Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 179 of 2012

Dated: 31st May, 2013

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

Kerala High Tension and Extra High Tension
Industrial Electricity Consumer's Association
Productivity House,
Jawaharlal Nehru Road,
Kalamassery, KOCHI-683 104

...Appellant(s)

Versus

1. **The Kerala State Electricity Regulatory Commission**
K.P.F.C Bhavanam,
C.V. Raman Pillai Road,
Vellayambalam,
Thiruvananthapuram-695 010
Kerala

2. **Kerala State Electricity Board,**
Vydyuthi Bhavanam,
Pattom, Thiruvananthapuram,
Pin-695 004
Kerala

...Respondent(s)

Counsel for Appellant(s) : Mr. Buddy A Ranganadhan
Ms. Richa Bhardawaja

Counsel for the Respondent(s): Mr. Ramesh Babu for R-1
Mr. M.T George for R-2
Mr. Sreenivasan and
Ms. Kavita K.T for R-2
Mr. Siva Prasad for KSEB

JUDGMENT

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

1. Kerala High Tension (HT) and Extra High Tension (EHT) Industrial Electricity Consumer's Association is the Appellant herein.

2. The present Appeal is directed against the tariff order passed by the Kerala State Commission dated 25.7.2012 wherein the State Commission determined the Retail Supply Tariff for the State of Kerala.

3. The short facts are as under:

a) The Appellant is the consumer's Association comprising of 166 nos. of

consumers including more than 29 major industries.

b) Out of the members of the Association of HT and EHT industries, about 31 industrial consumers have contracted for a maximum demand of more than 2000 KVA each with Kerala Electricity Board, the Second Respondent.

c) Out of them, more than 20 industries draw power at the EHT level from the State Electricity Board. They are the subsidizing category of consumers for the Electricity Board.

d) In the State of Kerala, High proportion of Hydel generation in the overall mix has been instrumental in keeping tariff revisions to the barest minimum.

e) The State Commission was constituted in November, 2002. In 2007, the State Commission after observing all the formalities, fixed the tariff for the Appellant's

category by the tariff order dated 26.11.2007. Subsequently, tariff was not revised by the State Commission till 2012.

f) The State Electricity Board (R2), on 31.12.2011 filed a Petition before the State Commission for the approval of ARR and ERC for the year 2012-13. In the ARR Petition, the State Commission by the order dated 28.3.2012 approved the Revenue Gap for the period 2012-13 at Rs.1889.15 Crores.

g) Thereupon, on 29.3.2012 the State Electricity Board filed a Tariff Petition for the revision of tariff for the year 2012-13 on the basis of a Revenue Gap of Rs.1586 Crores.

h) The Tariff Petition was admitted by the State Commission on 25.4.2012. As directed by the State Commission, the tariff proposal was published in newspapers on 10.5.2012.

i) In response to the publication, the Appellant's Association on 25.5.2012, filed its objections to the Draft Regulations published

by the State Commission in which the State Commission had proposed to notify a roadmap for reduction of Cross Subsidies in the State.

j) In the meantime, the Appellant filed a Review Petition before the State Commission against the ARR and ERC order that was passed by the State Commission on 28.3.2012.

k) The Appellant on 4.6.2012 filed its objections to the tariff proposal of the Board. The State Commission conducted public hearing in which the public including the Appellant participated on 4th to 8th June, 2012.

l) At that stage, the Appellant filed a Writ Petition before the Kerala High Court on 16.7.2012 praying the High Court to direct the State Commission not to revise the tariff without finalizing the roadmap for reduction of cross subsidy in the State.

m) The Writ Petition came-up for hearing on 25.7.2012. During the hearing, the learned Counsel appearing for the State Commission made a statement giving an undertaking that the State Commission would take into consideration Section 61 and 62 of the Electricity Act, 2003 and various policy documents reflecting the cost of electricity and progressive reduction of cross subsidy while finalizing the Tariff proceedings. This undertaking was recorded in the order passed by the High Court on 25.7.2012.

n) On the very same date i.e. on 25.7.2012, the State Commission issued the impugned tariff order increasing the tariff for HT and EHT consumers which varies between 26% and 58% stipulating that the revised tariff would come into effect from 1.7.2012 by giving the retrospective effect.

o) Aggrieved by this, the Appellant has presented this Appeal.

4. The Learned Counsel for the Appellant in this Appeal has raised the following issues:

a) Determination of tariff on the basis of category wise/voltage wise cost of supply and not on the basis of Average Cost of supply;

b) Increase in cross subsidy and tariff shock;

c) Increase in tariff violative of Regulation 5(3) of the Tariff Regulations, 2006;

d) No load factor incentive and prompt payment incentive given in the tariff order;

e) Retrospective fixation of tariff;

5. The gist of the submissions made by the learned Counsel for the Appellant on the each of the issues, is as follows:

a) The State Commission ought to have determined the tariff on the basis of voltage wise cost of supply instead of choosing to fix the tariff on the basis of average cost of

supply. This is contrary to the principles laid down by this Tribunal in various judgments.

b) Contrary to the mandate of the Act, the State Commission has increased cross subsidy for the HT and EHT consumers. The table shown in the impugned order indicates that there is an increase not only in the tariff but also there is increase in the cross subsidy which is contrary to the Act and tariff policy.

c) The impugned order is contrary to the judgment of this Tribunal which mandates that no category of consumers should be visited with a tariff shock which has been done in the impugned order while increasing the tariff between 26% and 58% in violation of Regulation,2006.

d) The State Commission having allowed the Power Factor incentive has disallowed other incentives such as load factor incentive, etc.

and prompt payment incentive without valid reasons.

e) The impugned order is wrong in law since it has been made effective retrospectively from the date even prior to the date of tariff order. The tariff order was passed on 25.7.2012, yet the impugned order has stipulated that the revised tariff would come into effect from 1.7.2012.

6. The learned Counsel for both the Respondents i.e. State Electricity Board as well as the State Commission while refuting the grounds urged by the learned Counsel for the Appellant have pointed out the findings of the State Commission in the impugned order on these issues and submitted that the impugned order is well justified which does not call for any interference.

7. In the light of the rival contentions urged by the learned Counsel for the parties, the **following question would arise for consideration.**

(a) Whether the State Commission failed to determine the tariff on the basis of the voltage wise cost of supply and instead determined the tariff on the basis of average cost of supply which is contrary to the law laid down by this Tribunal?

(b) Whether the impugned order is completely contrary to the judgment of this Tribunal to the effect that cross subsidy should not be increased and no category of consumers should be visited with the tariff shock?

(c) Whether the State Commission while increasing the tariff causing tariff shock has violated its own Regulations 5(3) of the Tariff Regulations, 2006 ?

(d) Whether the State Commission is right in disallowing the incentive such as load factor incentive and prompt payment incentive, etc even though it has allowed power factor incentive?

(e) Whether the Act or the Tariff Regulations would permit the State Commission for retrospective fixation of the tariff?

8. The first three issues are interconnected and, therefore, we shall be taking them up together.

9. Before examining the impugned order, let us discuss about the order dated 28.3.2012 by which the State Commission approved the ARR and ERC of the Electricity Board for the FY 2012-13 based on which the State Commission has determined the retail supply tariff in the impugned order.

10. The Electricity Board filed a petition for determination of ARR for FY 2012-13 on 31.12.2011 with a proposal for 15% power restrictions for the entire year so as to avoid purchase of costly power from liquid fuel based power stations. The Electricity Board also assumed that 50% of consumers will purchase extra energy over the quota at marginal cost and thereby assumed additional revenue of about Rs. 775.94 crores. With these assumptions the revenue gap was projected at about Rs. 3240 crores which was to be made good by increasing the tariff.

11. The State Commission after issuing public notice considered the objections and suggestions of the stakeholders on the ARR petition before passing the order. Some of the industrial consumers opposed imposition of power restrictions and suggested that the State Commission may adopt a general tariff increase

instead of imposing power restrictions. The State Commission accepted the view of the objectors and accordingly rejected the proposal of the Electricity Board for power cuts and directed the Board to procure additional power from liquid fuel based stations. The State Commission accordingly determined an ARR with a revenue gap of Rs. 1889 crores to be made up by increase in tariff. This revenue gap of Rs. 1889 crores was determined as against the revenue gap of Rs. 4337 crores projected by the Electricity Board without imposition of any power cuts and by procuring costly power from liquid fuel fired power stations. In this order, the State Commission determined the average cost of supply of Rs. 4.64 per unit and average revenue at existing tariff at Rs. 3.49 per kWh with a revenue gap of Rs. 1.15 per unit.

12. In the meantime, the Electricity Board filed a petition for determination of tariff. In the petition, the Board indicated following reasons for increase in revenue requirements:

i) Adverse change in hydro thermal mix resulting in increased requirement from thermal sources.

ii) Increased dependence on volatile short term market to meet power demand in the State.

iii) Increase in cost of generation of all thermal stations due to dependence on imported coal as well as phenomenal increase in price of crude oil adversely affecting the finances of the Board. Consequently, the average unit rate of thermal stations increased by Rs. 111.54% in 2012-13 compared to price in 2006-07.

iv) Upward revision of tariff norms for central generating stations by the Central Commission.

v) New regulations of Central Commission for sharing of inter-state transmission charges by the Central Commission.

vi) Inflationary trend in economy substantially impacting the expenses of the Board.

13. The Electricity Board also pointed out difficulties in managing resources even for its day to day operations. Further, the Board submitted that in the past, the Board had been able to meet the revenue requirements by availing overdraft from Financial Institutions but the Banks were reluctant to lend and were putting many restrictions while giving additional funds. Therefore, increase in tariff to reflect the average cost of supply was the only solution. The Board also referred to the directives of this Tribunal in

OP no. 1 of 2011 vide order dated 11.11.2011 to all State Commissions.

14. Let us now examine the objections and suggestions made by the Appellant regarding cross subsidy before the State Commission on the proposal of the Electricity Board regarding revision of tariff. The relevant portion is reproduced below:

"3.42 Section 61 of the Act mandates reduction of cross subsidies in a manner specified by the Hon'ble Commission. Admittedly, the Hon'ble Commission is yet to specify the roadmap for reduction of cross subsidies, although the process has now been initiated".

....

"3.44. This delay is regrettable, as Section 8.3(2) of the National Tariff Policy states that a roadmap for cross subsidy reduction should be notified within six months of the NTP being notified and that by the end of FY 2010-11, tariffs were to be within ± 20% of the average cost of supply. The

relevant portion of the NTP is quoted below for easy reference".

"Thus, the Tariff Policy envisages that the tariff should progressively reflect the efficient and prudent cost of supply of electricity and latest by 2010-11 the tariffs for all categories of consumers except the consumers below poverty line should be within ± 20% of the average cost of supply".

3.46 Therefore, the Hon'ble Commission should have taken steps to adjust tariffs in such a manner that cross subsidy was gradually reduced over the years since the notification of the NTP, and bring them within ± 20% of the average cost of supply for the year by the end of FY 2010-11.

"3.49 Therefore, in this tariff exercise for 2012-13, the Hon'ble Commission ***mandatorily*** *has to set tariffs in a manner that achieves* ***at least*** *the target that was to have been achieved in FY 2010-11".*

"3.50 There is also an important observation made by the Hon'ble ATE in Appeal no. 131 of 2005.

On consideration of the submissions of the learned counsel for the Appellant and Respondents, the provisions of the Electricity Act, 2003, the National Electricity and Tariff Policies, we are of the view that the ***cross-subsidies can only be gradually reduced and brought to the levels envisaged by the Act and Tariff Policy.***

3.51 Therefore, in setting tariffs in this exercise, the Hon'ble Commission has to ensure that under no circumstances is the cross subsidy level of a cross subsidizing consumer increased, ***when calculated with reference to the category-wise cost of supply".***

15. Thus, the Appellants requested the State Commission to set tariff for FY 2012-13 in a manner that achieves at least the target that was to have been achieved in FY 2010-11 as per the Tariff Policy i.e.

tariff should be within ± 20% of the average cost of supply and under no circumstances the cross subsidy of cross subsidizing consumer should be increased when calculated with reference to category wise cost of supply.

16. Let us now examine the impugned order dated 25.7.2012 of the State Commission which is the first comprehensive tariff order of the State Commission determining the Retail Supply Tariff in which tariff has been revised for the Appellants after a span of 10 years.

17. The State Commission has made the following observations in the impugned order regarding the issue of cross subsidy, cost of supply and tariff stock raised by the

EHT and HT consumers including the Appellant:

i) Para 8.3.2 of the Tariff Policy indicates that the State Commission which notify road map within six months with a target latest by 2010-11 end, the tariffs are within ± 20% of the average cost of supply.

ii) Para 5.5.2 of the National Electricity Policy states that tariff for consumers below poverty line who consume electricity below a specified level of 30 units per month, may have tariff at least 50 % of the average cost of supply.

iii) The Forum of Regulators in its meeting held on 29.7.2011 regarding "Model Tariff Guidelines" has decided that the State Commission would notify revised road map within six months with a target that the latest by 2015-16, the tariffs are within ± 20% of

the average cost of supply. Forum of Regulators is statutory body under the Act and its decisions and findings are to be taken as a guiding principle for taking decisions.

iv) The National Electricity Policy, Tariff Policy and Forum of Regulators' recommendations all state that all the tariff have to be within ± 20% of the average cost of supply.

v) The State Commission has also referred to various judgments of this Tribunal on the issue of cost of supply, cross subsidy, etc., where the approach of determining tariff within ± 20% of the average cost of supply has been upheld.

vi) The cardinal principles like recovery of reasonable costs of Discoms, avoiding tariff shocks to consumers, ensuring social justice to weaker strata of

society, limiting cross subsidy and direct subsidies to sustainable levels should be taken care of.

vii) There should be gradual reduction of cross subsidy so as to reach the benchmark level of ± 20% of the average cost of supply.

viii) The State Commission has already put the draft 'Regulation on principles for determination of Roadmap for cross subsidy reduction' in public domain which will be finalized after due process.

ix) The average cost of supply is Rs. 4.64 per unit. The approximate average cost of supply at transmission delivery point is Rs. 3.39 per unit. If the tariff of the EHT consumers is fixed based on voltage level cost, the average cost of balance consumers becomes approximately Rs. 4.79 per unit. The tariff of domestic consumers which is presently Rs. 1.99 per

unit will have to be increased to Rs. 4.79 per unit, i.e. 140% increase resulting in huge tariff shock to domestic consumers.

x) The State Commission has also observed the following with regard to the judgments of this Tribunal:

"37. As pointed out earlier in the various judgments of Hon. APTEL even though the ultimate aim is to go by the concept of cost plus basis of supply of electricity to various categories and classes of consumers, 'this cannot be achieved immediately in one go'. This can be accomplished 'stage by stage over a period of time by reducing the cross subsidies etc'. The Commission can endeavour only 'for a gradual transition from the tariff loaded with cross subsidies to a tariff reflective of cost of supply to various class and categories of consumers'. The tariff cannot 'be the mirror image of the cost of supply of electricity to a category of consumer' under the existing circumstances. Therefore the Commission believes that 'for the

present, the approach adopted by the Commission in determining the average cost of supply will not be faulted'. (Quotes from APTEL orders)".

xi) Clause 19 of the Tariff Regulations, 2006 also empowers the State Commission to fix tariff which will reflect the average cost of supply.

xii) Under the prevailing circumstances and considering the various ground realities particular to the State, the Tariff shall be designed based on the Average Cost of supply. The absence of data on the embedded cost of supply voltage/consumer category wise is also one of the reasons for the Commission to decide the average cost of supply as the basis for determining the tariff for FY 2012-13.

18. In this way the State Commission gave detailed reasonings for determining the tariff based on average cost of supply during FY 2012-13.

19. Let us now examine the tariff of the Industrial consumers with respect to other major tariff categories of subsidized consumers determined by the State Commission in the impugned order. The position regarding pre-revised and revised average tariff, increase in tariff and tariff variation of approved tariff with respect of average cost of supply that emerges from table given under paragraph 101 of the impugned order is as under:

Tariff Category	Pre-revised tariff (average) Rs./kWh	Revised tariff (average) Rs./kWh	Percentage increase in tariff	Variation of approved tariff with regard to average cost of supply of Rs. 4.64/kWh
Subsidized categories				
LT Domestic	2.00	2.81	40.7%	(-) 39%
LT Agriculture	0.92	1.77	91.9%	(-)62%
HT Agriculture	3.12	4.58	46.7%	(-)1%
Subsidizing categories				
LT Industrial	4.04	5.15	27.4%	+11%
HT Industrial	4.12	5.21	26.6%	+12%
EHT 66 kV	3.77	4.97	31.9%	+7%
EHT 110 kV	3.49	4.70	34.6%	+1%
Total	3.37	4.37	29.6%	

20. The above table indicates that the State Commission has given tariff increase of higher percentage to the subsidized categories compared to the subsidizing categories of the Appellant Association. For example, the Domestic tariff has been increased by more than 40% and LT Agriculture by about 92%. On the other hand, the percentage increase in Appellant's categories is lower e.g. HT Industrial category 26.6%, EHT 66 kV about 32% and EHT 132 kV 34.6%. The approved tariff of HT Industrial Category is 12% above the average cost of supply, EHT 66 kV 7% above and EHT 132 kV 1% above the average cost of supply. Thus, the tariff of Appellant's categories i.e. HT Industrial, EHT 66 kV and EHT 132 kV are well within ± 20% of the average cost of supply, as per the Tariff Policy and the directions of the Tribunal in the various judgments and as also sought by the Appellants in

their suggestions and objections filed before the State Commission. However, the tariff of domestic and LT Agriculture categories is not within ± 20% of the average cost of supply though the tariff of the HT Agriculture Category has been brought very close to the Average cost of supply.

21. Let us now examine the Tariff Regulations, 2006 which is relevant to the present case. The relevant Regulations are Regulation 5 and 19.

> ***"5. Tariff Principle.-*** *(1) While determining tariffs, the Commission may apply the principle that will reward performance and efficiency and reduction of losses and costs.*
>
> *(2) Tariff should be based on the average cost of supply to various categories of consumers based on Tariff Policy announced by Government of India as per Order No.23/2/2005-R&R Vol. III dated 6th January 2006. The licensee should conduct a study based on average cost method and the report*

of the study indicating the cost of providing electricity to various categories of consumers should form part of tariff revision proposal.

(3) When tariff revision proposals are formulated, the licensee should ensure that increase in tariff is minimum for subsidizing category of consumers bearing maximum cross subsidy and should be increased in a graded manner to the consumers in subsidized categories so that maximum increase in tariff is for categories of consumers enjoying maximum subsidy. The road map finalized by the Commission for reducing cross subsidy shall be followed by the Licensee".

"19. Road map for cross subsidy reduction.-
(1) The tariff charged to the consumer has to reflect the average cost of supply.
(2) A road map for cross subsidy reduction will be fixed by the Commission and will be reviewed on the basis of average cost of supply".

22. Regulation 5 stipulates that tariff has to be based on average cost of supply to various categories of consumers based on Tariff Policy notified by the Government of India. Also the increase in tariff should be minimum for subsidizing category of consumers and maximum for the subsidized categories to which the tariff should be increased in a graded manner. The Regulation 19 regarding cross subsidy reduction also specifies the road map for cross subsidy reduction on the basis of average cost of supply.

23. Regulation 8.3 of Tariff Policy which deals with Tariff design and linkage of tariffs to cost of service provides for:

> *"Accordingly, the following principles should be adopted:*
>
> *1. In accordance with the National Electricity Policy, consumers below poverty line who consume*

below a specified level, say 30 units per month, may receive a special support through cross subsidy. Tariffs for such designated group of consumers will be at least 50% of the average cost of supply. This provision will be re-examined after five years.

2. For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC would notify roadmap within six months with a target that latest by the end of year 2010-2011 tariffs are within ± 20 % of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy.

For example if the average cost of service is Rs. 3 per unit, at the end of year 2010-2011 the tariff for the cross subsidised categories excluding those referred to in para 1 above should not be lower than Rs 2.40 per unit and that for any of the cross-subsidising categories should not go beyond Rs 3.60 per unit".

24. The Tariff Policy indicates that the tariff should progressively reflect the cost of supply of electricity and to achieve this objective by 2010-11, the State Commission would notify a road map with the target that by the end of FY 2010-11 the tariffs are within ± 20% of the average cost of supply. The example given in the Tariff Regulations clearly indicates that the tariffs of subsidized and subsidizing categories of consumers by 2010-11 have to be within ± 20% of the average (overall) cost of supply of the distribution licensee as the targetted tariffs for all subsidizing and subsidized consumers categories have been worked out with reference to one average cost of supply.

25. Let us now examine the various judgments of the Tribunal referred to by the Appellant.

26. The first judgment is dated 2.6.2006 in Appeal nos. 124 of 2006 & batch in the matter of Kashi Vishwanath Steel Ltd. vs. UERC. In this case the State Commission's order was challenged as it determined the cost of power supplied to steel units separately on the basis of the highest power purchase cost instead of on the basis of pooled purchase cost. The Tribunal decided that the State Commission should re-determine the tariff on the basis of pooled average cost of power purchased from all sources for all the categories of consumers and while re-determining the tariff the Commission shall ensure that no tariff shock is caused to any other category.

27. In the present case the State Commission has determined the average cost of power supply on the basis of pooled power purchase cost. The percentage increase in tariff in case of Appellant's categories is

comparable to percentage increase in average cost of supply and is lower than the percentage increase for subsidized categories as per the Tariff Regulations. The tariff for the Appellants has been enhanced in 2012-13 after a period of 10 years. The Appellants in their objections filed before the State Commission had requested for their tariff to be kept within ± 20% of the average cost of supply in accordance with the Tariff Policy which has been achieved in the impugned tariff order. The increase in tariff of the Appellant's categories is not disproportionate to the increase in average cost of supply. Therefore, we do not find that the Appellants' category has been subjected to a tariff shock. Thus, this judgment will be of no help to the Appellant.

28. The next judgment is dated 26.5.2006 in Appeal nos. 4 of 2005 & batch in the matter of M/s. Siel Ltd. vs. PSERC & Others.

29. In the above Appeal the Industrial consumers had challenged the tariff order on the ground that the tariff is to be based on cost of supply of electricity to each category of consumers having regard to voltage at which supply is made available and the tariff order was contrary to the provisions of the Section 61(d) and (g) of the Act. In the above case, the cross subsidy of the industrial consumers had been increased. The Tribunal in this case decided as under:

> *"109. According to Section 61(g) of the Act of 2003, the Commission is required to specify the period within which cross subsidy would be reduced and eliminated so that the tariff progressively reflects the cost of supply of electricity. Under Section 28(2) of the Act of 1998, the Commission while*

prescribing the terms and conditions of tariff was required to safeguard the interests of the consumers and at the same time, it was to ensure that the consumers paid for the use of the electricity in a manner based on average cost of supply. The word "Average" preceding the words "cost of supply" is absent in Section 61(g) of the Act of 2003. The omission of the word "Average" is significant. It indicates that the cost of supply means the actual cost of supply, but it is not the intent of the legislation that the Commission should determine the tariff based on cost of supply from the date of the enforcement of the Act of 2003. Section 61(g) of the Act of 2003 envisages a gradual transition from the tariff loaded with cross subsidies to a tariff reflective of cost of supply to various class and categories of consumers. Till the Commission progressively reaches that stage, in the interregnum, the roadmap for achieving the objective must be notified by the Commission within six months from January 6, 2006, when the tariff Policy was notified by the Government of India, i.e. by July 6, 2006. In consonance with the

tariff policy, by the end of the year 2010-11, tariffs are required to be fixed within ±20% of the average cost of supply (pooled cost of supply of energy received from different sources). But the policy has reached only up to average cost of supply. As per the Act, tariff must be gradually fine tuned to the cost of supply of electricity and the Commission should be able to reach the target within a reasonable period of time to be specified by it. Therefore, for the present, the approach adopted by the Commission in determining the average cost of supply cannot be faulted. We, however, hasten to add that we disapprove the view of the Commission that the words "Cost of Supply" means "Average Cost of Supply". The Commission shall gradually move from the principle of average cost of supply towards cost of supply.

110. Keeping in view the provisions of Section 61 (g), which requires tariff to ultimately reflect the cost of supply of electricity and the National Tariff Policy, which requires tariff to be within ± 20% of the average cost of supply, it seems to us that the

Commission must determine the cost of supply, as that is the goal set by the Act. It should also determine the average cost of supply. Once the figures are known, they must be juxtaposed, with the actual tariff fixed by the commission. This will transparently show the extent of cross subsidy added to the tariff, which will be the difference between the tariff per unit and the actual cost of supply.

111. In a given case, where an appropriate Commission comes to the conclusion that time has come when tariff is to be fixed without providing for cross subsidies between various consumer categories, it can fix the tariff accordingly as there is nothing in the Act which compels a regulatory Commission to formulate tariff providing for cross subsidies between the consumer categories for all times to come".

"119. We further direct that:

i) The Commission shall determine the cost of supply of electricity to different class and categories of consumers;

ii) The Commission shall also determine the average cost of supply;

iii) Once the figures of cost of supply and average cost of supply are known, the Commission shall determine the extent of cross subsidies added to tariff in respect of each class/category of consumers; and

iv) The consumers who are being cross subsidized by the Commission, a limit of consumption shall be specified for which special support through cross subsidy may be provided. Once the consumer exceeds the limit, he shall be charged at normal tariff. These directions shall be applicable from the next tariff year onwards".

30. In the above judgment, the Tribunal decided that the Section 61(g) of the Act required the Commission to specify the period within which cross subsidy would

be reduced and eliminated so that the tariff progressively reflected the cost of supply of electricity. Till the Commission progressively reaches that stage, in the interregnum, the road map for achieving objective must be notified by the State Commission in consonance of the Tariff Policy so that the tariffs are fixed within ± 20% of the average cost of supply (pooled cost of supply received from different sources) by the end of year 2010-11. Therefore, the Tribunal directed that the State Commission would determine both average cost of supply and cost of supply to different categories of consumers. The Tribunal also did not find fault with the approach of the State Commission to determine the average cost of supply, for the present but also wanted cross subsidy to be determined on the basis of respective cost of supply to

the various categories of consumers to transparently show the extent of cross subsidy.

31. In the present case, the State Commission has not determined the cost of supply for different categories of consumers due to non-availability of data and has determined the tariff on the basis of average cost of supply. However, it is noticed that the State Commission has tried to gradually reduce the cross subsidy to the subsidized consumers. The tariffs of Appellant's categories have been fixed well within ± 20% of the average cost of supply. The State Commission for the domestic consumers has limited the cross subsidies to a particular consumption of electricity and the domestic consumers beyond that limit are not subsidized but on the other hand cross subsidize other subsidized consumers in line with the directions of the Tribunal in Siel judgment. However,

the State Commission has gone wrong in deciding not to consider the voltage-wise cost of supply taking refuge under the Model Tariff Guidelines recorded by the Forum of Regulators which is not proper.

32. One pertinent point which is required to be considered by us is that after the Siel judgment, Section 61(g) has been amended w.e.from 15.6.2007 to the extent that the wordings "and also reduces and eliminates cross subsidies within the period to be specified by the Appropriate Commission" have been substituted by the wordings "and also reduces cross subsidies in the manner specified by the Appropriate Commission". Thus, the intent of the legislation after the above amendment is that the cross subsidies have to be reduced in the manner specified by the State Commission but may not be eliminated. Thus, the findings of the Tribunal in Siel judgment rendered

prior to the 2007 amendment regarding gradual reduction of cross subsidy with a view to 'eliminate' the cross subsidy will not be applicable after amendment of the Act in 2007. Therefore, we may have to refer to the findings of the Tribunal in this regard subsequent to the amendment of 2007.

33. The next judgment is dated 19.12.2007 in Appeal no. 146 of 2007 in the matter of Spencer's Retail Ltd. vs. MERC & Others. In this case the Appellant, a shopping mall had challenged the tariff order for increasing the tariff of their category by 80% even though average cost of supply increased by only 6% due to reclassification of the Appellant's category, thus increasing the cross subsidy substantially and causing tariff shock. The Tribunal set aside the order for increasing the cross subsidy exorbitantly subjecting the Appellant's category to severe shock. That is not

the case in the present case. Hence, Spencer's case also would not be of any help to the Appellant.

34. Appeal nos. 16, 98 and 107 of 2008 referred to by the Appellant are also cases similar to Appeal no. 146 of 2007 by the same Appellant i.e. M/s. Spencer's Retail Ltd. and other similar consumers challenging the order of the State Commission due to exorbitant increase in cross subsidy and tariff shock by increasing the tariff at a percentage much higher than %age increase in average cost of power supply which have also been decided in favour of the Appellant on the lines of the judgment in the Appeal no. 146 of 2007. These judgments are also not relevant to the present case where the %age increase in tariff of the Appellant's category is more or less at the same level as %age increase in average cost of power supply and the tariffs of Appellant's categories are also within

± 20% of the average cost of power supply as per the Tariff Policy.

35. Another issue in the above Appeals was booking of expensive power to the Appellant's category instead of pooled cost of power which was the issue already decided by the Tribunal in Kashi Vishwanath case against the State Commission. This is not the case in the present Appeal where the State Commission has not booked expensive power procured by the distribution licensee to the Appellant's category but has determined the tariff on the basis of pooled cost of power procured by the Board, as per the dictum laid down by the Tribunal.

36. Appeal no. 131 of 2008 and batch in the matter of Inorbit Malls (India) Pvt. Ltd. vs. MERC & Ors. are also cases similar to Spencer's case where the tariff of the Appellant's category was increased exorbitantly much

more than the increase in average cost of power supply which again is not the case in the present Appeal.

37. Appeal no. 9 of 2009 was an Appeal filed by Multiplex Association challenging the order of the State Commission increasing the tariff of the Appellant. The Tribunal found that the tariff increase was not disproportionate or exorbitant and dismissed the Appeal. This case is, therefore, against the Appellant in the present case.

38. Appeal no. 106 of 2008 by Mumbai International Airport Ltd. pertained to challenge of Maharashtra State Commission's tariff order reclassifying the Airport in Commercial category imposing higher tariff on the ground that the consumers in this category were non-critical service having higher capacity to pay. The contention of the Appellant was that the Airport is

rendering essential service and its consumption cannot be said to be unwanted consumption. The cross subsidy in case of the Appellant was made 85% and increase in tariff 43% with respect to the previous year and the State Commission felt that their consumption was increasing rapidly resulting in purchase of expensive power. The Tribunal on the basis of judgment in Spensers' case and Kashi Vishwanath Steel Ltd. case set aside the order of the State Commission reclassifying the Appellant in the newly created category with higher tariff. The fact of that case would not apply to the present case. The Appellants are not rendering essential public service. Hence, this case will also be of no use to the Appellant.

39. The next case is Appeal nos. 102 of 2010 & batch in the matter of M/s. Tata Steel Ltd. vs. OERC & Others. In this Appeal the issues on hand have been

deliberated upon comprehensively by this Tribunal. In Tata Steel case also the State Commission contended that it was not possible to determine category wise cost of supply due to lack of data.

40. The findings of the Tribunal in the above Appeals is as under:

> *"6. After considering the contentions of the parties, we have framed the following questions for consideration:*
>
> *i) Whether the State Commission has erred in not determining the tariff of the appellants based on the actual cost of supply according to the provisions of the Act, the Policy and the Regulations?"*
>
> *"16. In view of above provisions of the Act, National Electricity Policy, Tariff Policy and the Regulations, we have to find answer to the question whether the tariff of the appellants should be based on average cost of supply or actual cost of supply to the*

appellant's consumer category, which we shall do in the following paragraphs.

17. Section 61(g) of the 2003 Act stipulates that the tariff should progressively reflect the cost of supply and cross subsidies should be reduced within the time period specified by the State Commission. The Tariff Policy stipulates the target for achieving this objective latest by the end of year 2010-11, such that the tariffs are within ± 20% of the average cost of supply. In this connection, it would be worthwhile to examine the original provision of the Section 61(g). The original provision of Section 61(g) "the tariff progressively reflects the cost of supply of electricity and also, reduces and eliminates cross subsidies within the period to be specified by the Appropriate Commission" was replaced by "the tariff progressively reflects the cost of supply of electricity and also reduces cross subsidies in the manner specified by the Appropriate Commission" by an amendment under Electricity (Amendment) Act, 2007 w.e.f. 15.6.2007. Thus the intention of

the Parliament in amending the above provisions of the Act by removing provision for elimination of cross subsidies appears to be that the cross subsidies may be reduced but may not have to be eliminated. The tariff should progressively reflect the cost of supply but at the same time the cross subsidy, though may be reduced, may not be eliminated. If strict commercial principles are followed, then the tariffs have to be based on the cost to supply a consumer category. However, it is not the intent of the Act after the amendment in the year 2007 (Act 26 of 2007) that the tariff should be the mirror image of the cost of supply of electricity to a category of consumer".

"19. The National Electricity Policy provides for reducing the cross subsidies progressively and gradually. The gradual reduction is envisaged to avoid tariff shock to the subsidized categories of consumers. It also provides for subsidized tariff for consumers below poverty line for minimum level of support. Cross subsidy for such categories of

consumers has to be necessarily provided by the subsidizing consumers".

"22. After cogent reading of all the above provisions of the Act, the Policy and the Regulations we infer the following:

i) The cross subsidy for a consumer category is the difference between cost to serve that category of consumers and average tariff realization of that category of consumers. While the cross-subsidies have to be reduced progressively and gradually to avoid tariff shock to the subsidized categories, the cross-subsidies may not be eliminated.

ii) The tariff for different categories of consumer may progressively reflect the cost of electricity to the consumer category but may not be a mirror image of cost to supply to the respective consumer categories.

iii) Tariff for consumers below the poverty line will be at least 50% of the average cost of supply.

iv) The tariffs should be within ±20% of the average cost of supply by the end of 2010-11 to achieve the objective that the tariff progressively reflects the cost of supply of electricity.

v) The cross subsidies may gradually be reduced but should not be increased for a category of subsidizing consumer.

vi) The tariffs can be differentiated according to the consumer's load factor, power factor, voltage, total consumption of electricity during specified period or the time or the geographical location, the nature of supply and the purpose for which electricity is required.

Thus, if the cross subsidy calculated on the basis of cost of supply to the consumer category is not increased but reduced gradually, the tariff of consumer categories is within ±20% of the average cost of supply except the consumers below the poverty line, tariffs of different categories of consumers are differentiated only according to the factors given in Section 62(3) and there is no tariff

shock to any category of consumer, no prejudice would have been caused to any category of consumers with regard to the issues of cross subsidy and cost of supply raised in this appeal".

"The State Commission has expressed difficulties in determining the voltage-wise cost of supply in the absence of 100% metering at the level of consumers and distribution transformers. The State Commission has also held that the submissions of distribution companies regarding cost allocation in the tariff filing do not have technical and commercial data support. The State Commission has also concluded that from the conjoint reading of the Tariff Policy and National Electricity Policy, the cost of supply can be construed to mean the average cost of supply. Therefore, the State Commission has considered it prudent to accept the average overall cost of supply for computation of cross-subsidy".

"27. We do not agree with the findings of the State Commission that the cost to supply a consumer

category is the same as average cost of supply for the distribution system as a whole and average cost of supply can be used in calculation of cross subsidy instead of cost to supply. This is contrary to Regulation 7 (c)(iii) of the State Commission".

"This Tribunal in the above Judgment has held that the cost of supply as indicated in Section 61(g) is not the average cost of supply but the actual cost of supply and the cross subsidy is the difference between the tariff fixed by the State Commission and the actual cost of supply".

"32. Ideally, the network costs can be split into the partial costs of the different voltage level and the cost of supply at a particular voltage level is the cost at that voltage level and upstream network. However, in the absence of segregated network costs, it would be prudent to work out the voltage-wise cost of supply taking into account the distribution losses at different voltage levels as a first major step in the right direction. As power purchase cost is a major component of the tariff,

apportioning the power purchase cost at different voltage levels taking into account the distribution losses at the relevant voltage level and the upstream system will facilitate determination of voltage wise cost of supply, though not very accurate, but a simple and practical method to reflect the actual cost of supply".

"40. We are also unable to establish if the cross subsidy as determined with respect to cost to supply has reduced, with respect to the previous year (s) for the appellants' category, as per the mandate of the Act, or not as the State Commission has not determined the cross subsidy with respect to cost of supply according to the Regulations. We are also not in a position to establish if the tariff for different categories of consumers including the appellant's category is within ± 20% of average cost of supply as per the mandate of the Tariff Policy due to incorrect representation in the impugned order. Determination of cost of supply as per our directions will involve carrying out system studies which is time consuming and can

be implemented only in the future tariff orders. However, whether the tariff of the appellant's category is within 20% of the average cost of supply can be determined. Accordingly, the State Commission is directed to determine the average tariff realization per unit of the appellant's category which will be the expected revenue realised from the appellants' consumer category divided by the expected energy sale to the appellants' consumer category according to the ARR, and check if the tariff applicable to appellants' consumer category is within 20% of average cost of supply and provide consequential benefit to the appellants, if any after hearing all concerned.

41. Summary of our findings

41.1. After considering the provisions of the Act, the National Electricity Policy, Tariff Policy and the Regulations of the State Commission, we have come to the conclusion that if the cross subsidy calculated on the basis of cost of supply to the consumer category is not increased but reduced gradually, the tariff of consumer categories is

within ±20% of the average cost of supply except the consumers below the poverty line, tariffs of different categories of consumers are differentiated only according to the factors given in Section 62(3) and there is no tariff shock to any category of consumer, no prejudice would have been caused to any category of consumers with regard to the issues of cross subsidy and cost of supply raised in this appeal.

41.2. We do not agree with the findings of the State Commission that cost to supply a consumer category is the same as average cost of supply for the distribution system as a whole and average cost of supply can be used in calculation of cross subsidy instead of actual cost of supply. This is contrary to Regulation 7 (c)(iii) of the State Commission and findings of this Tribunal in the Judgment reported in 2007(APTEL) 931 SIEL Limited, New Delhi v/s PSERC & Ors.

41.3. The State Commission has expressed difficulties in determining cost of supply in view of

non-availability of metering data and segregation of the network costs. In our opinion, it will not be prudent to wait indefinitely for availability of the entire data and it would be advisable to initiate a simple formulation which could take into account the major cost elements. There is no need to make distinction between the distribution charges of identical consumers connected at different nodes in the distribution network. It would be adequate to determine the voltage-wise cost of supply taking into account the major cost element which would be applicable to all the categories of consumers connected to the same voltage level at different locations in the distribution system. We have given a practical formulation to determine voltage wise cost of supply to all category of consumers connected at the same voltage level in paragraphs 31 to 35 above. Accordingly, the State Commission is directed to determine cross subsidy for different categories of consumers within next six months from FY 2010-11 onwards and ensure that in future orders for ARR and tariff of the distribution licensees, cross subsidies for different consumer

categories are determined according to the directions given in this Judgment and that the cross subsidies are reduced gradually as per the provisions of the Act.

41.4. In view of pathetic condition of consumers and distribution feeder and transformer metering, we direct the State Commission to take immediate action for preparation of a metering scheme as a project by the distribution company and its approval and implementation as per a time bound schedule to be decided by the State Commission.

41.5. According to the Tariff Policy, the tariff of all categories of consumers except those below poverty line have to be within ± 20% of the total average cost of supply. The variation of tariffs of different category with respect to average cost of supply has not been correctly determined by the State Commission. The State Commission has erred in clubbing different consumer categories having different tariff in one category based on voltage of supply. Also for the appellants' category average

tariff per unit has been incorrectly determined at assumed load factor of 80%. The State Commission is directed to determine the average tariff for appellant's another category according to the directions given in paragraphs 39 and 40. Accordingly, we remand the matter to the State Commission to re-determine the variation of average tariff for different consumer categories with respect to average cost of supply and provide consequential relief to appellant's consumer category in terms of the tariff policy, if any, after hearing all concerned".

41. Thus, in Tata Steel case, the Tribunal laid down the principles of tariff determination with respect to cross subsidy, average cost of supply and category-wise cost of supply. The Tribunal granted relief to the Appellant to the extent of maintaining tariff within ± 20% of the overall average cost of supply. For determination of the cross subsidy on the basis of cost of supply to the respective category of consumer for

the sake of transparency and to check if the cross subsidy has increased or reduced, the Tribunal gave a formulation for determination of voltage wise cost of supply for future tariff determination. However, the Tribunal did not hold that the tariffs have to be determined only on the basis of voltage wise cost of supply. The Tribunal also held that the tariffs may not be the mirror image of voltage wise cost of supply.

42. In the present case, the State Commission has determined the tariff of the Appellant's category of HT and EHT Industrial consumers well within 20% of the average cost of supply as per the Tariff Policy but did not consider the voltage-wise cost of supply for working out the cross subsidy for each category of consumer.

43. The State Commission has not determined cross subsidy with respect to cost of supply to the respective consumer categories due to lack of data. This would have transparently shown the cross subsidies by Appellant's HT & EHT categories to subsidized categories of consumers. However, we find that the State Commission has enhanced the tariff of subsidized consumers much more than the increase of tariffs for the Appellant's categories and attempted to reduce cross subsidies. The tariffs of domestic and agriculture categories have also been increased by 40.7% and 91.9% respectively as against average increase in tariff by 29.6%. Further increase in domestic and agriculture categories would have given a higher tariff shock to these subsidized categories of consumers. It is also seen that the tariff of the domestic consumers beyond a level of energy

consumption has also been increased so that they are not subsidized and on the other hand they subsidize other subsidized consumers. Thereafter, we do not incline to set aside the impugned order merely because the voltage-wise cost of supply has not been determined. However, we direct the State Commission to initiate study for voltage wise cost of supply as directed in the Tata Steel judgment of the Tribunal and complete the same within 6 months of the date of this judgment for use in the subsequent tariff orders to transparently determine the cross subsidy by the various categories of consumers with respect to voltage-wise cost of supply.

44. The next case referred to by the Appellant is Appeal nos. 13 and 198 of 2010 in the matter of Ispat Industries Ltd. vs. MERC & Ors. The relevant findings of the Tribunal in this case are as under:

"15.4 The issue relating to voltage-wise cost of supply and cross subsidy has been decided in the judgment dated 30.05.2011 in Appeal nos. 102 of 2010 and batch in the matter of Tata Steel Ltd. Vs. Orissa Electricity Regulatory Commission & Another. The relevant extracts of the judgment are reproduced below:-"

"15.6 The ratio in the above judgments of the Tribunal will squarely apply to the present case. Accordingly, the State Commission is directed to undertake the exercise of determination of voltage-wise cost of supply within six month of the date of this judgment and ensure that in tariff orders passed subsequent to that, cross subsidies for different categories of consumers are determined based on the voltage-wise cost of supply and tariffs are determined based on the settled principles.

15.7 In the impugned tariff order the State Commission has computed the ratio of average billing rate to average cost of supply for different categories of consumers at Page 221 of the order.

For HT-I Industry (Express factor) applicable to M/s. Ispat Industries the ratio of average billing rate to average cost of supply is 128%. The increase in the tariff for HT category has been of the order of 1.87% only. The State Commission has also recorded in the impugned order that it has separately initiated a consultative process for formulation of the road map for cross subsidy reduction. The FY 2010-11 is already over and one more year e.i FY 2011-12 has also elapsed after that. Determination of voltage-wise cost of supply will take some more time. Any change in principle of setting up the tariffs will have an impact on other categories of consumers and retrospective change in the tariffs of all the consumers which may not be desirable. In view of above, we do not want to interfere with the impugned order. Therefore our directions in this regard are for future after the voltage-wise cost of supply is determined by the State Commission".

"17. Summary of our findings:

……………..

iv) Cross subsidy/cost of supply: We are not inclined to interfere with the impugned order for the reasons explained in paragraph 15.7 of the judgment. However, we have given directions in paragraph 15.6 of the judgment for determination of voltage-wise cost of supply in pursuance of the decision of this Tribunal in judgment dated 30.05.2011 in Appeal nos. 102 of 2010 and batch in the matter of Tata Steel Ltd. Vs. OERC & Another, within six months of the date of this judgment and ensure that in tariff orders passed subsequent to that take into account the voltage-wise cost of supply in determining the cross subsidy and tariffs".

45. Thus, in Ispat Industries case the Tribunal after referring to Tata Steel judgment directed the State Commission to determine voltage wise cost of supply within 6 months of the date of the judgment for determining the cross subsidies for different categories

of consumes based on voltage wise cost of supply in future.

46. We cannot give a straight forward formula for determination of Retail Supply Tariff. However, the State Commission has to determine the tariff as per the principle laid by the Tribunal in the various cases.

47. The findings of the Tribunal in the various cases are summarized as under keeping in view the amendment made in the Electricity Act, 2003 in the year 2007:

i) The pooled power purchase cost from all sources of supply to the distribution licensee has to be used for determination of cost of supply instead of using different costs of various power supply sources to different categories of consumers.

ii) The cost of supply referred in Section 61(g) is the cost of supply to the consumer category and not overall average cost of supply.

iii) The cross subsidy for a consumer category is the difference between cost to serve that category of consumer and average tariff realization for that category of consumer.

iv) The State Commission has to determine the category wise cost of supply as well as overall average cost of supply to all the consumers of the distribution licensee.

v) While the cross subsidies have to be reduced progressively and gradually in the manner specified by the Appropriate Commission so as to avoid tariff shock to the subsidized categories of consumers, it is not the intention of the legislation that cross subsidies have to be eliminated. Therefore, it is not necessary that the

tariff should be the mirror image of actual cost of supply to the concerned category of consumer and to make the cross subsidy zero.

vi) The subsidizing consumers should not be subjected to disproportionate increase in tariff so as to subject them to tariff shock.

vii) The State Commission should fix a limit of consumption for the subsidized consumer categories and once a consumer exceeds that limit he has to be charged at normal tariff.

viii) Tariff for consumer below the poverty line will be at least 50% of the average cost of supply. Tariffs for all other categories should be within ± 20% of the overall average cost of supply for the distribution licensee by the end of 2010-11.

ix) The tariffs can be differentiated according to consumer's load factor, voltage, total consumption of electricity during specified period or the time or the geographical location, the nature of supply and the purpose for which electricity is required. For example, the consumers in domestic category can be differentiated from the consumers in Industrial category or commercial category on the basis of purpose for which electricity is required.

x) The Tribunal in Appeal no. 102 of 2010 and batch in Tata Steel case has also given a formulation for determination of voltage-wise cost of supply in the absence of availability of detailed data.

48. In the present case, as indicated above, the tariffs of the Appellant's HT/EHT categories have been revised after ten years. The State Commission in the impugned order has fixed the tariff of the HT/EHT

Industrial categories i.e. the categories of the Appellant's members, within ± 20% of the average cost of supply as sought by them in their objections/suggestions filed before the State Commission. The tariffs of the HT/EHT industrial consumers have also not been subjected to disproportionate increase in tariff and they have not been subjected to any tariff shock. The percentage hike in tariffs of subsidized Domestic and Agriculture categories has been much more than the HT/EHT Industrial categories. Within the Domestic Category the consumers beyond a particular consumption level are not subsidized and infact they subsidize other categories, as per the dictum laid by the Tribunal. Any reduction in tariff of the Appellant's categories would have resulted in further increase in tariff of the

subsidizing categories subjecting them to further tariff shock.

49. The State Commission in the impugned order has decided not to consider voltage wise cost of supply to determine cross subsidy relying on its own Regulations and recommendations of the Forum of Regulators. We find that the State Commission's Regulations provide for determination of cross subsidy with respect of average cost of supply which is contrary to the interpretation of cost of supply and cross subsidy under Section 61(g) of the Act given by this Tribunal. The State Commission is also wrong in relying upon the recommendations of the Forum of Regulators which is only a recommendatory body as against the dictum held by this Tribunal which is binding on the State Commission. In view of this Tribunal's interpretation of Section 61(g) of the Act for cost of

supply, we have to ignore the Regulations of the State Commission and have to hold that the State Commission has to determine the cross subsidy with respect to cost of supply for the particular category of consumer. Accordingly, as mentioned earlier, we have given directions to the State Commission for determination of voltage wise cost of supply within six months from the date of this judgment for future for bringing transparency in determination of cross subsidy. However, as the State Commission has decided a higher percentage increase in tariffs of subsidized consumers as compared to subsidizing categories with a view to reduce the cross subsidies and have kept the tariffs of the consumer categories of the Appellant's members within ± 20% of the average cost of supply, we do not incline to interfere with the tariff decided by the State Commission for the Appellants.

50. Learned counsel for the Appellant has given a comparison of change in cross subsidy for Domestic and HT/EHT Industrial categories with respect to voltage wise cost of supply as computed by them to show that cross subsidy for HT Industrial categories has been increased against the dictum of the Tribunal. The Appellant has computed cost of supply at EHT, HT and LT levels by their own assumptions of transmission losses, and losses in HT and LT system of the Electricity Board. The cost of supply at EHT and has been considered as cost of power purchase from sources other than Board's own generation, total energy procured from outside sources and that supplied by Board's own power plants and assumed transmission loss of 3%. This is wrong. Firstly, no such voltage-wise cost of supply has been decided by the State Commission in the impugned order.

Secondly, the computation of the Appellant is incorrect. The total cost of energy supply does not include the cost of generation of Board's own power stations while the total energy considered includes the energy supplied by the Board's own generation. Thirdly, the method of cost of supply at EHT is not in consonance with the ratio laid down by this Tribunal in Tata Steel judgment in Appeal no. 102 of 2010 and batch, wherein the Tribunal rejected the contention of the Appellants, the EHT consumers, that the distribution losses in respect of EHT consumers would be nil for computing cost of supply. The Tribunal held that the difference between the distribution losses allowed in the ARR and the technical losses as computed by the studies should also be apportioned to consumers at EHT for computing the cost of supply. The Tribunal also decided that as segregated network

costs are not available, all other costs of distribution system could be poled equitably at all voltage levels including EHT.

51. The Appellant has also argued that the HT/EHT Industrial categories have been subjected to tariff shock. We are unable to agree with the contention of the Appellant. Firstly, the tariff of the Appellant's category has been revised after 2002 i.e. after a lapse of about ten years as contended by the Electricity Board. Moreover, the Appellant's consumer categories have been subjected to tariff increase in consonance with the increase in average cost of supply. The percentage increase in tariff of the subsidized categories has been much more than the HT/EHT Industrial categories of the Appellant's members. The overall increase in tariffs is 29.6%. The increase in tariffs of HT, EHT 66kV and EHT 132 kV is 26.6%, 31.9% and 34.6%

respectively as against increase in Domestic of 40.7% and Agriculture 91.9%. In our opinion, the Board could not be penalized so as not to allow its prudent expenditure in full and the subsidized consumers could not be subjected to a higher tariff shock merely because the State Commission has chosen not to increase tariff for past several years.

52. According to the Respondent Electricity Board, the State Commission had reviewed the tariff during the FY 2007-08 but decided that there was no necessity of tariff revision and did not enhance the tariff applicable to the Appellant. However, since 2007-08, the average cost of supply has been increasing considerably and they have given figures for increase in the cost of supply increasing by 53.9% since 2007-08. In our opinion, comparison of cross subsidy with reference to the previous year i.e.

2011-12 will not be valid as the tariff was not changed for last 10 years even though the cost of supply increased substantially after 2007-08 and the tariff for EHT and HT categories in the previous year was less than the average cost of supply.

53. The **next issue is the disallowance of the Load factor incentive and Prompt Payment incentive.**

54. The Appellant has made the following submissions on this issue:

> *"The Appellant's association before the State Commission sought the introduction of various rebates and incentives such as power factor incentive, load factor incentive, prompt payment incentive, bulk consumption etc. The State Commission allowed the Power Factor incentive only but has disallowed the Load Factor incentive*

and the Prompt Payment incentive without adducing valid reasons".

55. In reply to the above submissions, the learned counsel for the Respondents would submit the following:

"The State Commission has enhanced the power factor incentive rates considerably in the impugned order. Every consumer has the obligation to pay the electricity tariff within the time stipulated. However, the Electricity Board has been allowing a rebate upto 4% per annum for advance payment to the consumers. Therefore, there is no merit in the contention urged by the Appellant".

56. The Appellant before the State Commission prayed for various incentives such as power factor incentive, load factor incentive, prompt payment incentive, and bulk consumption etc.; but the State Commission has allowed only the power factor incentive without allowing the other incentives. With

regard to this issue, the State Commission has made the following observations:

> **"**47. Representatives *of HT-EHT Consumers had suggested that adequate incentive systems for power factor improvement, high load factor, bulk energy consumption, prompt payments etc may be introduced. The implications of these systems in the performance and revenues of the Board and the impact in the consumer's bill amount can be evaluated only after a detailed study. Hence Commission decides that the question of introduction of these incentives will be taken up separately and KSEB shall be directed to submit a detailed report on these issues. However, the Commission* ***accepts the proposal for improving the incentives for Power Factor Improvement*** *and the details are provided in the order in due course…."*

57. The above observations would indicate that the State Commission though accepted the proposal by

including the incentives for power factor improvement; the State Commission has concluded that the other incentives could be considered only after a detailed study.

58. As pointed out by the learned Counsel for the Appellant, the conduct of business regulations of the Commission which were framed in 2004 clearly provides that some of the incentives like load factor and power factor should be decided while determining the tariff. The relevant Regulation is as follows:

> "***46. Factors for determining tariff:*** *without prejudice to the generality of the powers of the Commission in determining the tariff for generation, transmission, wheeling and supply of electricity, the Commission may keep in view, while determining the tariff, factors such as;*
>
> *a) The need to link tariff adjustments to increases in the productivity of capital*

employed and improvements in efficiency so as to safeguard the interests of the consumers;

b) *The need to rationalize tariffs to progressively reflect the cost of generation, transmission and distribution;*

c) *The need to eliminate cross-subsidies in a phased manner;*

d) *The need to transparently provide for appropriate incentives in a non-discriminatory manner, for a continuous enhancement in the efficiency of generation, transmission and distribution and up-gradation in the levels of service;*

e) ***the need to transparently provide for appropriate incentives in a non-discriminatory manner to the consumers operating at high load factor and high power factor and without harmonics;***

f) *the promotion of development of a market (including trading) in power;*

g) the promotion of co-generation and generation of electricity from renewable sources of energy;

h) the least cost adoption of environmental standards;

i) the need for healthy growth of the industry....”

59. The Business of Conduct Regulations, 2004 provides that the State Commission may keep in view *inter alia* appropriate incentive to the consumers operating at high load factor amongst many other factors.

60. However, the Tariff Regulations, 2006 notified subsequent to the above 2004 Regulations which are relevant to determination of tariff do not provide for any such incentives.

61. Section 62 (3) of the 2003 Act also provides that the State Commission may differentiate the consumers according to consumer's load factor, power factor, voltage, etc. However, it is a well settled position of law that the tariff determined by the State Commission cannot be held to be *ultra vires* just because it did not take into consideration certain principles or factors laid down in the Act or the Regulations.

62. The State Commission in the impugned order has held that it would separately consider the introduction of such incentive for high load factor and prompt payment after the Board has carried out a study on implication of these incentives in the performance and revenues of the Board and impact on consumer's bill. In view of the above, we do not find any infirmity in the order of the State Commission. The State Commission is justified in examining the implications of these

incentives before allowing them. We also find that the State Commission has not included any interest on working capital to cover the Operation and Maintenance expenses and receivables from the consumers in the ARR and Tariff of the Board. Inclusion of such expenses in the ARR could have given a reason to the Appellant to claim rebate for prompt payment. This is not the case here.

63. However, since the State Commission has decided that the question of introduction of incentive for load factor and prompt payment would be decided after examining the implications of these proposals and the Board has been directed to submit a detailed study on these issues, we feel that a time bound direction is necessary. Accordingly, we direct the Electricity Board to submit the relevant information on these issues as sought by the State Commission within 3

months from the date of this judgment and thereafter the State Commission shall decide the issue after hearing all concerned within 120 days for adoption by the State Commission in the subsequent tariff order. This issue is decided accordingly.

64. The **Last issue is retrospective Operation of the Tariff.**

65. According to the learned Counsel for Appellant, though the impugned order was passed on 25.7.2012, the State Commission held that it would be effective from 1.7.2012 i.e. retrospectively even before the date of the tariff order which is not contemplated by the Electricity Act as well as by the Regulations of the State Commission.

66. On this point, the learned counsel for the Appellant has cited the following authorities:

(a) Binani Zinc Ltd Vs Karnataka State Electricity Board (2009) 11 SCC 244;

(b) Bhupendra Singh Bhatia Vs State of Madhya Pradesh (2006) 13 SCC 700;

(c) Judgment dated 11.11.2011 in OP No.1 of 2011

67. According to the learned Counsel for the Respondent, the retrospective fixation is only for the purpose of annualization and the State Commission is entitled to fix the period for which the tariff would be operational retrospectively.

68. The learned Counsel for the Respondent has cited some decisions as under:

(a) Appeal no. 4 of 2005 in SIEL Ltd. Vs. Punjab State Electricity Regulatory Commission.

(b) Appeal No.140 of 2010 dated 28.1.2011 in the case of Kannan Devan Hill

Planatation Company Ltd Vs KSERC and Anr.

(c) Kanoria Chemical Industries Vs State of UP in (1992) 2 SCC 124.

69. Let us now examine the judgments of the Hon'ble Supreme Court relied upon by the Appellant.

70. In (2009) SCC 244 in the matter of Binani Zinc Ltd. Vs KERC the Hon'ble Supreme Court has held that the Commission is not empowered to frame tariff with retrospective effect so as to cover a period before its constitution. It was further held that it was a well settled law that the rule of law *inter alia* postulates that all laws would be prospective subject of course to enactment of an express provision or intendment to the contrary. The Hon'ble Supreme Court held that the Electricity Board had the requisite jurisdiction to

revise the tariff till such time the Regulatory Commission was constituted and the purposes of the Electricity Regulatory Commissions Act 1998 could be achieved through it. In the present case the State Commission has not determined the tariff for the period prior to its formation. Therefore, findings of Bihani Zinc case will not be applicable in the present case.

71. The second case (2006) 13 SCC 700 in the matter of Bhupendra Singh Bhatia Vs State of Madhya Pradesh is relating to sale and purchase of foreign liquor where the District Level Committee determined the price of foreign liquor procured by the State from whole sellers retrospectively. In that case the price decided by the purchaser State Government subsequent to the sale/purchase was set aside by the Hon'ble Supreme Court. This case is not applicable to

the present case where the Tariff has been determined by the State Commission after providing opportunity of hearing to all concerned including the buyers of electricity as per the provision of the Electricity Act, 2003 which is a complete law. Public notice for determination of ARR and ERC was given on $4^{th}/5^{th}$ February, 2012. The submissions made by the Appellant before the State Commission in the ARR and ERC proceedings clearly indicates that the Appellant knew that the tariff could be revised from 01.04.2012. However, due to the time taken in the ARR and ERC proceedings and thereafter tariff determination proceedings where the Appellants were again heard by the State Commission, the tariff order was issued on 25.7.2012 with tariff made effective from 01.07.2012 i.e. from beginning of the same month in which the tariff order was issued.

72. The third authority relied upon by the Appellant is order dated 11.11.2011 in OP No.1 of 2011 by this Tribunal in which the Tribunal directed the State Commission to initiate the tariff proceedings every year as per the time line specified in its Regulations and decide the annual tariff before the commencement of the Financial Year. This order could not be relied upon for retrospective application of the tariff order.

73. Learned Counsel for the Appellant has also referred to Regulation 3(1) and 4(2) of the 2003 Tariff Regulations in support of its argument against retrospective application of the tariff order stating that the State Commission had acted against its own Regulations. We find that these Regulations only give the time line for submission of the Annual Revenue Requirement before the commencement of any

financial year and in case the licensee desired to amend the current tariff, its application for amendment of tariff should be filed not later than 4 months before the intended date of implementation of the amended tariff. These Regulations do not pertain to retrospective application of the tariff. In the present case the ARR & ERC application was filed on 31.12.2011 i.e. 6 months before the date of implementation of the revised tariff (1.7.2012) and the Tariff Petition was filed in February, 2012 i.e. 4 months before the date of application of the revised tariff. In any case the 2003 Tariff Regulations have been superseded by the 2006 Tariff Regulations which do not have such provisions and which are relevant to the tariff determination in the impugned order.

74. Let us now refer to findings of the full bench of the Tribunal dated 26.5.2006 in Appeal no.4 of 2005 &

batch in case of Siel Ltd. which has upheld the retrospective determination tariff by the State Commission and which has been referred to by the learned counsel for the Respondent Board. The relevant findings are as under:

> *"77. Some of the Industrial Consumers have questioned determination of tariff by the Commission on the ground that the effect of the Tariff Order for the year 2005-06 was given from April 1, 2005 while the order was passed on June 14, 2005. According to them the Commission was not having any jurisdiction to require the consumers to pay enhanced tariff from a retrospective date.*
>
> *78. In order to determine the reasons which led to the passing of the tariff order on June 14, 2005 instead of it being passed on March 31, 2005, it is necessary to refer to a few dates. The Board filed ARR and tariff application on December 30, 2004. The application, however, was found to be*

incomplete. The Commission by its communication dated January 21, 2005 asked the Board to remove the deficiencies and complete the application. It was, however, only on Feb., 9, 2005 that the deficiencies were removed and the application was taken on record. This led to delay in the determination of tariff for the year 2005-06. The Commission was able to pass the tariff order only on June 14, 2005, though the financial year commenced on April 1, 2005.

79. It is not in dispute that the Commission determined the tariff for the year 2005-06. The Industrial Consumers would not have been able to grudge the application of the tariff order with effect from April 1, 2005, in case the tariff order was passed on that date or on a date close to that date. It is only because the tariff order was delayed by about two months that the Industrial Consumers are finding fault with its application from April 1, 2005.

80. It needs to be noticed that the retrospective operation covers only a period of two months and having regard to the short time involved, the Commission was of the view that the interest of the consumers will not be adversely affected by the retrospective operation of the tariff order.

81. We do not find that the Commission was wrong in its approach by giving effect to the tariff order from the aforesaid retrospective date as the tariff was fixed for the tariff year 2005-06, which commenced on 1st April, 2005. If the submission of the Industrial Consumers is accepted, a consumer could initiate some proceedings in a Court against the Commission with a prayer for seeking an interim order restraining the Commission from revising the tariff on some ground or the other. This could delay the passing of the tariff order in case an interim order interdicting the determination of tariff is passed pending the proceedings. In such a contingency, it is only after the interim order is lifted by the Court that the Commission would be in a position to pass the tariff order. Obviously, it

would only be just and fair that the tariff order relates back to and commences on the first day of the year for which the tariff determination is made. In Kanoria Chemicals & Industries Ltd. & Anr. Vs. State of U.P. & Ors. (1992) 2 SCC 124, a question was raised with regard to the competence of the Electricity Board to determine tariff with retrospective effect. The Supreme Court was of the view that retrospective effect to the revision of tariff was clearly envisaged in law. In this regard, the Supreme Court held as follows:

> *" A retrospective effect to the revision also seems to be clearly envisaged by the section. One can easily conceive a weighty reason for saying so. If the section were interpreted as conferring a power of revision only prospectively, a consumer affected can easily frustrate the effect of the provision by initiating proceedings seeking an injunction restraining the Board and State from revising the rates, on one ground or other, and thus getting the revision deferred indefinitely. Or, again, the*

> *revision of rates, even if effected promptly by the Board and State, may prove infructuous for one reason or another. Indeed, even in the present case, the Board and State were fairly prompt in taking steps. Even in January 1984, they warned the appellant that they were proposing to revise the rates and they did this too as early as in 1985. For reasons for which they cannot be blamed this proved ineffective. They revised the rates again in March 1988 and August 1991 and, till today, the validity of their action is under challenge. In this State of affairs, it would be a very impractical interpretation of the section to say that the revision of rates can only be prospective".*

82. Section 62, which provides for determination of tariff by the Commission, does not suggest that the tariff cannot be determined with retrospective effect. In the instant case, the whole exercise was undertaken by the PSERC to determine tariff and the annual revenue requirement of the PSERB for the period April, 1, 2005 to March 31, 2006,

therefore, logically tariff should be applicable from April 1, 2005.

83. According to sub-section (6) of Section 64 of the Act of 2003, a tariff order unless amended or revoked continues to be in force for such period as may be specified in the tariff order. Thus the Commission is vested with the power to specify the period for which the tariff order will remain in force. The Commission deriving its power from Section 64(6) has specified that the order shall come into force from April 1, 2005. No fault can be found with such a retrospective specification of the Commission.

84. The learned counsel for the industrial consumers relied on the decision of the Supreme Court in Sri Vijay Lakshmi Rice Mills vs. State of Andhra Pradesh, AIR 1976 SC 1471, wherein it was held that a notification takes effect from the date it is issued and not from a prior date unless otherwise provided by the statute, expressly or by appropriate language from which its retrospective

operation could be inferred. This decision is of no avail to the industrial consumers, in view of the provisions of Section 64 (6) of the Act of 2003, which empowers the Commission to specify the period for which the tariff order will remain in force. In other words, the Commission is empowered to specify the date on which the tariff order will commence and the date on which it will expire.

85. The Board in consonance with the cost plus regime is entitled to recover all costs prudently incurred for providing service to the consumers. Besides, the Board is entitled to reasonable return. Since the cost prudently incurred has to be recovered, therefore, in the event of the tariff order being delayed, it can be made effective from the date tariff year commences or by annualisation of the tariff so that deficit, if any, is made good in the remaining part of the year or it could be recovered after truing up exercise by loading it in the tariff of the next year. All these options are available with the Commission.

86. There is one more aspect which needs to be considered. In case the Commission had lowered the tariff rates, relief to the consumers could not be denied on the ground that the tariff order is being operated retrospectively.

87. For all these reasons we hold that the Commission had the jurisdiction to pass the tariff order with retrospective effect. Therefore, we reject the submission of the learned counsel for the industrial consumers that the tariff cannot be fixed from a retrospective date.

75. In the above judgment the Tribunal has relied on the findings of the Hon'ble Supreme Court in (1992)2 SCC 124 in the matter of Kanoria Chemical Industries Vs. State of UP in which the Hon'ble Supreme Court upheld the retrospective revision of tariff. The findings of the Tribunal in the Siel case will be applicable to this case also.

76. Learned counsel for the Appellant has referred to the full bench judgment of the Tribunal dated 11.1.2011 in Appeal nos. 111 of 2010 and batch in the matter of Tamil Nadu Spinning Mills Association vs. Tamil Nadu Electricity Board & Others in support of his argument that the State Commission is not empowered to issue tariff order retrospectively. In that case the State Commission amended the Supply Code Regulations retrospectively to allow the Electricity Board to raise certain charges retrospectively. It was seen that when the State Commission passed the order for recovery of these charges, the Supply Code Regulations had not been amended and these were amended retrospectively subsequent to passing of the order for recovery of the charges. The Tribunal held that in the absence of a statute providing for power for delegated legislation to operate retrospectively, the

Regulations can only have prospective application. This judgment will not be applicable to the present case where the amendment of the regulation retrospectively is not involved. In the present case, the ERC and ARR proceedings for FY 2012-13 had been initiated in December,2011. The tariff petition was also filed before the commencement of the FY 2012-13 and the stakeholders were put to notice. The Appellants also furnished their objections and suggestions in the ARR and ERC proceeding and tariff proceeding for FY 2012-13 separately and all along they were aware that tariff were going to be revised for the FY 2012-13. It is not the case of the Appellants that they were unaware that the tariff was going to be revised for FY 2012-13 and the order has been passed applying the tariff retrospectively without their having any knowledge about the revision of tariff for FY 2012-13.

Thus, the above judgment referred to by the Appellant will not be of any help to him.

77. If the tariff is made applicable from the date of order i.e. 25.7.2012, the revenue gap in the ARR due to short recovery of the approved revenue will have to be allowed in the ARR and tariff of the subsequent year with carrying cost which will unnecessarily burden all the consumers with the carrying cost.

78. In any case the bills for the month of July 2012 at the revised tariff have to be raised only in the month of August 2012, i.e. after the date of the impugned order. Thus, there will not be any recovery of past arrears by the distribution licensee from the consumers on account of revision in tariff w.e.f. 1.7.2012.

79. In view of above, this issue is decided as against the Appellant.

80. **<u>Summary of our findings:</u>**

"i) **We find that in the present case, the State Commission has determined the tariff of the Appellant's category of HT and EHT Industrial consumers within ± 20% of the average cost of supply as per the Tariff Policy, the dictum laid down by this Tribunal and as sought by the Appellant in their objections filed before the State Commission. However, we give directions to the State Commission to determine the voltage-wise cost of supply for the various categories of consumers within six months of passing of this order and take that into account in determining the cross subsidy and tariffs in future as per the dictum laid down by this Tribunal.**

ii) We do not find that the Appellant's categories have been subjected to disproportionate increase in tariff and they have not been subjected to tariff shock.

iii) We also do not find that the State Commission has violated its Tariff Regulations in determining the tariff of the Appellant's category.

iv) It is a well settled position of law that the tariff determined by the State Commission cannot be held to be *ultra vires* just because it did not take into consideration certain principles or factors laid down in the Act or the Regulations for fixation of tariff. We do not incline to interfere with the order of the State Commission especially when it observed in the order that it would separately consider the introduction of incentive for high load factor and prompt payment after the

Board has carried out a study on implication of these incentives on the performance and revenues of the Board and impact on consumer's bill. However, we have given directions to the Electricity Board and the State Commission for consideration of these issues, as referred to, in paragraph 63 of this judgment.

v) We do not find any infirmity in the State Commission effecting the revision in tariff retrospectively w.e.f. 1.7.2012 as against the date of the tariff order of 25.7.2012."

81. Accordingly, this Appeal is disposed of with the directions to the Electricity Board and the State Commission on the issue of incentive for load factor and prompt payment in accordance with paragraph 63

and directions to the State Commission for determination of voltage-wise cost of supply in future.

82. Before parting with this case, we would like to record our appreciation for the thorough preparation and effective representation made by Mr. Buddy Ranganadhan, the learned Counsel for the Appellant. Mr. Ramesh Babu for R-1 and Mr. M.T. George for R-2 also deserve our appreciation for their effective assistance rendered to this Tribunal.

83. Pronounced in the open court on this ***31st day of May, 2013***.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

√
REPORTABLE/~~NON-REPORTABLE~~