

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**Dated:8<sup>th</sup> Oct, 2014**

**Present:**

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

**APPEAL NO.42 OF 2014**

**In the Matter of:**

**Federation of Karnataka Chambers  
Of Commerce & Industry (FKCCI),  
Federation House, K.G. Road,  
Bangalore-560 009**

**..... Appellant**

**Versus**

- 1. Bangalore Electricity Supply Company Limited  
K R Circle,  
Bangalore-560 001**
- 2. Karnataka Electricity Regulatory Commission  
6<sup>th</sup> & 7<sup>th</sup> Floor, Mahalaxmi Chambers,  
No.9/2, M.G. Road,  
Bangalore-560 001**

**...Respondent(s)**

Counsel for the Appellant(s) : Mr. Rohit Rao N  
Mr. Sridhar Prabhu

Counsel for the Respondent(s):Ms. Swapna Seshadri  
Ms. Mandakini Ghosh for R-1  
Mr. Anand K Ganesan for R-2

## **J U D G M E N T**

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

1. Federation of Karnataka Chambers of Commerce & Industry is the Appellant herein.
2. Challenging the Order dated 6.5.2013 passed by the Karnataka Electricity Regulatory Commission, the present Appeal has been filed by the Appellant.
3. The basic facts that are relevant to decide the issues raised in this Appeal are as follows:
  - (a) The Appellant consists of the 15 members who are consumers of the Distribution Licensee. The Bangalore Electricity Supply Company Limited (BESCOM), the Distribution Licensee, is the First Respondent.
  - (b) Karnataka Electricity Regulatory Commission is the second Respondent.
  - (c) The BESCOM on 19.12.2012 filed an Application for (a) Annual Performance Review of its figures for the year 2011-12 (b) ARR for the Financial Years 2013-2014 to 2015-2016 and (c) Determination of

tariff for Distribution and Retail Supply Business for the Financial Year 2013-14.

(d) After entertaining the said Petition, the State Commission directed for the issuance of public notice. Accordingly, the public notice was issued.

(e) During the public hearing, the Appellant appeared before the State Commission and filed the statement raising objection to the Application on various grounds.

(f) Ultimately, the State Commission passed the Impugned Order dated 6.5.2013.

(g) Aggrieved over the findings on some of the issues, the Appellant has filed the present Appeal.

4. The learned Counsel for the Appellant has raised the following issues:

(a) Increase in cross subsidy from 11% in the year 2011-12 to 15% in the year 2012-13 which has been passed on in tariff and cross subsidy of some consumers above 20%.

(b) Basic level of Cross Subsidy for each category of consumers has not been calculated.

- (c) No prudence check of audited accounts for earlier control period has been carried out.
  - (d) The allocation of power between distribution companies has been done by the State Government.
  - (e) Cross Subsidies to un-metered consumers has not been correctly calculated.
  - (f) Concept of Commission Determined Tariff'
5. On these issues, elaborate arguments were advanced by the learned Counsel for the Appellants.
  6. In reply to the said arguments, the learned Counsel for the Respondents in justification of the Impugned Order submitted that there is no infirmity in the findings rendered by the State Commission on these issues.
  7. Let us refer to each of the issues.
  8. The **First two Issues** relating to **Cross Subsidy** are interconnected and therefore being dealt with together.
  9. According to the Appellant, there is increase in cross subsidy 11 to 15% between the years and 2010-11 and 2011-12.

10. According to the State Commission, it has determined the tariff in terms of the National Tariff Policy so as to bring out the cross subsidy level to within  $\pm 20\%$  of the average cost of supply. The cross subsidy has actually been reduced between the years 2010-11 and 2011-12 which is evident from the hereunder:

In respect of LT and HT Industries the Cross Subsidy level for FY 11 and FY 12, as per the State Commission's Orders is as follows:

<b>Category of Consumers</b>	<b>Cross Subsidy level in FYH 11</b>	<b>Cross Subsidy level in FY 12</b>
LT Industries	14.58%	14.49%
HT Industries	18.39%	17.69%

11. From the above table it is evident that there is a marginal reduction in the cross subsidy but in any case, the cross subsidy has not increased. The cross subsidy is required to be gradually reduced so as not to result in tariff shock to said consumers. The cross subsidy in FY 11 and FY 12 is in compliance with the tariff policy as contemplated u/s 42 of the Electricity Act, 2003.

12. The State Commission in its Impugned Tariff Order dated 6.5.2013 has held as under:

**“5.7 Average Cost of Supply:** As per the approved ARR for FY14 and the approved sales, the average cost of supply for FY14 is computed as follows:

**TABLE – 5.37**

**Average Cost of Supply for FY14**

S.No.	Particulars	Amount in Rs (Cr)
1	Approved ARR for FY14	12498.31
2	Deficit of FY12	82.94
3	Net ARR for FY14 (1 +2 above)	12581.25
4	Approved Energy sales in MU for FY14	24977.60
5	Average cost of supply in Rs. Per unit	5.04

*The determination of the retail supply tariff of BESCO for FY14 on the basis of the approved ARR and the projected revenue deficit is taken up in the subsequent Chapter of this order.*

**6.3 Consideration for Tariff setting:** The Commission has considered the following relevant factors for determination of retail supply tariff:

**a) Tariff philosophy:**

*As discussed in the earlier tariff orders, the Commission continues to fix tariff below the average cost of supply for consumers whose ability to pay is considered inadequate and fix tariff at or above the average cost of supply for categories of consumers whose ability to pay is considered to be greater. As a result the system of cross subsidy continues. However, the Commission has taken due care to progressively bring down the cross subsidy levels as envisaged in the*

*Tariff Policy of the Government of India dated 6th January 2006.*

**b) Average cost of supply:**

*The Commission has been determining the retail supply tariff on the basis of the average cost of supply. The KERC (Tariff) Regulations 2000, require the licensees to provide details of embedded cost of electricity voltage / consumers category wise. This methodology requires the necessary data to be furnished by the licensee and the validation of the same by the Commission. Since this process of categorization of data / validation is not finalized, the Commission decides to continue with the existing method of determining retail supply tariff on the basis of average cost of supply.*

**c) Differential Tariff:**

*Beginning with its tariff order dated 25th November 2009, the Commission has been determining differential retail supply tariff for consumers in urban and rural areas. The Commission decides to continue the same in the present order also.*

**6.7 Other tariff related issues:**

*i) Fuel Cost Adjustment Charge*

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**ii) Cross subsidy surcharge:**

*BESCOM has not proposed cross subsidy surcharge in its filings. However, the Commission in its MYT Regulations has specified the methodology for calculating the cross subsidy surcharge. Based on the*

*above methodology, the category wise cross subsidy will be as indicated below:*

Particulars	HT-1 Water Supply	HT-2a Industries	HT-2b Commercial	HT3(a)Lift Irrigation	HT-3(B) Irrigation & Agricultural Farms	HT-4 Residential Apartments	HT-5 Temporary
Average Realization rate-Paise/unit	422.30	616.75	795.93	177.04	439.02	539.00	905.90
Cost of supply at 5% margin @ 66 kV and above level	536.31	536.31	536.31	536.31	536.31	536.31	536.31
Cross subsidy surcharge paise/unit @ 66 kV & above level	-114.00	80.40	259.60	-359.30	-97.30	2.70	369.60
Cross subsidy surcharge paise/unit @ HT level	-155.90	38.50	217.70	-401.20	-139.20	-39.20	327.70

*For the categories where the surcharge is negative, the surcharge is made zero at the respective voltage level. For the remaining categories, the Commission decides to determine the surcharge at 80% of the cross subsidy worked out above, as the cross subsidy surcharge has to be gradually reduced. Thus, the cross subsidy surcharge is determined as under:*

*Paise/Unit*

<b><i>Voltage Level</i></b>	<b><i>HT-2a</i></b>	<b><i>HT-2b</i></b>	<b><i>HT-4</i></b>	<b><i>HT-5</i></b>
66 kV & above	64	208	2	296
HT level-11 kV/33kV	31	174	0	262

*Since the realization rate for the newly introduced categories HT2(c)(i) and HT2(c)(ii) is not available, the cross subsidy surcharge shall be calculated based on the actual realization rate and adopting the surcharge formula as specified in the KERC (Terms and Conditions for Open Access) (First Amendment) Regulations 2006. The wheeling charges and cross subsidy surcharge determined in this order will supersede the charges determined earlier and are applicable to all open access/wheeling transactions in the area coming under BESCO. The Commission directs the Licensees to account the transactions under open access separately. Further, the Commission directs the Licensees to carry forward the amount realized under Open Access/wheeling to the next ERC, as it is an additional income to the Licensees.”*

13. We find that the State Commission in the tariff determination for 2013-14 has adopted average cost of supply for the distribution licensee. The Tariff Policy stipulates that the Cross Subsidies have to be reduced gradually and the State Commissions by the end of 2010-11, have to ensure that the tariffs are within  $\pm 20\%$  of the average cost of supply. In the Impugned Order the State Commission has not clearly indicated the category wise cross subsidy with respect to the average cost of supply. The average cost of supply is Rs.5.05/ kWh. Therefore, as per the Tariff Policy the tariffs have to be in the range of Rs.5.04/kWh  $\pm 20\%$ . The

Impugned Tariff order does not indicate variation of average realisation from such consumer category with respect to average cost of supply to establish that the tariffs are within  $\pm 20\%$  of the average cost of supply.

14. This Tribunal in judgment dated 31.5.2013 in the matter of Kerala High Tension and Extra High Tension Industrial Electricity Consumers' Association vs KSERC & others in Appeal No.179 of 2012 has considered findings of the Tribunal on the issue of cross subsidy in various judgments including Appeal No.102 of 2010 –Tata Steel Ltd Vs OERC & Others in which it had given detailed findings on this issue. The Tribunal had directed determination of category wise cross subsidy with respect to voltage wise cost of supply to transparently indicate the cross subsidy and to ensure that the cross subsidy determined with respect to voltage wise cost of supply is not increased. At the same time tariffs have to be within  $\pm 20\%$  of the average cost of supply as per the Tariff Policy.
15. In the Impugned Order the State commission has not determined the voltage wise cost of supply due to non-availability of data. It is unfortunate that despite clear finding by this Tribunal in various Appeals for determination of cross subsidy surcharge transparently with respect to voltage wise

cost of supply, the State Commission has failed to do so. The State Commission has also to clearly indicate the variation of category wise tariff with respect to overall average cost of supply to ensure that the tariffs for all the categories are within  $\pm 20\%$  as per Clause 8.3 of the Tariff Policy. However, the State Commission has failed to indicate the anticipated average revenue realisation from the various consumer categories and its variation with respect to average cost of supply.

16. As the FY 2013-14 is already over and the Respondent have given data to indicate that the cross subsidy in various categories have been reduced, we are not interfering with the Impugned Order. However, we give directions to the State commission to clearly indicate the variation of anticipated category wise average revenue realisation with respect to over all average cost of supply in order to establish that the stipulation of the Tariff Policy that tariffs are within  $\pm 20\%$  of the average cost of supply is met in the tariff orders being passed in the future. The State Commission shall also indicate category wise cross subsidy with reference to voltage wise cost of supply so as to show the cross subsidies transparently.
17. These issues are decided accordingly.
18. The **third issue** is with reference to the **prudence check**.

19. According to the Appellant, the State Commission has failed to conduct a prudence check of the financials of the distribution Companies BESCO for the previous control period.
20. The Appellant on this issue has raised a general contention that the State Commission has not carried out any prudence check and on the other hand, it has allowed the claims of the Distribution Licensee without any prudence check or verifications.
21. The State Commission is vested with the functions of determination of the Revenue Requirement and tariff based on the norms and parameters. After conducting due diligence, verifications of the details, the tariff orders are being passed. These orders are purely based upon the provisions of the Tariff Regulations, 2006 framed by the State Commission which provides for an Annual Performance Review and truing-up for the previous years.
22. The State Commission determines the Revenue Requirement and tariff in advance, based on the estimates. Thereafter, there is an Annual Performance Review conducted by the State Commission as a truing up exercise based on actual truing up data.

23. Therefore, it cannot be contended that the State Commission did not conduct a comprehensive performance review or prudence check of the distribution licensee.
24. According to the Respondent, a comprehensive approach was adopted by the Commission in the truing-up filing wherein the details regarding the expenditure estimated and the expenses approved by the State Commission were provided by the Distribution Company. Each item wise expenditure which were staggered as a controllable and uncontrollable, were explained in detail in the Application filed before the State Commission.
25. That apart, exhaustive information was furnished relating to the power purchase cost duly comparing the source wise energy estimated, approved by the State Commission and the actual, the quantum of purchase and the cost incurred as per the actual. In this Impugned Order, the State Commission validated the figures under each head of expenditure and validated the prudence of expenditure incurred. The State Commission has also carried out prudence check of the capital investment for FY 2010-12 by the Respondent Distribution Licensees with the assistance of a Consultant as evident from the Impugned Order.

26. As per the Tariff Regulations, 2006, the Distribution Licensee shall file estimation of ARR of each year of the control period. The State Commission in turn, will approve requirement of each of the year of the control period. Hence, while truing-up, the actual expenditure of the particular year is to be validated with respect to that of the expenditure approved by the State Commission.
27. The Appellant as pointed out by the State Commission has not pointed out any specific issue on the annual performance review and the truing up process conducted by the State Commission. It merely raised a general issue that there is no prudence check. The State Commission has conducted detailed check considering the claims as per the provisions of law and only such claims which are reasonable, are allowed.
28. Hence, there is no violation of any of the principle of the Electricity Act, 2003 or Tariff Regulations, 2006. Accordingly, this issue is decided against the Appellant.
29. The **4<sup>th</sup> Issue** is relating to **Allocation of Power between the various Distribution Companies by the State Government.**
30. The State Commission has submitted that the State Government has allocated the power which was purchased

by the erstwhile Karnataka Electricity Board from various Distribution Licensees in the State and this is outside the jurisdiction of the State Commission.

31. There is no dispute that in the present case, the unbundling of the erstwhile Karnataka Electricity Board was not undertaken by the State Commission but the statutory powers vested with the State Government. Hence, it is for the State Government to decide over the manner in which allocation of power purchase agreement of the erstwhile Karnataka Electricity Board is to be done among the Distribution Licensees which are the successor entities.
32. There is no provision for the State Commission to decide on which Generator will supply the electricity to the Distribution Licensees or otherwise for the State Commission to decide on the transfer of rights and obligation from the erstwhile Karnataka Electricity Board to the successor entity.
33. Under the provisions of the Karnataka Electricity Reforms Act 1999, the State Government had the powers to allocate power purchase between the distribution licensees. Section 185 (3) of the Electricity Act, 2003 provides that the provisions of the enactment are applicable so long it is not in consistence with the provisions of the Act, 2003. Therefore,

there is no infirmity in the allocation of the power being done by the State Government.

34. In any event, the State Government has only a limited role of allocating the source of power based on availability and requirements, the consumer profile and other factors of each Distribution Company. The State Commission is in the stage of allocating power purchase cost, conduct of prudence check and approved only the legitimate cost for passing on to the consumers.
35. As pointed out by the Respondent, the Appellant has not shown any infirmity in the allocation of power by the State Government. Therefore, the challenge on the Government power is without any basis.
36. The **Fifth Issue** is relating to the **Cross Subsidies to un-metered consumers** which has not been correctly calculated.
37. The State Commission has in the Impugned Order determined the tariff for the Irrigation Pump Sets and BJ/KJ category consumers after determination of the Cross Subsidies from other categories of consumers. This is termed as “Commission Determined Tariff (CDT)”.

38. The State Commission while considering for the State of Karnataka as a whole, determined the tariff for irrigation pump sets at more than 50% of the average cost of supply. Whereas for the consumers below poverty line, the tariff is being fixed at the rate of average cost of supply. Therefore, there is zero cross subsidy to this category.
39. This issue relating to the agricultural tariff and they being metered on the distribution transformers level, is covered by the judgment of this Tribunal in Appeal No.108 of 2010 dated 2.1.2013. The findings are as follows:

*“44. Fourth issue for consideration is related to consumption attributed to Irrigation pump sets.*

*45. The learned Counsel for the Appellant submitted that Section 55 of the 2003 Act contemplates that metering of all classes of consumers have to be necessarily be done. The 2<sup>nd</sup> Respondent BESCO has not metered the IP set consumers and has always claimed power purchase on assumptions and projections. The Commission in its order has noted that the IP set consumers are not opposed to metering. The Commission has also noted that the data regarding number of IP Set consumers has not been furnished by BESCO. Further, the Commission has also noted that the data from the meters of Distribution Transformers feeding power predominantly to IP set consumers has not been placed on record. Yet, the Commission has approved 4125.22 Million Units basing its figure on the data*

*furnished by BESCO. The approach of the Commission is erroneous. It should have disallowed any power purchase on account of IP sets until production of reliable data by BESCO.*

*46. The Commission has justified the assumption taken by them in regard to consumption by the IP sets and have submitted that it had considered the number of IP sets as per the 2<sup>nd</sup> Respondent's audited data for FY 2008 and census data produced by the 2<sup>nd</sup> Respondent BESCO. The Commission has considered IP sets sales on the basis of consumption recorded in the meters installed at the Distribution Transformer Level. Thus the sales to IP sets has been correctly made.*

*47. This Tribunal in catena of judgments has held that the Commissions ought to approve the power purchase costs subject to prudence check. This Tribunal in its judgment in Appeal No.250 of 2006 in the case of Bangalore Electricity Supply Company Limited & Ors. v/s Karnataka Electricity Regulatory Commission & Ors. 2008 ELR (APTEL) 164 had held as under:*

*“11. We hold that as the appellant is responsible for meeting the power demand in its area, its projections – unless perverse or grossly wrong – should not be interfered. Any variation in power procurement cost can be taken care of during truing up exercise. In the present case since tariff years 2007-08 and 2008-09 are over and we are in the midst of the tariff year 2009-10, the Commission is directed to i) allow the power purchase cost on the basis of actual available*

*figures and ii) also allow it the carrying cost, while carrying out the truing up exercise."*

*48. In view of findings of the Commission that it has considered IP sets sales on the basis of consumption recorded in the meters installed at the Distribution Transformer Level and in view of this Tribunal's judgment quoted above, we do not find any reason to interfere with the findings of the Commission. The issue is decided against the Appellant."*

40. In view of the findings rendered earlier by this Tribunal, there is no merit in the contentions of the Appellant on this issue.

41. Accordingly, the same is decided against the Appellant.

**42. The last issue is the concept of Commission determined Tariff.**

43. According to the Appellant, the concept of Commission determined tariff is not a correct principle and ought not to be given effect to.

44. In the State of Karnataka, the ground water level widely varies from North to South of Karnataka. The concept of Commission Determined Tariff (CDT) is to place different level of subsidy to support poorer farmers of the region where adverse ground water table conditions require larger quantity of electricity for irrigation.

45. The differential tariff under Commission Determined Tariff for Different Distribution Companies is as under:

ESCOMs	Commission Determined Tariff for Irrigation Pump-sets are as under as per Tariff Order dated 06.05.2013 (Rate Rs.Per unit)
BESCOM	1.51
MESCOM	3.68
CESC	3.36
HESCOM	4.42
GESCOM	3.88
Hukkeri Rural Co Operative Society	4.61

46. This determination was done on the basis of the principles laid down in the National Tariff Policy.

47. Para-8.3 of the National Tariff Policy is as under:

*“3. While fixing tariff for agricultural use, the imperatives of the need of using ground water resources in a sustainable manner would also need to be kept in mind in addition to the average cost of supply. Tariff for agricultural use may be set at different levels for different parts of a State depending of the condition of the ground water table to prevent excessive depletion of ground water. Section 62 (3) of the Act provides that geographical position of any area could be one of the criteria for tariff*

*differentiation. A higher level of subsidy could be considered to support poorer farmers of the region where adverse ground water table condition requires quantity of electricity for irrigation purposes subject to suitable restrictions to ensure maintenance of ground water levels and sustainable ground water usage.”*

48. In view of the above, there is no merit in the contention raised by the Appellant on this issue also.

49. Therefore, this issue is also decided as against the Appellant.

#### **50. Summary of Our Findings**

(a) **The State Commission has not determined variation of category wise revenue realisation per unit with respect to overall average cost of supply to indicate that the tariffs are within  $\pm 20\%$  of the average cost of supply as per the Tariff Policy. The State Commission has also not determined voltage wise cost of supply and category wise subsidy with reference to actual cost of supply as mandated by this Tribunal in the various judgments. As the FY 2013-14 is already over and the Respondent have given data to indicate that the cross subsidy in various categories have been reduced, we are not interfering with the Impugned Order. However, we**

**give directions to the State Commission to clearly indicate the variation of anticipated category wise average revenue realisation with respect to over all average cost of supply to establish that the stipulation of the Tariff Policy that tariffs are within  $\pm 20\%$  of the average cost of supply is met, in the future tariff orders. The State Commission shall also indicate category wise cross subsidy with reference to voltage wise cost of supply as mandated in the various judgments of this Tribunal and comprehensively dealt with in the judgment dated 31.5.2013 in Appeal No.179 of 2012..**

**(b) There is no merit in the contentions of the Appellant regarding prudence check of the expenditure incurred by the Distribution Licensee by the State Commission.**

**(c) There is no merit in the contentions of the Appellant regarding the allocation of power by the State government from various State Generating Companies to the distribution licensees.**

**(d) There is no merit in the contentions of the Appellant regarding cross subsidy to un-metered categories and Commission determined tariff.**

51. In view of the above, the Appeal is disposed of with certain directions to the State Commission regarding determination of cross subsidy for various categories in the future, without interfering with the Impugned Order. No order as to costs.

52. Pronounced in Open Court on \_\_\_\_ Oct'2014.

**(Rakesh Nath)**  
**Technical Member**  
Dated:8<sup>th</sup> Oct, 2014

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

✓ ~~REPORTABLE/NON-REPORTABLE~~