IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 71 OF 2015

Dated: 2nd March, 2016

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

IN THE MATTER OF

M/s Sai Regency Power Corporation Private Limited
Office No. 3, 2nd Floor, Crown Court,
128, Catherdral Road,
Chennai-600084 ..... **Appellant**

VERSUS

1. **Tamil Nadu Generation and Distribution Corporation Ltd.**
No. 144, Anna Salai,
Chennai-600 002

2. **Tamil Nadu Electricity Regulatory Commission**
No. 19-A, Rukmani Lakshmipathy Salai,
Egmore, Chennai-600 008 ..... **Respondents**

Counsel for the Appellant ... Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Counsel for the Respondent(s)... Mr. G. Umapathy
Mr. S. Vallinayagam for R-1

Mr. T. Mohan for R-2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. The instant Appeal under Section 111 of the Electricity Act, 2003, has been preferred by M/s Sai Regency Power Corporation Private Limited (in short, the **'Appellant'**), against the Impugned Order, dated 11.12.2014, passed by the Tamil Nadu Electricity Regulatory Commission (in short the '**State Commission**') in Petition No. SMT Order No. 9 of 2014, whereby the

State Commission has, on the suo-moto basis, approved the Annual Revenue Requirements (ARR) and determined the retail supply tariff of the Tamil Nadu Generation and Distribution Corporation Limited, the Respondent No. 1 herein, as payable by the consumers in the State of Tamil Nadu w.e.f. 12.12.2014.

2. According to the Appellant, the State Commission has, in the impugned order, classified the requirement of start-up power for generating stations under HT-V category, which is the highest category for consumers including temporary supply. The generating stations have been treated as the least priority consumers whereas, the generating stations are to be given benefits and treated as essential services. Further, the State Commission, while allowing the drawal of start-up power for only 42 days in a year, has not allowed the proportionate recovery of demand charges for such 42 days and made the recovery of demand charges for the entire year. Further, the State Commission has also proceeded to increase the cross subsidy in the system, contrary to the very objective and specific provisions of the Electricity Act, the National Tariff Policy and the consistent judgments of this Appellate Tribunal.

3. The Appellant is a generating company having established a 58 MW gas based generating station at Kalugurani village, in the district of Ramanathapuram in the State of Tamil Nadu. The Respondent No. 1 is the successor entity of the erstwhile Tamil Nadu Electricity Board. The Respondent No.1 was formed and vested with the functions of generation, distribution and retail supply of electricity pursuant to the re-organization of the erstwhile Tamil Nadu Electricity Board under Section 131, 132 etc. of the Electricity Act, 2003.

4. The Respondent No.2 is the Electricity Regulatory Commission for the State of Tamil Nadu exercising powers and discharging functions under sections 61, 62, 64 & 86 and other provisions of the Electricity Act, 2003.

5. The relevant facts for the purpose of deciding this Appeal, are as under:

(a) that the Respondent No. 1 is regulated by the State Commission for its generation, distribution and retail supply activities within the state of Tamil Nadu. The tariff recoverable is to be determined by the State Commission from time to time under various provisions of the Electricity Act, 2003 read with the Regulations framed by the State Commission there-under;

(b) that the Appellant supplies electricity to captive consumers and third parties from its generating station, through open access. The Appellant is connected to the state grid and has obtained open access through the state transmission and distribution system for supply of electricity to its consumers;

(c) that the Appellant, being connected to the State grid, draws electricity from the state grid for its start up requirements. For the same, the Appellant has a contract demand of 1625 KVA contracted with the Respondent No. 1;

(d) that while under Section 64 of the Electricity Act, the Respondent No. 1 is required to file a tariff application with the State Commission for determination of tariff, the Respondent No. 1 has over the years been reluctant to file its tariff application and in many occasions filed it with substantial delays. The previous tariff order, prior to the impugned order, was passed by the State Commission on 20.6.2013 as applicable for the period from 21.6.2013. The tariff order was passed by the State Commission for the year 2013–14, however, the same was passed only in the month of June 2013 and applied from 21.6.2013;

(e) that for the year 2014–15, the Respondent No. 1 did not file any petition for determination of tariff before the State Commission. The Respondent No. 1 was required to file the tariff petition by 30.11.2013 to enable the State Commission to determine the tariff on or before 1.4.2014 to be applicable from 1.4.2014. In

view of the failure on the part of the Respondent No. 1 to file a tariff petition, the State Commission initiated a suo-motu exercise for determination of tariff of the Respondent No. 1, inviting objections and suggestions from the public at large for the determination of tariff of the Respondent No. 1;

(f) that by the impugned order, dated 11.12.2014, the State Commission has determined the retail supply tariff of the Respondent No. 1 for the year 2014–15 and has made the same applicable with effect from 12.12.2014. In the said order, the State Commission has categorized start-up supply in the highest tariff bracket and the drawal has been restricted to 42 days. However, the demand charges have been levied in a disproportionate manner and for the entire year.

6. We have heard Mr. Anand K. Ganesan, learned counsel for the Appellant, Mr. G. Umapathy, learned counsel for the Respondent No.1 and Mr. T. Mohan, learned counsel for the Respondent No. 2 and gone through the written submissions filed by the rival parties. We have deeply gone through the material available on record including the impugned order passed by the State Commission.

7. The following issues arise for our consideration in this Appeal:

(A) Whether the State Commission has increased the cross-subsidies for the Appellant's category contrary to the provisions of the Electricity Act, 2003, the National Tariff Policy and consistent decisions of this Appellate Tribunal?

(B) Whether the State Commission has erred in not reducing the demand charges payable by the Appellant and similarly placed consumers, who are restricted in using start up power only for 42 days in a year?

(C) Whether the State Commission has failed to determine the voltage wise cost of supply and tariff in violation of the directions issued by this Appellate Tribunal and the position in law settled by the Hon'ble Supreme Court?

(D) Whether the Appellant has been placed in a residual category – Temporary Tariff along with other consumers deemed unwanted, with the highest tariff?

OUR ISSUE-WISE CONSIDERATIONS ARE AS FOLLOWS:

8. **ISSUE (A) : INCREASE IN CROSS SUBSIDY:**

8.1 On this issue, the following submissions have been made on behalf of the Appellant:

(a) that the Electricity Act 2003 was enacted to reorganize electricity sector and to ensure that the distribution licensees (then Electricity Boards) function in an efficient manner. In fact, one of the reasons given in the Statement of Objects and Reasons to the Electricity Act is that the cross subsidies had reached unsustainable levels which was required to be rectified. The current level of cross subsidy would be gradually phased out;

(b) that merely because suo-motu revision of tariff has been undertaken by the State Commission, the necessity to comply with tariff setting regulations does not get eliminated as tariff could be fixed only after proper scrutiny and prudence check of various parameters that are required to be submitted by the Distribution Licensee. In the absence of ARR and other reliable data, the tariff fixation can only be based on assumptions.

(c) that Section 61(g) provides that the tariff should progressively reflect the cost of supply. Further, the cross subsidies shall be progressively reduced and eliminated;

(d) that by the amendment of the Electricity Act in the year 2007, the word '*eliminate*' was removed and the said sections provided that the cross subsidies and also the surcharge shall be reduced;

(e) that the Government of India has also framed and notified the National Tariff Policy under Section 3 of the Electricity Act. The same was notified on 6.1.2006 and in terms thereof, the cross subsidies were to be brought within the level of ±20% of the average cost of supply by the year 2010–2011 for which a roadmap was to be notified by the State Commission;

(f) that the issue of cross subsidies and the reduction of cross subsidy have been previously raised before this Appellate Tribunal in many appeals. This Appellate Tribunal has consistently held that under the Electricity Act 2003, the cross subsidies have to be necessarily reduced and, in any case, there cannot be an increase in cross subsidy;

(g) that far from reaching the level of 120% of the average cost of supply by the year 2010–11, in the previous tariff order, dated 20.6.2013, passed by the State Commission, the cross subsidy for the Temporary tariff was fixed at 222%. The State Commission was already in violation of the mandate under the Electricity Act, wherein, even in the year 2013, the cross subsidy was much higher than 120% of the average cost of supply;

(h) that by the impugned order, the State Commission rather than reducing the cross subsidy, has proceeded to increase the same from 222% to 249%, which is clearly contrary to the provisions of the Electricity Act, 2003, the National Tariff Policy and the decisions of this Appellate Tribunal;

(i) that the Appellant is not even questioning any of the costs and expenses of the Respondent No. 1 and is assuming the same to be correct. Even based on the data furnished by the Respondent No. 1 and as decided by the State Commission, there is a substantial increase in the cross subsidy i.e. from 222% to 249%;

(j) that the very object of the Electricity Act is to ensure that the consumers are not unnecessarily burdened and the distribution licensees operate in an efficient manner. Further, in case any particular category of consumers are to be provided with a lower tariff, the decision is to be taken by the State Government under Section 65 of the Electricity Act, 2003 provided the State Government furnishes the entire subsidy in advance. Cross subsidy is not a manner for funding of the inefficiencies in the system and to lower the tariff for some consumers. Hence, the impugned order of the State Commission in increasing cross subsidy from 222% to 249% for temporary tariff is bad in law and is liable to be set-aside.

8.2 ***Per contra,*** the following submissions have been made on behalf of the Respondent/State Commission on this issue:

(a) that it is true that as per National Tariff Policy, tariff for any category of consumer has to be fixed at ±20% of average cost of supply. At the same time, the National Electricity Policy provides for reducing the cross subsidies progressively and gradually. The gradual reduction is envisaged to avoid tariff shock to the subsidized categories of consumers. The tariff for agriculture which was Rs.250/HP/per annum in the year 2010 was increased to Rs.1750/HP/per annum in the year 2012 and, further, increased to Rs.2500/HP/per annum in 2013. In the impugned order, the same was fixed as Rs.2875/HP/per annum. Therefore, the effective increase in tariff in respect of agriculture in the above period of 5 years i.e. from 2010 to 2015 is 1050%. Similarly, for Hut category, the tariff which was Rs.10/service/per month in the year 2010 was increased to Rs.60/service/per month in the year 2012. It was, further, increased Rs.120/service/per month in the year 2013. In the impugned order, the tariff was increased to Rs.145/service/per month. The effective increase in respect of Hut category in a

period of 5 years i.e. from 2010 to the impugned order in 2015 is 1350%. Therefore, it can be understood that the State Commission is consciously addressing the issue of cross-subsidy by increasing the tariff for subsidized categories. The power-loom consumers are treated as poor and low income group and the tariff in respect of power-loom consumers is maintained at 107% i.e. above cost of supply and the tariff has been gradually increased even for the domestic category of consumers.

(b) that, now, in the impugned order, 15% increase is effected across the board to all categories of consumers. As the tariff for the Appellant was not revised in the last year, effective rate of increase is only 7.2% on a year on year basis but, for the subsidized categories like agriculture and hut, last year also, the tariff was revised to the extent of 43% and 108%. In the impugned tariff order, the increase in agriculture and hut was t the extent of 15% and 16% respectively.

(c) that the allegation of the Appellant that the cross subsidy has been raised from 222% to 249% in respect of the Appellant category is wrong. The actual position is that the cross subsidy level for this category of consumer was around the same percentage from the previous tariff order issued during 2013-14. The cross subsidy level in the previous order is 204%, whereas, in the impugned order it was at 203%. Hence, the State Commission is addressing for reduction of cross subsidy surcharge and the same is done progressively too whenever tariff order is issued. The reduction in cross subsidy in respect of the subsidizing category is duly addressed and the same will be done over a period of time.

8.3 **Our consideration and conclusion on Issue-A**:

(a) We have considered the rival contentions of the parties on this issue of increase in cross-subsidy. We do not find any merit in any of the contentions of the Appellant because the State Commission, while passing the impugned order, has given categorical and cogent reasons on this issue. We have been emphasizing the State Commission to atleast make an endeavor to reduce the level of cross subsidy at ±20% and the State Commission appears to have been working towards that aspect. It is true that the Electricity Act and National Tariff Policy provide for reducing cross subsidy within the level of ±20% and the average cost of supply by the year 2010-11 for which a roadmap is required to be invited by the State Commission. The State Commission has narrated the circumstances and the condition under which the cross subsidy increased from 222% to 249% in the impugned order. We do not find any perversity or illegality in the impugned order on the point that the cross subsidy has increased from 222% to 249% in respect of the Appellant's category because the State Commission has been consciously addressing the issue of cross subsidy by increasing tariff for subsidized categories. The actual position, so far as the increase in the cross subsidy from 222% to 249% in respect of the Appellant's category is concerned, is that the cross subsidy level for this category of consumers was around the same percentage of the previous tariff order issued during 2013-14. The cross subsidy level in the previous tariff order was 204% whereas, in the impugned order, it is 203%. The State Commission assured that it will be making an effort in bringing down the cross subsidy to the level of ±20% over a period of time. **In view of this, the Issue No. (A) is decided against the Appellant.**

9. **ISSUE (B): <u>NON-REDUCTION OF DEMAND CHARGES</u>:**

9.1 On this issue, the following submissions have been made on behalf of the Appellant:

(a) that the State Commission, while placing generating stations in the HT-V (Temporary Supply) category for start-up power requirements, has placed restrictions on the total number of days during which start up power can be drawn;

(b) that while all the other consumers in the said category have no restriction on the number of days for which electricity can be drawn during the year, there is a specific restriction on generating companies from drawing more than 42 days;

(c) that, even if, there is drawal for a few minutes in a day, it is counted as one full day;

(d) that while placing restrictions on the drawal of electricity from the grid for only 42 days, the Appellant is, however, required to pay the demand charges for the entire year and there is no reduction in demand charges provided to the Appellant;

(e) that the other consumers in the same category, who do not have any restriction on the number of days for drawal of electricity, are placed in the same position as the Appellant who has a restriction of drawal of electricity only for 42 days during the year;

(f) that while the demand charges are payable for the entire year as a whole, as in the case of other consumers, the demand charges for generating companies should be proportionately reduced to be applied only for 42 days in a year as against 365 days;

(g) that the issue of proportionate reduction in demand charges is well settled. As held in Northern India Iron & Steel Co. vs. State

of Haryana & Ors. (1976) 2 SCC 877 wherein the Hon'ble Supreme Court was interpreting the entry in the tariff schedule (Clause f(f) providing for proportionate reduction in demand charges holding as under:

> *"8. Under clause 4(f) the consumer is entitled to a proportionate reduction of demand charges in the event of lockout, fire or any other circumstances considered by the supplier beyond the control of the consumer; that is to say, if the consumer is not able to consumer any part of the electric energy due to any circumstance beyond its control and which is considered by the Board to be so, then it shall get a proportionate reduction in demand charge. The circumstance of power cut which disable the Board to give the full supply to the appellant because of the government order under Section 22B of the 1910 Act, undoubtedly would be a circumstance which disabled the consumer from consuming electricity as per the contract. And this was circumstance which was beyond its control and could not be considered otherwise by the Board. It entitled the consumer to a proportionate reduction of the demand charges. This interpretation of sub-clause (f) of clause 4 of the tariff was accepted to be the correct, legal and equitable interpretation on all hands. In our opinion it is so. In a circumstance like this, it is plain, the obligation of the consumer to serve at least 3 days' notice on the supplier as per the latter part of the sub-clause (f) was not attracted, as the requirement of notice was only in the case of shutdown of not less than 15 days' duration."*

(h) that, further, this Appellate Tribunal in the case of Indian Tea Association & Ors vs Assam State Electricity Regulatory Commission & Ors, 2007 APTEL 611, has held that it was necessary to have a target availability in dealing with levy of demand charges and there ought to be proportionate reduction in demand charges for non-availability of system and power supply by the distribution licensee;

(i) that when the obligation of the Respondent No.1 to supply power to the generating companies is restricted only to 42 days in a year (even few minutes in a day counted as one full day),

there ought to be a proportionate reduction in the demand charges payable by the Appellant. In other words, the Appellant who is prohibited from using electricity from the Respondent No. 1 for more than 42 days as against other consumers in the same category who can consume for the entire year, there ought to be a proportionate reduction in demand charges payable.

(j) that in any event, at the very least there ought not to be any demand charges payable for the months in which there is no drawal of electricity by the Appellant. Even if there is no proportionate reduction in demand charges for the generating companies as against other consumers, the demand charges ought to be levied only for those months when the Appellant has actually drawn electricity.

9.2 ***Per contra,*** on this issue, the following arguments have been made on behalf of the Respondent/State Commission:

(a) that the collection of demand charges for start-up power in full has been in vogue since the issue of Tariff Order in 2013 which has not been challenged. Therefore, the Appellant cannot now seek to challenge the same;

(b) that the Appellant has the option to employ the diesel sets for the purpose of start-up power if at all he wants to avoid payment of demand charges in full. The concept of monthly minimum charges which is synonymous with demand charges has already been upheld by this Appellate Tribunal in Appeal No. 257 of 2012;

(c) that the collection of demand charges in full is justifiable on the ground that the distribution licensee is also paying demand charges to the transmission licensee on the installed capacity. Hence, the Appellant is liable to pay the demand charges, when

the distribution licensee itself is paying the demand charges to the transmission licensee. The total transmission charges payable by TANGEDCO to TANTRANSCO is in the order of Rs. 1,692 crores for the financial year 2014-15;

(d) that the National Tariff Policy has endorsed the concept of grid support charges which is synonymous with the start-up power. Since, the Appellant has not challenged the Intra-State Open Access Regulations of the Commission in regard to the start-up power but has chosen to challenge the consequential order arising out of the same. Regulation 25 of the Grid Connectivity and Intra State Open Access Regulations, 2014 places the start-up power on par with the grid support charges and the clause No. 8.56 of the National Tariff Policy also specifically states that standby arrangements, namely; the grid support should be provided by the licensee on payment of tariff for temporary connection. A cogent reading of clause No. 8.5.6 of the National Tariff Policy and regulation No. 9.7 of the repealed Open Access Regulations, 2005 of the State Commission and Regulation 25 of the Grid Connectivity and Open Access Regulations, 2014 would make it clear that there is a statutory sanction for billing for start-up power under the tariff applicable to temporary service connection;

(e) that, as far as the temporary supply is concerned, even the subsidized consumers are treated as subsidizing consumers and the tariff order does not accord any discriminatory treatment among various consumers in respect of temporary supply but for a very marginal difference in the tariff. Therefore, the issue of cross subsidy raised by the Appellant to support the case is devoid of merits. Further, having failed to challenge the regulation 9.7 of the Tamil Nadu Electricity Regulatory Commission's repealed Intra-State Open Access Regulation and Regulation25 of the Grid Inter Connectivity and

Intra-State Open Access Regulation and the Tariff Order of 2014, the Appellant is deemed to have acquiesced to the statutory provision and, therefore, is precluded from raising the issue;

(f) that the contract load of the Appellant is 1625 KVA and, therefore, the distribution licensee has to keep the infrastructure in readiness always to cater to its start-up power before requirements. Therefore, the levy of demand charges in full instead of restricting it to 42 days is justifiable. The general concept is that the demand charges are payable even when supply is not availed and, therefore, the collection of demand charges on proportionate basis sought for by the Appellant is not justifiable.

9.3 **Our consideration and conclusion on Issue-B**:

(a) We have considered the rival contentions of the parties on this issue. The relevant part of the impugned order on this issue reads as under:

"6.8 High Tension Tariff V

Tariff Category	Commission Determined Tariff	
	Demand Charge in Rs/kVA/month	Energy charge in Paise per kWh(Unit)
High Tension Tariff V	350	1100

i. This tariff is applicable to Temporary supply for construction and for other temporary purposes.
a) For this category of supply, the initial/in-principle approval for such construction or to conduct such temporary activity obtained by the applicant from the appropriate authority, wherever necessary, is adequate to effect the supply.
b) In case of conversion of temporary supply into applicable permanent supply, the same shall be done subject to compliance of codes/regulations/orders.
c) This tariff is also applicable to start-up power provided to generators. The generators are eligible to get start-up power under this tariff after declaration of CoD. The demand shall be limited to 10% of the highest capacity of

the generating unit of the generating station or the percentage auxiliary consumption as specified in the regulation, whichever is less. The supply shall be restricted to 42 days in a year. Drawal of power for a day or part thereof shall be accounted as a day for this purpose. Power factor compensation charges are not applicable for start-up power."

(b) We have examined and correctness and legality of the impugned order on this issue on collating the rival contentions. We find no infirmity or illegality in the findings recorded by the State Commission on this issue because the contentions of the Appellant are meritless. High Tension Tariff-V is applicable to temporary supply for construction and for other temporary purposes. This tariff is also applicable to startup power provided to generators. The generators are eligible to get start-up power under this tariff after declaration of commercial operation date. The demand shall be limited to 10% of the highest capacity of the generating unit of the generating station or the percentage auxiliary consumption as specified in the regulation, whichever is less. The supply shall be restricted to 42 days in a year. Drawal of power for a day or part thereof shall be accounted as a day for this purpose. Power factor compensation charges are not applicable for start-up power. The rulings cited by the Appellant are not squarely applicable to the matter before us because as per the first ruling, the consumer is entitled to a proportionate reduction of demand charges in the event of lockout, fire or any other circumstances considered by the supplier beyond the control of the consumer. The circumstance of power cut which disable the Board to give the full supply to the appellant because of the government order would be a circumstance which disabled the consumer from consuming electricity as per the contract. And this act was the circumstance which was beyond its control and could not be considered otherwise by the Board. It entitled the consumer to a proportionate reduction of the demand charges.

(c) Regulation 25 of the Tamil Nadu Electricity Regulatory Commission (Grid Connectivity and Intra-State Open Access) Regulations, 2014 provides as under:

> ***"25. Charges for Startup Power Supplied by the Distribution Licensee.***
>
> *(1) The generators connected with the state grid are eligible to get start up power after declaration of CoD. The demand shall be limited to 10% of the highest capacity of the generating unit of the generating station or the percentage of auxiliary consumption as specified in the Commission's Tariff Regulations, whichever is less. The supply shall be restricted to 42 days in a financial year. Drawal of power for a day or part thereof shall be accounted as a day for this purpose. Power factor compensation charges are not applicable for start-up power. The generator shall pay the Distribution Licensee for the supply of start up power at the rates as specified by the Commission in its Tariff Order issued from time to time. Start up supply beyond 42 days in a financial year may be provided by the Distribution Licensee at the rate of one and half times of the normal rate as specified by the Commission. However, no start up supply shall be provided beyond 120 days in a financial year. In case of new and renewable energy based generator, the Commission may add/vary/delete certain criteria in the specific order issued for that category of new and renewable energy based generation. In case of Independent Power Producer (IPP), start-up power transactions shall be governed by this regulation only if it is not covered by the Power Purchase Agreement."*

(d) The above Regulation 25 dealing with charges for startup power supplied by the distribution licensee provides that the generators connected with the state grid are eligible to get start up power after declaration of commercial operation date. The demand shall be limited to 10% of the highest capacity of the generating unit of the generating station or the percentage of auxiliary consumption as specified in the Commission's Tariff Regulations, whichever is less. This Regulation further provides that the supply shall be restricted to 42 days in a financial year. Drawal of power for a day or part thereof shall be

accounted as a day for this purpose. Power factor compensation charges are not applicable for start-up power. Thus, there is a regulation providing for charges for start up power supplied by the distribution licensee to the generating stations. We agree to the contention of the learned counsel for the State Commission that the regulation framed by the State Commission cannot be challenged before this Appellate Tribunal as this Appellate Tribunal is not entitled or competent to decide the legality or validity of the Commission's regulations but, this Appellate Tribunal can only interpret the said regulation. Since, the said regulations have not been challenged before any Writ Court i.e. the Hon'ble High Court, the consequential thereof cannot be argued before this Appellate Tribunal in this appeal. **Thus, the Issue No. (B) is decided against the Appellant**.

10. **ISSUE (C): DETERMINATION OF VOLTAGE-WISE COST OF SUPPLY & TARIFF:**

10.1 On this issue, the following submissions have been made on behalf of the Appellant:

(a) that the State Commission has erred in continuing with determination of cost of supply and tariff on average cost basis and not on voltage wise basis;

(b) that this Appellate Tribunal has directed the State Commission to ensure that the cost of supply and tariff is determined based on voltage wise data and not based on average cost of supply. This Appellate Tribunal, vide its judgment, dated 28.7.2011, in Appeal Nos. 192 & 206 of 2010, had directed the State Commission to determine the voltage wise cost of supply within 6 months and to ensure that in future tariff orders, cross subsidies for different categories of consumers are determined and reduced as per the provisions of the Electricity Act, 2003

and the regulations framed there-under. These directions have never been complied by the State Commission, on the excuse that the distribution licensee has not provided the necessary data. Despite this, the distribution licensee had been granted higher revenue requirements and tariff to the prejudice of the consumers in the State;

(c) that, further, this Appellate Tribunal, in its judgment, dated 9.4.2013, in Appeal No. 257 of 2012, directed the State Commission to determine the voltage wise cost of supply and corresponding cross subsidy for each category of consumers in the future tariff order. However, in the tariff order, dated 20.6.2013, the State Commission proceeded to again determine tariff based on average cost of supply citing the reason that the Respondent No. 1 has not conducted the study and provided sufficient data to the State Commission. Further, thrice, this Appellate Tribunal, vide its judgment, dated 27.10.2014, in Appeal Nos. 196 and 199 of 2013, directed the State Commission to determine the voltage wise cost of supply as previously directed and determine the cross subsidy transparently for the years 2012–13, 2013–14 and 2014–15 in the tariff order for the year 2015–16;

(d) that subsequent to the above, the State Commission had passed the impugned order and once again proceed on the basis of average cost of supply on the ground that sufficient data is not available. Even though, the details have been furnished by the distribution licensee, the State Commission has postponed the exercise to the next tariff order. Hence, the State Commission is repeatedly violating directions issued by this Appellate Tribunal and also burdening the consumers with increase in tariff on account of the defaults on the part of the Respondent No.1/distribution licensee in not providing sufficient and timely data.

11.2 ***Per contra,*** on this issue, learned counsel for the Respondent/State Commission has contended that TANGEDCO submitted its detailed study report on the voltage wise cost of supply as per the directions of the State Commission in Order No.1 of 2013, dated 20.6.2013 on 19.11.2014. As the study report was submitted during November, 2014 and for studying the same, reasonable time is required. This Appellate Tribunal has directed to carry out the voltage wise cost of supply in 2015-16 tariff order.

11.3 **Our consideration and conclusion on Issue-C:**

(a) From the above rival contentions, it is apparent that the State Commission has been trying its best to comply with the above-stated repeated directions to ensure that cost of supply and tariff is determined based on voltage wise data and not based on average cost of supply.

(b) The State Commission, in order to give full impetus to our direction, has been endeavoring towards that end and is trying its best to determine the voltage wise cost of supply and corresponding cross subsidy for each category of consumers in the future tariff order. The circumstances being faced by the State Commission are delaying the process of the said determination of voltage wise cost of supply and corresponding cross subsidy for each category of consumers. Further, the State Commission has already obtained the study report on voltage wise cost of supply from the distribution licensee of the State, which is Respondent No.1 herein, and the said report had already been submitted in November, 2014. Naturally, the State Commission would require reasonable time to study the report on the voltage-wise cost of supply and, thereafter, the State Commission is in the process of doing the same. Apart from that, this Appellate Tribunal has already directed, vide its judgment, dated 27.10.2014, in Appeal Nos. 196 and 199 of 2013, to determine the voltage wise cost of supply and also

determine the cross subsidy transparently for the years 2012–13, 2013–14 and 2014–15 in the tariff order for the year 2015–16 because these aspects require a lot of study and then only the State Commission can, in an effective way, be in a position to determine the voltage-wise cost of supply as well as cross subsidy for the aforesaid period. Thus, in this light, we do not find any perversity or illegality in the findings recorded by the State Commission on this issue. **Thus, in view of this, the issue no. (C) is also decided against the Appellant.**

12. **ISSUE (D): <u>RESIDUAL CATEGORY HT-V</u>:**

12.1 On this issue, the following submissions have been made on behalf of the Appellant:

(a) that the State Commission has grossly erred in determining the start-up tariff for generators in the state of Tamil Nadu in HT-V category, which is the highest category for High Tension consumers. The State Commission has, further, failed to appreciate that start-up tariff cannot be compared with that of similar such consumers placed in the same category, whereas, start-up tariff is to be provided to the generator at a cheaper cost as it is incidental to the activity of generation. The State Commission has erred in treating start-up requirements of generators to that of consumers who are required to pay the highest tariff category such as temporary supply;

(b) that many State Commissions including Chhattisgarh, Punjab etc. have provided a separate category for startup power considering the power requirements being incidental to the activity of generation. The higher startup tariff, the cost of generation would also correspondingly increase placing additional burden on the consumers;

(c) that the State Commission has failed to appreciate that placing the start-up requirements in the highest tariff category

equivalent to temporary supply and other set consumers who are considered least in the priority list and charged the highest category of tariff goes contrary to the very object of the Electricity Act. Start-up tariff is a basic requirement of a generating company to operate its generating station and the same, being an integral part of the activity of generation, ought to be provided tariff at the cost of supply. The generating company being engaged in the business of generating and injecting electricity into the grid ought not to be unduly prejudiced for the drawal of electricity for start-up power at a rate much higher than the cost and in fact, the highest prevalent tariff;

(d) that there is no rational purpose in placing the generators requiring start-up power at a much higher level than even high tension industrial and commercial consumers. Start-up power generators, in fact, ought to be provided electricity at much more economical levels than industrial and commercial consumers since the generators contribute to the electricity industry and inject electricity into the grid to satisfy demand in the State;

(e) that the Appellant's category of consumers pay tariff at 249% of the overall average cost of supply of the distribution licensee, which is excessive and amounts to penalizing the generators for drawing start-up power. This is when the generators have no option and have to necessarily draw electricity from the grid for the start-up requirements. The very activity of generation requires drawal of electricity from the grid and being a contributory to the electricity system and one of the important objects of the Electricity Act being to encourage generation and for capacity to be added, the State Commission ought to have determined the tariff for start-up requirements at a much lower level.

12.2 ***Per-contra***, this issue has neither been argued, nor taken in the counter affidavit filed by the State Commission.

12.3 **Our consideration and conclusion on Issue-D:**

(a) After going through the material on record and the merits of the contention raised by the Appellant, we find force and substance in the contention of the Appellant.

(b) It is true that under the various provisions of the Electricity Act, 2003, the generation has been encouraged. Many State Commissions, like Chhattisgarh, Punjab, etc, have provided a separate category for startup power considering the power requirements being incidental to the activity of generation. Due to the higher startup tariff, the cost of generation would also correspondingly increase placing additional burden on the consumers. The State Commission has really failed to consider this aspect of the issue that placing the start-up requirements for a generating company after the commercial operation date in the highest tariff category, equivalent to temporary supply, is quite unjust, unreasonable and unappreciable. The start-up tariff is a basic requirement of a generating company to operate its generating station and the same being an integral part of the activity of generation ought to be provided tariff at the cost of supply. Further, the generating company being engaged in the business of generating and injecting electricity into the grid ought not to be unduly prejudiced for the drawal of electricity for start-up power at a rate much higher than the cost. We do not find any rationale behind placing the generating companies, like the Appellant, in a HT-V category for startup power after attaining the commercial operation date. The start-up power requirements of generators, in fact, ought to be provided electricity at much more economical levels than industrial and commercial consumers, since the generators contribute to the

electricity industry and inject electricity into the grid to satisfy the power demand in the State. The State Commission appears to have wrongly and unjustly placed the generating station, like Appellant's, taking start up power after commercial operation date at the highest category of HT supply equivalent to consumers requiring temporary supply. We are of the view that the very activity of generation requires drawal of electricity from the grid and being a contributor to the electricity system and one of the important objects of the Electricity Act being to encourage generation and for capacity to be added, the State Commission ought to have determined the tariff for start-up requirements for the generating station after attaining commercial operation date at a much lower level. Atleast, they should not be charged more than the cost of supply to be made by generating companies to the distribution licensee in the State.

(c) We do not intend to disturb the impugned order but we find it appropriate to direct the State Commission to consider the view points of the Appellant, a generator, who takes startup power from the Respondent No.1, a distribution licensee, on attaining commercial operation date. The generation in the country is to be promoted as the motive and the objective of the Electricity Act, 2003, for encouraging such kind of generation, there should be a separate category for generators drawing startup power for initiating generation from the station which will cater to the need of the power in the State. Thus, a separate category of such kind of generators should be created and a separate tariff in such category should be determined. The State Commission should consider these aspects in a positive manner in the immediate future and to frame the relevant regulations in this regard. **In view of the above, the issue no. (D) is disposed of accordingly.**

O R D E R

13. The present Appeal, being Appeal No. 71 of 2015, is partly allowed to the extent indicated above. The impugned order, dated 11.12.2014, passed by the Tamil Nadu Electricity Regulatory Commission in Petition No. SMT Order No. 9 of 2014 is not being disturbed.

14. We direct the State Commission to consider the view point of the Appellant, a generating company, who takes startup power from the Respondent No.1, a distribution licensee, on achieving commercial operation date. The generation in the country is to be promoted as per the motive and the objective of the Electricity Act, 2003, and for encouraging such kind of generation, there should be a separate category for generators drawing startup power for initiating generation from the station which will cater to the need of the power in the State. Thus, a separate category of such kind of generators should be created and a separate tariff for such category should be determined. The State Commission should consider this thing in a positive manner in the immediate future and to frame the relevant regulations in this regard.

15. There shall be no order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 2ND DAY OF MARCH, 2016.

(I.J. Kapoor)	**(Justice Surendra Kumar)**
Technical Member	**Judicial Member**

√ **REPORTABLE/~~NON-REPORTABLE~~**

vt