Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 2nd December, 2013

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V J Talwar, Technical Member

APPEAL No.178 of 2011

IN THE MATTER OF
Reliance Infrastructure Limited (R-Infra)
Reliance Energy Centre,
Santacruz (East)
Mumbai – 400 055.

… Appellant

Versus

1. **Maharashtra Electricity Regulatory Commission,**
   World Trade Centre No, 1, 13th Floor,
   Cufee Parade, Colaba,
   Mumbai – 400 001

2. **Maharashtra State Electricity Distribution Co. Ltd.,**
   Prakashgad, Plot No. G-9,
   Bandra (East),
   Mumbai – 400 051

3. **Tata Power Company Limited.,**
   Bombay House, Homi Mody Street,
   Mumbai – 400 005.

4. **The Brihanmumbai Electric Supply**
   & Transport Undertaking

BEST House, BEST Marg,
Mumbai – 400005

5. **Prayas (Energy Group)**
Amrita Clinic, Athawale Corner,
Karve Road, Lakdipool-Karve Road Junction,
Deccan Gymkhana, Karve Road,
Pune – 411 004.

6. **Mumbai Grahak Panchayat,**
Grahak Bhavan, Sant Dnyaneshwar Marg,
Behind Cooper Hospital
Vile Parle (W)
Mumbai – 400 056

7. **Thane Belapur Industries,**
Plot No. P0-14, MIDC,
Rabale Village, Post: Ghansoli,
Navi Mumbai – 400 071

8. **Vidarbha Industries Association,**
1st Floor, Udyog Bhavan,
Civil Lines, Nagpur – 440 001

9. **Mumbai – International Airport Pvt. Ltd.**
Chhatrapati Shivaji International Airport,
1st Floor, Treminal 1B,
Santacruz (East),
Mumbai – 400 099

….Respondent(s)

Counsel for Appellant(s): **Mr. J.J.Bhatt, Sr. Adv.**
Ms. Anjali Chandurkar
Mr. Hasan Murtaza

Counsel for Respondent(s): **Mr. Buddy A. Ranganadhan,**
Mr. Krishnan Venugopal Sr. Adv.
Ms. Richa Bhardwaja
Mr. Sitesh Mukherejee
Mr. Abhijeet K. Lala
Ms. Anusha Nagarajan
Ms. Kanika Agnihotri
Mr. Karan Minocha
Mr. Arijit Maitra

JUDGMENT

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

1. Reliance Infrastructure Limited (R-Infra) is the Appellant herein.

2. Aggrieved by the portion of the Impugned Order dated 9.9.2011 passed by the Maharashtra State Commission (R-1) in the case filed by the Maharashtra State Electricity Distribution Company Limited (MSEDCL-R-2), whereby the State Commission has purported to fix the Cross Subsidy Surcharge entitled to be recovered by the Appellant from Open Access Consumers including consumers who receive supply from Tata Power Company (R-3) using the Distribution Network of the Appellant and

the consumers who have migrated to the Tata Power Company (R-3), the Appellant has filed this Appeal.

3. The short facts are as follows:

(a) The Appellant is a Distribution Licensee. The said license was granted to the Appellant in 1926 to supply electricity in retail to the suburbs of Mumbai.

(b) The Tata Power Company (R-3) is a bulk licensee. The Appellant receives supply from Tata Power Company.

(c) On 5.9.2006, the State Commission passed the Cross Subsidy order by adopting the methodology for computation of Cross Subsidy Surcharge for Open Access transactions as provided in Clause 8.5 of the Tariff Policy and it had fixed zero Cross Subsidy Surcharge.

(d) Thereafter, a dispute arose between the R-Infra and Tata Power Company with regard to the license granted to the Tata Power Company to supply electricity in retail. This dispute was taken up to Hon'ble Supreme Court.

(e) The Hon'ble Supreme Court by the order dated 8.7.2008, upheld the entitlement of the Tata Power to

supply electricity in retail in the Appellant's area of supply.

(f) The Hon'ble Supreme Court in the Order dated 8.7.2008 held the following:

(i) Wheeling would be available to enable the Distribution Licensees who were yet to install their distribution lines to supply electricity directly to retail consumers;

(ii) Such Wheeling would be available to Distribution Licensees who were yet to install their distribution lines to supply electricity directly to retail consumers and the same shall be subject to the payment of Surcharge in addition to the charges of Wheeling as the State Commission may determine.

(g) On the basis of this judgment passed by the Hon'ble Supreme Court, the Tata Power Company filed a Tariff Petition in case No.113 of 2008.

(h) The State Commission by the Order dated 15.6.2009, passed the Tariff Order in the Petition filed by Tata Power Company in the Case No.113 of 2008.

(i) Simultaneously, the State Commission passed the Tariff Order in regard to Tariff of R-Infra's Distribution Business in case No.121 of 2008.

(j) By the said order, the tariff of subsidizing categories of consumers of the Appellant was increased while tariff to subsidized categories was reduced.

(k) At that stage, on 15.6.2009, the Government of Maharashtra directed the State Commission u/s 108 of the Electricity Act, 2003 to take emergent steps as may be necessary to ensure that no unreasonable bills are collected in the intervening period and with regard to that, investigation may be conducted.

(l) On receipt of this Order, the State Commission passed the Order dated 15.7.2009 in Tariff Petition No.121 of 2008 relating to the Appellant staying the tariff increase until further orders to the categories of consumers whose tariff was increased.

(m) In the meantime, the Tata Power Company filed a Petition in Case No.50 of 2009 before the State Commission for approval of the operating procedure to be adopted by the Tata Power Company while supplying power to the consumers in their common area of license.

(n) Simultaneously, the State Commission by its order dated 8.9.2009, appointed Administrative Staff College of India (ASCI) to carry out investigation into the affairs of the Appellant (R-Infra).

(o) In the meantime, the replies were filed by the Appellant in the case No.50 of 2009 and public hearing also was conducted. In the said proceedings, the State Commission, on the basis of the consent given by the Appellant, passed an interim order on 15.10.2009 u/s 94(2) of the Electricity Act, 2003 providing for a protocol for Open Access in respect of consumers in the common area of supply of the Appellant and Tata Power Company.

(p) In the said proceeding in respect of the said protocol, the Appellant raised the issue relating to the fixation of the Cross Subsidy Surcharge. However, the State Commission while providing for the protocol left the issue of Cross Subsidy Surcharge to be decided at a later stage.

(q) Under those circumstances, the Appellant filed a separate Petition in case No.7 of 2010, before the State Commission praying for an appropriate mechanism for recovery of loss of Cross Subsidy Surcharge as well as past year's revenue gaps from

migrating consumers to avoid tariff shock to the existing consumers of the Appellant. When those proceedings were pending, the State Commission received the report from ASCI on 9.7.2010 prepared after detailed investigations into the accounts and affairs of the Appellant.

(r) In their report, the ASCI submitted that it did not find any discrepancy in the accounts and affairs of the Appellant.

(s) On that basis, the State Commission passed another order on 9.9.2010, vacating the stay earlier granted.

(t) On 10.9.2010, the State Commission once again deferred the issue of fixation of Cross Subsidy Surcharge through an Order holding that the Cross Subsidy Surcharge would be dealt with only at the time of the issuance of the tariff order.

(u) Accordingly, the Appellants filed Tariff Petition in case No.72 of 2010 on 11.10.2010 praying for the determination of tariff as well as for fixation of the Cross Subsidy Surcharge.

(v) In the meantime, as against the order of the State Commission dated 10.9.2010, refusing to determine the Cross Subsidy Surcharge, the Appellant filed an

Appeal before this Tribunal in Appeal No.200 of 2010.

(w) This Tribunal, after hearing the parties, by the order dated 1.3.2011, directed the State Commission to consider the issue relating to the Cross Subsidy Surcharge and fix the same in a time bound manner.

(x) Accordingly, the State Commission in the Case No.72 of 2010 which was already pending before the State Commission passed an order dated 29.7.2011 ruling on the applicability of the Cross Subsidy Surcharge on various categories of the consumers. Even at that stage, the State Commission did not determine the amount of Cross Subsidy Surcharge.

(y) Ultimately, the State Commission passed the impugned order dated 9.9.2011 determining the Cross Subsidy Surcharge in respect of the Appellant, MSEDCL and Tata Power Company prospectively from the date of the said order.

(z) According to the impugned order, the Cross Subsidy Surcharge was to be done prospectively from the date of the said order in spite of the fact that the Hon'ble Supreme Court in its earlier orders observed that the licensees who were yet to install their

distribution lines to supply electricity directly to retail consumers can be subjected to the payment of surcharge in addition to the wheeling charges and despite the order passed by the State Commission dated 29.7.2011 in case No.72 of 2010 wherein it was held that the Cross Subsidy surcharge would be payable from the date of the migration.

(aa) The Appellant aggrieved over the portion of the impugned order, has challenged the validity and legality of the said impugned order in so far as the quantum of the Cross Subsidy Surcharge to be recovered prospectively by the Appellant is concerned.

4. The main issue raised in this Appeal are as follows:-

<u>Issue:</u> Wrongful calculation of Cross Subsidy Surcharge (CSS) and also usage of previous year data to work out CSS for current year and application of CSS prospectively.

5. In order to understand the issue before us in its correct prospective, it is beneficial to look in to the statutory provisions relating to CSS.

i) Statutory provisions: Section 42 of the 2003 Act deals with duties of a Distribution Licensee and

mandates it to provide open access to any person on payment of a surcharge to meet the current level of cross subsidy. Relevant extracts of Section 42 of the 2003 Act are reproduced below:

"42. .(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 may 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 :"

ii) Following propositions would emerge from the above section:

- State Commission to make Regulations permitting open access in distribution.

- Open access thus permitted by State Commission may be subjected to certain conditions such as Cross Subsidy and operational constraints.

- Open Access, once permitted, could be availed by a consumer on payment of a surcharge to the Distribution Licensee in addition to wheeling charges.

- Such surcharge would be utilised to meet **the current level of cross subsidy.**

- In other words, open access can be availed only on payment of CSS, determined by the State Commission, to meet the requirement of current level of cross subsidy by the Distribution Licensee.

iii) Clause 8.5 of Tariff Policy specified the method of calculating CSS in a particular situation. Relevant portion of clause 8.5 of Tariff Policy is set out below for ready reference:

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

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

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

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

Surcharge formula:

S = T – [C (1+ L / 100) + D]

Where

S is the surcharge

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

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

D is the Wheeling charge

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

…

iv) According to Clause 8.5 of Tariff policy, CSS would be the difference between the **tariff payable by the relevant category of consumers and the cost of the distribution licensee to supply electricity to the consumers of the applicable class.** 2nd Proviso to Section 42 mandates the State Commission to determine the CSS in such a manner that it reflects the current level of cross subsidy. Clause 8.5 of Tariff Policy has given some formula for calculate the CSS.

6. Let us now refer to the factual details to understand the issue in question:-

(a) By an order dated 5th September 2006 in Case No.9 of 2006, the State Commission adopted the

Methodology for computation of Cross-Subsidy Surcharge for Open Access transactions as provided in Clause 8.5 of Tariff Policy and had fixed zero cross subsidy surcharge.

(b) By a judgment and order dated 8th July 2008 in Tata Power (R-3) Company Vs MERC and Others, (2008) 10 SCC 321, the Hon'ble Supreme Court while upholding the entitlement of Tata Power (R-3) to supply electricity in retail in the Appellants' area of supply held as under:-

> "*"99. Regarding Mr. Venugopal's other submission relating to Section 42 of the 2003 Act, we are unable to appreciate how the same is relevant for interpreting the provisions of the licences held by TPC. It is no doubt true that Section 42 empowers the State Commission to introduce a system of open access within one year of the appointed date fixed by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling having due regard to the relevant factors, but the introduction of the very concept of wheeling is against Mr. Venugopal's submission that not having a distribution line in place, disentitles T.P.C. to supply electricity in retail directly to consumers even if their maximum demand was below 1000 KVA".*
>
> *"100. 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. We, therefore, see no substance in the said submissions advanced by Mr. Venugopal."

(c) The Hon'ble Supreme Court in the above Judgment specifically held the following:-

i. That wheeling would be available *"to enable distribution licensees who are yet to install their distribution line to supply electricity directly to retail consumers"* and

ii. That such wheeling available to distribution licensees who were yet to install their distribution line to supply electricity directly to retail consumer was specifically *"subject to payment of surcharge in addition to the charges of wheeling as the State Commission may determine".*

(d) After the aforesaid judgment, Tata Power (R-3) filed a Tariff Petition being Case No.113 of 2008.

(e) By an order dated 15th June 2009 in the aforesaid Case No.113 of 2008, State Commission, inter alia, held as under:-

"Section 43 of the Electricity Act, 2003 specifies the distribution licensee's duty to supply on

request, within one month of the application being received. Further, in terms of the MERC (Specific Conditions of Distribution Licence applicable to The Tata Power (R-3) Company Limited) Regulations, 2008, notified by the State Commission on August 20, 2008, TPC-D has to comply with all the provisions of the EA 2003 as well as the MERC (General Conditions of Distribution Licence) Regulations, 2006, notified on November 28, 2006. Accordingly, the State Commission directs TPC-D not to discriminate between various consumer categories while providing connections to new consumers, and ensure that the Universal Service Obligations are met. The State Commission also directs TPC-D to submit quarterly status report of category-wise applications received for new connections and new connections released by TPC-D, to the State Commission. Further, TPC-D should ensure wide publicity periodically to communicate to all categories of consumers in its entire licence area that they can approach TPC-D for availing supply, detailing the procedure and contract addresses, ward-wise, etc., for going about the process of submitting applications, etc.

As stated above, TPC-D has proposed a roll-out plan covering only 9 Wards, primarily overlapping with the licence area currently being served primarily by Reliance Infrastructure Limited – Distribution Business (Appellant-D), and no roll out plans has been proposed for the Wards being served primarily by the BEST till FY 2011-12, except one Ward at Wadala. TPC-D will have to meet its licence obligations in its entire licence area, and cannot pick and choose the Wards wherein it will supply electricity.

Moreover, incurring heavy capital expenditure for the network roll-out is not the only option available to TPC-D in its efforts to supply electricity to different consumers in its licence area, and the provisions of the EA 2003 relating to Open Access and the provisions of the MERC (General Conditions of Distribution Licence) Regulations, 2006 relating to use of the distribution network of another distribution licensee, need to be explored by TPC-D, so that the capex is optimized. The Honourable Supreme Court also, in its Judgment on the matter of TPC's distribution licence, observed that TPC could supply to consumers in its licence area, by utilizing the distribution network of the other distribution licensee already present in the area. Hence, incurrence of capex cannot be a condition for meeting the Licensee's obligations to all the consumers. In fact, the capital costs should be incurred only when there is no better optimal solution."

(f) Simultaneously, on 15th June 2009, the State Commission passed a tariff order in Case No.121 of 2008 with regard to tariff of **Appellant's distribution business effective for the year 2009-10.** By the said order, the tariff to subsidizing categories of consumers of the Appellants was increased while tariff to subsidized categories was reduced.

(g) By a letter dated 25th June 2009, the Government of Maharashtra directed the State Commission "*to take emergent steps as it may deem fit, relating to policy*

of Government of Maharashtra of protecting consumer's interest in a monopoly situation, as may be necessary to ensure that no unreasonable and unjustified bills are collected in the intervening period in which this investigation is in progress" under Section 108 read with Section 86(2) of 2003 Act. Thus within 10 days of the tariff order, the Government of Maharashtra gave the aforesaid direction.

(h) Within 1 month of the tariff order dated 15th June 2009, the State Commission passed an order staying the tariff increase till further orders to the categories of consumers whose tariff was increased. Consequently, such consumers were continued to be charged as per the earlier tariff order dated 4th June 2008 applicable for the year 2008-09 and the reduced tariff for the current year was recovered from the rest of the consumers

(i) By a Petition in Case No. 50 of 2009 Tata Power (R-3) sought from State Commission "*approval of operating procedures"* to be adopted by Tata Power (R-3) and the Appellants "*while supplying powers to consumers in their common area of license, using*

open access of each other's existing distribution network".

(j) Simultaneously, the State Commission by its Order dated 8th September 2009 appointed Administrative Staff College of India (ASCI) to carry out investigation into the affairs of the Appellants.

(k) After replies were filed by the Appellants and public hearings conducted by State Commission in respect of the aforesaid Petition in Case No. 50 of 2009 filed by Tata Power (R-3) for open access, the State Commission on the basis of the consent of the Appellant passed an interim order on 15th October 2009 under Section 94(2) of 2003 Act, providing for a protocol for open access in respect of consumers in the common area of supply of the Appellant and Tata Power (R-3). During the course of the proceedings in respect of the said protocol, the Appellants specifically raised the issue relating to cross-subsidy surcharge. State Commission while providing for the protocol, left the issue of cross-subsidy surcharge to be decided at a later stage and observed as follows:

"11. Besides the above mentioned points, the following points were raised –

i. …

ii. …

iii. It was submitted by Appellant-D that since tariffs are different for different classes of consumers, the implementation of changeover may lead to switching by the subsidizing consumers of Appellant-D to TPC-D. As a result, the burden of the cross-subsidy will have to be absorbed by the remaining Appellant-D consumers.

iv. …

v. …

vi. *…*

vii. *The State Commission is of the view that these points have wider implications and require more examination. Therefore, the State Commission will consider the same separately in appropriate proceedings."*

(l) Since the State Commission has failed to provide for CSS recovery along with protocol order of 15.10.2009 allowing open access on Appellant's system, the Appellant filed a Petition in Case No. 7 of 2010 before State Commission praying for appropriate mechanism for recovery of loss of CSS as well as past year revenue gap from migrating consumers to avoid tariff shock to the Appellants existing consumers consisting of major number of low end consumers.

(m) Throughout the aforesaid period right from 15th July 2009, when exparte stay of increase in tariff was granted by State Commission, the Appellants continued to recover the old tariff in respect of consumers where there was a tariff increase and the new lower tariff in respect of consumers where there was no stay.

(n) On 9thJuly 2010 ASCI made a Report after detailed investigation conducted into the accounts and affairs of the Appellant which report did not find any discrepancy in the accounts or affairs of the Appellant.

(o) In the mean time the MSEDCL (R-2) filed a petition on 25th August 2010 seeking a Review of the Order dated 5th September 2006 in Case No. 9 of 2006 whereby the cross-subsidy surcharge in respect of MSEDCL (R-2) was fixed as zero. MSEDCL (R-2) applied for Review of the said order and also for re-fixation of the cross-subsidy surcharge.

(p) On 9th September 2010 nearly after 13 months from the date of the exparte stay, State Commission after receipt of ASCI Report passed another order vacating the stay granted. Since the accounts and affairs of the Appellants were under investigation and

since the exparte stay was operating in respect of the tariffs of the Appellants, there was no question of the revision of Appellant's tariff for subsequent years till the stay was vacated. Accordingly, the Appellants did not file any fresh Petition for tariff for the subsequent year.

(q) On 10th September 2010, The State Commission once again deferred the issue of fixation of cross-subsidy surcharge by an order holding that cross-subsidy surcharge being a tariff design issue, would be dealt with at the time of issuance of tariff order. State Commission further stated that till the issue was decided in the tariff order the interim order on changeover should continue and licensees should continue compliance with the same.

(r) By a tariff Petition in Case No. 72 of 2010 the Appellant on 11th October 2010 applied for determination of tariff as well as for fixation of cross-subsidy surcharge.

(s) Since State Commission was consistently refusing to determine CSS in spite of a specific direction particularly under the judgment of the Hon`ble Supreme Court to do so, the Appellants challenged the order of the State Commission dated 10th

September 2010 refusing to determine CSS by filing an appeal before this Tribunal being Appeal No.200 of 2010. By an Order dated 1st March 2011 this Tribunal after considering the statement of learned Counsel for State Commission directed State Commission to consider the issue of cross-subsidy surcharge in a time bound manner.

(t) By an Order dated 29th July 2011 in the aforesaid Case No.72 of 2010 State Commission passed an order ruling on the applicability of the cross-subsidy surcharge on various categories of consumers. State Commission specifically ruled that "*Since the scheme of migration has been formulated in accordance with the above referred Hon'ble Supreme Court judgment, the cross subsidy surcharge will be applicable from the date of migration, till such time the respective consumer disconnects from the distribution network of Appellant."*. Even at this belated stage, the State Commission did not incline to determine the amount of cross-subsidy surcharge.

(u) Thereafter, after hearing the various stakeholders, State Commission passed an order in Case No.43 of 2010 (Review Petition filed by MSEDCL (R-2)) whereby State Commission held that the Review

Petition was liable to be dismissed and proceeded to dismiss the Review Petition as not maintainable. However, after dismissal of the Petition, State Commission proceeded to determine CSS in respect of the Appellants, MSEDCL (R-2) and Tata Power (R-3) prospectively from the date of the said order by the impugned order dated 9.9.2011.

(v) The Appellants have challenged the validity and legality of the said Order dated 9th September 2011 insofar as the quantum of cross-subsidy surcharge recoverable by the Appellants prosectively.

7. In the light of the above facts, let us discuss the issue raised in this Appeal.

Through the Impugned order, the State Commission has determined CSS for all the three Distribution Licensees in the state using the formula for determining the CSS given in the Clause 8.5 of the Tariff Policy. The State Commission had also ruled that CSS, so determined shall be applicable from the date of issuance of the Impugned Order. Aggrieved by the Impugned Order on both the counts i.e. quantum of CSS as well as its applicability from the date of Impugned Order, the Appellant has filed this Appeal. After hearing the learned counsel for the parties following issues are framed for our consideration:

i. Whether the period in respect of which the figure of cost of power purchase is taken is flawed?

ii. Whether the manner in which the average cost of power purchase of top 5% at margin taken in the case of Appellants is flawed and discriminatory qua other distribution licensees?

iii. Whether the selection of the contracts for short term power purchase to determine the weighted average cost of power purchase of top 5% is correct?

iv. Whether the figures considered for the Tariff in the formula for determination of CSS is flawed in view of the particular and peculiar circumstances of the Appellants' case?

v. Whether the fixation of CSS prospectively from the date of the impugned order is correct?

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

- Category wise expected sale to each of the category of consumer is estimated on the basis of previous

year consumption and CAGR computed using historical data.

- Sum of expected category wise sale is the total sale of power by the Distribution Licensee during the year. Let it be ‘SoP’.

- Estimated transmission and distribution losses are added to total sale of power to consumers. Let it be ‘PP’

- Cost of power purchase is calculated on the basis of tariff for each of the sources available and selected based on merit order to meet the power purchase requirement of Distribution Licensee. Let it be ‘CoPP’

- Other elements of tariff such as RoE, Interest on loan, Interest on working capital, O&M charges, Depreciation etc are also determined on the basis of norms specified in relevant regulations. Sum these charges is Wheeling Charges. Let these be ‘WC’

- Sum of power Purchase cost (CoPP) and Wheeling Charges (WC) is the ARR of the Distribution Licensee.

- Since category wise sale of power has already estimated, expected revenue from such sale is

estimated from current tariff. Let it be 'RCT' (Revenue from current tariff)

- Difference between ARR and RCT is the gap in revenue. Let it be 'GAP'

- The GAP so arrived at is filled up by redesigning the category wise tariff.

- CSS is the difference between the tariff for category of consumer and the cost of supply. CSS is determined by using the figures of Tariff (T) for the year in question and cost of power purchase (C) in that year.

- Tariff of subsidising consumers is generally in two parts i.e. fixed charges and energy charges. Therefore, the term tariff is the effective tariff for that category of consumers.

- Since fixed charges remain constant irrespective of consumption by the consumer, the effective tariff varies and gets reduced with increase in consumption as can be seen from following illustration:

    - Let us assume fixed charges at Rs 200 per kVA of contract demand and energy charges at Rs 5 per unit. Effective tariff for a consumer having

contract demand of 100 kVA at different load factor would be as given in the table below:

Load Factor	Consumption	Fix charges	Energy Charges	Total Charges	Effective Tariff
0.1	7200	20000	36000	56000	**7.78**
0.2	14400	20000	72000	92000	**6.39**
0.3	21600	20000	108000	128000	**5.93**
0.4	28800	20000	144000	164000	**5.69**
0.5	36000	20000	180000	200000	**5.56**
0.6	43200	20000	216000	236000	**5.46**
0.7	50400	20000	252000	272000	**5.40**
0.8	57600	20000	288000	308000	**5.35**
0.9	64800	20000	324000	344000	**5.31**
1	72000	20000	360000	380000	**5.28**

- Effective tariff shown in last col. is also known as Average Billing Rate (ABR) for that particular consumer. ABR for a consumer category is determined by dividing total expected revenue from the category by total expected sale to that category (Tribunal's judgment dated 30.5.2011 in Appeal No. 102 of 2010 and Batch – Odisha case). Mathematically, it can be represented as:

$$\text{ABR of a category of consumer} = \frac{\text{Total Expected Revenue from a category}}{\text{Total Sale of power to that category}}$$

With this background, we will now deal with each of the above issues

9. The first issue before us for consideration is as to whether the period in respect of which the figure of cost of power purchase is taken is flawed?

What Commission has done: The State Commission has considered the figures for power purchase during the year 2010-11 instead of year 2011-12, the year when CSS was determined and made applicable prospectively on the ground that data for FY 2011-12 was not made available by the Appellant.

10. The learned Senior Counsel for the Appellant has made the following submissions on this issue:-

a) Tariff has to be determined for an ensuing year based on the estimated cost and estimated revenue of the said year. Thus tariff is always determined ex-ante and not ex-post. While approving the ARR for a particular year, the figures that are approved by the State Commission, relate to the year for which tariff is determined and ARR is approved to recover the approved ARR for the ensuing year.

b) As the number or extent of consumers who would be seeking open access in a year cannot be predicted at the time of tariff determination by the State Commission, for the purpose of estimated revenue from sale of electricity and cost to be incurred by the distribution licensee, the State Commission considers as if all the consumers would be supplied by the distribution licensee and the tariff payable by all the

consumers during the year would offset the Annual Revenue Requirement of the licensee.

c) Thus CSS which has an element of Tariff "T" payable by a consumer before availing open access, avoided cost of Power purchase "C" also needs to be determined at the time of tariff determination. This would ensure that if the consumer decides to opt for Open Access, the distribution licensee on the one hand will lose the tariff payable by such cross subsidizing consumer and on other hand save the power purchase cost that is deemed to have been avoidable due to consumer opting for alternate supply through open access. The difference between "T" and "C" is the net loss to the licensee which needs to be compensated by the open access consumer through payment of Cross subsidy surcharge. The CSS is to be determined Ex-Ante along with the tariff determination and the extent of migration of consumer on open access during the year cannot be ascertained. It is for this reason the tariff policy formulae suggests notional 5% of marginal cost power as avoidable power. Thus "C" is such marginal cost power as reflected in the Annual Revenue Requirement approved by the State Commission for the ensuing year.

d) The State Commission in order to arrive at the weighted average cost of power purchase of top 5% at margin have taken the contracts entered into for the period FY 2010-11. The State Commission was determining CSS for the period FY 2011-12 and taking of costs of contracts for a previous period is clearly fallacious as the cost and/or the projected cost of power purchase for the period for which CSS was being determined should be taken in accordance with the formula for it based on only such cost as would have been avoided in that year and not any past cost. The State Commission by an e-mail dated 25th July 2011 called upon the Appellant to furnish, inter alia, details of power procurement and HT Consumer mix for FY10-11 (as per actual) and FY11-12 (Projected). In response to the said e-mail the Appellant by their reply dated 12th August 2011 submitted the required particulars including the particulars of the power purchase contracts for FY 2011-12. Thus, the State Commission had in its possession before passing the impugned order, the projected data for FY 2011-12 and the alleged reason given by the State Commission that since tariff petition for FY 2011-12 was to be received it

had taken the data for the previous year is factually incorrect.

e) The contention of the State Commission that since the contracts for FY 2011-12 were not approved the State Commission could not have taken those figures, is incorrect for the following three reasons.

(i) In no case would the short term contracts for subsequent year be approved prior to the commencement of that year and also, in terms of Section 62(1) of the Act, such short term contracts do not require any prior approval from the State Commission. In case of the Appellant, the contracts that the State Commission has taken to determine the top 5% at margin are all short-term contracts only.

(ii) The State Commission, if at all, would approve, in terms of proviso to Section 62(1), a rate for short term purchase which would be the average rate of the entire basket relating to bilateral contracts in which case the State Commission would then have to take the whole basket of various types of contracts such as short, medium and long term in order to determine the merit order stack of top of 5%.

(iii) Even if it is assumed that all short term contracts are to be approved by the State Commission before issuing the ARR order for FY2011-12, the same being available with the State Commission could have been considered as the approved figures would have been same or lower than that reflected in such contracts. Thus, the State Commission ought to have considered the basket of various sources of short term power rather than individual contracts. In this view of the matter the reason given by the State Commission that the contracts were not pre-approved is incorrect.

f) In the present case, the figures and the contracts that the State Commission has relied upon in order to determine the avoided cost relate to FY 2010-11 though CSS was to be determined for FY2011-12.

g) The avoidable power purchase cost should always be considered on ex-ante basis else in ex-post basis it will not be an avoidable power due to migration but would be power actually procured net of migration for the prior year. The majority of contracts considered by the State Commission in computation of avoidable cost were very short term contracts for few hours in a

day, for few days in a month, for few months in a year, during FY 2010-11, which were over and consummated much before the commencement of FY 2011-12.

h) The Appellant filed a Petition for tariff determination of FY 2010-11 (Case No.72 of 2010). In this petition the Appellant proposed that the retail tariffs should continue at the existing levels even for FY 2010-11. The State Commission accepted the proposal, retained and fixed the tariff at the same levels. The same Tariff continued in FY2011-12 as well. In the circumstances, the argument that the tariff was not available for the year in question namely 2011-12 is incorrect as Tariff (T) was available for FY 2011-12 which happened to be fixed by the State Commission at the same levels as FY 2010-11.

i) The State Commission in its order in Case No. 7 of 2010 did not determine CSS by stating that it is tariff design issue and the same will be dealt with in appropriate proceedings. However, State Commission itself determined CSS in the impugned order independent of tariff order of all the licensees.

j) The State Commission had all the data before it in respect of the proposed contracts for the year in

question, namely FY 2011-12 and by the very nature of exercise, there was no need to wait for an approval for such contracts. The argument that the order was required to be passed in a time bound manner is not correct as the State Commission had all the figures before it.

11. The arguments of the learned Counsel for the State Commission are as follows:-

a) In view of judgments of Mumbai High Court and this Tribunal in Appeal No 200 of 2010, the State Commission has to pass the order in time bound manner and State Commission despite agreeing in the impugned order that for determining CSS which is to be made applicable in FY2011-12 should be based on the Tariff “T” and avoided cost of Power purchase “C” of the same year could not do so and/ or have waited for the figures to be approved for FY2011-12 therefore chose to adopt figures of the previous year i.e. FY2010-11.

b) There were no approved figures for FY11-12 till the issuance of impugned order on 9/9/2011 and if Commission would have waited further, it would have resulted in violation of order of High Court and this Tribunal.

c) The Appellant in its arguments in Appeal No 200 had taken the stand that CSS can be fixed independent of tariff and is not a tariff issue and are now arguing that Commission ought to have considered Tariff "T" and "C" for the year FY2011-12.

d) Contention of the Appellant is to determine CSS based on approved figures for the future and apply retrospectively and this contention is completely contradictory.

12. Let us now discuss the 1st issue:-

13. Determination of CSS by the State Commission has been provided in provisos to the Section 42 of the Act. Let us re-examine these provisos to the Section 42 of the Act for clarity;

> *"42. …*
>
> *(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 may 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 :

14. Bare reading of the above provisos would establish that the State Commission has been mandated to determine the CSS to meet the requirements of **current level of cross subsidy**. We would like to place stress on the words **'current level of cross subsidy**'. These words are very important to adjudicate on the issue before us. Cross subsidy is the difference between tariff realization from a particular category of consumer and the cost of supply to that category of consumer. Naturally current level of cross subsidy can be determined only with current tariff and current cost of supply. Current level of cross subsidy cannot be determined using the power purchase cost of the previous year as well as effective tariff or average billing rate of previous year.

15. Hon'ble Supreme Court in its judgment dated 30.9.2013 in Selvi J Jayalalitha Vs Government of Karnataka 2013(12) SCALE 234 has held that when a statue provides that a thing is to be done in a particular way, it has to be done in that way only and no other way. Relevant extracts of the Judgment are quoted below:

29. We find force in the submissions advanced by the learned Attorney General that this Court generally should not pass any order in exercise of its extraordinary power under Article 142 of the Constitution to do complete justice if such order violates any statutory provisions. We do not intend to say that it would be illegal to extend the term of the special judge, but that it is a matter within the jurisdiction of the State in accordance with the relevant law.

There is yet an uncontroverted legal principle that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. In other words, where a statute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusio alterius", meaning thereby that ***if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no other manner and following any other course is not permissible.***

16. The State Commission has contented that it had used these figures for the year 2010-11 for the reason that the figures for the year 2011-12 were not available and it was required to determine CSS in time bound manner without any further delay in view of Tribunal's directions. However, the Appellant has denied this and has stated that all the required data was made available to the State

Commission. We do not want to go into this argument as to whether data was available or not. The fact of the matter is that CSS can only be determined with the figures for the current year as per the law (2nd proviso to Section 42 of the 2003 Act). Anything done outside this requirement is patently illegal. Section 86(1)(b) mandates the State Commission to regulate the power purchase of the Distribution Licensee including the cost of power purchase. If the State Commission did not have the figures of power purchase for the year 2011-12 during the month of September 2011 i.e. during the period of regulation, then it means that the State Commission had failed in its duty casted upon it under Section 86 (1)(b) of the Act.

17. In view of the clear provision of 2nd proviso to Section 42, there cannot be any other view on this issue. In fact Tata Power (R-3) and MIAL, who have very strongly contested other arguments of the Appellant were silent on this aspect. The learned Counsel for the State Commission, Mr Buddy Ranganadhan has also submitted some explanation. He Submitted that data for 2011-12 was not made available by the Appellant and the State Commission was forced to use whatever latest data was available with it to compute CSS in view of High Court's and this Tribunal's directions to compute CSS in time

bound manner. The Respondents did not dispute that the legal requirement was to use the data for the year for which CSS is being determined.

18. However, for the sake of argument, one can say that 1st proviso to Section 42 requires the State Commission to determine the CSS and 2nd proviso to Section 42 provides that the CSS shall be utilized to meet the requirement of current level of cross subsidy. It does not mandate that the CSS shall be equal to current level of cross subsidy.

19. But, this may not be correct. Hon'ble Supreme Court in catena of judgments has held that every word of the Statute has to have some meaning. The Parliament has used the term 'current level of cross subsidy' in 2nd proviso to Section 42. This term would have no meaning if the contention that CSS could be anything is accepted.

20. The issue is accordingly decided in favour of the Appellant

21. The second and third issues are related issues and are being dealt with together. The Second issue is as to **whether the manner in which the average cost of power purchase of top 5% at margin taken in the case of Appellants is flawed and discriminatory qua other distribution licensees** and the third issue is as to **whether the selection of the contracts for short term**

power purchase to determine the weighted average cost of power purchase of top 5% is correct?

What the State Commission has done

The State Commission has approved pooled power purchase cost for short term purchases. However, while arriving at top 5% of power purchase made by the Appellant during FY 2009-10, the State Commission considered the rate of individual short term contract. On the other hand, it considered pooled power purchase cost for short term purchases for Tata Power (R-3).

The State Commission has also pooled the power purchased from Tata Power (R-3) Units (Unit 4,6 &8) and arrived at lower average power purchase cost from these stations to exclude these from top 5%. On the other hand, it has used data for individual stations for Tata Power (R-3). Thus, discrimination qua Tata Power (R-3).

22. Arguments of the Appellant are as follows:-

a) If three separate baskets of contracts are to be taken for the Appellant (as has been done by the State Commission in the case of other distribution licensees) the average highest cost would be Rs.5.62 per unit as an average of bilateral contracts. However only for the Appellant, the State Commission has

further split up the bilateral contracts of the previous year 2010-11 and arranged the top 5% individual bilateral short term contracts in descending order of unit cost and has taken weighted average of the said top bilateral contracts and arrived at an average cost of Rs.7.35/kWh. Similarly the Appellant is further discriminated as in case of other distribution licensee, the State Commission has taken the figures of "C" on the basis of one basket of contracts and not on the basis of individual contracts. Instead of applying the same logic as has been applied in the case of MSEDCL (R-2) and TPC (R-3) to Appellant as well, the Appellant has been singled out by the State Commission for a differential discriminatory treatment without there being any basis there for.

b) This top 5% at margin has to be a representative of the avoidable power purchase round the clock (RTC) round the year (RTY) and this is clear specifically in the formula as liquid fuel based generation is excluded (since it represents power procured during peak period and the consumer who migrates do not consume power only during peak period but Round the Clock (RTC) Round the Year (RTY)). The State Commission's order shows that sources of purchase including bilateral purchase and has arrived at a per

unit cost of Rs.5.62/- from bilateral purchases. The State Commission has further bifurcated such bilateral purchases and has arrived at a rate of Rs.7.35/- by identifying top 5% contracts which included only peak contracts and not RTC/ RTY contracts. The details of the contracts clearly suggests that they were for very short duration for meeting exceptional peak power requirement only and therefore cannot be considered as representative of avoided cost of power due to migration of consumer who is consuming electricity on Round the Clock (RTC) and Round the Year (RTY) basis.

c) The rate mentioned in the top 11 contracts would not mean that if the consumers migrate, those contracts would be avoided. Since the contracts are for very short duration (few hours in a day, few days in a month, few month in a year), if the hourly demand & supply curve is considered for the year, for large part of the year, the top 5% of the power would come from source other than those considered by the State Commission as marginal power. Whatever be the consumer base, it is the extent of demand at a given point of time that determines the quantity and the rate at which power is bought by a distribution licensee

and to take a rough and ready method of taking top 11 contracts irrespective of regard to the aforesaid relevant factors such as the nature of contract, the time at which power is drawn from such contracts, etc. is clearly an arbitrary method. In such a situation, if, to identify the top 5% marginal power on hourly basis for the year is a cumbersome process, the least Commission could have done is to apply average of bilateral power as one source as was done for other licensees.

d) The arguments of the State Commission that if similar methodology was followed for the Appellant also, the average of the basket of bilateral power purchase would be Rs.5.62 p.u., the CSS would have been high. Undoubtedly, the CSS would have gone up by Rs 1.73 p.u for all the categories. However the same would still have remained lower than the CSS determined for MSEDCL. Cross-subsidy surcharge has to be calculated in accordance with the actual figures available irrespective of the fact that the cross-subsidy surcharge would be at a figure higher than what is in the mind of the State Commission. The CSS has to be fixed as per the formula, whatever it may be and in the application of the said formula the methodology or figures cannot be twisted

for the Appellant to suppress the figures of CSS on the purported ground that otherwise the cross-subsidy would be high. While computing the ingredient 'C' for surcharge computation, the State Commission specifically observed as under:

> "*Further, Rs 5.62/kWh as 'C' would lead to very high CSS as the component of 'C' computed in this manner is way lower as compared if computed on source wise bilateral power purchase which is the correct manner for computation."*

e) If the CSS as claimed for by Appellant is allowed on the basis of the formula adopted by the State Commission the tariff of other distribution licensees would still be lower and fixation of such CSS would be consistent with the objective of the tariff policy that CSS should not be onerous or non-competitive. On the contrary, artificially suppressing the CSS has resulted in a non-competitive environment for Appellant.

f) Sec 42 (2) proviso of 2003 Act clearly states that surcharge shall be utilized to meet current level of cross subsidy and Clause 8.5.1 of Tariff Policy clearly mentions that CSS to be determined in a manner it compensates the distribution licensee and does not

constrain introduction of competition through Open Access.

g) The Appellant has submitted comparison of Cross Subsidy in tariff and CSS payable by Open Acess /Changeover consumers, which clearly shows that CSS so determined did not meet current level of Cross Subsidy as contrary to the provisions of 2003 Act and was also very low to compensate distribution licensee as per the Tariff Policy and has resulted in a non-competitive environment for the Appellant.

h) Despite the fact that power from TPC was sourced from various units of TPC which has different fixed and variable cost, only for the Appellant Power purchased from TPC generation has been considered as single source and same is not being spilt into unit wise generation of TPC as is done while determining CSS for TPC. In the case of TPC the baskets have been bifurcated into TPC-G Unit 6, Unit 5, Unit 7, actual external power purchase and short term external power purchase etc. and the highest basket of Rs.5.92 kWh from TPC-G Unit 6 has been considered to determine highest 5% margin. Had the State Commission applied the same methodology to Appellant, the power purchase from TPC Unit 6 at Rs

5.92/unit, accounting for 4% of power purchase by Appellant, would have been at 1st position of merit order being the costliest power procured by Appellant and the average cost of top 5% would have been around Rs 6.00 only instead of Rs 7.35 considered by the State Commission.

23. The reply by the learned Counsel for the State Commission is as follows:

a) Treatment of "C" for Appellant is correct; they should not look into calculation of "C" for TPC. If any correction is required then "C" of TPC has to be corrected. There is no discrimination and formula has been correctly applied to both TPC and Appellant in view of different circumstances for both the utilities.

b) Referred to Para 8.5 of Tariff Policy, "amount of cross-subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition". The Tariff Policy clearly states that CSS has to fixed in such a manner that it benefits consumers opting for Open Access (OA) after paying all the charges.

c) The Tariff Policy formula only mentions about excluding Liquid Fuel and Renewable, but it does not mention about non-RTC to be excluded. It is presumption of Appellant based on assumption and arriving at conclusion i.e. Appellant has arrived at conclusion that non-RTC contracts are to excluded based on the assumption that excluding liquid fuel means peak or non-RTC contracts can be excluded.

d) In case of TPC and MSEDCL, top 5% of avoidable cost of power purchase is from single source, where as for Appellant, it is from multiple sources. Bilateral purchase constitutes about 42% of the total power purchase and so Commission has rightly considered individual contracts for calculating “C”.

24. The arguments of TPC are as follows:-

a) It is contented that top 5 % for TPC and MSEDCL comes from the single source whereas for Appellant it comes from 11 different PPAs.

b) If Appellant’s arguments are to be accepted then it would mean that “C” must be worked out by excluding 5% of “short term” power purchase. This is not as per Tariff Policy formula and Appellant has not challenged the formula.

c) Tariff policy does not provide that only RTC/RTY contracts are to be considered for determining "C". Tariff Policy does not provide for considerations of short term, long term, peak/off peak, RTC/RTY etc. Appellant is wrong in seeking to draw sustenance for its contention that liquid fuel generation is excluded while computing "C".

25. The arguments of MIAL **are as follows:-**

a) "C" considered by the State Commission in the computation is incorrect. As per NTP, "C" is the avoidable cost of power purchase and cost of power purchase avoided by Appellant would not be average of 11 contracts but the power purchase rate of highest contract as if the consumers had not migrated Appellant would have procured power higher than the highest rate contract. Therefore "C" to be considered for Appellant should at least be considered at highest marginal cost.

26. In view of discussions we have already made on Issue No. (i), these issues have become infructuous. However, for the sake of completeness, we would like to discuss these issues in detail.

27. While computing the cost of power purchase the State Commission has done two things viz., (i) cost of short term power purchases broken up to individual contract and (ii) power purchase cost from Tata Power's (R-3) various units bundled together and have taken weighted average power cost of Tata Power (R-3) Units.

The State Commission has explained the reasons for doing so as below:

- The Appellant itself had supplied weighted average rate of Tata Power's (R-3) various units and total power purchased from these units. The Appellant did not provide the breakup of power procured from Tata units; and
- Total short term purchases made by the Appellant account for 35% of total power purchase. Thus in order to get the cost of top 5% power purchase, it had to break into the basket of short term purchases in to individual contracts.

28. The Appellant as well as the Respondents have relied on Clause 8.5 of the Tariff Policy. Let us re-examine the same. Relevant portion of Clause 8.5 is reproduced below:

> ***"8.5 Cross-subsidy surcharge and additional surcharge for open access***

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

…

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

29. Thus, cost of power purchase has to be top 5% in merit order approved by the State Commission. Admittedly, the State Commission did not approve the individual contract for short term purchases made by the Appellant. The

State Commission had approved only the weighted average rate of basket of short term purchases.

30. The State Commission had followed the formula given in the Tariff Policy and should have taken approved power purchase costs only and should have avoided to get into individual contracts which had not been approved by it. Contention of the State Commission that the total quantum of short term power purchases were much more than 5% of the total requirement and accordingly it had to get into individual power purchase contract is misplaced. The State Commission ought to have used only the approved power purchase cost to use the formula of Tariff Policy.

31. Regarding bundling of power purchases from Tata Power's (R-3) various units, the State Commission contended that the Appellant itself had provided the weighted average rate for all the units of Tata Power (R-3) together. This contention of the State Commission is misplaced. As mentioned above the State Commission have been mandated to regulate the power purchase by the Distribution Licensee by Section 86(1)(b). This requires the State Commission to know the complete details of the power purchase including cost, except short term purchases in terms of the proviso to Section 62(1)(a)

which provides that in shortages the State Commission may provide the maximum and minimum ceiling of tariff for purchase or sale of electricity. In this case the purchases were made from various units of Tata Power (R-3), the tariff of which is determined by the State Commission itself. Therefore, the State Commission, at this stage, cannot plead that it was not aware of tariff for Tata Power's(R-3) unit and have, therefore, adopted the weighted average rate as provided by the Appellant. While pleading so, the State Commission has indicated that it had again failed to perform its function under section 86(1)(b) of the 2003 Act.

32. The contention of the State Commission that Tariff Policy provide that the CSS should not be so enormous to suffocate the Competition is misplaced. The Act mandated the State Commission to determine the CSS to meet the requirement of current level of cross subsidy. We have to keep in mind that the State Commission has permitted open access to consumers with contracted demand of more than 1 MW under section 42 of the Act and CSS is paid by the subsidizing consumers only. This Tribunal in catena of cases has held that CSS is compensatory in nature. It is meant for to compensate the loss suffered by the remaining subsidized low-end consumers. Thus, in the scenario of mass change-over of consumers, the CSS has

also to be such that exodus of consumers does not load the remaining low-end consumers heavily. The State Commission has to balance the interest of all the consumers, as pleaded taken by the State Commission in Appeal No. 132 of 2011 which was accepted by this Tribunal in its judgment. The above submission of the State Commission also suggests that it has attempted to suppress the CSS artificially.

33. Regarding the contention of Appellant that the State Commission should not have considered the short term purchases which were contracted for few hours of a day to meet peak hour shortages and should have considered only the RTC purchases, we feel that application of such an approach would be extremely difficult. In order to attempt to implement the contention the State Commission would have to draw hourly requirement vis-à-vis availability to arrive at top 5% in merit order which would be a herculean task.

34. The issue is decided accordingly.

35. The forth issue before us for consideration is as to whether the figures considered for the Tariff in the formula for determination of CSS is flawed in view of the particular and peculiar circumstances of the Appellants' case?

36. In view of our findings in Issue No (i) above this issue has also become infructuous. However, it would be beneficial to discuss the same for the sake of completeness.

What Commission has done: The State Commission has computed Average Billing Rate using actual revenue collected during FY 2009-10 and actual sale during that year. The tariff of subsidizing consumers for first six months was the tariff for FY 2008-09 which was much lower than the approved tariff for FY 2009-10. Average Billing Rate (ABR) or effective Tariff computed was lower than the approved tariff for FY 2009-10 which continued for 2010-11 and for 2011-12 also.

37. The Arguments of the Appellant are as follows:-

a) The State Commission in order to determine CSS for the FY 2011-12 has taken the Component "T" as ABR for the period FY 2010-11. As aforesaid, by an ex-parte Order dated 15th July 2009, the State Commission had unilaterally stayed the tariff increase and continued the reduced tariff in respect of several categories of consumers for the period FY 2009-10. The said stay continued till 9th September 2010 (Part of FY2010-11) during which period Appellant was made to recover tariff as fixed by the order even prior to 2009. Post 9-9-2010 Appellant was allowed to

recover tariff as fixed by the State Commission in its order dated 1^{5th} June 2009 for the period FY 2009-10. Thus, for the period 1-4-2010 to 9-9-2010, i.e. for nearly 5 months and 9 days during the FY 2010-11 Appellant was allowed to recover a stayed tariff and it is only after 9-9-2010 that the stay was lifted that Appellant was allowed to recover the full tariff that too fixed for the period FY 2009-10. What the State Commission has done is to take the ABR of Appellant for the period 1-4-2010 to 31-3-2011 on the basis of the actual recovery of the tariff from its consumers. In other words, for a substantial part of the year the stayed tariff, i.e. the lower tariff, was being recovered.

b) Thus, the average ABR for FY2010-11 would reflect that for the substantial part of the year, the tariff was artificially suppressed by the State Commission and not the subsequent higher tariff post lifting of stay. The fact that the stay was wrongly granted is clear from the fact that the same was imposed unilaterally. Thus what the State Commission ought to have done was to take the tariff as if no stay was granted for the entire period 1-4-2010 to 31-3-2011. Without prejudice to the aforesaid in any event, the State Commission ought to have taken the ABR for the

period 10-9-2010 to 31-3-2011, i.e. during the period when there was no stay which would have realistically reflected the actual ABR based on tariff fixed.

c) The exception of suppression of tariff was applicable to Appellant only. While the State Commission chose to discriminate for computation of “C” by justifying that its bilateral quantum is higher compared to other licensee, it did not chose to apply exception for Appellant for the purpose of determination of “T” despite the fact the same was artificially suppressed by the State Commission itself and which resulted in artificially suppressed CSS.

d) Contention of TPC that Appellant is trying to burden changeover consumers by way of CSS is flawed. It is as per 2003 Act, the Tariff Policy and Hon’ble SC judgment, Appellant is entitled to recover CSS from Changeover/OA consumers. The CSS is a reflection of Tariff and Cost of a distribution licensee. It is evident that Appellant tariff has high element of cross subsidy so as to maintain the tariff of large number of subsidizing consumers at affordable level. The migration of such cross subsidizing consumers through Open Access to TPC resulted in loss of

cross subsidy. The 2003 Act provides for levy of CSS so as to insulate subsidizing consumers from the loss of cross subsidy. The spirit of levy of CSS in the 2003 Act is that if the Cross subsidizing consumers are contributing in the collection of cross subsidy amount before the date of changeover/ open access, there is no reason why such consumers should not be asked to contribute the same.

e) In the absence of CSS earlier for almost two years since migration of consumers started pursuant to 15th Oct 2009 order and later due to artificially suppressed CSS there is huge revenue gap created for Appellant which has translated into Regulatory Asset. There is a need to separate from the Regulatory Asset, the amount which ought to have been collected as CSS from certain identified consumers only so that rest of the consumers are not subjected to such payment of Regulatory Asset which is not attributable to them. Revenue collected by Appellant by way of CSS will reduce the amount of Regulatory Asset to be recovered from consumers and there would be no enrichment of Appellant in any manner whatsoever.

38. The arguments of the State Commission are as follows:-

a) Tariff (T) consists of two parts- Fixed Charge and Energy Charge. So while Calculating "T" for determination of CSS, effective tariff i.e. ABR has to be considered based on Total Projected Revenue and total sales for the category.

b) Appellant's contention is to take the tariff at higher rate which was payable by consumer and not actually paid by consumer in FY2010-11.

39. The arguments of TPC-D are as follows:-

a) As per Appellant tariff orders dated 27.2.2012 and 15th June 2012, Total gap (under recovery) is for FY10-11 is Rs 436.72 Crs and same is added to Regulatory Assets of Appellant.

b) Appellant has proposed a plan to collect the Regulatory Assets in its Business Plan. Therefore allowing Appellant to consider the effect of stayed tariff in computation of CSS and allowing the RA to be recovered by way of revenue gap would result in double accounting and lead to unjust enrichment of Appellant.

c) Appellant is trying to recover tariff under-recovery for FY 2010-11 by way of CSS. This would burden only the changeover/Open Aaccess consumers and not

direct consumers of Appellant. This clearly discriminates between Changeover consumer and direct consumers of Appellant.

40. Let us now discuss the issue:-

41. The issue for consideration is the value of tariff (T in the Tariff Policy formula) payable by the category of consumer. As explained in opening paragraphs, term tariff in the Tariff Policy formula is the effective tariff or tariff realization from the category of consumers. It has also been demonstrated above that the effective tariff gets reduced with the increase in load factor of the consumer. This Tribunal in its judgment in Appeal No. 102 of 2010 and batch dated 30.5.2011 has defined tariff realization as under:

> *"35… Thus the method used by the State Commission in calculating average tariff for the appellant's category is incorrect and needs to be corrected as per formula given below:*
>
> Average Tariff realization for a category =
>
> $$\frac{\text{Total expected revenue realized from that category as per ARR}}{\text{Total anticipated sale to that category as per ARR}}$$
>
> …"

42. In the present case, the problem has arisen due to the fact that the State Commission did not issue the Tariff order for FY 2011-12 in time and it was issued only some time

during September 2011. The State Commission has contended that the Appellant did not file the ARR and Tariff Petition for FY 2011-12 in time and that therefore, it had no option but to use what ever data it had. The Appellant, on the other hand, pleaded that complete records were with the enquiry committee set up by the State Commission to look into its affairs and that therefore, it could not file the petition in time. However, the State Commission had been supplied with the data required for determination of CSS.

43. The State Commission had used actual revenue recovered from various category of consumers during FY 2010-11 and divided it with actual sale to those category during the same period. This approach is quite wrong.

44. No doubt, the tariff recovered from the consumers for FY 2011-12 was same as the tariff for FY 2010-11 and the same could have been used. But, the State Commission had completely forgotten that the Tariff for first six months of FY 2010-11 for subsidizing category was in effect the Tariff for FY 2008-09. Approved Tariff for FY 2009-10 for subsidizing category had been stayed by the State Commission itself and this stay continued for first six months of FY 2010-11. Thus, in fact the State Commission had used tariff for 2008-09 for first six months

and tariff for 2009-10 for rest of the year to determine the current level of cross subsidy for FY 2011-12.

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

46. Alternatively, in the absence of any accurate data for effective tariff, as claimed by the State Commission, what the State Commission was expected to do, was to consider the revenue collected for last six months of FY 2010-11 i.e. when the approved tariff for FY 2009-10 was in force and divide it by sale of power to that category during the period to arrive at Average Billing Rate or effective Tariff. Alternatively, The State Commission could have used the category wise average load factor to arrive at the effective tariff as demonstrated in the table above. It is true that load factor of consumer may vary month to month, but average load factor of complete category, as a whole, remains almost constant and change with in very narrow band. Commission had this information for the past years. Even it did not have, it could have used Average Billing Rate, Fixed charges and Energy charges (tariff

component) to arrive at average load factor as per the formula given below:

$$\text{Average Load factor} = \frac{FCr}{Hrs \times (ABR - ECr)}$$

Where:

FCr = Rate of Fixed charges as per applicable tariff

Hrs = No. of hours in the period

ABR = Average Billing Rate

ECr = Energy Charges per unit as per applicable tariff

47. Average Load factor thus arrived for the previous year could have been used to work out ABR for the current year using the same formula backwards. But, instead of using mathematical tools available, the State Commission used a method which was erroneous.

48. The fifth issue is as to whether the fixation of CSS prospectively from the date of the impugned order is correct?

49. The arguments of the Appellant are as follows:-

a) The entire basis of the order of the State Commission for levying and fixing CSS is the judgment of the Hon`ble Supreme Court in CA 2898 of 2006. The said judgment clearly and unequivocally states as quoted by the State Commission in the impugned order, that the concept of wheeling has been

introduced in the 2003 Act to enable the 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 of wheeling** as the State Commission may determine. Thus any direction that the State Commission may give for enabling a distribution licensees who are yet to install their distribution line to use the facility of wheeling had at inception to be subject to payment of surcharge in addition to the charges of wheeling. It cannot be that the State Commission can first direct wheeling and then determine the wheeling charges or CSS. The Hon'ble Supreme Court was explicitly clear that a surcharge has to be applied in addition to the charge of wheeling. Just because wheeling charges alone were determined earlier they were levied whereas merely because CSS was not determined hence can only apply prospectively is fallacious.

b) By the Order dated 15th June 2009 in Case No.113 of 2008, the State Commission directed TPC to ensure that its Universal Service Obligations are met and in that behalf referred to the aforesaid judgment of the Hon`ble Supreme Court.

c) In Order dated 29th July 2011 in Case No.72 of 2010 the State Commission has, inter alia, observed that since the scheme of migration has been formulated in accordance with the above referred Hon`ble Supreme Court judgment the CSS will be applicable from the date of migration.

d) Even in the impugned order, the State Commission has repeatedly emphasized that CSS would be applicable from the date of migration. However, having so held in the last line of the order the State Commission holds: "*the CSS specified through this order for this group of consumers shall be applicable henceforth as the rate of CSS has been determined in this order*".

e) The aforesaid finding of the State Commission is clearly contrary to the judgment of the Hon`ble Supreme Court as well as its own understanding of the legal position on the part of the State Commission. The very basis on which migration was ordered was the payment of wheeling and CSS as well as other charges. Migration was permitted by the State Commission Order dated 15th October 2009 in case no 50 0f 2009 and the present order impugned herein is dated 9th September 2011. Thus, for a

period of nearly two years from the direction of migration Appellant would not be able to recover CSS which position would be contrary to the judgment of the Hon`ble Supreme Court as well as Section 42(3) of 2003 Act. Such an order puts TPC and a large number of consumers of Appellant in an extremely advantageous position who have migrated to TPC. Many consumers have migrated during the said two year period to TPC and some of the high end consumers have directly connected to the network of TPC in the meantime thereby completely depriving Appellant of the CSS for the past period (this is without prejudice to the contention of Appellant that even such consumers who have switched over to the network of TPC are liable to pay CSS). This is clearly contrary to the law.

f) Changed over consumers were contributing to a level of cross subsidy before migration. CSS is nothing but compensation. How can compensation reduce to zero and now resurface after 2 years.

g) Just because the State Commission does not determine tariff for few years that does not mean that Appellant is not entitled to recover gap arisen due to delayed regulatory process. Similarly just because

the State Commission determined CSS late does not mean it was not entitled for such recovery.

h) Like Tariff, CSS as and when determined is applied prospectively. However the impact of delayed tariff determination gets included in the revised tariff for the current year such that all consumers pay tariff higher than current years cost to recover past revenue gap. Similarly, CSS when determined should also take into account impact of its delayed determination and should be included in the CSS for the current year so that impact of under recovery of CSS of the past period on the revenue gap does not passed onto undeserving balance consumer of the licensee.

i) Before consenting to TPC to avail open access on its network, Appellant requested the State Commission to address the issue of Cross subsidy as the CSS in FY2009-10 Tariff order dated 15th June 2009 was determined as ZERO. It is also not the State Commission case that when CSS was fixed as ZERO in FY2009-10 it was based on any formulae based on the values of “T” and “C”. The State Commission in the interim order dated 15th Oct 2009 in case no 50 of 2009 stated that the issue of Cross subsidy involves

wider implication and the same shall be considered in future proceedings. The migrating Consumers were put to notice that CSS if and when so determined will be applicable to migrating consumers. Later in Case No. 7 of 2010 the State Commission did not determined the same by stating that the same is a Tariff issue and shall be determined in future ARR proceedings. Subsequently when ARR order for FY2010-11 was issued on 29th July 2011, the State Commission mentioned that it is yet to frame Open Access Regulations and CSS shall be determined once the formulae is determined. The CSS determination by the State Commission was delayed for one reason or the other. And when the CSS was actually determined in the impugned order it was separated from tariff order and without issuance of Open Access Regulations.

j) Retrospective CSS application is only a rationalization of recovery from those who are responsible for it. Else non availability of CSS (because of delayed determination) would get passed on to those consumers who were supposed to be beneficiary of Cross subsidy created by the State Commission.

k) This Tribunal in its Judgment dated 26th May 2006 in Appeal No 4, 13, 14, 23, 25, 26, 35, 36, 54 & 55 of 2005 has clearly held that Commission has powers to pass tariff order with retrospective effect.

50. The Arguments of the State Commission are as follows:-

a) There was no commitment from State Commission about date of applicability of CSS i.e. from the date of changeover order in Case No 50 of 2009 dated 15/10/2009. Consideration of CSS happened only in the impugned order.

b) It is not fair to the consumers to say today that they have to pay retrospectively. If consumer would have known CSS figure, he would have weighed his options before availing OA/Migration.

c) There is no provision in 2003 Act for retrospective tariff.

d) It is conscious decision of Commission to maintain uniformity in approach and apply CSS prospectively.

e) CSS was fixed to be “Zero” prior to the date of impugned order and same principle has to be followed for all licensees.

51. The arguments of TPC are as follows:-

a) As per Commission's order dated 5th September 2006 in Case No. 9 of 2006, CSS for Appellant worked out to be Zero. Also, MYT order dated 24.4.2007, CSS is Zero. Also in its Tariff order dated 15.6.2009, Commission has ruled that CSS will be Zero in continuation with its earlier tariff orders**.**

b) TPC's contention is that CSS continued to be "Zero" as per various tariff orders of Commission till Commission re-determined it in impugned order.

52. The arguments of MIAL are as follows:-

a) As per Commission's order dated 5th September 2006 in Case No. 9 of 2006, CSS for Appellant worked out to be Zero. Also, MYT order dated 24.4.2007, CSS is Zero. Also in its Tariff order dated 15.6.2009, the State Commission has ruled that CSS will be Zero in continuation with its earlier tariff orders.

53. Before we discuss the Issue (v), let us refer to Section 42 of the 2003 Act quoted below:

"42(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:

Provided that such open access may 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 :"

54. 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 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.

55. Accordingly, the State Commission was required to compute the CSS along with 15.10.2009 order where in it had allowed open access to all consumers following the Hon'ble Supreme Court's order. However, the State Commission postponed calculation of CSS again and again on one pretext or other.

56. The State Commission's contention that it had worked out CSS in its 2006 order as 'Zero' and the same would hold good unless it was modified. This contention of Commission is misplaced for the reason that as per 2nd proviso to Section 42 of the 2003 Act, the State State Commission was required to compute CSS with every change in tariff or cost of supply, the two essential component of CSS. The State Commission had adopted the Tariff Policy formula and computed negative CSS in the year 2006 using the data for that year. Since CSS thus worked out was negative, the State Commission fixed CSS at 'Zero'. However, it would not mean that CSS would always remain negative year after year and effective value of CSS would remain 'Zero'. Even if so, the State Commission was required to work out and demonstrate that CSS remained 'Zero'.

57. Now important question that arises is this Had the State Commission computed CSS using the correct data for 'T' and 'C' and came out with some reasonable figure, would the consumers had migrated to Tata Power paying CSS and would it be fair for such consumers, who have already migrated to Tata Power considering that they would be liable to pay NO CSS, be subjected to revised CSS with effect from date of migration? It is true, that the

Consumers were supposed to know that they would be liable to pay CSS, but the issue is retrospectivity.

58. In our judgment dated 13.11.2013 in Appeal No. 140 of 2012 we have held that the cross subsidy surcharge is compensatory charge. It is meant to compensate the consumers of a distribution licensee by the consumers who had sought open access. The CSS collected by the licensee from such open assess consumers is deducted from the ARR of the licensee and, therefore, the revenues of the licensee is not affected. The CSS thus collected by the licensee is distributed amongst the consumers who remained with the licensee at the relevant times through tariff. In case the State Commission now works out the yearly CSS from the date of migration, the benefit of such CSS would be restricted only to the consumers who are still connected to the Appellant's system and the consumers, who have migrated to Tata System, both group II and group III consumers, in the interregnum would be divested from their legitimate right. To elaborate, migration of consumers from one licensee to another is a continuous process. Some of the consumers migrated during first year. The CSS collected from them would have reduced the tariff of remaining consumers including the consumers who had migrated during the second year and so on.

59. As we know that presently a state of flux exists in Mumbai. Directing the State Commission to work out CSS afresh from the date of migration and charge the same from the group II consumers would create chaos in already fluid situation. Since CSS is not going to affect the revenue of the Appellant in any manner, we are not inclined to interfere with the impugned order at this stage.

60. <u>Summary of the findings:-</u>

I. The CSS can only be determined with the figures for the current year as per the law (2nd proviso to Section 42 of the 2003 Act). Anything done outside this requirement is patently illegal. Hon'ble Supreme Court in its judgment dated 30.9.2013 in Selvi J Jayalalitha Vs Government of Karnataka 2013(12) SCALE 234 has held that when a statue provides that a thing is to be done in a particular way, it has to be done in that way only and no other way. In view of the clear provision of 2nd proviso to Section 42, there cannot be any other view on this issue.

II. The contention of the State Commission that Tariff Policy provide that the CSS should not be so enormous to suffocate the Competition is misplaced. The Act mandated the State

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

III. The State Commission had used actual revenue recovered from various category of consumers during FY 2010-11 and divided it with actual sale to those category during the same period. This approach is completely wrong and dehores any logic. While passing the tariff order for FY 2009-

10 the Commission must have the figures for expected revenue from every category and sale to such category. The Commission should have used these figures approved in the tariff order to arrive at Average Billing Rate or effective Tariff during the relevant year.

IV. As we are aware that presently a state of flux exists in Mumbai. Directing the State Commission to work out CSS afresh from the date of migration and charge the same from the group II consumers would create chaos in already fluid situation. Since CSS is not going to affect the revenue of the Appellant in any manner, we are not inclined to interfere with the impugned order at this stage.

61. With these observations, the present Appeal is disposed of with directions to be followed by the State Commission in the future. However, there is no order as to costs.

(V J Talwar) **(Justice M. Karpaga Vinayagam)**
Technical Member **Chairperson**

Dated: 2nd December, 2013

√REPORTABLE/~~NON-REPORTABALE~~