Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:26th Nov, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

APPEAL NO.294 OF 2013 AND IA No.391 OF 2013
APPEAL NO.299 OF 2013 AND IA No.395 OF 2013
APPEAL NO.331 OF 2013 AND IA No.437 OF 2013
AND
APPEAL No.333 OF 2013 AND IA No.443 OF 2013

APPEAL NO.294 OF 2013 AND IA No.391 OF 2013

In the Matter of:

1. Indian Hotel and Restaurant Association,
   B-2, Wadala Shriram Industrial Estate,
   Ground Floor, G.D. Ambekar Marg,
   Wadala, Mumbai-400 031

2. Hotel and Restaurant Association,
   Western India,
   Candy House, 1st Floor,
   Mandlik Road,
   Colaba, Mumbai-400 001

……. Appellant(s)

Versus

1. Maharashtra State Electricity Regualtory Commission
   13th Floor, Centre No.1,
   World Trade Centre,
   Cuffe Parade Centre,
   Cuffe Parade, Mumbai-400 005

2. Reliance Infrastructure Ltd.,
Reliance Energy Centre, Santacruz East,
Mumbai-400 055

...Respondent(s)

Counsel for the Appellant(s) : Mr. Ruth Elwin
Ms. Shikha Ohri
Mr. Hemant Singh

Counsel for the Respondent(s): Mr. J J Bhatt, Sr Adv.
Ms. Anjali Chandurkar
Mr. Hasan Murtaza
Mr. Aditya Panda for R-2
Mr. Buddy A Rangandhan
Mr. Raunak Jain for R-1

APPEAL NO.299 OF 2013 AND IA No.395 OF 2013

In the Matter of:
MIDC Marol Industries Association
Plot No.P-15, Street No.14,
MIDC, Marol,
Andheri (E)
Mumbai-400 093

……. Appellant

Versus

1. Maharashtra Electricity Regulatory Commission
World Trade Centre No.1,
13th Floor,
Cuffe Parade, Colaba,
Mumbai-400 005

2. Reliance Infrastructure Ltd
Reliance Energy Centre,
Santa Cruz (East)
Mumbai-400 055

...Respondent(s)

Counsel for the Appellant(s) : Mr. M G Ramachandran
Mr. Anand K Ganesan
Ms. Swapna Seshadri

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Mr. Hasan Murtaza
Mr. Aditya Panda for R-2
Mr. Buddy A Rangandhan
Mr. Raunak Jain for R-1

APPEAL NO.331 OF 2013 AND IA No.437 OF 2013

In the Matter of:
M/s. Tata Power Company Limited
Bombay House,
24, Homi Mody Street,
Mumbai-400 001

……. Appellant

Versus

1. Maharashtra Electricity Regulatory Commission
World Trade Centre No.1,
13th Floor,
Cuffe Parade, Colaba,
Mumbai-400 005

2. Reliance Infrastructure Ltd
H Block, First Floor,
Dhirubhai Ambani Knowledge City
Navi Mumbai-400 710

...Respondent(s)

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Ms. Prerna Priyadarshini
Ms. Kanika Chug

Counsel for the Respondent(s):Mr. J J Bhatt, Sr Adv.
Ms. Anjali Chandurkar
Mr. Hasan Murtaza
Mr. Aditya Panda for R-2
Mr. Buddy A Rangandhan
Mr. Raunak Jain for R-1

APPEAL No.333 OF 2013 AND IA No.443 OF 2013

In the Matter of:
Mumbai Grahak Panchayat
Grahak Bhavan,
Sant Dnyaneshwar Marg,
Behind Cooper Hospital,
JVPD Scheme, Vile Parle (West)
Mumbai-400056

…. Appellant

Versus

1. Maharashtra Electricity Regulatory Commission
World Trade Centre No.1,
13th Floor,
Cuffe Parade, Colaba,
Mumbai-400 005

2. Reliance Infrastructure Ltd
H Block, First Floor,
Dhirubhai Ambani Knowledge City
Navi Mumbai-400 710

3. PRAYAS (Energy Group)
Amrita Clinic,
Athawale Corner,
Karve Road,
Pune-411 004

4. Thane Belapur Industries
Plot No.P-14, MIDC,
Rabale Vilalge, PO: Ghansoli,
Navi Mumbai-400 071

5. Vidarbha Industries Association
1st Floor, Udyog Bhavan,
Civil Lines,
Nagpur-400 041

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Ms. Anjali Chandurkar
Mr. Hasan Murtaza
Mr. Aditya Pand for R-2
Mr. Buddy A Rangandhan
Mr. Raunak Jain for R-1

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. The Batch of these Appeals are directed against the Impugned Order of the Maharashtra Electricity Regulatory Commission (State Commission) dated 22.8.2013. This Impugned Order passed by the State Commisison pertains to the approval of Annual Revenue Requirement, Determination of Multi Year Tariff of Reliance (RInfra-D) for the second Control Period being 2012-13 to 2015-16.

2. The two primary issues raised in these Appeals are in respect of determination of (1) Cross Subsidy Surcharge and (2) Regulatory Assets Surcharge.

3. The short facts are as under:

   (a) The Hon'ble Supreme Court by the Order dated 8.7.2008 held that the Tata Power (TPC) was a licensee for the city and suburbs of Mumbai with no restrictions on the load to be supplied or the category of consumers.

(b) After the judgment of the Hon'ble Supreme Court, the Tata Power filed Petition No.113 for Annual Performance Review for the FY 2008-09 and Tariff Petition for the FY 2009-10. Accordingly, the State Commission passed the Tariff Order on 15.6.2009 in the Petition filed by the Tata Power.

(c) Similarly, the Reliance (RInfira-D) also filed a Petition in Case No.121 of 2008 for the tariff year 2009-10 with reference to its Distribution Business. On the same day on 15.6.2009, the tariff order was passed by the State Commission in case No.121 of 2008 by which the tariff with reference to certain categories of consumers was increased.

(d) In response to the public outcry, the State Government of Maharashtra sent a letter to the State Commission on 25.6.2009 giving directions to the State Commission to take emergent steps as per the necessity to ensure that no unreasonable bills are collected in the intervening period in which the investigations is being carried out.

(e) Accordingly, the State Commission by the Order dated 15.7.2009 stayed the tariff increase through the

tariff order dated 15.6.2009 until further orders in respect of some of the categories. These consumers were continued to be charged as per tariff order applicable for the previous year.

(f) At this stage, the Tata Power filed a Petition in case No.50 of 2009 on 31.8.2009 seeking Open Access and approval of the operating procedures to be adopted by the Tata Power and Reliance while supplying the power to the consumers in their common area of licence using Open Access to each other's existing distribution network.

(g) In view of the fact that both the parties agreed, the State Commission passed the Interim Order on 15.10.2009 in case No.50 of 2009 permitting the Tata Power to use the network of the Reliance to supply electricity to the consumers of the Reliance who chose to take supply from the Tata Power.

(h) In that order, the State Commission observed that the issue of cross subsidy surcharge and regulatory assets would be decided separately in future.

(i) Thereupon, after a few months, the Reliance filed Case No.7 of 2010 on 27.4.2010 praying for appropriate mechanism for recovery of loss of cross subsidy surcharge as well as past year's Revenue gaps from consumers who choose to migrate to the other Licensee.

(j) At this stage, the State Commission by Order dated 9.9.2010, vacated the stay order passed on 15.7.2009.

(k) On the next day on 10.9.2010, the State Commission passed the order holding that the issue relating to the Cross Subsidy Surcharge which is a tariff design issue would be dealt with at the time of issuance of tariff order of Reliance.

(l) As against this order dated 10.9.2010, the Reliance filed an Appeal in Appeal No.200 of 2010.

(m) After hearing the parties, this Tribunal passed the order on 1.3.2011 directing the State Commission to determine the Cross Subsidy Surcharge within 120 days thereof.

(n) At this stage, the Reliance filed a Petition in case No.72 of 2010 for tariff determination for the FY 2010-

11. The State Commisison passed order in Case No.72 of 2010 by which the State Commission ruled on the applicability of the Cross Subsidy Surcharge and Regulatory Assets Charge on the categories of the consumers.

(o) However, in the said order, neither cross subsidy surcharge nor regulatory assets charges were determined by the State Commission.

(p) At this stage, the Tata Power and Others challenged the said Order in case No.72 of 2010 in Appeal No.132 of 2011 by which the consumers using Open Access of Reliance were made liable to pay cross subsidy surcharge and regulatory assets charge.

(q) At that point of time, the State Commission passed the Order on 29.7.2011 holding that the consumers of Reliance who had chosen to take supply from Tata power on the network of Reliance would be liable to pay cross subsidy surcharge. Thereupon, the State Commission by its order dated 9.9.2011 determined the Cross Subsidy Surcharge.

(r) The Reliance, thereupon filed a Petition in case No.180 of 2011 on 4.11.2011 for approval of ARR and Tariff for the FY 2011-12 seeking revision of cross subsidy surcharge. In this matter public notice was issued and public hearing was held.

(s) The objections were filed and the consumers also were heard on all the issues.

(t) Ultimately in case No.180 of 2011 filed by the Reliance, the State Commission by the Order dated 15.6.2012 determined the tariff. In Appeal No.160 of 2012 the Reliance challenged the said order in case No.180 of 2011 for clarification and for direction to the State Commisison to determine the cross subsidy surcharge using the same methodology as followed in the Order dated 9.9.2011.

(u) At this point of time, this Tribunal rendered judgment in Appeal No.132 of 2011 & batch on 21.12.2012. Through this order, the Tribunal upheld the order of the State Commission dated 29.7.2011 holding that the consumers who have migrated to the

Tata Power on the wires of Reliance are Open Access consumers and would be liable to pay Cross Subsidy Surcharge.

(v) As against this judgment of the Tribunal the Tata Power challenged the same before Hon'ble Supreme court.

(w) On 7.1.2013, the Reliance filed case No.3 of 2012 seeking for determination of Cross Subsidy Surcharge based on the values approved in the tariff order dated 15.6.2012 in case No.180 of 2011.

(x) Ultimately, the State Commission on 10.5.2013 passed the order determining the Cross Subsidy Surcharge in case No.3 of 2012 after it had concluded the proceedings in case No.9 of 2013. In the meantime, the order dated 10.5.2013 had been challenged by the Tata Power and Others in Appeal No.107 of 2013 and Batch.

(y) This Tribunal in that Appeal No.107 of 2013 stayed the Order dated 10.5.2013 by the order dated 21.6.2013.

(z) At this stage, the State Commission filed an Application before this Tribunal seeking for the permission to release the MYT order in the Petition filed by the Reliance.

(aa) Accordingly, the same was permitted by the Order dated 28.6.2013. In pursuance of this order, the State Commission issued the Impugned Order in case No.9 of 2013 on 22.8.2013. Thereupon, this Tribunal gave judgment and order in Appeal No.178 of 2011 by the judgment dated 2.12.2013 setting aside the order of the State Commission dated 9.9.2011 giving some directions to be followed by the State Commission in future.

(bb) In fact, in the Impugned Order, the State Commisison adopted the same methodology endorsed by this Tribunal in judgment dated 2.12.2013 in Appeal No.178 of 2011.

(cc) In the mean time, these Appeals have been filed in the month of October, 2013 challenging the order dated 22.8.2013 rendering the findings on two aspects namely Cross Subsidy Surcharge and Regulatory Asset charge.

4. Let us now refer to the arguments of the Appellants on these two primary issues. The first issue is relating to the Cross Subsidy Surcharge:

(a) There is an exponential increase in the Cross Subsidy Surcharge and the same has been fixed at an exorbitantly high rate.

(b) The State Commission has approved the exponential level of cross subsidy surcharge. It has been increased from Rs. 84 Paise to Rs.3.89 Paise for change over consumers, Rs. 26 Paise to 3.69 Paise for HT commercial category consumers and Rs. 3 Paise to Rs.3.76 Paise for Residential Category Consumers having a monthly consumption of above 500 units.

(c) The aforesaid increase has resulted in huge tariff shock.

(d) The Cross Subsidy Surcharge is required to be brought down progressively by the year 2010. Therefore, the Cross Subsidy Surcharge cannot be increased.

(e) The consumer's choice cannot be defeated and competition cannot be killed by imposing exponential or high level of Cross Subsidy Surcharge.

(f) The Cross Subsidy Surcharge has to be determined in a manner that while it compensates a distribution licensee it cannot be onerous so as to eliminate the competition.

(g) The fact that Cross Subsidy Surcharge has not been correctly determined in the past which has been rectified and corrected in the judgment of this Tribunal in Appeal No.178 of 20011 cannot be relied upon by the State Commission as the judgment of this Tribunal provides that the Cross Subsidy Surcharge calculated incorrectly cannot be charged retrospectively.

(h) The reduction trajectory provided in the Impugned Order is misleading as it initially increases the Cross Subsidy surcharge exponentially and then follows a marginal reduction trajectory.

(i) The sum and substance of these submissions of the Appellant is that there is an exponential rise in the

Cross Subsidy Surcharge resulting in the tariff shock and as such the determination cannot be onerous to eliminate the competition.

5. In justification of the Impugned Order on these aspects, the learned Counsel for the Respondents namely Distribution Licensee and the State Commission argued at length contendint that the levy of Cross Subsidy Surcharge on Group-II consumers was fixed by the State Commission in its order dated 29.7.2011 and the same was upheld by this Tribunal in Appeal No.132 of 2011 in the judgment dated 21.2.2012. It is also submitted that when the applicability of the Formula is not disputed unless the Appellants were able to show that the values adopted for the elements of the Formula are wrong, the Cross Subsidy Surcharge cannot be disputed irrespective of being high or low.

6. Let us now discuss the issue with regard to the Cross subsidy surcharge in the light of the rival contentions urged by the learned Counsel for the parties.

7. The facts enumerated in the earlier paragraphs would show that Hon'ble Supreme Court in its order dated 8.7.2008 specifically held that wheeling was introduced in the Act, 2003 by which the Distribution Licensees who are yet to

install their Distribution Lines, can supply in retail by using the Distribution Lines of another Distribution Licensee subject to payment of surcharge.

8. In pursuance of the said order the State Commission through the order dated 15.10.2009, as an interim measure by consent permitted Tata Power to use the network of Reliance to supply electricity primarily to consumers of Reliance who choose to take supply from the Tata Power. In the said order, the State Commission specifically held that the issue of Cross Subsidy Surcharge and Regulatory Assets Charge would be considered separately in appropriate proceedings since it would require more examination.

9. It is only by the order dated 9.9.2011, i.e. after two years, the State Commission determined the Cross Subsidy Surcharge. This order dated 9.9.2011 was challenged by the Reliance by way of Appeal No.178 of 2011 on the ground that the Cross Subsidy Surcharge was determined at an extremely low figure. This Tribunal by the judgment dated 2.12.2013 though upheld the contentions of the Reliance, did not direct the State Commission to re-determine the Cross Subsidy Surcharge retrospectively.

10. The learned Senior Counsel for the Reliance has argued that had the State Commission calculated CSS under Order dated 9.9.2011 correctly, the resultant CSS would have been significantly higher and CSS in the Impugned Order would not have shown any significant increase. The comparison of CSS computed based on the judgment of this Tribunal dated 2.12.2013 and the Impugned Order as shown by the learned Senior Counsel is as under:

Consumer category	**CSS as per Order dated 9.9.2011**	**Scenario if CSS calculated considering components of NTP formula for respective year as per ATE Judgment in Appeal No.178 of 2011** **FY 11-12**	**Revised CSS as per MYT Order dated 22nd August, 2013** **FY 13-14**
BPL	0.00	0.00	0.00
LT Residential			
0-100 Units	0.00	0.00	0.00
101-300 Units	0.00	0.00	0.00
301-500 Units	0.00	2.26	2.53
500 and above units	0.00	3.82	3.97
LT Consumers			
Non Domestic			
Up to 20 kW/Public services	0.00	1.30	1.30

20kW to 50 kW	0.84	3.81	3.89
Above 50 kW	1.90	4.21	4.27
Industrial			
Below 20 kW load	0.00	0.67	1.25
Above 20 kW load	0.00	0.73	1.38
HT Consumers			
Industry	0.00	1.57	2.55
Commercial	0.26	2.53	3.69
Group Housing	0.00	0.00	0.33
Temporary	2.22	4.45	6.64
Railway/Public Services	-	-	2.98
Agriculture	0.00	0.00	0.00
Advertisements	8.35	10.85	11.55
Street Lighting	0.00	1.47	2.14
Temporary Religious	0.00	0.00	1.41
Temporary Others	5.51	8.57	10.01
Crematorium & Burial Grounds	0.00	0.00	0.00

11. As found by this Tribunal in Appeal No.178 of 2011, the original determination of Cross Subsidy Surcharge was incorrectly fixed at low figure. In the Impugned Order, the State Commission determined the Cross Subsidy Surcharge

using the value of various parameters for current year as per the Tariff Policy Formula.

12. In short, the contention of the Respondent is that there is no exponential rise in the Cross Subsidy Surcharge but the Cross Subsidy Surcharge has been fixed following the principles laid down by this Tribunal in accordance with the Tariff Policy.

13. According to the Respondent, if the State Commission had committed an error in not fixing Cross Subsidy Surcharge correctly, as has been found by this Tribunal in Appeal No.178 of 2011, the remaining consumers of Reliance cannot be loaded with the consequences for such an error on the part of the State Commission.

14. In this context, the Appellant has made the following arguments:

    (a) Cross Subsidy Surcharge has not been fixed in accordance with Section 42 of the Electricity Act, 2003. This Section mandates that the Cross Subsidy Surcharge has to be utilised to meet the requirements of current level of cross subsidy.

(b) Subsidy for direct category I, the consumers of the Reliance is less than the Cross Subsidy Surcharge and RAC for Open Access consumers. Consequently, the Open Access consumers will have to pay higher tariff than the direct consumers of the Reliance.

(c) The amount of Cross Subsidy Surcharge allowed to be recovered is significantly high despite the fact that there is a surplus fund with the Reliance. This would mean that as the Reliance has excess fund, no compensation is required to be fixed at such high level of Cross Subsidy Surcharge. Consequently, there is an error by which the Cross Subsidy Surcharge has been used only as revenue enhancing measure and not a compensatory charge.

15. While dealing with this submission, it would be proper to refer to the relevant provisions of the Act as well as the MYT Regulations, 2011.

16. Section 42 of the Act reads out as under:

> ***42. Duties of distribution licensees and Open Access-****(1) It shall be the duty of a distribution licensee to develop and maintain an efficient co-ordinated and economical distribution system in his*

area of supply and to supply electricity in accordance with the provisions contained in this Act.

(2) The State Commission shall introduce Open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of Open Access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such Open Access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

17. The reading of the above Section would show that the Commission is required to determine the Cross Subsidy Surcharge which shall be utilised to meet the current level of Cross Subsidy. This Section uses the words “as determined by the State Commission” and did not use the words “as specified by the State Commission”.

18. From these wordings, it is clear that the Parliament required the Cross Subsidy Surcharge to be determined first and the

Cross Subsidy Surcharge so determined shall be required to meet the current level of Cross Subsidy.

19. The Central Government notified Tariff Policy in accordance with Section 3 of the Act, 2003. This Tariff Policy also recommended certain formula for determination of Cross Subsidy.

20. The order dated 9.9.2011 passed by the State Commission was challenged by the Reliance in Appeal No.178 of 2011. In that Appeal, the Reliance challenged only the figures of the tariff of Power Purchase cost and did not challenge the Formula itself but the Tata Power and other consumers of the Respondent supported the Formula and have specifically stated that the Formula is the correct way to determine the Cross Subsidy Surcharge. In fact, the Full Bench judgment of this Tribunal in RVK case has upheld the validity for the said Formula.

21. In view of the above, the Formula cannot be challenged at this stage especially when the State Commission had been using the same since 2006.

22. Let us see the relevant provisions of MYT Regulations, 2011 dealing with the components of the wheeling cost. The same is reproduced below:

> *"73. Components **of Aggregate Revenue Requirement for Distribution Wires Business***
>
> *73.1 The wheeling charges for Distribution Wires Business of the Distribution Licensee shall provide for the recovery of the Aggregate Revenue Requirement, as provided in Regulation 78 of these Regualtions and shall comprise the following:*
>
> *Aggregate Revenue Requirement:*
>
> *(a) Return on Equity Capital;*
>
> *(b) Interest on Loan Capital;*
>
> *(c) Depreciation;*
>
> *(d) Operation and Maintenance Expenses:*
>
> *(e) Interest on Working Capital and Deposits from consumers and Distribution system Users;*
>
> *(f) Provision for Bad and doubtful debts; and*
>
> *(g) Contribution to contingency reserves.*
>
> ***Wheeling charges = Aggregate Revenue Requirement, as above, minus**:*
>
> *(h) Non tariff income; and*
>
> *(i) Income from Other Business to the extent specified in these Regualtions, and*

(j) Receipts on account of additional surcharge on charges of wheeling.

73.2 The Wheeling Charges of the Distribution Licensee shall be determined by the Commission on the basis of an application for determination of tariff made by the Distribution Licensee in accordance with Part C of these Regualtions.

Provided that the Wheeling Charges may be denominated in terms of Rupees/kWh or Rupees/kW/month, for the purpose of recovery from the Distribution System User, or any such denomination, as stipulated by the Commission from time to time.

23. The State Commission having determined the wheeling charges as per the Regulations is required to determine the Cross Subsidy Surcharge as per the Formula given in the tariff policy. Only, thereafter, the State Commission could determine the ARR of the Distribution Licensee for retail supply business as per the Regulations, 86 of the MYT Regulations, 2011. The said Regulation is as follows:

"*86.1 The tariff for retail supply by a Distribution Licensee shall provide for recovery of the aggregate revenue requirement of the Distribution Licensee for each year of the Control Period, as approved by the Commission and comprising the following:-*

Aggregate Revenue Requirement:

(a) Return on Equity Capital;

(b) Interest on Loan Capital;

(c) Depreciation;

(d) Cost of own power generation/power purchase expenses;

(e) Transmission charges;

(f) Operation and Maintenance Expenses;

(g) Interest on working capital and on consumer security deposits;

(h) Provision for Bad and doubtful debts and

(i) Contribution to contingency reserves

Revenue requirement from sale of electricity=Aggregate revenue requirement, as above, minus:

(j) Non tariff income;

(k) Income from Other Business, to extent specified in these Regualtions;

(l) Receipts on account of cross-subsidy surcharge.

24. On going through the said Regulations, it is evident that the Annual Revenue Requirement of the Distribution Licensees for Retail Supply Business can be determined only after determining the receipts on account of Cross Subsidy Surcharge. This is made clear in Regulations 95 of the MYT Regulations, 2011. The same is as follows:

"***95. Receipts on account of Cross-Subsidy surcharge***

95.1 The amount received by the Distribution Licensee by way of cross subsidy surcharge, as approved by the Commission in accordance with the Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regualtions, 2005 as amended from time to time, shall be deducted from the Aggregate Revenue Requirement in calculating the tariff for retail supply of electricity by such Distribution Licensee."

25. The above Regulations would establish that the State Commission can fix the retail tariff for various categories only after approving the ARR of the Distribution Licensees both for wire business and supply business.

26. In this way, the State Commission has utilised the Cross Subsidy Surcharge to meet the requirement of current level of cross subsidy.

27. Section 61 (g) of the Electricity Act, 2003 provides "that the tariff progressively reflects the cost of supply of electricity and also reduces cross subsidies in the manner specified by the Appropriate Commission".

28. In view of the exigencies of a given situation, such as consumer mix, existence of a large number of extremely low end consumers compared to small number of high end

consumers and likelihood of a huge tariff shock etc., the State Commission ought to determine the tariff which cannot be the mirror image of the actual cost of supply or a voltage wise cost of supply. The State Commission while determining the tariff, has to take into consideration the aforesaid and similar other relevant and germane consideration which is not based on voltage wise cost of supply or actual cost of supply.

29. In the present case, if the State Commission were to determine the tariff on the basis of the voltage wise cost of supply, it would certainly lead to a tariff shock to certain categories of consumers. Consequently, the State Commission has determined the tariff at the present point of time with respect to average cost of supply.

30. The relevant extract of the Impugned Order on this aspect is as follows:

> *"5.5.3.9 The Commission observed that in case of RInfra-D, wheeling losses for HT and LT level are available but applying average power purchase cost to LT and HT level to determine cost results in average voltage wise supply. The Commission further notes that such a tariff design on the basis on average voltage wise cost of supply would lead to tariff shock to certain categories of consumers.*

Moreover, RInfra-D has not submitted the details of voltage-wise Cost of Supply in the MYT Petition that was published for public comments.

5.5.3.10 Also, the consumers have not had the opportunity to give their comments and suggestions on the proposal to determine tariffs and cross subsidy on the basis of voltage wise cost of supply."

31. The average cost of Supply across all categories would consist as components of average cost, the following elements:

(a) Average Power Purchase Cost;

(b) Average Renewable Energy Cost;

(c) Average Transmission Cost;

(d) Average Standby Cost;

(e) Average Wheeling Charges;

(f) Average Retailing Costs;

32. The total cost in respect of all the elements are divided by the number of units sold and the resultant figure is Average Cost. The State Commission fixed the tariff of each category of consumers taking into account the various factors including affordability, etc.,

33. The difference between the tariff and the average cost would be the cross subsidy. The State Commission is as far

as possible required to ensure that the tariffs are with ±20% of the average cost of supply to satisfy the provisions of tariff regulations and tariff policy.

34. In the present case, the State Commission has attempted to ensure that the overall objective of reduction of cross subsidies to be within the limits of ±20%.

35. The relevant extracts in the Impugned order are given as under:

> *"5.5.3.11 In view of all the above reasons, the Commission is of the view that it would not be appropriate to determine tariffs on the basis of voltage wise cost of supply at this point of time, and hence, for the purpose of this Order, the Commission has continued to compute the cross subsidy with respect to the Average Cost of Supply. However, the Commission has attempted to ensure that the overall objective of reduction of cross subsidies to be within the limits of ±20% of the Average Cost of Supply, as laid down in the Tariff Policy as well several judgments of the Hon'ble Tribunal."*

36. The fixation of Cross Subsidy Surcharge follows the formula provided in the Tariff Policy. The same is as follows:

> ***"Surcharge Formula***
>
> *S=T- (C*(1+L/100)+D)*
> ***Where***
> *S is the Surcharge*

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

C is the weighted average cost of power procurement 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".

37. Thus, the three important elements of Cross Subsidy Surcharge Formula in the Tariff Policy are 'T' i.e. the tariff for the relevant category of consumers, 'C' i.e. the weighted average cost of power procurement of top 5% at the margin, 'D' is wheeling charges payable by such category of consumers. This is the Formula that is mandated by the tariff policy to be applied while fixing the Cross Subsidy Surcharge.

38. The Average Cost of supply contains several other elements apart from power purchase cost and wheeling charges. Section 42(4) provides that in case of open access, the open access consumer shall be liable to pay additional surcharge on the charges of wheeling as may be specified by the Commission "to meet the fixed cost of such distribution licensee arising out of his obligation to supply".

39. In the present case, by virtue of the fact that the tariff is based on the average cost of supply and the Cross Subsidy Surcharge so determined by applying the said “T” i.e. tariff in the Formula specified in the tariff policy fixed other than power purchase would get recovered.

40. Thus, in the present case, the State Commission has adopted the tariff policy formula to determine the Cross Subsidy Surcharge.

41. In view of the above, the arguments of the Appellant cannot be accepted in as much as the State Commission has not at all included any cost in the components of tariff policy formula that are not permissible to be included. The component “C” in the tariff policy formula is restricted only to weighted average power purchase cost of top 5% at margin, excluding liquid fuel based generation and renewable power. Thus, the Cross Subsidy Surcharge which was accordingly determined by deducting only such power purchase cost allows Distribution Licensees to recover the fixed cost arising out of supply as mandated by the Act, 2003 as component “T” as per the said formula covers all fixed and variable costs.

42. Having prescribed the formula in the said manner, the tariff policy in order to avoid double recovery of fixed costs has restricted additional surcharge only to recovery of stranded power purchase costs. The relevant extract is as follows:

> *"8.5.4 The additional surcharge for obligation to supply as per Section 42 (4) of the Act should become applicable only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. The fixed costs related to network assets would be recovered through wheeling charges."*

43. Fixed costs of the Distribution Licensees other than power purchase are generally included in the Wheeling Charges. The Cross Subsidy Surcharge then computed using the Tariff Policy formulae would not thus include such fixed costs. However, in case, the Wheeling Charges do not contain certain fixed cost of the distribution licensee then the same gets recovered by way of Cross Subsidy Surcharge as in the Tariff Policy Formula. The wheeling charges are to be subtracted from the tariff payable by various categories of consumers which include such fixed costs. The State Commission, in fact adopted the Cross Subsidy Surcharge formula specified in the tariff policy. Therefore, such fixed

cost is recovered through Cross Subsidy Surcharges instead of wheeling charges. Since the fixed cost of distribution licensee other than power purchase cost would be recovered by the Distribution Licensee either by way of wheeling charges or Cross Subsidy Surcharges, therefore, as per the tariff policy, the additional surcharge is limited to stranded cost of power purchase only otherwise it would amount to double recovery of fixed cost from the migrating consumers.

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

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

46. Why CSS is higher than Cross Subsidy in the present case? The difference between the tariff "T" determined using Average Cost of Supply (ACoS) and Cross Subsidy. For subsidizing consumers tariff is higher than ACoS, whereas for subsidized consumers tariff is lower than ACoS. For RInfra, ACoS and therefore "T" included in it Average Power

Purchase Cost including Renewable Energy, Transmission and Standby Charges. In addition, Wheeling and Retailing charges is also included in "T". Since tariff is determined on ACoS basis there are fixed costs elements which are built into the tariff "T" in addition to variable cost of Power Purchase.

47. Under the Tariff Policy, CSS is mainly difference of Tariff 'T' and weighted average cost of power procurement of top 5% at the margin i.e. 'C'. There are no other elements of costs which are required to be deducted while determining CSS other than wheeling thus CSS is higher than the Cross Subsidy. However, if the tariffs were determined based on actual Cost to serve principles instead of ACoS basis, CSS would have been equal to Cross Subsidy. In case of TPC also, Commission had adopted identical principles of tariff determination based on ACoS basis and in that case also Cross Subsidy and CSS are not identical.

48. The Maharashtra Commisison works out ARR for Wire Business as well as of Retail Business. ARR of Wire business includes RoE, Interests on loan, Depreciation) on GFA of network, O&M charges etc. ARR of retail business includes Power Purchase Costs, RoE, Interests on loan,

Depreciation on meter costs, Employees Costs and A&G Expenses and Interest on Working Capital. ACoS is the summation of Power Purchase Cost, Transmission Charges, Wheeling Charges and Retailing Charges.

49. Wheeling Charges are worked out by dividing ARR of Wire Business by total sale. Transmission Charges are included in Wheeling Charges as the ARR of Wire Business includes the ARR of Transmission Licensee and PGCIL Charges etc.,

50. Only Wheeling Charges determined are deducted from 'T' as per Tariff Policy Formula. The licensee gets Wheeling Charges separately from the Open Access Consumers. If Commission does not work out retailing charges separately, such charges would be included in Wheeling Charges for distribution licensee. The Open Access Consumers would pay lesser CSS but higher Wheeling Charges. In case Commission determines retailing ARR for retail supply then Open Access Consumer pays higher amount as CSS and lower as Wheeling Charges.

51. In view of the above, the Cross Subsidy Surcharge and Cross Subsidy may not be equal.

52. On the basis of the interpretation of Regulation 3.1 and 4.1 of the MYT Regulations, 2011, it is argued by the Appellant that the determination of cross subsidy surcharge and additional surcharge u/s 42(2) and 42(4), ought to be yearly, whereas the other components listed in Regulation 3.1 (i) to (v) ought to be done under Multi Year Tariff framework. However, it is to be pointed out that there is no power conferred in the Regulations from determining the cross subsidy surcharge in the manner done by the Impugned Order.

53. On the other hand, the Sate Commission has determined the Cross Subsidy Surcharge which is the outcome of tariff determination for the aforesaid years.

54. According to the Appellant, the Cross Subsidy Surcharge is wrongly determined.

55. This submission of the Appellant may not be correct in as much the Formula considered by the State Commission is the formula prescribed in the tariff policy which is not disputed by anyone. Thus, the figures approved by the State Commission, as well as the formula are not challenged. The Appellants figures do not at all coincide with the approved figures required to be taken for

determining the cross subsidy surcharge as prescribed in the tariff policy formula.

56. According to the Appellant, the direct high end consumers of the Tata Power are subsidizing certain categories of change over consumers who in turn pay cross subsidy surcharge to Reliance consumers and thus the high end direct consumers of the Tata Power are subsidizing the directing consumers of the Reliance which is anti competitive.

57. The submissions namely circuitous method that high end consumers of the Tata Power are indirectly subsidising direct consumers of Reliance may not be correct.

58. In fact, the changeover consumers have agreed to change over on the tariff of Tata Power. If such a tariff includes any cross subsidy element, it is a part of such tariff. It has nothing to do with the cross subsidizing direct consumers of Reliance.

59. While dealing with this issue, this Tribunal in the judgment in Appeal No.132 of 2011 has held as under:

> "*143. TPC further contended that if Section 42 is to be applied in the present case, it would mean that the State Commission has no jurisdiction to fix the tariff in*

respect of the change over open access consumers u/s 49 and 86 (1) (a) of the act. This contention also is misplaced. The TPC is an independent distribution licensee in the same area of supply. They are entitled to have the tariff of their consumers determined by the State Commission. In other words, the State Commission alone has got the jurisdiction to fix the tariff of the consumers of the TPC u/s 62 of the Act. The TPC and its Open Access Consumers have chosen to adopt the said tariff out of their own choice and volition.

144. According to RInfra , the TPC are taking away the high end consumers from RInfra on representation that the tariff fixed by the State Commission for high end consumers of Tata is lower than the tariff fixed for the high end consumers of the RInfra. If the TPC Company are to start negotiating the tariff in the case of each high end consumers, there will be a vast disparity among the consumers which will negate the spirit of the competition under the Act.

145. As mentioned earlier, in the present case, TPC has voluntarily chosen to supply and the open access consumers have voluntarily chosen to receive supply from the TPC on the basis of the tariff fixed by the State Commission as applicable generally to the TPC Consumers within the area of distribution. This shows that Section 49 and Section 86 (1) (a) have no application".

60. The above observation of this Tribunal would indicate that if the exercise of determination of Cross Subsidy Surcharge is in accordance with the law, then the consequences are

irrelevant. The law requires the payment of cross subsidy surcharge which has been determined in accordance with the law.

61. As a matter of fact, the change over consumers when they entered into an Agreement for supply with Tata Power have specifically agreed to the following two conditions:

> *"(c) To be bound by the provisions of MERC Order dated 15th October, 2009 in case No.50 of 2009 pertaining to interim arrangement for Mumbai North AVR Customer Changeover by usage of network infrastructure of Existing Distribution License and any further MERC Order/Regulation or otherwise regarding the same.*
>
> *(e) To pay for the said supply at the prevailing tariff rates as also to pay the charges based on the Schedule of Charges/Rates for individual connections approved by MERC for Tata power from time to time."*

62. In view of the above conditions which have been agreed to, the contention urged by the Appellant has no basis.

63. The Cross Subsidy Surcharge has been determined by the State Commission by using the Formula prescribed by the National Tariff Policy which has not been challenged. Accordingly, the State Commission has taken all approved components of the Formula while determining the cross subsidy surcharge for the MYT period.

64. In the Impugned Order, the State Commission has merely applied the approved values of the components of the Formula and arrived at a cross subsidy surcharge number.

65. The Appellants have sought to rely upon several Clauses of the MYT Regulations to show that while the tariff is to be determined over the MYT period, the cross subsidy surcharge has to be determined for each year.

66. It is noticed that in the Impugned Order, the State Commission have done both the things. The ARR and Tariff have been computed over the MYT period. On the basis of such computation over the MYT period, the final value of 'C' and 'T' has been arrived at for each year of the control period. It is these approved values which have been used in Cross Subsidy Formula.

67. According to the Appellant, the change over consumers would be constrained to pay cross subsidy twice over one to Reliance and other to Tata Power. This contention as indicated above, has been rejected earlier by this Tribunal in Appeal No.132 of 2011 Batch.

68. The consumers who are connected to one licensee and receive the supply from another licensee are special

category of consumers as compared to those who are connected to and receive supply from the same licensee.

69. The above classification bears a rational nexus to the object sought to be achieved. This is to identify which consumer are availing Open Access and which consumers are not. It is on this basis that the consumers who are availing Open Access are liable to pay the cross subsidy surcharge.

70. In other words, the consumers who are not availing Open Access need not have to pay the Cross Subsidy Surcharge.

71. On behalf of the Appellant, Mumbai Grahak Panchayat, it is contended that the cross subsidy surcharge cannot be determined in the light of the observations made in Appeal No.200 of 2010.

72. This submission is not correct since this issue was already considered by the State Commission when it first determined the cross subsidy surcharge in its order dated 29.7.2011.

73. That apart, this Tribunal in Appeal No.178 of 2011 has held that whenever there is a change in either of the components 'C' or 'T', the State Commission is bound to re-determine

the Cross Subsidy Surcharge i.e. what has been done in the Impugned Order.

74. The relevant portion of the order is as follows:

> *"Bare reading of the above provision would indicate that Open Access in distribution is coupled with CSS. The State Commission has to compute CSS to meet the requirement of current level of cross subsidy.* ***There cannot be any open access with (sic) CSS determined by the State Commission and the State Commission is bound to determine the CSS with every change in tariff and cost of supply".***

75. Therefore, the submissions made by the Appellants in respect of the Cross Subsidy Surcharge issue does not deserve acceptance. Accordingly, this issue is decided as against the Appellants.

76. The next issue is **Regulatory Assets Charges**.

77. Let us now refer to the issue with regard to the Regulatory Asset Charge. On this issue, the Appellants have made the following arguments.

a) Regulatory Asset Charge on Open Access Consumers is illegal;

b) The Consumers who had migrated from Reliance to Tata Power have been slammed with Regulatory

Asset Charge after they so migrated, which is clearly illegal;

c) Regulatory Asset Charge cannot be fixed as a separate charge on Open Access Consumers;

d) There cannot be any liability on Open Access Consumers of separate Regulatory Asset Charge, when it does not form part of tariff;

e) On a construction of Section 42 of the Electricity Act, 2003, the levy of Regulatory Asset Charge on Open Access Consumers is extraneous and onerous. This is borne out by Regulation 8.2 of the Open Access Regulations. There is no authority to impose Regulatory Asset Charge either under Section 42 of the Act or under Section 86 (1) (e) of the Act;

f) Regulatory Asset Charge cannot be added to tariff and is therefore outside the revenue requirements;

g) The past Regulatory Asset Charge cannot be included in the Power Purchase Cost of the current year. The Regulatory Asset Charge imposed on Open Access Consumers relates only to un-recovered Power

Purchase Cost and related expenses of the past year, which cannot be related to current year.

h) The State Commission has not undertaken any prudent check or verification to determine the quantum of Regulatory Asset Charge.

i)Regulatory Asset Charge has not been proportionately allocated taking into account the period during which the change over consumer was a retail consumer of Reliance and has been indiscriminately applied to all change over consumers of a particular category.

78. While dealing with these submissions, it would be worthwhile to recall the relevant facts on this issue. The Tata Power Company filed the Petition on 31.08.2009 before the State Commission for giving directions for enabling migration of consumers subsequent to the tariff Orders dated 15.06.2009 and the clarificatory orders dated 22.07.2009. In the said Petition, it was prayed that the protocol set out in the Petition be allowed to be followed by the distribution licensees while dealing with the changeover consumers with such modification as the State Commission

may deem fit. This Petition was filed under the provisions of the Open Access Regulations 2005.

79. The Reliance filed the reply with reference to all the issues including those relating to recovery of cross-subsidy and regulatory assets from the consumers who may migrate.

80. On this petition, public hearing was held by the State Commission. Thereupon, the State Commission passed its Order on 15.10.2009. In the said Order, the State Commission recorded that the Reliance submitted that since the tariffs are different for different classes of consumers, the implementation of the changeover may lead to switching by the subsidizing consumers of Reliance to Tata Power. The State Commission also recorded that the Reliance highlighted the issue relating to regulatory asset and likely under recovery of its revenue requirement due to stay on tariffs where tariffs have gone up pursuant to the tariff Order dated 15.06.2009. The State Commission held that these points have wider implication and therefore would consider the same separately in appropriate proceedings. Thus, the Order dated 15.10.2009 has been accepted and acted upon by the Tata Power.

81. After a lapse of six months, the Reliance filed a Case No. 7 of 2010 praying that an appropriate mechanism for recovery of loss of cross-subsidy as well as the past years revenue gap from consumers who migrate to other distribution licensee, be specified to avoid a tariff shock on the balance consumers left with Reliance. In the meantime, the tariff Order dated 15.06.2009, which was in force was stayed by the State Commission by the Order dated 15.07.2009. However, the stay was vacated by an Order dated 09.09.2010. Due to this, the tariff for categories of consumers for the period from 15.06.2009 to 09.09.2010 could not be recovered.

82. The State Commission thereafter passed an Order dated 10.09.2010 in Case No. 7 of 2010 holding that the issue raised in this case is a tariff design issue and would be dealt with at the time of issuance of tariff Order to be passed in the Petition submitted by the Reliance. Against this Order, the Reliance filed an Appeal No. 200 of 2010 before this Tribunal. This Tribunal by the Order dated 01.03.2011 after hearing the parties, directed the State Commission to consider those issues within 120 days from the date of the said Order.

83. Thereupon, the Reliance filed a Petition for truing up for the year 2008-09 and APR for 2009-10 and tariff determination for 2010-11 in Case No. 72 of 2010. The Reliance in this Petition requested the State Commission that in view of the numbers of the APR and revenue getting crystallised, the cross subsidy surcharge and payment of regulatory assets on migrating consumers may be prescribed. It has also provided the proposed methodology for determination of cross subsidy surcharge. In the said Petition in Case No. 72 of 2010, the State Commission passed the Order on 29.07.2011 holding that the cross-subsidy surcharge and Regulatory Asset Charge would be payable by the consumers categorized in Group No.1, namely, direct consumers and Group No.2, namely, consumers connected to reliance network.

84. The Reliance thereupon filed a Case No. 9 of 2013 being the MYT Petition. In the said Petition, the Reliance proposed the recovery of regulatory asset by way of Regulatory Asset Charge as well as recovery of cross-subsidy surcharge. This Petition was enquired into; public hearing was held after inviting the suggestions and objections from them, thereafter the State Commission had passed the impugned Order.

85. It cannot be debated that the State Commission has the power, authority and jurisdiction to recover Regulatory Assets created in the previous years or the legitimate revenue gap of the previous years found in the true-up of accounts in the tariff of the following years under the provisions of the tariff policy as well as under the 2003 Act. The tariffs are determined for the ensuring year on the basis of the estimates. The uncontrollable expenditures are trued-up after the completion of year and after the audited accounts become available. If revenue gap is found as a result of true-up of the previous year, it has to be recovered in the ensuring year. Similarly, any un-recovered revenue for previous years due to a Court's order has also to be allowed to be recovered in the ensuing year. The general practice followed by the State Commission is to add the previous year's revenue gap in the ARR of the ensuring year to be recovered in the tariff. However, in this case, the State Commisison has chosen to recover the past revenue gap of Reliance by creating a separate Regulatory Asset Charge.

86. The Regulatory Assets have been created on account of the following reasons.

(i) Certain legitimate expenditure incurred by Reliance had been allowed by the State Commission. However, in order to avoid the tariff shock, the State Commission had created regulatory asset in respect of the same and had deferred the recovery of the same in future tariffs.

(ii) The tariffs for 2009-10 were fixed by the State Commission through the tariff Order dated 15.6.2009, by changing the previous years tariff of certain categories of consumers of Reliance. However, by an Order dated 15.7.2009, the State Commission stayed the said change. Subsequently, the State Commission vacated the stay after 15 months. The loss of recovery and the consequent recovery in the ARR of Reliance by virtue of *ex parte* stay, resulted in the creation of regulatory assets.

(iii) The State Commission by the Order dated 15.10.2009 had allowed the migration of consumers from Reliance to Tata Power on network of Reliance for supply from Tata Power. Migration of consumers commencing from November 2009 allowed by the State Commission, caused a significant loss of high

paying consumers from the fold of Reliance leading to under recovery of revenue.

(iv) The State Commission through its Order dated 09.09.2011 has determined the Cross-Subsidy Surcharge applicable for changeover consumers of Reliance. However the component of formula was incorrectly considered by the Sate Commission. Therefore, the Appeal No. 178 of 2011 had been filed. This Tribunal in the Judgment passed in this Appeal has clearly held that the Cross-Subsidy Surcharge computed by the Sate Commission was artificially suppressed under the garb of not making it onerous. Thus with the right Cross-Subsidy Surcharge, the changeover consumers would have provided a fair compensation to the remaining consumers of the Tata Power and the accrual of regulatory assets would have been lesser to that extent.

(v) Under recovery of wheeling charges from changeover consumers has also contributed to accumulation of revenue deficit. The wheeling charges of Reliance were not revised since the tariff Order dated 15.06.2009. Thereafter the revision in wheeling

charges has been made in the MYT Order i.e., applicable from 01.09.2013. Therefore, for financial year 2010-11 and 2011-12 the consumers continued to pay wheeling charges determined for 2009-10 without any revision in the same.

The above factual aspects have to be borne in mind while considering this issue.

87. Section 42 (2) of the Act of 2003 mandates the State Commission to introduce Open Access for consumers in phases, subject to the conditions as specified by it. The said Section is as follows:

> ***42. Duties of distribution licensees and Open Access-***
>
> *(1) ……*
>
> *(2) The State Commission shall introduce Open access in such phases and* ***subject to such conditions****, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of Open Access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:"*

88. The Sate Commission has imposed the Regulatory Asset charge on these Open Access Consumers as a condition pursuant to Section 42 (2) of the Act 2003. Further, the migration of consumers to the Tata Power has been held to be open access as per the findings given by this Tribunal in Appeal No. 132 of 2011.

89. The Regulatory Asset Charge is an outcome of regulatory asset, which is approved by the State Commission. The approved amount of such regulatory asset has not been disputed by both the parties. The Tata Power and other changeover consumers were aware that the State Commission would be determining the Regulatory Asset Charge along with the Cross Subsidy Surcharge in appropriate proceedings, thus the migration of consumers from Reliance to Tata Power was after having the full knowledge of the fact that such charges would be payable. The Provisions of Section 42 (2) of the Act clearly show that the State Commission can introduce open access subject to such conditions including cross subsidies as may be specified.

90. In fact, through its various Orders, the State Commission has allowed the open access to consumers to avail supply

from Tata Power on the condition that such consumers will have to make payment of cross subsidy surcharge and regulatory asset charges to Reliance. On the strength of these Orders, which were based upon the Hon'ble Supreme Court Order, the State Commission has given reasons for levy of regulatory asset charge in this impugned Order which are as follows:

> "***4.3.2.2 The Commission in its Order in Case 72 of 2010 has rules that Regulatory Asset can be recovered from Group I and Group II consumers. The Relevant extracts of the Commission's ruling in Case No. 72 of 2010 is as given below:***
>
> > ***h) Given this background, the applicability of the charges to recover the regulatory assets for the above Groups and the rationale for the same are discussed below:***
> >
> > ***i) Group I: will have to pay the charges for recovery of regulatory assets, since they continue to be consumers of RInfra-D, both for Wires as well as supply.***
> >
> > ***ii) Group II: will have to pay the charges for recovery of regulatory assets, since they continue to be consumers of RInfra-D for Wires.***
> >
> > ***iii) Group III: will not have to pay the charges for recovery of regulatory assets, since they are no longer consumers of RInfra-D, either for Wires or Supply, and charges can be levied by a licensee only on a 'consumer'.***
> >
> > ***Accordingly, RInfra-D should propose recovery of the regulatory asset from Group I and Group II consumers, in the subsequent years.***

> ***4.3.2.8 The Commission has approved RAC as a separate charge, as this liability pertaining to the past period needs to be borne by consumers who are connected to the RInfra-D distribution network, i.e., the direct retail sale consumers and changeover consumers. For levying the RAC to the changeover consumers, it should be a separate charge and not merged with the retail tariff.***
>
> ***4.3.2.10 As regards to creation of a liability on a consumer, if consumers decides to determinate its contract, the Commission is also of the opinion that a distribution licensee should be considered to be operating on a 'Going concern basis, which is one of the fundamental assumptions in accounting on the basis of which financial statements are prepared. The Commission also notes that there would be new consumers being added to the consumers who will also be paying Regulatory Asset Charge. Hence, the consumers will be paying Regulatory Asset Charge till they are connected to the RInfra-D distribution network as Direct or Changeover consumers and the day consumer terminates its contract, the recovery of RAC from such consumers shall stop. Further, the Regulatory Asset Charge approved by the Commission shall be levied on energy consumption of the direct consumers and changeover consumers connected to the RInfra-D network on a monthly basis and not after termination of contract with RInfra-D".***

91. Thus, the above finding would show that the State Commission has in fact recognized the situation as not being "business as usual" and consequently approved the recovery of "regulatory assets" from changeover consumers as well, in its Order dated 29.07.2011. This has again been referred to in the impugned Order. There is no bar either in the Tariff Policy or in the Regulations denying the said

revenue gaps to Reliance. It is an admitted fact that the regulatory asset is nothing but deferred recovery of cost through tariff. We shall now refer to the Order dated 29.07.2011 in Case No. 72 of 2010, which is reproduced below:

> ***"Electricity, being an ongoing business, consumers are also added regularly to the system, while some consumers would move away from the system, either to another licence area or another State/country. Under 'business-as-usual' circumstances, regulatory Assets as well as the impact of truing up and associated carrying costs as well as Fuel Adjustment Cost (FAC) Charges are recovered only from the consumers who are receiving supply at the time of recovery, and are not recovered on a one-to-one basis from the same set of consumers who were receiving supply at the time of incurring the costs. It may be noted that under 'business-as-usual' circumstances, the consumers who are receiving supply from the licensee are also the same set of consumers who are connected to the distribution network of the licensee.***
>
> ***d) However, the present situation is not a 'business-as-usual' situation, and is one of the few instances in the country where parallel licensees are operating in the same area of supply and consumers have the right to migrate from one licensee to another. The migration has been facilitated by the above-referred Commission's Interim Order dated October 15, 2009, which was based on the Judgment of the Hon'ble Supreme Court of India dated July 8, 2008 in Civil Appeal No. 2898 of 2006 with Civil Appeal Nos. 3466 and 3467 of 2006, wherein the Hon'ble Supreme Court ruled as under:***
>
> ***"The concept of wheeling has been introduced in the 2003 Act to enable distribution licensees who are yet to install their distribution line to supply electricity directly to retail consumers, subject to payment of surcharge in***

addition to the charges for wheeling as the State Commission may determine."

92. The recovery of certain approved costs of Reliance was merely deferred by the State Commission in order to avoid tariff shock to the consumers. Had the State Commission permitted such recovery through tariff for the relevant years, the same would have resulted in an increase in the tariff to the consumers and consequently, the consumers including the changeover consumers would have paid higher tariff during the relevant period. These are consumers who had been benefited by the suppressed tariff and therefore liable to pay for amortization of regulatory assets by way of Regulatory Asset Charge. The increase in tariff for that year would have also resulted in an increase in CSS for that year.

93. In the case of Reliance, only the nomenclature of such past revenue gaps has been changed to regulatory assets and separate charge is prescribed. The Regulatory Asset Charge could have been divided into power purchase related and wheeling related costs and merged with energy charges and wheeling charges respectively. In that situation, every changeover would have paid for its share of

Regulatory Asset charge through the Cross Subsidy Surcharge and Wheeling Charges respectively.

94. It is normal practice to add the revenue gap of the previous year determined after true-up and recovery of regulatory assets created in the past, to the ARR of the ensuring year and determining the tariff to recover the ARR including the recovery of revenue gap and regulatory asset in the tariff. There is no illegality in the same. In this way, the recovery of the regulatory asset is reflected in the retail supply tariff which is designed to recover the ARR. Had the State Commission included the regulatory asset recovery in the retail supply tariff, 'T' in the Cross Subsidy Surcharge Formula would have changed and accordingly, the CSS would have increased to the extent of recovery of regulatory asset from that category of consumer. Instead of that, the State Commission has created a separate Regualtory Asset Charge. Just because the State Commission has used a different method for recovery of the regulatory assets, the distribution licensee viz, Reliance could not be denied of the legal recovery of the regulatory assets from the change over consumers on the plea that the Open Access consumers are liable to pay only CSS and additional surcharge, if any.

95. In the case of Tata Power, the regulatory assets have been merged with energy charges of Tata Power and such energy charges have been used to determine the Cross Subsidy Surcharge for Tata Power. Thus, any Open Access Consumer opting out of Tata Power supply and choosing to take supply from any other supplier on Tata Power network would pay the Cross Subsidy Surcharge of Tata Power. This would include regulatory assets recovery component of Tata Power. This would establish that separate display of Regulatory Asset Charge in tariff is only the matter of how the State Commission has chosen to display those tariffs to the consumers.

96. We, however, do not understand why the State Commission has used different methodologies for recovery of the regulatory asset surcharge for Tata and Reliance. We feel that the same methodology should have been used for both the distribution licensees.

97. The reason given by the State Commission for a separate Regulatory Asset Charge is for maintaining a separate regulatory asset recovering account. We do not understand why the need for maintaining a separate Regulatory Asset recovery account was not felt for Tata Power. We do not

think that there is any need to maintain a separate regulatory asset account. The Opening and Closing balance of the Regulatory Asset and carrying cost can be determined without creating Regualtory Asset Charge as a separate line item in tariff. We, therefore, direct the State commission to use same methodology for all the distribution companies in future for maintaining level playing field between the competing distribution licensees.

98. However, our observation above does not make recovery of Regualtory Asset Charge as illegal. The recovery of Regualtory Asset for the change over consumers is perfectly legal.

99. According to the Appellants, the recovery of Regulatory Asset Charge ought to have been done over a period of three years as per the Tariff Policy and this had not been done as Reliance has been allowed recovery over a period of six years while the Tata Power has been allowed recovery of its Regulatory Asset Charge over a period of three years.

100. According to the Reliance, the Tata Power approved Regulatory Assets with the carrying cost stand at about Rs. 1055 Crore while the Regulatory Assets approved for Reliance stand at Rs. 3377 Crores as on 01.04.2013 and

thus the regulatory assets of Reliance are roughly 3.2 times than that of Tata Power.

101. We feel that in these Appeals which are against the MYT Order for Reliance, we cannot go into the issue of period of recovery of Regulatory Assets for Tata Power. Why recovery of Regualtory Assets from Tata Power was kept 3 years in their MYT order would require detailed examination of the ARR Petition and the MYT Order in respect of Tata Power which cannot be decided in these Appeals.

102. It is contended by the Appellants that the Open Access Consumers have to pay double Regulatory Asset Charge i.e., one for the Tata Power and the other for Reliance. The Tata Power and changeover consumers had chosen to accept the Tata Power tariff out of their own choice. In fact, the Tata Power has voluntarily chosen to supply and similarly the changeover consumers also have voluntarily chosen to receive supply from Tata Power, on the basis of the tariff fixed by the State Commission. This has been clearly referred to in the Judgment in Appeal No. 132 of 2011 and batch by this Tribunal. Thus, it is clear the consumers have agreed to pay the same which is apparent from the proforma applications required to be signed by

them. Therefore, there is no merit in the contention of the Appellant.

103. One other contention urged by the Appellants is differential approach has been adopted by the State Commission in tariff fixation between the Reliance and the Tata Power to defeat the process of competition in the market so as to unduly benefit Reliance. There is no dispute in the fact that the Reliance and the Tata Power are the distribution licensees in the same area of supply and the tariff of the same is determined by the State Commission based on their estimated sales, cost etc., as per Sections 62 and 64 of the Act of 2003. As consumer mix, cost of both licensees is totally different. The tariff including the Cross Subsidy Surcharge, Wheeling Charges and other Charges are determined considering the factors for that licensee independent of any other licensee's consumer mix, cost etc., As tariff determined vary from one licensee to the other licensee based on the various factors, it may not be correct to compare tariffs and charges of Tata Power with the Reliance.

104. The charges imposed on changeover consumers through the impugned Order are as per the mandate of Act of 2003,

the tariff Policy. It is also made clear that the consumers who chose to move to Tata Power can again exercise that choice and move back to Reliance, if they so desire.

105. SUMMARY OF OUR FINDINGS

(a) **The Cross Subsidy Surcharge has been determined as per the Formula stipulated in the Tariff Policy. We do not find any illegality or error in determination of the CSS by the State Commission.**

(b) **There is no illegality in recovery of Regualtory Asset Charge from the change over consumers who have migrated from Reliance to Tata Power. However, we have given some directions to the State Commission regarding recovery of Regualtory Assets under Paragraphs (96 & 97).**

106. In view of the above, the Appeals are dismissed as devoid of any merits. No order as to costs.

107. Pronounced in the Open Court on this **26th day of November, 2014.**

(Rakesh Nath) **(Justice M. Karpaga Vinayagam)**
Technical Member **Chairperson**
Dated:26th Nov, 2014

√REPORTABLE/~~NON-REPORTABALE~~