondent members shall be returned to it with commercial rate of interest @15% per annum. "</i></p>

27.01.2016	<p><i>In compliance with the said order dated 8.1.2016 of the Hon'ble Supreme Court the Answering Respondent raised Cross subsidy surcharge against the Appellant Association members in terms of the impugned order of the State Commission by way of bills for the period June, 2015 upto December, 2015.</i></p>
01.02.2016	<p><i>Instead of paying the said bills, the Appellant herein filed a clarification application before the Hon'ble Supreme Court in Civil Appeal 181 of 20 15 (earlier SLP no. 31390115) praying inter alia for stay of the bills dated 27.01.2016 issued by the Answering Respondent on the following incorrect averments/grounds:</i></p> <p><i>“4. Therefore, the Hon’ble Supreme Court permitted the authorities to collect the cross subsidy surcharge under the Impugned Regulations if</i></p> <p><i>(a) The Licensee will be in a position to supply power;</i></p> <p><i>(b) The cross subsidy surcharge is in accordance with the National Tariff Policy and National Electricity Policy;</i></p> <p><i>5. Pursuant to the above and in utter disregard of the above, the Respondent no. 4 has raised bills pertaining to cross subsidy surcharge on the members of the Respondent No.1 Association for the past period, without regard to the fact that the Respondent no. 4 was not always in a position to supply and that the surcharge calculation was not in terms of the National Tariff Policy and National Electricity Policy. The bills relating to the period from</i></p>

	<i>June 2015 to December 2015 are dated 27.01.2016 and prescribe the due date for payment as 8.02.2016."</i>
09.02.2016	<i>Simultaneously, the Appellant filed an application for early hearing in the present Appeal before this Tribunal for early disposal of the Appeal stating that the main grievance of the Appellant in the present Appeal is that of wrong calculation of Cross subsidy surcharge and that the members of the Appellant are suffering month on month because the open access consumers are being billed cross subsidy surcharge at Rs. 1.51 per unit (EHT) instead of 44 paise, and Rs. 1.41 per unit (HT) instead of 9 paise.</i>
19.02.2016	The Answering Respondent No 2 herein filed a detailed reply to the allegations in the Clarification Application of the Appellant filed in CA 181 of 2016 before the Hon'ble Supreme Court establishing the position that the Answering Respondent has been power surplus since 2013 contrary to the allegations of the Appellant.
22.02.2016	In view of the above, the Clarification Application of the Appellant was dismissed as not pressed, vide order dated 22.02.2016 of the Hon'ble Supreme Court.

- e) In the present Appeal, the Appellant has also pleaded that the Cross subsidy surcharge is prohibitively high and is making open access

unaffordable for the members of the Appellant. It is pertinent to submit in this regard that Cross-subsidy surcharge bills have been raised by the Answering Respondent pursuant to the Hon'ble Supreme Court order dated 8.01.2016 in CA no. 181/2015 and if the Appellant had any grievance against the said order of the Hon'ble Supreme Court, then the Hon'ble Supreme Court itself should have been approached which is already seized of the matter. The issue before this Tribunal is only in relation to the correctness of the computation of the Cross subsidy Surcharge under the Impugned order and as such the scope of the challenge cannot be enlarged in any manner whatsoever before this Tribunal.

- f) It is also relevant to mention that out of 5 members of the Appellant Association, one member has already paid the Cross-subsidy surcharge amount and has been availing open access, two have captive generators and two others have come forward for settlement of the Cross Subsidy bills and the payment has been allowed in instalments subsequent to which one of them has paid the instalment amount and is availing open access as on day.
- g) Besides the said members of the Association are enjoying several concessions under various Central Government and State Government Scheme, for instance, Central Government Subsidy Scheme, 2007, Central Interest Subsidy Scheme, 2007, Meghalaya Industrial Policy, 1997 etc. for establishing industries in the State.
- h) Even otherwise without prejudice it is submitted that on the issue of

cross-subsidy surcharge this Tribunal in its earlier judgment has categorically held the following in a bunch of titled Mumbai Grahak Panchayat vs. Maharashtra Electricity Regulatory Commission & ors in Appeals no. 294 of 2013 by judgment dated 26.11.2014 as :

"60. The above observation of this Tribunal would indicate that if the exercise of determination Cross Subsidy Surcharge is in accordance with the law, then the consequences are irrelevant. The law requires the payment of cross subsidy surcharge which has been determined in accordance with the law. "

14. After having a careful examination of all the issues brought before us as above on the issue of Cross Subsidy Surcharge for our consideration, our observations are as follows:-

15. Reliance has been made by the parties on the relevant provisions of the National Electricity Policy and National Tariff Policy related to Cross Subsidy Surcharge.

We are, therefore, going through the relevant provisions of the National Electricity Policy notified on 12th February, 2005. The para 5.4.5 of the **National Electricity Policy** makes it mandatory for SERCs to notify Regulations for introducing Open Access in Distribution. The SERCs were also directed to determine Cross Subsidy Surcharge as required under section 42 of the Electricity Act 2003. The para 5.4.5 of the National Electricity Policy states as follows;

*“5.4.5 The Electricity Act 2003 enables competing generating companies and trading licensees, besides the area distribution licensees, to sell electricity to consumers when open access in distribution is introduced by the State Electricity Regulatory Commissions. As required by the Act, **the SERCs shall notify regulations** by June 2005 that would enable open access to distribution networks in terms of sub-section 2 of section 42 which stipulates that such open access would be allowed, not later than five years from 27th January 2004 to consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one mega watt. Section 49 of the Act provides that such consumers who have been allowed open access under section 42 may enter into agreement with any person for supply of electricity on such terms and conditions, including tariff, as may be agreed upon by them. While making regulations for open access in distribution, **the SERCs will also determine wheeling charges and cross-subsidy surcharge as required under section 42 of the Act.**”*

Further , the para 5.8.3 of the notified **National Electricity Policy** specifies the purpose of levy of Cross Subsidy Surcharge i.e. to compensate the host distribution licensee serving such consumers who are permitted open access under section 42(2) of the Electricity Act 2003, for loss of the cross-subsidy element built into the tariff of such consumers. The relevant extract of the para states as –

*“5.8.3 Under sub-section (2) of Section 42 of the Act, a **surcharge is to be levied** by the respective State Commissions on consumers switching to alternate supplies under open access.*

This is to compensate the host distribution licensee serving such consumers who are permitted open access under section 42(2), for loss of the cross-subsidy element built into the tariff of such consumers. An additional surcharge may also be levied under sub-section (4) of Section 42 for meeting the fixed cost of the distribution licensee arising out of his obligation to supply in cases where consumers are allowed open access. **The amount of surcharge and additional surcharge levied from consumers who are permitted open access should not become so onerous that it eliminates competition that is intended to be fostered in generation and supply of power directly to consumers through the provision of Open Access under Section 42(2) of the Act. Further it is essential that the Surcharge be reduced progressively in step with the reduction of cross-subsidies as foreseen in Section 42(2) of the Electricity Act 2003.”**

In the foregoing Para 5.8.3 of the National Electricity Policy, we have observed that there is clear direction that the amount of the Cross Subsidy Surcharge should not prohibit use of Open Access and there should be gradual reduction in such surcharge with reduction in cross subsidies to promote competition.

16. Now let us go through relevant provisions of the National Tariff Policy notified on 6th January, 2006.

The para 8.5 of the **National Tariff Policy** specifies the methodology or the formula for calculation of Cross Subsidy Surcharge for relevant category of consumer who wants to avail open access. The relevant

provision of the para 8.5 of the National Tariff Policy is reproduced below:

“8.5 Cross-subsidy surcharge and additional surcharge for open access

8.5.1 National Electricity Policy lays down that the amount of cross-subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access.

*A consumer who is permitted open access will have to make payment to the generator, the transmission licensee whose transmission systems are used, distribution utility for the wheeling charges and, in addition, the cross subsidy surcharge. **The computation of cross subsidy surcharge, therefore, needs to be done in a manner that while it compensates the distribution licensee, it does not constrain introduction of competition through open access.** A consumer would avail of open access only if the payment of all the charges leads to a benefit to him. While the interest of distribution licensee needs to be protected it would be essential that this provision of the Act, which requires the open access to be introduced in a time-bound manner, is used to bring about competition in the larger interest of consumers.*

Accordingly, when open access is allowed the surcharge for the purpose of sections 38,39,40 and sub-section 2 of section 42 would be computed **as the difference between (i) the tariff applicable to the relevant category of consumers and (ii) the cost of the distribution licensee to supply electricity to the consumers of the applicable class.** In case of a consumer opting for open access, the distribution licensee could be in a position to discontinue purchase of power at the margin in the merit order. Accordingly, the cost of supply to the consumer for this purpose may be computed as the aggregate of (a) the weighted average of power purchase costs (inclusive of fixed and variable charges) of top 5% power at the margin, excluding liquid fuel based generation, in the merit order approved by the SERC adjusted for average loss compensation of the relevant voltage level and (b) the distribution charges determined on the principles as laid down for intra-state transmission charges.

Surcharge formula:

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

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”

17. Here in the present Appeal against the Impugned Order, the two aspects on the issue regarding determination of Cross Subsidy Surcharge have been brought-out for consideration:

- a) The State Commission while issuing the Impugned Order has identified Cross Subsidy Surcharge without giving any computation or calculation, making the cross subsidy surcharge prohibitively high and making open access unaffordable for the members of the Appellant.
- b) The submissions made by the Appellant and the State Commission regarding calculation of Cross Subsidy Surcharge have variance on two factors i.e. "T"- the Tariff payable by the relevant category of consumers and "C"- the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power.

Now in the light of the National Electricity Policy and the National Tariff Policy as discussed above, we would be analysing both the above aspects;

On the first aspect regarding not providing any computation or calculation in the Impugned Order, we would like to refer to the Impugned Order Chapter 9 "Wheeling Charges and Cross subsidy for FY 2015- 16" and the relevant extract of the same is reproduced below;

"Cross Subsidy Surcharge:

Under the law and also the OA Regulations (regulation 24) an open access consumer shall, in addition to transmission and wheeling charges, also pay cross subsidy surcharges on per unit basis for

actual energy through open access. The amount of surcharge so calculated to meet the current level of cross subsidy from that category of consumer and shall be paid to the distribution licensee. The intent of the EA 2003 is also that the licensee is compensated for the requirement of cross subsidy in its ARR. It is necessary to subsidize the other category of consumer of the distribution licensee as there is no other mean to do so. The State Government in its letter dated 31.03.2015 addressed to the Commission has made it clear that it does not contemplate to extent any tariff subsidy to any class of consumers. The control period in the ARR has overall surplus in availability of power due to new allotments of power stations from central as well as new generation projects within the State. In this scenario it is essential to charge open access consumers the cross subsidy so as to meet the current requirement of the cross subsidy for majority of consumers of the State i.e. domestic, lifeline, crematorium and agriculture. In past 2 years the consumption by industries has gone down substantially. In this situation there is a need to recover cross subsidy from open access consumers. In the past it has been experienced that the open access has facilitated open access consumers to get round the clock power supply. The Commission cannot ignore the present scenario where the major category is in the subsidized domestic category, BPL and the agriculture sector. In the event of no subsidy from the State Government as stated above in 2015-16, the need and interest of common man cannot be overlooked. Even at present IHT and IEHT consumers of the distribution licensee are subsidizing large number of consumers of the State by paying cross subsidy in their tariff. The Commission has given serious thought and is convinced that it is essential that cross subsidy is charged from open access consumers

and if further required to levy additional surcharge too. At different occasions and in written submissions industry association demanded that cross subsidy surcharge should be decided as per NTP follow formula. **Ideally the cost of supply should be determined at weighted average cost of power purchase instead top 5% most expensive power as the licensee has to meet its long term commitments as per PPA.** However, the Commission is following NTP formula for FY2015- 16.

The formula for assessing the cross subsidy surcharge as per the Tariff Policy issued by Government of India is given below:

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

Where S is the cross subsidy 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;

and L is the system losses for the applicable voltage level, expressed as a percentage.

By using this formula, the cross subsidy surcharge for EHT category of consumers shall be Rs. 1.51 per unit for EHT category and Rs. 1.41 per unit for HT category.

The losses for EHT category is allowed @ 4% and for HT category at @ 6% for 33 KV and @9% for 11 KV.

These rates shall be applied w.e.f 1.4.2015. All conditions for open access shall be as per MSERC (terms and condition of open access) Regulations 2012 and its amendments. It is further directed the SLDC in association with MNREDA shall apply RPO compliances for meeting purchase of energy/ REC from solar and non solar sources

as per MSERC (Renewable purchase obligations and compliance) Regulations 2015.”

It is clear from the above 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 despite raising an observation that -

“...Ideally the cost of supply should be determined at weighted average cost of power purchase instead top 5% most expensive power as the licensee has to meet its long term commitments as per PPA”.

However the computation for the same is not available in the Impugned Order.

On the second aspect regarding different interpretation of the numbers used for arriving the Cross Subsidy Surcharge as per the formula identified in the National Tariff Policy, the State Commission has submitted in its written submissions that the computation of cross-subsidy surcharge in accordance with the National Tariff Policy formula is as below:

Particulars	Description	Units	(132 kV)	(33 kV)
T	Tariff (equivalent to ABR)	Rs/kWh	6.37	6.86
C	Power Purchase Cost of Top 5%	Rs/kWh	3.97	3.97
L	Loss	%	4%	6%
D	Wheeling Charge	Rs/kWh	0.73	1.24
S	Cross-subsidy Surcharge	Rs/kWh	1.51	1.41

18. The Cross Subsidy Surcharge is the difference between the tariff for category of consumer and the cost of supply. CSS is determined by using the figures of Tariff (T) for the relevant category of consumer for the year in question and cost of power purchase (C) of top 5% at margin excluding liquid fuel based and renewable power in that year.

It is observed that Appellant has made reliance on the Table 8.2 of the Impugned Order i.e. "Category of consumer wise tariffs approved by the Commission" and used approved Energy Charge of Rs 5.40/KVAH as the Tariff for computation of Cross Subsidy Surcharge.

19. In the National Tariff Policy formula, "T" is the Tariff payable by relevant category of consumers. The Tariff has two components viz. Fixed/ Demand charge and Energy charge and hence, for the purpose of calculating cross- subsidy surcharge, the State Commission has considered Average Billing Rate in Rs/ KWh for the respective category as "T" as it reflects the effective combination of fixed/demand and energy charges payable by that category of consumers. We are in agreement with the formulation of the State Commission for using Average Billing Rate for a consumer category to be used while determining Cross Subsidy Surcharge.
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.

21. Since we have found that the Cross Subsidy Surcharge has been determined by the State Commission as per the formula stipulated in the National Tariff Policy using the factors “T” and “C” appropriately, hence we do not find any error in determination of the CSS by the State Commission in its Impugned Order. However we would like to put a remark on this count that the State Commission should have brought out detailed calculations/computations regarding computation of the Cross Subsidy Surcharge for EHT and HT categories in the Impugned Order itself which would have facilitated better appreciation by all the stakeholders and avoided the apprehensions in the minds of the stakeholders.

ORDER

We are of the considered opinion that there is no merit in the present Appeal and the Appeal is hereby dismissed. The Impugned Order dated 31.03.2015 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **26th day of May, 2016.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

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REPORTABLE/~~NON-REPORTABLE~~

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