APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 259 of 2016

&

APPEAL NO. 386 of 2017

Dated : 28th August, 2018

PRESENT:HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 259 of 2016

BETWEEN

FORTUNE FIVE HYDEL PROJECTS PRIVATE LIMITED
A Company registered under and governed by the
Companies Act, 1956, having its Registered Office at
Plot No. No.173, 3rd Main,11th Cross, Dollars Colony,
RMV 2nd State, Bangalore – 560 094
Represented by its Director (Mr. C. Purushotham)

…APPELLANT

AND

1. KARNATAKA ELECTRICITY REGULATORY COMMISSION
   6th & 7th floor, Mahalaxmi Chambers, # 9/2, MG Road
   Bangalore - 560 001
   (Represented by its Secretary)

2. BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED
   K.R. Circle
   Bangalore – 560 001
   (Represented by its Managing Director) **...RESPONDENTS**

APPEAL NO. 386 of 2017

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FORTUNE FIVE HYDEL PROJECTS PRIVATE LIMITED
A Company registered under and governed by the
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   K.R. Circle
   Bangalore – 560 001
   (Represented by its Managing Director)

…… RESPONDENT(S)

Counsel for the Appellant(s) **:** Mr. Basava Prabhu S.Patil, Sr.Adv.
Mr.Shailesh Madiyal
Mr. Sudhanshu Prakash
Ms. Rachitha Hiremath
Mr. Geet Ahuja
Mr. Srinivas R Rao
Mr. Abid Ali Beeran P.
Mr. Arun Devdas

Counsel for the Respondent(s) **:** Mr. Anand K. Ganesan
Ms. Parichita Chowdhury
Ms. Neha Garg for R-1

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

APPEAL NO. 259 of 2016

1. The present appeal is filed under section 111 of the Electricity Act, 2003, being preferred against the impugned order dated 30.03.2016 notifying the Cross Subsidy Surcharge (CSS) notified under Chapter 6.7 of the Karnataka Electricity Regulatory Commission's (the "**KERC**") order of retail supply tariff for financial year 2017.

APPEAL NO. 386 of 2017

2. The instant appeal is filed under section 111 of the Electricity Act, 2003, being preferred against the impugned order dated 02.03.2015 notifying the Cross Subsidy Surcharge (CSS) notified under Chapter 6.7 of the Karnataka Electricity Regulatory Commission's (the "**KERC**") order of retail supply tariff for financial year 2016.

2.1 The Appellant / Petitioner is a generator of Clean Energy and at present generating 100 MW of power from Wind mills. The project is located in Bijapur District of Karnataka state.

2.2 The 1st Respondent (the "KERC" or the "Commission") is the State Electricity Regulatory Commission for the State of Karnataka.

2.3 The 2nd Respondent (BESCOM) is the Distribution Licensee in the State of Karnataka, distributing electricity in the Bangalore city and outer limits as more fully outlined under its distribution license.

3. **Brief Facts of the Case in the instant Appeals:-**

3.1 The 2nd Respondent BESCOM filed an application on 08th December, 2014 seeking approval for the Annual Performance Review (APR) for FY14, Revised ARR for the 3rd year of the third control period i.e. FY16 and Revised Retail Supply Tariff for FY16. KERC had determined retail Electricity tariff for the FY 2015-16 by order issued on 2nd March 2015, which to the extent determined CSS applicable on open access sales, is challenged by the Appellant herein before this Tribunal.

3.2 During the pendency of the above case, for FY 2016-17, the 2nd Respondent BESCOM filed the retail tariff petition on 15th December 2015 seeking approval of, *inter alia*, Retail Supply Tariff for FY17 and CSS applicable on open access sales.

3.3 Accordingly, the KERC, vide its notice no. KERC / A / 04 / 2046 / 15-16, dt. 8th February 2016, called for a public hearing on 26th February 2016, to seek views of the general public and stakeholders.

3.4 In response to the KERC's public hearing notice, Greenko Energy Pvt Ltd. (Greenko), the holding company of the Appellant herein, submitted written comments vide its letter dt. 25th February 2016. In this submission, Greenko highlighted, *inter alia*, the inconsistency observed in the data used by BESCOM for calculating the CSS from FY 15-16 to FY 16-17, and also reiterated the incorrect components "T" (Average Tariff Realisation) and "C" (Cost of Supply) used by the Hon'ble Commission in calculating the CSS. The submission also highlighted the earlier Appeal pending before this Tribunal challenging the methodology of calculating the CSS. The representative of Greenko also made verbal submissions during the said public hearing on 26th February 2016.

3.5 The 1st Respondent KERC notified the Impugned Order, without considering the submissions made by the Appellant herein and also in the Appeal pending before this Tribunal with regard to CSS. As regards Greenko's written submissions dt. 25th February 2016 and verbal submissions dt. 26th February 2016, the Commission, in the Impugned Order, responded by merely stating that "*the Commission is determining the cross subsidy surcharge as per the methodology specified in the MYT Regulation*".

3.6 As regards computing Average Realization Rate (Rs / unit), the Commission failed to take into consideration the difference in tariff payable by the consumers located within the BBMB & Municipal Corporation area and outside it, despite the fact that the Energy Charge is lower by 15-20 paise / kWh for industrial and commercial consumers located outside the BBMP and Municipal Corporation area. This failure to take the difference in tariff has resulted in the CSS for industrial and commercial consumers located outside the BBMP and Municipal Corporation area being unjustifiably higher by 15-20 paise / kWh.

3.7 The Commission has done so while quoting the National Tariff Policy, 2006, and the KERC (Terms and Conditions for Determination of Tariff for Distribution and Retail Sale of Electricity) Regulations, 2006, dt. 31st May 2006 (in short "**KERC MYT Regulations".**

3.8 The contention of the Appellant is that calculation of CSS by the 1st Respondent in the impugned order as the difference between two components viz. the Average Realization rate and the Cost of Supply, fails to follow the CSS formula, thus resulting in an inflated and erroneous CSS. The **Average Realization Rate** (Rs/unit) considered by the 1st Respondent Commission in the above calculation of CSS has been incorrectly considered to be higher than the **Energy Charge** (Rs/kWh)

notified by the KERC in the Impugned Order for the above consumer categories, thereby resulting in an inflated CSS.

3.9 The contention of the Appellant is that the **Average Realisation Rate** should either be lower than, or at the most, be equal to the **Energy Charges**, and never more than the Energy Charge itself. It is relevant to note that **renewable energy based generating companies** in the State of Karnataka are required to avail Intra State Open Access through a mechanism known as Wheeling & Banking and therefore, a **Wheeling & Banking Agreement (WBA)** is executed by the Generating Company, the Distribution Companies in whose location the generator and consumer/s are located, and the State Transmission Licensee.

3.10 The **renewable energy based generating companies** in the State of Karnataka are required to avail Intra State Open Access through a mechanism known as Wheeling & Banking and therefore, a **Wheeling & Banking Agreement (WBA)** is executed by the Generating Company, the Distribution Companies in whose location the generator and consumer/s are located, and the State Transmission Licensee.

3.11 The open access consumers of renewable energy projects are necessarily **non-exclusive consumers**, as they continue to be the consumers of the Distribution Companies. Only the energy (kWh terms) purchase by such

non-exclusive consumer from the open access generator gets set-off against total energy consumed. Therefore, the consumer does not pay **Energy Charge** for the units (kWh) wheeled by the generating company under the WBA.

3.12 However, the **Demand Charges**, Initial Security Deposit, Additional Security Deposit, Meter Security Deposit, Electricity Tax / Duty, Power Factor Penalties or any other component of tariff that is applicable **other than Energy Charge**, is continued to be paid by the consumers to their respective Distribution Companies. In other words, the **only component** of tariff that a Distribution Company loses from its consumers who opt for open access / WBA is the **Energy Charge**.

3.13 Thus, as per the Appellant, the Average Realisation Rate must be either lower than the Energy Charge or at the most, equal to Energy Charge, but certainly not more than the Energy Charge itself. However, as per the Impugned Order's chapter 6.7(i), the Average Realisation Rate is significantly higher than the Energy Charge which is evident from the workings furnished in Table 3. This is because the 1st Respondent has pooled every cost over and above the Energy Charges in the name of Average Realisation Rate, even though it continues to allow the 2nd Respondent BESCOM to levy the above-said fixed charges from the

open access consumers. Thus, the CSS calculated as above is inflated and illegal.

3.14 The 1st Respondent KERC has not detailed the basis of the second component in the Impugned Order, that is, Cost of Supply at 5% margin at 66 kV & above level (Rs. 5.65/unit), and at HT level, that is, 11 or 33 kV, (Rs. 6.07 /unit). The Appellant had requested the Commission to provide the Excel sheets used in preparing the retail tariff orders for FY 2016-17 and FY 2015-16 but not received any details whatsoever.

3.15 As per the Appellant, this component (Cost of Supply) has been very erratic as well as unsubstantiated over the years, resulting in erratic cross subsidy surcharge, as depicted below:

Cost of Supply @ 5% margin	**Same for HT-2a Industries, HT-2b Commercial , HT-2c (Rs / kWh)**	
	11/33 KV	**66 KV**
FY 2012-13	5.74	5.34
FY 2013-14	5.78	5.36
FY 2014-15	6.33	5.88
FY 2015-16	5.95	5.52
FY 2016-17	6.07	5.65

3.16 The Appellant further submits that the 1st Commission has also not followed in spirit the para 8.5.1 of the National Tariff Policy, 2006, of the Ministry of Power, Government of India. As is evident from the para 8.5.1, the National Tariff Policy intended to allow distribution licensee to

charge cross subsidy surcharge as a **compensatory mechanism**, not as **predatory mechanism** or with a malicious intent of thwarting the open access in the power sector.

3.17 The Appellant questioning the legality and validity of the impugned order for determination of the CSS for the referred financial years by the 1st Respondent Commission in non-transparent manner and felt necessitated to present these Appeals.

4. FACTS IN ISSUE:-

4.1 Whether the Average Realisation Rate calculated and arrived at by the 1st Respondent contains charges other than Energy Charge viz., Demand Charges, Initial Security Deposit, Additional Security Deposit, Meter Security Deposit, Electricity Tax / Duty, Power Factor Penalties or any other component of tariff that is applicable other than Energy Charge?

4.2 Whether the Distribution Licensee loses any component of tariff other than the Energy Charge, when any of its consumers opt for Wheeling and Banking?

4.3 Whether the 1st Respondent failed to draw distinction between the consumers located within the BBMB & Municipal Corporation area and outside it, as regards computing Average Revenue Realisation for determination of CSS, when in fact the Energy Charge being lower by

15-20 paise / kWh for industrial and commercial consumers located outside the BBMP and Municipal Corporation area?

5. QUESTION OF LAW:-

The Appellant has raised following questions of law in its Appeals for our consideration:-

5.1 Whether it is within the power and scope of the 1st Respondent under the Electricity Act, 2003 to compute and arrive at the Average Realisation Rate by adding all charges other than Energy Charge, viz., Demand Charges, Initial Security Deposit, Additional Security Deposit, Meter Security Deposit, Electricity Tax / Duty, Power Factor Penalties or any other component of tariff that is applicable other than Energy Charge?

5.2 Whether the Impugned Order failed to create the regulatory environment to achieve the intended objective of para 8.5.1 of the National Tariff Policy, as regards CSS?

5.3 Whether increase in CSS is against the Electricity Act 2003 and also the National Tariff Policy and also violates proviso of section 42 (2) of the Electricity Act 2003 and violates the mandate of the Act to face out progressively surcharge and cross subsidies.

5.4 Whether the regulator has a power to impose CSS without framing a road map for facing out of the same and the present action without

framing a road map; is it not contrary to the very preamble of Electricity Act, 2003.

5.5 Whether it is intra vires the Electricity Act, 2003 to arrive at the Average Realisation Rate as arrived at by the 1st Respondent by adding all charges other than energy charges viz., Demand Charges, Initial Security Deposit, Additional Security Deposit, Meter Security Deposit, Electricity Tax / Duty, Power Factor Penalties or any other component of tariff that is applicable other than energy charges?

5.6 Whether the Impugned Order has created the regulatory environment to achieve the intended objective of para 8.5.1 of the National Tariff Policy?

6. **Relief sought**:-

In view of the facts mentioned in facts of the case and question of law, the Appellant has prayed for the following relief(s):-

a) Call for records;

b) Upon perusal of records, be pleased to set aside the impugned orders dated 30th March, 2016 and dated 2nd March, 2015 passed by the Karnataka Electricity Regulatory Commission, in respect of, *inter alia,* Retail Supply Tariff for FY 16 & FY 17, to the limited extent of the re-determination of the Cross Subsidy Surcharge (CSS) calculated therein;

c) Grant the cost of this Appeal and pass such other order or orders as the Hon'ble Tribunal may deem it fit and proper in the circumstances of the case.

6. <u>The Learned Counsel, Mr. Shailesh Madiyal, appearing for the Appellant has filed the written submissions in Appeal No.259 of 2016 and adopted in companion Appeal No. 386 of 2017 as follows</u>:-

6.1 The KERC has determined the CSS at para 6.7 of the Impugned Order. The same is purportedly done in accordance with the KERC [Terms and Conditions for Determination of Tariff for Distribution and Retail Sale of Electricity], Regulations 2006 as also, in accordance with the National Tariff Policy, 2006 and the Electricity Act, 2003. The objections filed by the Appellant have not even been considered.

The formula for determination of CSS as prescribed under the National Tariff Policy, 2006 as well as the KERC MYT Regulations, is as follows:-

"Surcharge (S) = T-[C (1+L/100) + D]

Where

T <u>is the Tariff payable by the relevant category of consumers</u>

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"

6.2 The KERC in determination of the CSS in the Impugned Order, completely misread and misapplied the formula prescribed. This is ex-facie evident from the following:

- In the impugned order, the energy charges are determined by the KERC at differential rates depending on the category of the consumer and the location of the user. Different energy rates are prescribed for various categories of users and even within those users, different energy rates are prescribed at different levels of usage. There is also a differential energy charges for users located in BBMP and Municipal areas as opposed to those located in other areas.

6.3 In spite of the differential energy rates set out in the Impugned Order itself, the CSS has been determined by the KERC at para 6.7 (i) of the Impugned Order by completely ignoring the differential energy charges. The error in the manner of calculation and application of the formula is as follows:

(i) The distinction between the energy charges prescribed for BBMP and Municipal Corporation areas as opposed to other areas is completely ignored in the Impugned Order. Leave alone determining CSS on the basis of the differential rates

for BBMP and non BBMP areas, the KERC has not even referred to this differential rate at para 6.7 of the Impugned Order. It is pertinent to submit that the Energy Charges for BBMP and Municipal areas is almost 15-20 paise more per kWh than for other areas.

(ii) The Impugned Order takes into consideration a uniform tariff [by referring to it as **'Average Tariff'**], rather than a differential tariff. In doing so, the Impugned Order does not take into consideration the differential energy charges between different levels of usage that the Impugned Order itself notices at.

(iii) Even the so called 'Average Tariff' is not at all the average of the various Energy Charges specified. As evident from a comparison of the so called 'Average Tariff' relied on by the KERC with the various tariffs prescribed for different categories of users, the Average Tariff for each category of user is higher even than the highest energy charge prescribed for such category, without any explanation as to what are the additions made thereto [by way of Demand Charges or otherwise].

6.4 In the impugned Order, the Commission has calculated the CSS on Average Realization Rate (ARR) instead of on Energy Charge. It is submitted that the National Tariff Policy as well as the KERC MYT Regulations permit calculation of CSS on Tariff and not on Average Realization Rate. The Factor '**T'** refers to Tariff and not the Average Realization Rate. The Average Realization Rate apart from tariff also includes the Demand Charges and other fixed charges which are continued to be billed to and collected from the end consumers by respective ESCOMs even after they migrate to an open access purchase. Therefore, the CSS computed and fixed by the Impugned Order is legally untenable, and further the observation of the KERC that CSS is arrived at as per the methodology specified in the KERC MYT Regulation is incorrect.

6.5 As per the scheme of Intra State Open Access through WBA (Wheeling & Banking Agreement) in the State of Karnataka, all consumers who avail intra state Open Access from renewable energy generators are non-exclusive open access consumers of the Distribution Companies in the State of Karnataka. Therefore, only the energy consumed by the consumer of the Distribution Company gets set off from the energy wheeled by the generating company. In other words, the open access

consumer- the non exclusive consumer of DISCOMs - continue to pay all charges other than Energy Charge for the units set off under the Wheeling and Banking.

6.6 The KERC while arriving at the CSS has not just added the Energy Charges but also appear to have added Demand Charges and all other charges which otherwise are continued to be paid by the Open Access Consumers to the BESCOM **[2nd Respondent]**. If the 2nd Respondent does not lose any of these charges by providing open Access, then there is no reason or purpose why the same should be factored in formulation for computation of Tariff and the resultant Cross Subsidy Surcharge.

6.7 The only exemption that a non-exclusive open access consumer receives is that he does not pay Energy Charge to distribution licensee for the units wheeled by the generating company under the WBA. Thus, since the supply of such open access units is through, the Distribution Company, the Demand Charges, Initial Security Deposit, Additional Security Deposit, Meter Security Deposit, Electricity Tax/Duty, Power factor Penalties or any other component of tariff that is applicable other than Energy Charge will be continued to be borne and paid by the consumers to their respective Distribution Companies. It means the only component of tariff that a Distribution Company loses from its

consumers who opt for Open Access/ Wheeling and Banking is the Energy Charge. **Thus, the Average Realisation Rate can at best be the Energy Charge and certainly no more than the Energy Charge. However, the KERC, in computing to arrive at CSS, appears to have pooled every cost over and above the Energy Charge in the name of Average Realisation Rate. Thus, the CSS calculated as above is arbitrary and inflated.**

6.8 The CSS being the difference between the tariff applicable and the cost of supply, unless the cost of supply is determined, the applicable CSS cannot be determined. In the impugned order, a reasonable basis for arriving at the cost of supply has not been disclosed, and the same vitiates the Impugned Order.

6.9 The National Tariff Policy mandates that the computation of CSS needs to be done in a manner so that it compensates the distribution licensee without constraining the introduction of compensation through open access. Presently, the arbitrary and inflated determination of CSS makes it lose its compensatory character and has a negative effect on the competition through open access.

6.10 The two fundamental principles for determination of tariff and the surcharge as statutorily mandated under section 61 of the Electricity Act, that:-

i) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

ii) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

have been completely discarded, thereby vitiating the impugned order to the extent surcharge fixed arbitrarily and that to at an inflated rate.

6.11 The National Tariff Policy mandates that the amount of CSS 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. In the impugned Tariff orders there is absolutely no consideration of these aspects and therefore the determination of CSS is bad in law.

6.12 Among the renewable sources, the KERC ought not to have discriminated against generating companies generating Hydel power as opposed to solar power.

6.13 In view of the facts and questions of law mentioned hereinabove, the impugned order may be set aside.

7. <u>The Learned Counsel, Mr. Anand K. Ganesan , appearing for the Respondent No.1 has filed the following written submissions in Appeal No.259 of 2016</u> :-

7.1 The only issue raised by the Appellant is with respect to the determination of Cross Subsidy Surcharge (CSS). It is the Appellant's case that the State Commission has wrongly computed the CSS and has not explained the corresponding calculation in the Impugned Order. The Appellant has raised the following issues:

(a) The State Commission has not given any details of the computation and the impugned order does not contain the basis on which the CSS has been calculated.

(b) The State Commission has taken the entire tariff as against only Energy Charges for the computation of CSS.

(c) The State Commission has taken the Average Tariff or Average Realisation rate as Tariff for computing CSS.

(d) The State Commission has not computed separate CSS for sub-classes under the HT-2(a) category and has computed only a single CSS rate for the HT-2(a) category.

7.2 The submissions of the Appellant are not correct. The submissions on behalf of the State Commission on each of the issues raised are as under:

A. THE IMPUGNED ORDER DOES NOT CONTAIN THE BASIS ON WHICH THE CSS HAS BEEN CALCULATED

7.3 The State Commission has in the Impugned Order in Para 6.7 has provided the CSS for each of the categories of consumers. The State Commission has determined the CSS as per the methodology specified for calculating the CSS in its MYT Regulations and given the figures for the formula for determination of CSS, namely, (a) the Tariff; and (b) The cost of supply at 5% margin. The CSS is worked out, as the difference between the Average Tariff for the particular category of consumers and the cost of supply at the HT voltage or EHT voltage level, as the case may be. Further, as the CSS has to be reduced gradually to encourage open access, the Commission has determined the CSS at 75% of the CSS, as worked out above. Thus, the basis for computation of CSS is clearly explained in the Order.

7.4 The total revenue from each category of consumers approved by the State Commission is also provided for in Annexure III to the impugned order. For the HT-2a category, since there are two sub-classes, the total number of units is 2442.89 MUs + 2300.58 MU aggregating to 4743.47 MUs.

Correspondingly the revenue from the HT-2a category is Rs. 1811.07 crores + Rs. 1640.90 crores aggregating to Rs. 3451.97 crores.

7.5 The average tariff for the HT-2a category for each sub-class is provided at Rs. 7.41/- per unit and Rs. 7.13/- per unit. The average based on the total revenue and total units sold comes to Rs. 7.21 per unit, which is what has been provided by the State Commission.

7.6 Every tariff order has substantial calculations and computations. The figures provided in the tariff order are derivative figures, based on the total number of units approved and the total revenue considered by the State Commission. In the circumstances, it is submitted that the contention of the Appellant that there are no details of CSS calculation is incorrect and is liable to be rejected.

B. THE STATE COMMISSION HAS TAKEN THE ENTIRE TARIFF AS AGAINST ONLY ENERGY CHARGES FOR THE COMPUTATION OF CSS.

C. THE STATE COMMISSION HAS TAKEN THE AVERAGE TARIFF OR AVERAGE REALISATION RATE AS TARIFF FOR COMPUTING CSS.

7.7 The formula for determination of the CSS is provided for in the National Tariff Policy, 2006 and also in the Regulations of the State Commission, as under:

Surcharge formula:

S = T – [C (1+L/100)+D]

Where

S is 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

7.8 The interpretation and manner of implementation of the above formula has been well settled by various decisions of this Appellate Tribunal. The Tribunal has held the following:

(a) The tariff computation has to include both fixed charges and energy charges and cannot be only on the basis of energy charges.

(b) The Tariff for the purposes of **T** in the formula is to be the Average Billing Rate which is to be determined by dividing the total expected revenue from the category from the total expected sale to the category.

7.9 In this regard, the following decisions of the Tribunal, which deal with the identical formula as in the present case, are relevant:

i) <u>Appeal No. 181 of 2015 – Byrnihat Industries Association v Meghalaya Electricity Regulatory Commission &Anr. (Judgment dated 26.05.2016)</u>

…

18. The Cross Subsidy Surcharge 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 relevant category of consumer for the year in question and cost of power purchase (C) of top 5% at margin excluding liquid fuel based and renewable power in that year.

It is observed that Appellant has made reliance on the Table 8.2 of the Impugned Order i.e. "Category of consumer wise tariffs approved by the Commission" and used approved Energy Charge of Rs 5.40/KVAH as the Tariff for computation of Cross Subsidy Surcharge.

19. In the National Tariff Policy formula, "T" is the Tariff payable by relevant category of consumers. The Tariff has two components viz. Fixed/ Demand charge and Energy charge and hence, for the purpose of calculating cross- subsidy surcharge, the State Commission has considered Average Billing Rate in Rs/ KWh for the respective category as "T" as it reflects the effective combination of fixed/demand and energy charges payable by that category of consumers. ***We are in agreement with the formulation of the State Commission for using Average Billing Rate for a***

consumer category to be used while determining Cross Subsidy Surcharge."

• 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.

7.10 The State Commission has applied the above formula stipulated by the Tribunal in letter and spirit. On the contrary, the Appellant seeks a deviation from the above decision and formula stipulated, which is erroneous.

7.11 The term Average tariff or Average Billing Rate or Average Realisation are only terminologies used, but the formula for arriving at the same is by dividing the total expected revenue from a category by the total sale of power to that category. This is the exact methodology followed by the State Commission in the impugned order.

7.12 In the light of the above decisions, the contention of the Appellant both on the issue of inclusion of fixed charges in the computation of CSS and also the adoption of Average Tariff or Average Billing Rate is liable to

be rejected, as the Commission has worked out the tariff 'T' by dividing the expected revenue from the particular category of consumers from the estimated sales to that particular category of consumers.

D. THE STATE COMMISSION HAS NOT COMPUTED SEPARATE CSS FOR SUB-CLASSES UNDER THE HT-2(A) CATEGORY AND HAS COMPUTED ONLY A SINGLE CSS RATE FOR THE HT-2(A) CATEGORY.

7.13 The contention of the Appellant is that since there are two sub-classes in the HT-2a category of consumers with separate tariffs, two separate CSS ought to be determined for each of the sub-classes.

7.14 The Commission in all its earlier tariff orders, has worked out the CSS, as per the formula specified in its MYT Regulations, considering the tariff for the category of consumers and not the sub-classes. While the tariff category and sub-categories are same in all the ESCOMs except in the BESCOM, wherein additional sub-categories have been specified for the BESCOM for HT-2a and HT-2b categories. This has been done to encourage more HT-2a and HT-2b consumers outside the congested urban Bangalore area, by providing reduction in tariff for such consumers. However, for the purpose of the CSS, the State Commission

has considered one CSS for each category of consumer and further fixed the CSS as 75% of the CSS worked out as per the formula, as a part of its endeavour to gradually reduce CSS.

7.15 Subsequently, in its orders from 2017 onwards, the Commission has adopted the formula specified in the Tariff Policy,2016, wherein it is stipulated that the CSS has to be limited to 20% of the tariff applicable to the relevant category of consumers, which stipulation was not there earlier. Since, the sub categories have different tariff and to further encourage open access, the Commission, in its orders from 2017 onwards, has determined the CSS sub-category wise.

7.16 In the explained circumstances, there is no merit in the present appeal and needs to be dismissed.

8. We have heard at length the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent and considered carefully their written submissions/arguments during the proceedings and available material on record. The principal issue arising out of both Appeal for our consideration is as under:-

- Whether the State Commission has followed the requisite procedure and passed the impugned order in judicious and equitable manner?

9. **Our findings and analysis** :-

The learned counsel for the Appellant has submitted that in response to KERC public notice dated 08.02.2016, Greenco Energy Pvt. Ltd., the holding company of the Appellant herein, submitted written comments vide its letter dt. 25th February 2016. In the said submissions, Greenko had *inter alia*, highlighted various inconsistencies observed in the data used by BESCOM for calculating the CSS from FY 2015-16 to FY 2016-17, and also reiterated the incorrect components "T" (Average Tariff Realisation) and "C" (Cost of Supply) used by the State Commission in calculating the CSS. The counsel further stated that in addition to above, the representative of Greenko also made verbal submissions during the said public hearing on 26th February 2016. It is further alleged that the State Commission notified the Impugned Orders, without considering the submissions made by the Appellant. As regards Greenko's written submissions dated 25th February 2016 and verbal submissions dated 26th February 2016, the State Commission, in the Impugned Order, as responded by merely stating that "***the Commission is determining the cross subsidy surcharge as per the methodology specified in the MYT Regulation*****".**

9.1 The learned counsel further contended that the aforesaid written submission as well as verbal submission relating to CSS leviable for open access sales on renewable energy (RE) generators to HT consumers mainly focussed on following three aspects:-

1) Inconsistency in the data used for calculating CSS from FY 2015-16 to Financial Year 2016-17;

2) Methodology adopted for calculating the CSS, i.e. “T” & “C”

3) Preferential treatment to solar power at the detrimental cost to other RE generators, such as wind and small hydro.

9.2 It has further been submitted by the counsel that the State Commission neither considered the submissions made by the Appellant nor provided the details of computations for arriving at different slabs of CSS. He stated that The **renewable energy based generating companies** in the State of Karnataka are required to avail Intra State Open Access through a mechanism known as Wheeling & Banking and therefore, a **Wheeling & Banking Agreement (WBA)** is executed by the Generating Company, the Distribution Companies in whose location the generator and consumer/s are located, and the State Transmission Licensee.

9.3 The learned senior counsel appearing for the Appellant contended that the open access consumers of renewable energy projects are necessarily **non-exclusive consumers,** as they continue to be the consumers of the Distribution Companies. Only the energy (kWh terms) purchase by such non-exclusive consumer from the open access generators gets set-off against total energy consumed. Therefore, the consumer does not pay energy charges for the units (kWh) wheeled by the generating company under the WBA. However, the Demand Charges, Initial Security Deposit, Additional Security Deposit, Meter Security Deposit, Electricity Tax / Duty, Power Factor Penalties or any other component of tariff that is applicable other than energy charges, is continues to be paid by the consumers to their respective Distribution Companies.

9.4 In view of the above, it is the contention of the learned counsel for the Appellant that the Average Realisation Rate must be either lower than the Energy Charge or at the most, equal to the Energy Charge but certainly cannot be more than the Energy Charge itself. In utter contrast, as per the impugned order, the Average Realisation Rate is significantly higher than the Energy Charge even though it continue to allow BESCOM to levy the aforesaid fixed charges from the open access consumers. As such, the

CSS calculated by the State Commission is inflated and in the absence of requisite details, it is beyond comprehension of the Appellant. The learned counsel has further contended that the State Commission has also not followed the spirit containing in Para 8.5.1 of the National Tariff Policy, 2006 of the Govt. of India which envisages to allow distribution licensees to charge CSS as a compensatory and not as pre-datory mechanism or with a malicious intent of thwarting the open access in the power sector. Further, the CSS being the difference between the tariff applicable and the cost of supply, unless the cost of supply is determined reasonably giving full details the applicable CSS cannot be determined with proper rational. In the impugned order, the reasonable basis for arrive at the cost of supply has not been properly disclosed and the same vitiates the impugned order. The impugned order further discarded the two fundamental principles for determination of tariff and the surcharge mandated under Section 61(b) & (c) of the Electricity Act, 2003.

9.5 ***Per contra***, the learned counsel for the Respondent Commission has submitted that the CSS has been determined as per the methodology specified in the MYT Regulations and the National Tariff Policy, 2006. Further, he indicated that details have been given in the impugned order

appropriately at relevant pages and Annexure III. He further submitted that the State Commission has computed the CSS strictly as per the formula specified in the NTP and its MYT Regulations. The formula as well as interpretation of various factors stipulated therein are in adherence of the interpretation and elucidation contained in various judgments of this Tribunal. In response to the contentions of the Appellant that Average Realisation Rate should be either lower than the Energy Charges and at the most equal to it, he submitted that tariff of subsidising consumers is generally in two parts i.e. fixed charges and energy charges. Therefore, the term tariff (T) 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 such, the Average Realisation Rate is also known as Average Billing Rate for that particular consumer is determined by dividing total expected revenue from a category by dividing total expected sale to that category. He further indicated that the State Commission has applied the above formula in letter and spirit while on the contrary, the Appellant seeks a deviation therefrom.

9.6 The contention of the learned counsel for the Appellant regarding computation of separate CSS for sub-category of consumers, it is mentioned that while the tariff category and sub-categories are same in all the ESCOMs except in the BESCOM wherein additional sub-categories have been specified to encourage more HT consumers outside the congested urban Bangalore area by providing reduction in tariff for such consumers. The learned counsel further submitted that in its order from 2017 onwards, the Commission has adopted the tariff formula as per Tariff Policy, 2016 wherein it is stipulated that the CSS has to be limited to 20 % of the tariff applicable to the relevant category of consumers. Since, the sub categories have different tariff and to further encourage open access, the Commission, in its orders from 2017 onwards, has determined the CSS sub-category wise. He further contended that in the explained circumstances, there is no merit in the present appeals and need to be dismissed.

10. **Our Findings** :-

10.1 We have carefully considered the rival contentions of the learned counsel for the Appellant as well as the learned counsel for the Respondent and found that the Cross Subsidy Surcharge has been determined by the State Commission as per the formula stipulated in the

National Tariff Policy, 2006 using the factors "T' & "C" as per its MYT Regulations. The basic issues highlighted by the Appellant are that their written as well as verbal submissions made in response to the KERC public notice dated 8.2.2016 have not at all been considered by the State Commission. Besides, the computations have not been shown / given to them as requested for reference relating to the adoption of various factors / terms in the tariff formula.

10.2 We feel that in line with provisions made in the Electricity Act, 2003, adequate transparency in computations of tariff including CSS, is required to be ensured by the respective State Commission. In view of these facts, we would like to put a note on this count that the State Commission should have brought out detailed calculations of the computation regarding the CSS for various categories in the impugned order itself or ought to have provided the calculations to the stakeholders on request. This, in turn, would have facilitated better appreciation of the impugned order by all the stakeholders including the Appellant and avoided the apprehensions in the minds of the RE generators.

10.3 In the light of the foregoing facts and circumstances of the case, we are of the considered view that the issues raised in the present Appeal Nos. 259 of 2016 and 386 of 2017 have merits for consideration and deserve to be

allowed. Hence, the impugned orders dated 30.03.2016 and 02.03.2015 passed by Karnataka Electricity Regulatory Commission are liable to be set aside and the matter is required for reconsideration afresh.

ORDER

For the forgoing reasons, as stated above, we are of the considered view that the issues raised in the present Appeals being Appeal No. 259 of 2016 and 386 of 2017 have merits. The Appeals filed by the Appellant are allowed. The impugned order passed by Karnataka Electricity Regulatory Commission dated 30.03.2016 and 02.03.2015 are hereby set aside.

The matter stands remitted back to the State Commission with the direction for fresh consideration in accordance with law after affording reasonable opportunity to both the parties and dispose off as expeditiously as possible at any rate within a period of six months from the date of appearance of the parties in accordance with law.

The Appellants and Respondents are directed to appear before the first Respondent personally or through their counsel on 26.09.2018 at 11.00 A.M. without further notice to collect necessary date of hearing.

No order as to costs.

Pronounced in the Open Court on this **28th day of August, 2018.**

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~

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