

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

Appeal No. 184 of 2015 and IA Nos. 312 & 313 of 2015

Dated: 24th May, 2017

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

In the matter of

Open Access Users Association

2nd Floor, D-21 Corporate Park,
DMRC Building, Sector-21,
Dwarka, New Delhi - 110 075

... Appellant

Versus

- 1. Madhya Pradesh Electricity Regulatory Commission (MPERC)**
5th Floor, Metro Plaza,
E-5, Arera Colony, Bittan Market,
Bhopal, Madhya Pradesh **.....Respondent No 1**

- 2. Madhya Pradesh Poorv Kshetra Vidyut Vitaran Company Ltd.**
Shakti Bhawan, Vidyut Nagar, Rampur.
Jabalpur, Madhya Pradesh **.....Respondent No.2**

- 3. Madhya Pradesh Madhya Kshetra Vidyut Vitaran Company Ltd.**
Nishtha Parisar, Biljee Nagar Colony,
Govindpura, Bhopal, Madhya Pradesh **.....Respondent No.3**

- 4. Madhya Pradesh Paschim Kshetra Vidyut Vitaran Company Ltd.**
GPH Compound, Polo Ground,
Indore, Madhya Pradesh **.....Respondent No.4**

**5. Madhya Pradesh Power Management
Company Limited**

Block No.11, Shakti Bhawan, Vidyut Nagar,
Jabalpur, Madhya Pradesh

.....Respondent No.5

Counsel for the Appellant(s): Mr. Matrugupta Mishra
Mr. Hemant Singh
Mr. Nimesh Jha
Mr. Saahil Kaul
Mr. Nishant Kumar
Mr. Tushar Nagar
Mr. Tabrez Malawat

Counsel for the Respondent(s): Ms. Mandakini Ghosh
Mr. Saransh Shaw
Ms. Ritika Singhal for R-1

Mr. M G Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Shubham Arya for R-2 to R-5

JUDGMENT

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

1. The present Appeal is being filed under Section 111 of the Electricity Act, 2003 challenging the Impugned Order dated 17.04.2015 passed by the Madhya Pradesh Electricity Regulatory Commission (hereinafter referred to as the '**State Commission**') in Petition No. 30 of 2014 filed by Respondent Nos.2, 3, 4 and 5 for determination of Aggregate Revenue Requirement (ARR) and Retail Supply Tariff

for FY 2015-16 in accordance with MPERC (Terms and conditions for determination of tariff for supply and wheeling of electricity and methods and principles for fixation of charges) Regulations, 2012 (hereinafter referred as 'Tariff Regulations, 2012'). The present Appeal is concerning about the calculation of components 'C' (weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power) & 'T' (Tariff payable by the relevant category of consumers) for computation of Cross Subsidy Surcharge (CSS) and recovery of past trued-up costs.

2. The Appellant, Open Access Users Association is a registered society formed under Societies Registration Act, 1860, registered on 4.8.2012.
3. The Respondent No. 1 is the Electricity Regulatory Commission for the State of Madhya Pradesh exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.
4. The Respondent No. 2 to 4 are the Distribution Licensees (hereinafter individually termed as 'Discom' and collectively as 'Discoms') in the State of Madhya Pradesh having their specific area of Supply.
5. Respondent No. 5 is Madhya Pradesh Power Management Company Limited ("MPPMCL"), a company incorporated under the Companies Act, 1956.

6. Facts of the present Appeal:

- a) Respondent No. 2, 3, 4 and 5 jointly filed the Petition (Petition No. 30 of 2014) with State Commission on 19.12.2014 for determination of Aggregate Revenue Requirement (ARR) and Retail Supply Tariff for Financial Year 2015-16. The Petition was revised on 02.02.2015 after incorporating the information as desired by the State Commission.
- b) The State Commission on 17.04.2015 passed the Impugned Order in the Petition No. 30 of 2014 filed by Respondent Nos. 2, 3, 4 and 5.
- c) Aggrieved by the Impugned Order, the Appellant has preferred the present appeal before this Tribunal on the following issues:
 - (i) The State Commission acting contrary to the provisions of National Tariff Policy, 2006 (hereinafter referred as 'NTP') has wrongly calculated the components 'C' (weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power) & 'T' (Tariff payable by the relevant category of consumers) as per the formula prescribed under the NTP for calculating CSS.
 - (ii) Allowance of arrears of 5 years (Rs. 1730 Cr.) to be recovered from ARR for FY 2015-16.
 - (iii) Consideration of demand charges/ fixed charges along with energy charges while calculating CSS.

7. Questions of Law

The Appellant has raised the following questions of law in the present Appeal:

- a) Whether the Respondent Commission has erred in calculating the component 'C' & 'T' of the cross subsidy surcharge formula?**
- b) Whether the Respondent Commission while calculating component 'C' of the cross subsidy surcharge formula has wrongly calculated the Weighted Average Cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power in violation to the surcharge computation formula in the Tariff Policy in paragraph 8.5.1?**
- c) Whether the Respondent Commission has wrongly calculated the component 'T' i.e. Tariff at 50% load factor payable by the Industrial consumer while determining the cross subsidy surcharge payable by Industrial consumer using prescribed formula in the Tariff Policy?**
- d) Whether the Respondent Commission has violated provisions stipulated in sections 61(i) and 86 (4) by not adhering to the principle enunciated in the Tariff Policy for computation of cross subsidy surcharge?**
- e) Whether the Respondent Commission has wrongfully acted in violation of the provisions of the Electricity Act, 2003, and the relevant regulations framed thereunder by not following the principles laid down in the Tariff Policy while calculating the cross subsidy surcharge?**
- f) Whether the Respondent Commission by passing the Impugned Order has created a deterrent for the consumers to avail and exercise their statutory right to open access guaranteed under the Electricity Act, 2003?**

- g) Whether the Impugned Order suffers from gross irregularity by violating the objective and spirit with which the Electricity Act, 2003 has come into existence and the same being passed in violation of the provisions of Section 42 of the Electricity Act, 2003?**
- h) Whether the Respondent Commission erred by increasing the Tariff and calculating the Cross Subsidy Surcharge on the basis and recover past true up costs?**
- i) Whether the Respondent Commission has acted erroneously by including fixed charges to off-set the cross-subsidy?**
- 8.** We have heard at length the learned counsel for the parties and considered carefully their written submissions, arguments put forth during the hearings etc. Gist of the same is discussed hereunder.
- 9.** The learned counsel for the Appellant has made following arguments/submissions for our consideration on the issues raised by it:
- a. The State Commission in the Impugned Order has not fully adopted the principles and methodology of determination of CSS as per para 8.5.1 of the NTP which is reproduced below:

"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:

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

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".

- b. The State Commission failed to consider the costliest power purchased by the Respondent No. 5 which had to be considered for determining the top 5% costliest power, as such erred in computation of component 'C'. The State Commission in table No. 83 of the Impugned Order has taken into consideration the generators (SGTPS & SGTPS ext) which are selling power to the Respondent No. 2 to 4 at a cost less than other private generators (Torrent, Jaypee Bina 1 and Jaypee Bina-2) from whom Respondent No. 5 procures power.
- c. As per the table 83 of the Impugned Order the component 'C' is Rs. 3.88/kWh, however if the costliest power of Torrent, Jaypee Bina 1 and Jaypee Bina 2 is considered then component 'C' becomes Rs. 4.76/kWh. This will lead to reduction in CSS as per the above formula of the NTP. From table 30 and 31 along with para 3.53 of the Impugned Order it is clear that the cost of costliest power procured by Respondent No. 5 are passed on to the Respondents 2 to 4 and is not considered for calculation of component 'C' which is a clear-cut violation of the NTP.
- d. The argument of the Respondents that the State Commission has followed the 'merit order' for computation of the component 'C' and the treatment of costliest power as surplus is not sustainable and is misleading as they are trying to project that the whole surplus power is sold at power exchange and is not consumed in the State of Madhya Pradesh. Any

difference between the power sold at the exchange and the PPA tariff is passed on to the Discoms. Even if power is not scheduled the Discoms are liable to pay fixed charges to the generators which is loaded on the cost of service of the Discoms and is to be considered for calculation of CSS. Torrent is a liquid based generator even than if it is removed for computation of 'C' then Jaypee Bina 1 and Jaypee Bina 2 should have been considered for the same.

- e. The component 'T' i.e. tariff payable by relevant category of consumer has been calculated by the State Commission considering a load factor of 50% which increases its value and in turn there is increase in CSS. Generally, open access consumers are mostly HT and EHT consumers having load factor of more than 75%, which should have been considered for component 'T'. The computation of 'T' by using 50% load factor by the State Commission is arbitrary and without any basis. This is violation of Section 62 (3) of the Electricity Act, 2003. Section 61 (g) of the Electricity Act, 2003 provides that actual cost of service is required to be considered. The CSS needs to be re-determined based on logical load factor. The value of 'T' reduces nearly by Rs.1.24/kWh if 75% loading factor is considered.
- f. Considering the value of 'T' based on 75% load factor and 'C' based on Torrent, Jaypee Bina 1 & Jaypee Bina 2 the CSS will be reduced drastically. The State Commission instead of

incentivising and encouraging open access has actually created impediment in the way of availing their right to open access under Section 42 of the Electricity Act, 2003.

- g. The State Commission has also included demand/ fixed charges along with variable charges for calculation of component 'T'. In Madhya Pradesh the open access consumers are paying fixed cost to the respective Discoms based on the contract demand, notwithstanding the quantity of energy tied up through open access. Accordingly, the open access consumers are subjected to payment of fixed charges of the Discoms and in addition to that taking into consideration while computing the component 'T' amounting to imposing the same cost twice on the open access consumers. Thus, fixed charges are to be deducted for computation of component 'T'.
- h. The judgement of the Hon'ble Supreme Court in Sesa Sterlite Case (2014 (8) SCC 444) quoted by the Respondents interpreting that CSS is actual compensation is misplaced as the relevant para relied by the Respondents nowhere mentions that CSS is actual compensation equal to cross subsidies. The said judgement only says that CSS is a compensation for helping the Discom to meet the cross subsidies.
- i. The State Commission in para 1.22 of the Impugned Order has loaded the arrears of 5 years (Rs. 1730 Cr.) in one financial year (2015-16) transferring entire burden on the consumers of

the State of Madhya Pradesh. This has been done without assigning any reason. The State Commission could have reduced the amount of arrears attributable towards the inefficiency in the functioning of the Discoms.

- j. The increase in the cross subsidy charge for the Appellant is in violation of proviso of the Section 42 (2) of the Act. The said proviso is reproduced as under:

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

- k. The State Commission has ignored the fact that cross subsidy could not be determined without a road map for such reduction. The cross subsidy charge was fixed without fixing the actual cost of supply at various voltage levels and without indicating the cost for each category or indicating the extent of such cross subsidy for different class of consumers. There has been a rise of about 350% CSS for industrial consumers in comparison to FY 2014-15. The State Commission despite being aware of the provisions of the NTP increased CSS substantially which is contrary to the objective of NTP. The State Commission while framing regulations for determination of CSS has to keep in mind the intent of Electricity Act, 2003 under Section 181 and also NTP.

- I. The State Commission is bound to follow the formula adopted by it from the NTP for calculation of CSS. The same principle is also laid down by this Tribunal in RVK Energy Pvt. Ltd. Vs. Central Power Distribution Co. of Andhra Pradesh Ltd. & Anr. The same has been followed by this Tribunal in subsequent judgements including Sarover Energy Pvt. Ltd. Vs. Karnataka Electricity Regulatory Commission and Anr. dated 3.9.2013.
- 10.** The learned counsel for the Respondents have made following submissions on the various issues raised in the Appeal for our consideration:
- a. The Appellant has misunderstood the reasoning employed by the State Commission while calculating CSS. The contention of the Appellant regarding computation of component 'C' is erroneous and misplaced. In case a consumer opts for open access, the distribution licensee could be in a position to discontinue purchase of power at margin in the merit order. Accordingly, the cost of supply may be computed as the aggregate of weighted average of power purchase (inclusive of fixed and variable charges) of top 5% at margin, excluding liquid fuel generation and renewable power, in merit order approved by the appropriate State Commission, adjusted for average loss compensation of the relevant voltage level and the distribution charges determined on the principles laid down for intra state transmission charges. The State Commission has worked out the cost incidental upon the distribution licensees by considering the top 5% power at margin as per merit order

- approved by the State Commission. Accordingly, the State Commission has not considered the cost of those generating stations which were not envisaged for scheduling power to the Discoms for calculation of component 'C'. Cross subsidy surcharge compensates the Discom for the loss in cross subsidy on account of open access consumer sourcing power from third party. Accordingly, the compensation can only be in terms of power that is actually being scheduled to the Discom.
- b. The power requirement (64,261 MUs for FY 2015-16) of the Respondents 2 to 4 was determined by the State Commission after applying normative loss levels. The 5% of the most expensive power considered by the State Commission is 3,213.07 MUs. This has been arrived rightly by the State Commission by applying merit order on the purchases of the Respondents 2 to 4. The gap in the power requirement of the Respondents 2 to 4 was to be met from allocation of power by the Respondent No. 5. The Respondent No. 5 has been allocated power from the stations as notified by Govt. of M.P. (GoMP) notification dated 19.3.2013. The surplus power available with Respondent No. 5 was to be sold at the exchange at the rate fixed by the State Commission. Further, the merit order drawn and approved by the State Commission was based on the generating stations allotted as per Govt. of M.P. notification dated 19.3.2013. This notification also states that the surplus power will be sold outside the State or to any other utilities by the Respondent No. 5.

- c. The NTP envisages calculation of 'C' based on weighted average cost of power purchase of top 5% at margin for Discoms and not by considering the costliest power available for purchase as contested by the Appellant. The Torrent, Jaypee Bina 1 & Jaypee Bina 2 plants do not fall in the merit order while calculating top 5% expensive power, as the requirement of the Discoms was met by other cheaper stations. Therefore, the State Commission has not considered the power from Torrent, Jaypee Bina 1 & Jaypee Bina 2 for arriving at 'C'. Thus, the State Commission has rightly calculated 'C' as Rs. 3.88/kWh. The revenue from the surplus power sold at the exchange has been used to reduce the gap between ARR and estimated revenue. The approach of the State Commission is according to the NTP and computation is based on formula prescribed in the NTP.
- d. This Tribunal vide judgement dated 24.3.2015 in case of Maruti Suzuki India Ltd. Vs. Haryana Electricity Regulatory Commission in Appeal No. 103 of 2012 has held that the NTP only serves as a guiding factor and the Commissions shall be bound by the notified Regulations.
- e. The State Commission has notified the Open Access Regulations, 2005 which provides for determination of cross subsidy surcharge for different categories of consumers. These Regulations also contain Annexure-1 as sample calculation where it is clear that top 5% power at margin is to be taken in merit order approved by the State Commission. These are statutory regulations notified by the

State Commission and the State Commission is bound by it as per the above judgement of this Tribunal. Without admitting, even if the computation of CSS is contrary to the formula prescribed in the NTP the contention of the Appellant is not tenable.

- f. The component 'T' has been calculated by the State Commission based on the total estimated revenue and total estimated energy sale for the particular category of consumers. The State Commission has specified different energy charges for some of the HT consumer categories/ sub categories for consumption up to 50% load factor and for consumption in excess of 50% load factor in line with provisions enumerated in previous years' tariff orders. For calculating 'T' total energy sale and total revenue including fixed charge for a particular category/ sub-category has been considered. This is in line with provisions of the NTP as it does not stipulate for further break up of sale and revenue, if tariff is differentiated based on load factor or any other parameter. The State Commission at table 87 of the Impugned Order specifies category wise average tariff for FY 2015-16 which substantiates the claim of the State Commission. This approach has been upheld by this Tribunal in its judgement dated 30.5.2011 in Appeal Nos. 102, 103 & 112 of 2010 in the case of M/s Tata Steel Ltd Vs. Orissa Electricity Regulatory Commission and Anr.
- g. The tariff schedules in Impugned Order are for the use of electricity by the consumers such as domestic, non-domestic, industrial, non-industrial, agriculture etc. and not on any other

basis like load factor as referred by the Appellant. The Appellant or its stake holders had not made any representations for considering separate energy charge for 75% load factor or for computation of CSS.

- h. This Tribunal in many judgements has held that the CSS should be computed for a category of the consumers. The reference judgements are judgement dated 30.5.2011 in Appeal No. 102 of 2010 in the case of M/s Tata Steel Ltd Vs. Orissa Electricity Regulatory Commission and Anr., judgement dated 2.9.2011 in Appeal Nos. 57,67,68,69,70,71,72,73 of 2011 in the case of M/s Vishal Ferro Alloys Ltd and Ors. Vs. Orissa Electricity Regulatory Commission and Anr. and the judgement dated 23.9.2013 in Appeal No. 52 of 2012 in the case of M/s Ferro Alloy Corporation Ltd Vs. Orissa Electricity Regulatory Commission and Anr.
- i. The State Commission has categorised the consumer categories in Regulation 44.1 of the Tariff Regulations, 2012. In order to ensure appropriate cost to open access consumers connected at different voltage levels, the State Commission has determined cost based on various scenarios mentioned in 4.13 of the Impugned Order. Based on the same the cost of supply has been determined in table 86 of the Impugned Order. This is fully in accordance with law.
- j. The State Commission has adjusted the arrears arising out of true-ups of the previous years in FY 2015-16 and is in accordance with

Tariff Regulations and the judgements of this Tribunal. The true-up for earlier years i.e. 2006-07 & 2007-08 were pending before this Tribunal by way of Appeal Nos. 145 of 2009 & 150 of 2010. This has led to hold up of true-ups from 2008-09 onwards. After the judgements passed by this Tribunal the State Commission issued orders on true-up of ARR of the Discoms for FY 2008-09 to 2011-12 during the year 2014. All true up orders were passed in 2014 post the issuance of retail tariff order for FY 2014-15. The effect of true ups from 2009-13 were considered with the ARR of FY 2015-16. This Tribunal in OP No. 1 of 2011 had emphasised the need for true-up of the past ARRs and timely passing of the proceeds of true-ups in the forthcoming ARRs of the Discoms. This Tribunal also desired a status report and the same was to be complied with by 24.1.2014. The true ups have been allowed as per the intent of this Tribunal in OP No. 1 of 2011.

k. The Clause 8.3 of the Tariff Regulations, 2012 clearly spells out the recovery of balance amount after true-up due to under recovery appropriately as decided by the State Commission. The State Commission has not delayed the true-ups nor condoned any inefficiency on part of the Discoms.

l. The Appellant at para 7(6) of the instant Appeal has submitted as below:

“.....

It may be clarified that the Appellant is not challenging the entire order, the Appeal is limited to various observations,

calculations and conclusion drawn by the Respondent commission pertaining to determination of Cross Subsidy Surcharge (CSS)”

Accordingly, this issue is not in the scope of present proceedings.

- m. The argument of the Appellant against inclusion of the fixed charges for computing component 'T' is erroneous and misleading. The demand charges/ fixed charges are integral part of total tariff. As per the requirement of the NTP, computation of average tariff for a particular category of consumers can be arrived only after recognising the total expected revenue which includes the fixed charges as well as variable charges. If fixed charges are not considered in the computation of the expected revenue, it will increase the gap between ARR and revenue and thus lead to tariff hike.
- n. The fixed charges payable by the consumer for the contract demand is for consumer to draw power from Discom at any time without the need to schedule and in turn it is the obligation of the Discom to have infrastructure/ arrangement to make such power available when consumer decides to draw power. The energy availed through open access is in addition to the contracted demand and no fixed charges are paid for the same. The formula of CSS compensates the Discom for the financial loss due to loss of revenue due to open access consumer and therefore fixed and

variable charges have to be taken into account while computing average tariff of a consumer category.

- o. The State Commission vide notification dated 6.10.2007 had issued a roadmap for progressive reduction of the cross subsidy wherein the State Commission has proposed to achieve the tariffs within +/- 20% of the average cost of supply. This has been done keeping in view of the provisions of the Article 42 (2) of Electricity Act, 2003 (which provides for reduction of cross subsidy) and clause 8.3 (2) of the NTP (provides for tariffs within +/- 20% of the average cost of supply by the end of 2010-11).The tariffs determined in the Impugned Order are in line with these stipulations.

- p. Due to increase in average cost of supply to Rs. 5.29/kWh for 2015-16 as compared to Rs. 4.89/kWh for 2014-15, the CSS for 2015-16 is bound to increase. The computation of CSS is in accordance with the NTP only. The tariffs for different category of the consumers is kept within +/- 20% of the average cost of supply. Further, every tariff order is a fresh tariff order and needs to be judged by the applicable legal provisions and taking into consideration the prevailing circumstances.

- q. There is no need for separate proceedings for determination of the CSS as the revised CSS comes into force from the date of application of revised tariff order. This Tribunal in its judgement dated 3.9.2013 in Appeal No. 186 & 187 of 2012 in case of

Sarovar Energy Pvt. Ltd. Vs. KERC & Ors. has already directed to determine CSS in tariff orders itself by the State Commission.

11. After having a careful examination of all the aspects brought before us on the issues raised in Appeal and submissions made by the Appellant and the Respondents for our consideration, our observations are as follows: -

11.1 On question no 7 a) i.e. Whether the Respondent Commission has erred in calculating the component 'C' & 'T' of the cross subsidy surcharge formula?, our observations are as follows:

a. The CSS formula has been adopted by the State Commission in the Impugned Order from the NTP. The prescribed formula is reproduced below:

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

S is the surcharge

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

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

D is the Wheeling Charge

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

The component 'C' as defined above in the NTP is the weighted average cost of power purchase of top 5% at the

margin excluding liquid fuel based generation and renewable power. The component 'T' is the tariff payable by the relevant category of the consumers.

- b. The Appellant has contested that for computation of 'C', the weighted average cost of the costliest stations' top 5% at the margin should have been considered by the State Commission irrespective of the scheduling by Discoms from those stations. The Respondents have made the case that the same should have been considered based on annual energy requirements and scheduling as per merit order approved by the State Commission on the allocations prescribed by Energy Deptt. Govt. of Madhya Pradesh (GoMP) notification dated March 19, 2013.
- c. The component 'C' as defined above in the NTP and adopted by the State Commission is the weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power by the Discoms. The power purchase cost per unit can be determined if energy is scheduled by Discom. In the instant case based on merit order principles, Torrent, Jaypee Bina 1 and Jaypee Bina 2 power plants which are assigned to the Respondent No. 5 by GoMP do not fall in top 5% at the margin since they are not being scheduled by the Respondents 2 to 4. Accordingly, these plants are out for the purpose of computation of 'C'.

- d. The State Commission at paras 4.17 to 4.19 of the Impugned Order determined 'C' as stated below:

"4.17 As mentioned in the preceding para, the cost of supply to the consumer for this purpose may be computed on the basis of the aggregate of top 5 % at the margin of the power purchase costs.

4.18 The cost of marginal power purchase of top 5% power works out as below :

Total Energy required in FY 2015-16 = 64,261 MU

Table 83 : Cost of marginal power purchase of top 5% power i.e. 3213.07 MU

Stations	Units (MU)	Cost (Rs./unit)	Total cost (Rs. Crore)
SGTPS EXT	3,208.98	3.88	1,243.71
SGTPS	4.09	3.75	1.53
Total	3,213.07	3.88	1,245.24

4.19 The weighted average cost of power purchase of top 5% at the margin works out as Rs. 1245.24 Crore/3213.07 MU = Rs. 3.88 per unit."

The issue of not scheduling power from Torrent (Oil based), Jaypee Bina 1 and Jaypee Bina 2 to the Respondent No. 2 to 4 has not been disputed by the Appellant. Moreover, the sale

proceeds by sale of surplus power through exchange from these plants have been considered by the State Commission while arriving at the ARR.

- e. In view of our observations as above, we are of the considered opinion that the State Commission has not erred in computation of the component 'C' of the CSS formula.
- f. The Appellant has contested that the State Commission has erred in considering fixed charges for computation of the component 'T'. The Respondents have submitted that as per the formula prescribed in the NTP, the component 'T' is the tariff payable by the relevant category of the consumers which can only be arrived by considering fixed charges and variable charges.
- g. The component 'T' as defined above is the tariff payable by the relevant category of the consumers. The fixed charges are the integral part of the tariff. The State Commission has fixed the tariff of different categories of consumers including the fixed charges based on Tariff Regulations, 2012. The component 'C' also includes the fixed charges and variable charges. The formula for CSS will be misinterpreted if fixed charges are removed from the component 'T'. In our view, it seems that the Appellant is looking for reduction of CSS by way of pleading for removal of fixed charges from the component 'T'.

- h. The State Commission at paras 4.22, 4.23 and table 87 of the Impugned Order determined 'T' as stated below:

“4.22 Finally, the last term in the Tariff Policy formula ‘T’, Average Tariff for each category is derived from their expected revenue for FY 2015-16.

4.23 As per the MPERC (Open Access) Regulations, 2005, the consumers with contract demand of 1 MW or above are allowed open access w.e.f. 1st October, 2007. These consumers are to be connected at 33 KV or above as per Madhya Pradesh Electricity Supply Code, as amended from time to time.

Table 87 : Category wise average tariff (Rs. per unit)

Category of HT/EHT consumers	Average Tariff 'T'
HV- 1 : Railway Traction	6.41
HV- 2 : Coal Mines	7.10
HV- 3.1 : Industrial	6.75
HV- 3.2 : Non-Industrial	7.21
HV-3.3: Shopping Malls	7.48
HV-3.4: Power Intensive Industries	5.48
HV-4 : Seasonal	6.26
HV- 5.1 : Public Water Works	5.02
HV- 5.2 : Other than Irrigation	5.27
HV- 6 :Bulk Residential Users	5.27
HV-7: Start-up power for generators connected to the grid	6.25

- i. In view of our observations as above, we are of the considered opinion that the State Commission has not erred in computation of the component 'T' of the CSS formula.
- j. Hence this issue is decided against the Appellant.

11.2 On question no 7 b) i.e. Whether the Respondent Commission while calculating component 'C' of the cross subsidy surcharge formula has wrongly calculated the Weighted Average Cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power in violation to the surcharge computation formula in the Tariff Policy in paragraph 8.5.1?, our observations are as follows:

- a. In view of our observations at 11.1 a. to e. above, there is no violation committed by the State Commission in the surcharge computation which is strictly as per formula specified at paragraph 8.5.1 in the NTP.
- b. Hence this issue is decided against the Appellant.

11.3 On question no 7 c) i.e. Whether the Respondent Commission has wrongly calculated the component 'T' i.e. Tariff at 50% load factor payable by the Industrial consumer while determining the cross subsidy surcharge payable by Industrial consumer using prescribed formula in the Tariff Policy?, our observations are as follows:

- a. The Appellant has contested that the component 'T' for industrial customers should have been calculated at load factor of 75% instead of 50% as their load factor is in the range of 75% and this will lead to reduction of 'T' and in turn reduction in CSS.

- b. The Respondents have submitted that for calculating 'T' total energy sale and total revenue including fixed charge for a particular category/ sub-category has been considered. This is in line with provisions of the NTP which do not envisage further break up of energy sale and revenue if tariff is differentiated based on load factor or any other parameter. This approach has been upheld by this Tribunal in its judgement dated 30.5.2011 in Appeal Nos. 102, 103 & 112 of 2010 in the case of M/s Tata Steel Ltd Vs. Orissa Electricity Regulatory Commission and Anr. The State Commission has been following the similar methodology consistently for earlier tariff orders too.

- c. Tariff Regulations, 2012 provide as below:

“42. Determination of tariffs for supply to consumers

42.1.....

.....

(e) Load factor incentive: Load factor based concessions in tariff may be allowed to consumers based on the scheme approved by the Commission in its Tariff Orders issued from time to time.”

According to the Tariff Regulations, 2012, the State Commission may provide load factor based incentives in its tariff orders from time to time. The State Commission has provided incentives in energy charges for categories of consumers for load factor more than 50%. The same has been done by the State Commission after a consultative process involving all the stake holders. The Appellant or its representative body has not raised this issue during hearing on the tariff petitions of the Respondents 2 to 5.

- d. The State Commission at para 4.22 of the Impugned Order has elaborated how the component 'T' is determined. The same is produced below:

“4.22 Finally, the last term in the Tariff Policy formula ‘T’, Average Tariff for each category is derived from their expected revenue for FY 2015-16.”

- e. Relevant portion of this Tribunal's judgement dated 30.5.2011 in Appeal Nos. 102, 103 & 112 of 2010 in the case of M/s Tata Steel Ltd Vs. Orissa Electricity Regulatory Commission and Anr. is reproduced below:

“35. We have also noticed that the State Commission has wrongly determined the average tariff realization for the appellants' consumer category at an assumed load factor of 80%. According to Regulation 7(c) (iii) cross subsidy

has to be computed as the difference between cost to serve that category and the average tariff realization of that category. Thus the method used by the State Commission in calculating average tariff for the appellant's category is incorrect and needs to be corrected as per formula given below:

Average Tariff realization for a category= Total expected revenue realized from that category as per ARR /Total anticipated sale to that category as per ARR”

The above principle was also confirmed by this Tribunal's judgement dated 2.9.2011 in Appeal No. 57,67,68,69,70,71,72 and 73 of 2011 in case of Vishal Ferro Alloys Ltd. & Ors. Vs. Orissa Electricity Regulatory Commission & Anr.

- f. After a careful perusal of the above, we observe that the methodology adopted by the State Commission for arriving at 'T' based on expected revenue is in line with this Tribunal's judgement dated 30.5.2011 in Appeal Nos. 102, 103 & 112 of 2010 in the case of M/s Tata Steel Ltd Vs. Orissa Electricity Regulatory Commission and Anr. and the NTP. Accordingly, the contention of the Appellant that the State Commission has wrongly calculated the component 'T' is misplaced.
- g. Hence this issue is decided against the Appellant.

11.4 On question no 7 d) i.e. Whether the Respondent Commission has violated provisions stipulated in sections 61 (i) and 86 (4) by not adhering to the principle enunciated in the Tariff Policy for computation of cross subsidy surcharge? and on question no 7 e) i.e. Whether the Respondent Commission has wrongfully acted in violation of the provisions of the Electricity Act, 2003, and the relevant regulations framed thereunder by not following the principles laid down in the Tariff Policy while calculating the cross subsidy surcharge?, our observations are as follows:

- a. Section 61 (i) and 86 (4) of the Electricity Act, 2003 are reproduced below:

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

.....

(i) the National Electricity Policy and tariff policy.

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

- b. In view of our observations at S.No. 11.1 to 11.3 above, we are of

the considered opinion that the State Commission has not violated the principle of computation of cross subsidy surcharge as per the NTP. The State Commission has also followed its relevant regulations i.e. Open Access Regulations, 2006 & Tariff Regulations, 2012 and GoMP notification while deciding upon the CSS. Therefore, there is no question of violation of Sections 61 (i) and 86 (4) or any other relevant provision of the Electricity Act, 2003 and relevant regulations by the State Commission.

c. Hence the issue is decided against the Appellant.

11.5 On question no 7 f) i.e. Whether the Respondent Commission by passing the Impugned Order has created a deterrent for the consumers to avail and exercise their statutory right to open access guaranteed under the Electricity Act, 2003?, our observations are as follows:

a. The State Commission while determining the CSS has acted according to the provisions of the NTP and there is no violation of the Electricity Act, 2003 or relevant regulations framed by it. The State Commission has submitted that there is an increase in CSS for FY 2015-16 as compared to FY 2014-15. The State Commission further submitted that the comparison of CSS for FY 2014-15 and FY 2015-16 is not relevant as every tariff order is different and needs to be judged by the applicable legal provisions and taking into consideration the prevailing circumstances. Similar observations have been made by this

Tribunal in judgement dated 3.9.2013 in appeal no. 186 & 187 of 2012 in case of Sarover Energy Pvt. Ltd & Ors. and KERC and Anr. The relevant portion of the judgement is reproduced below:

“42. However, the circumstances that existed at the time of passing of the earlier orders in 2009, 2010 and 2011 and the circumstances that prevailed in State at the time of the passing of the present impugned order are completely different and therefore, the state Commission decided to reintroduce the Cross subsidy surcharge. In fact, the State Commission in the impugned order has taken into consideration the methodology set out in the KERC (Open Access Regulations), 2004.

43. The Electricity Act, 2003 provides for levy of Cross Subsidy Surcharge. The National Tariff Policy clearly mandates that the Regulatory Commissions ought to strike a balance between the requirements of the commercial viability of Distribution Licensees and the Consumer interest. Therefore, the application filed by the Distribution Licensee requesting for reintroduction of the Cross Subsidy Surcharge is in keeping with the statutory mandate of the Act.

44. That apart, the issue of previous year cross subsidy surcharge was determined at zero level cannot be a relevant issue in this matter since every tariff order is a fresh tariff order which needs to be judged by the applicable legal provisions and taking into consideration

the prevailing circumstances. As such, there is no infirmity in the findings given in the impugned order on this issue.”

We are in agreement with the views expressed by the State Commission and this Tribunal's judgement dated 3.9.2013 in Appeal Nos. 186 & 187 of 2012. Hence, it will not be fair to conclude that the Impugned Order has created a deterrent for the consumers to avail and exercise their statutory right to open access guaranteed under the Electricity Act, 2003.

- b. Hence this issue is also decided against the Appellant.

11.6 On question no 7 g) i.e. Whether the Impugned Order suffers from gross irregularity by violating the objective and spirit with which the Electricity Act, 2003 has come into existence and the same being passed in violation of the provisions of Section 42 of the Electricity Act, 2003?, our observations are as below:

- a. As per Appellant the increase in the CSS for the Appellant is in violation of Section 42 of the Electricity Act, 2003.
- b. Electricity Act, 2003 does not provide for elimination of cross subsidy but provides for reduction in the cross subsidy as per the third proviso of section 42 (2) of Act. Considering the need to continue with the scheme of cross subsidy, the third proviso to

section 42 (2) of the Act 2003 has been amended by the Act 26 of 2007 w.e.f. 15.06.2007 as under:

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

- c. The computation of the CSS has been made by the State Commission in line with the formula prescribed by the NTP. The top 5% at margin on the power purchase cost (Component 'C'), was computed by State Commission in line with Merit Order of the Discoms, as decided in the Impugned Order. The formula specified in the NTP also relates to the computation made as per the top 5% at margin on the power purchase cost. As per the NTP, the CSS has to be computed for a category of consumers; and Tariff Policy requires computation of average tariff for a particular category of consumers.
- d. The State Commission has observed at para 1.27 in its Impugned Order that :

" 1.27 The Commission has determined voltage wise cost of supply vis-a-vis cross subsidy percentage of the consumer categories on that voltage based on the proposals submitted by the Discoms. It may be mentioned here that the data/ information for working out the voltage wise cost of supply needs to be further validated to get a

fair and correct picture. The voltage wise cost of supply vis-a-vis cross subsidy percentage worked out in this tariff order is only indicative in nature in the absence of requisite data. This is in compliance of directives given in the judgment of APTEL on this issue as a first step in this direction.”

- e. The State Commission has observed in the Impugned Order that it is consciously making efforts over the past several years to reduce the CSS across all consumer categories. However, while doing so it has also kept in mind that any category of consumers is not put to tariff shock by a sudden steep hike. It may also be seen that although there is no change in the tariff for any category of consumers, however, the percentage cross subsidy vis-a-vis overall average cost of supply has undergone a marginal change. We are in agreement with the views of the State Commission in this regard.

- f. However, it has been brought to our notice that the CSS for some category of consumers like that of the Appellant has gone up substantially. The State Commission is required to prepare a road-map for reduction of cross subsidies amongst the various categories of consumers. The above observations are also in line with this Tribunal’s judgement dated 9.1.2017 in Appeal No. 134 of 2015.

- g. Hence this issue is decided accordingly.

11.7 On question no 7 h) i.e. Whether the Respondent Commission erred by increasing the Tariff and calculating the Cross Subsidy Surcharge on the basis and to recover past true up costs?, our observations are as below:

- a. As per the Appellant, the State Commission in para 1.22 of the Impugned Order has loaded the arrears of last 5 years (Rs. 1730 Cr.) in one financial year (2015-16) transferring entire burden on the consumers of the State of Madhya Pradesh. This has been done without assigning any reason. The State Commission could have reduced the amount of arrears attributable towards the inefficiency in the functioning of the Discoms.
- b. The State Commission has passed the orders for true-up of ARR for Discoms for FY 2009-10, (Rs.494.00 Crore), FY2010-11(Rs. 318.00 Crore) and FY 2011-12 (Rs.932.00Crore), true-up of ARR for MPPTCL for FY 2012-13 (Rs. 174.00 Crore) and true-up of ARR for MPPGCL for FY 2011-12 (-) Rs. 188.00 Crore) after the issuance of Retail Supply tariff order for FY 2014-15. This would result in an impact of Rs. 1730 Crore. Discoms have been allowed to recover these costs from ARR for FY 2015-16.
- c. The true-up costs for the past years have been adjusted in the FY 2015-16 as the methodology employed by the State Commission for determining the retail tariff was being

challenged in various appeals before this Tribunal. The true-ups for the earlier years i.e. FY 2006-07 and FY 2007-08 were pending adjudication before this Tribunal by way of Appeal No. 145 of 2009 and Appeal No. 150 of 2011 respectively. This had created an impasse and the trueing-up of ARR for 2008-09 onwards were put on hold. Subsequently, this Tribunal passed orders dated 19.05.2010 and 04.03.2011 in the matter of Appeal No. 145 of 2009 and order dated 04.11.2011 in the matter of Appeal No. 150 of 2010. Thereafter, the State Commission, in accordance with this Tribunal's aforementioned orders, while trueing up for FY 2007-08 and 2008-09 directed the Discoms to submit information to support their claim for supply to un-metered agricultural consumers. This was a common issue in the subsequent years as well. It was observed that while trueing-up for FY 2008-09 onwards, despite specific directives, the Discoms did not submit the details required which would have facilitated the State Commission in validating the claims with regard to establish the quantum of sale in excess of the prescribed benchmarks for unmetered connections.

- d. Therefore, the State Commission was delayed in the process of true-up and finally vide order dated 09.04.2013 decided to proceed for true-up of the ARR for FY 2008-09 and onwards on the basis of the information available and filed on record. The orders on true-up of ARR for the distribution licensees for FY 2009-10, 2010-11 and 2011-12 was determined by orders dated 12.06.2014, 19.06.2014 and 22.07.2014 respectively after

detailed scrutiny and deliberations. The true-up for FY 2012-13 for the transmission licensee of Madhya Pradesh was decided on 21.08.2014 and the true-up for FY 2011-12 for MP Power Generating Company was decided on 1.10.2014. All the true-up orders were passed in 2014 post the issuance of the retail tariff order for FY 2014-15. Accordingly, the effect of true-ups from 2009-13 were considered with the ARR for FY 2015-16 wherein the generation true up was negative in nature ((-) Rs. 188 Crore). The transmission true up and the generation true up were of routine nature and had to be passed through with the ARR of 2015-16.

- e. It is to further to state here that Clause 8.3 of the Tariff Regulations, 2012 provides that –

"in case the Tariff already recovered is less than the Tariff determined after true up, the Distribution Licensees shall recover from the consumers, the under recovered amount in the manner as may be decided by the Commission subject to adhering to the timelines specified by the Commission for filing of True-up Application. The decision of the Commission on the mechanism of recovery of balance amount due to under recovery shall be final".

Hence, the Tariff Regulations provide for mechanism of recovery of the true up costs as deemed appropriate by the

State Commission and its decision in this regard is final.

- f. The delay in truing-up the costs for the years 2009-10 to 2011-12 was due to the methodology for calculating unmetered sales being challenged by the distribution licensees before this Tribunal.
- g. In the light of the factual details enumerated above, we do not find any infirmity in the approach adopted by the State Commission in considering the impact of past period true-up in the Impugned Order.
- h. The above observations are also in line with this Tribunal's judgement dated 9.1.2017 in Appeal No. 134 of 2015.
- i. Hence this issue is also decided against the Appellant.

11.8 On question no 7 i) i.e. Whether the Respondent Commission has acted erroneously by including fixed charges to off-set the cross-subsidy?, our observations are as below:

- a. The question of the Appellant does not spell out clearly the inclusion of fixed charges in respect of which parameter to off-set the cross subsidy. However, if the Appellant is talking about inclusion of fixed charges in component 'T' of the CSS formula, the same has been answered against the Appellant at S. No. 11.1 f. to i. above.

b. Hence on this issue also, we decide against the Appellant.

ORDER

We are of the considered opinion that the issues raised in the present Appeal are liable to be dismissed as devoid of merit.

Accordingly, the Appeal is hereby dismissed. The Impugned Order dated 17.4.2015 passed by the State Commission is hereby upheld. However, the State Commission is hereby directed to prepare in a time bound schedule a road map for reduction of cross subsidies amongst the various categories of consumers as remarked by us while deciding the Question No. 7 g) at S. No. 11.6 as above. In view of above, I.A. Nos. 312 and 313 of 2015 do not survive and are disposed of as such.

No order as to costs.

Pronounced in the Open Court on this **24th day of May, 2017.**

(I.J. Kapoor)
Technical Member

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REPORTABLE/NON-REPORTABLE

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(Mrs. Justice Ranjana P. Desai)
Chairperson