

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

Appeal No. 257 of 2012

Dated: 9th April, 2013

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

In the matter of:

**The Southern India Mills' AssociationAppellant(s)
No. 41, Race Course Road
Coimbatore – 641 018**

Vs

- 1. Tamil Nadu Generation and Distribution Corporation Limited ...Respondent(s)
No. 144, Anna Salai
Chennai – 600 002**
- 2. Tamil Nadu Electricity Regulatory Commission
No. 19-A, Rukmani Lakshmi pathy Salai
Marshalls Road, Egmore
Chennai – 600 008**

**Counsel for the Appellant (s): Mr. N.L. Rajah, Sr. Adv.
Mr. Nikhil Nayyar
Mr. Arun Anbumani**

**Counsel for the Respondents (s): Mr. S. Vallinayagam
Mr. R. Selvakumar
Mr. M. Yogendher**

JUDGMENT

MR. RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by the Southern India Mills' Association against the order dated 30.3.2012 passed by the Tamil Nadu Electricity Regulatory Commission ("State Commission") determining the Annual Revenue Requirement and Tariff for the distribution licensee for the year FY 2012-13.

2. The Appellant is an association of Industrial consumers of electricity. Tamil Nadu Generation and Distribution Corporation Ltd., the generation and distribution company, is the Respondent no. 1. The State Commission is the Respondent no. 2.
3. The brief facts of the case are as under:

3.1 The State Commission after its constitution in the year 1999 passed the first tariff order in respect of the Electricity Board on 15.3.2003. After the pronouncement of the first tariff order by the State Commission on 15.3.2003, there has been no revision of retail supply tariff in the state for seven years because the Respondent no. 1 did not file any petition for determination of ARR and tariff.

3.2 The first Respondent filed the petition for tariff determination on 18.1.2010. The State Commission disposed of the petition by order dated 31.7.2010. Subsequently, the Appellant filed Appeal nos. 192 and 206 of 2010 before the Tribunal challenging the tariff order dated 31.7.2010. By the judgment dated 28.7.2011, the Tribunal allowed the Appeal in part and gave certain directions to the State Commission.

3.3 The first Respondent thereafter filed an application before the State Commission on 17.11.2011 for preliminary true up for the FY 2010-11 and approval of ARR for the FYs 2011-12 and 2012-13 under Multi Year Tariff regime and applied for tariff revision w.e.f. 1.4.2012 or earlier.

3.4 The State Commission passed the tariff order on 30.3.2012 after examining the comments and suggestions from the stake holders and conducting public hearing.

3.5 Aggrieved by the tariff order dated 30.3.2012, the Appellant has filed this Appeal.

4. The Appellant has raised the following issues:

4.1 The State Commission after admitting the petition had sought clarifications and replies to various questions raised by it. These were not put in public domain. The Appellant came to know about such communications between the Respondent nos. 1 and the State Commission only on perusal of the impugned order in which these communications had been listed out. Thus, the State Commission has relied on these communications in passing the impugned order but the stakeholders were not given copies of these communications due to which they could not give their response on the same. This is not in consonance with the Regulations which provide for making available such documents to the stakeholders besides hosting them on the website.

4.2 On account of severe Restrictions and Control measures in the state as authorized by the State

Commission, the recovery of demand charges for the whole month irrespective of the hours of supply to HT consumers was illegal.

4.3 The Appellant had furnished sufficient materials before the State Commission in support of their request to classify Textile Industry which is the single largest group of HT consumer under a separate tariff. However, the State Commission rejected the request of the Appellant without assigning any reason.

4.4 The State Commission fixed the tariff for HT consumes at Rs. 5.50 per unit as against the prayer of the distribution licensee (R-1) to fix it at Rs. 5.00 per unit. However, the State Commission has not provided valid reasons to fix the tariff at a level higher than that prayed by the distribution licensee.

- 4.5 The cross subsidy of HT consumers has been enhanced from 17% to 47% when the Electricity Act, 2003 as well as the Tariff Policy and the Regulations provide that the cross subsidy should be gradually reduced.
- 4.6 The State Commission has also failed to work out the cross subsidy surcharge on the basis of voltage-wise cost of supply as per the directions of Tribunal in Appeal nos. 192 and 206 of 2010.
- 4.7 The State Commission has decided the disincentive for consumption of electricity during the peak hours at 20% whereas for consumption during off-peak hours the incentive of only 5% has been provided. The incentive for drawal during off-peak hours and disincentive for drawal during peak hours should be of the same order.

- 4.8 The State Commission was not right in amortizing the accumulated losses. This is also in violation of the directions of the Tribunal in Appeal nos. 192 and 206 of 2010.
- 4.9 The entire tariff setting process has been vitiated on account of the fact that the subsidy payable by the State Government for free agriculture consumption has not been assessed properly by the State Commission resulting in higher tariff charges for the members of the Appellant. The incorrect assessment of the subsidy payable against free agriculture consumption is in violation of the provisions of Section 65 of the Electricity Act, 2003.
5. In reply to the above issues raised by the Appellant, the Respondent no.1 has made the following submissions:

5.1 Regarding the additional documents furnished by them to the State Commission, the Regulation only provide for making available copies of petition and documents filed with the State Commission and not the information sought by the State Commission as clarification from either the licensee or the stakeholder. The State Commission had only sought balance sheets, invoices and other related documents from the Respondent no. 1 for prudence check under the Regulation 7(2) of the Tariff Regulations. As a result of the prudence check, the State Commission approved the revenue gap of Rs. 7874 crores as against Rs. 14547 crores sought by the Respondent no. 1. Thus, the clarification sought by the State Commission has been beneficial and not detrimental to the Appellant. The Appellant has also

not brought on record any prejudice caused to them on this account.

5.2 The demand charges are towards recovery of fixed charges of the distribution licensee towards the cost of infrastructure provided to meet the maximum demand recorded by a consumer and are not related to the hours of actual supply to the consumer. The State Commission has also ordered to collect the demand charges in relation to the quota demand instead of sanctioned demand during the period the Restriction and Control measures were in force.

5.3 The demand of the Appellant to classify Textile Industry under separate tariff is against the State Commission's objective of rationalization of consumer categories and is against the provisions of the Regulations.

5.4 As per the tariff order dated 31.7.2010, the cross subsidy to the industrial consumer was very low and it has been brought to the level of 47% since the full fledged tariff revision was made after a gap of nine years. The present tariff is the first order passed by the State Commission after unbundling of the Electricity Board, therefore, the comparison of cross subsidy to the previous years is not possible.

5.5 Regarding penalty for peak hours and incentive for off-peak hours, grant of concession is a regulatory mechanism used by the State Commission and the Appellant cannot seek equity in grant of concessions since concession is not a substantive right. The peak hour tariff and night hour rebate should not be treated on equal footing. During peak hours, marginal cost of power procurement is very high and, therefore, 20% penalty has been allowed for peak hour consumption.

5.6 The percentage increase in tariff for HT Industrial consumers was 26% whereas the increase to LT Domestic consumer is 40%, Hut service 755%, Power loom 143% and agriculture service 593%.

5.7 The consumption of agriculture consumers was assessed based on 5% sample study. The tariff of the agriculture consumers was also raised by 593%. The State Commission determined the tariff to the un-metered agriculture consumers on the basis of computed consumption and the State Government has paid the requisite subsidy as per Section 65 of the Act.

5.8 The State Commission has approved to recover the revenue gap only from 1.11.2010 and directed to recover the gap prior to this date through financial restructuring. The Regulatory assets are proposed to be amortized over a period of 5 years commencing from FY 2013-14 onwards. The exact regulatory assets

would be known when the next tariff order is taken up. Hence, the ground questioning the quantum of Regulatory Asset provisionally is pre-mature and untenable.

6. The State Commission has filed written submissions in support of its order which we shall be discussing at the appropriate place.
7. On the above issues we heard the learned Sr. counsel for the Appellant and learned counsel for the State Commission and Learned Counsel for the Distribution Licensee.
8. After taking into account the rival contentions of the parties, the following questions would arise for our consideration:

- i) Whether the State Commission has erred in not putting the documents furnished by the distribution licensee in response to the clarifications sought by the State Commission in public domain and whether the tariff order could be set aside on this ground?
- ii) Whether the demand charges of the industrial consumers be reduced appropriately in view of Restriction & Control Measures imposed by the distribution licensee on the Industrial consumers?
- iii) Whether the State Commission has erred in not classifying the Textile Industry in a separate category for application of tariff?
- iv) Whether the State Commission could fix the tariff of HT Industrial consumers at rates higher than that prayed for by the distribution licensee?
- v) Whether the State Commission has erred in increasing the cross subsidy in case of HT industrial

consumers and not determining cross subsidy with respect to voltage-wise cost of supply?

- vi) Whether the State Commission has erred in increasing the energy charges during the peak hour by 20% while allowing only 5% incentive for off-peak hours?
 - vii) Whether the State Commission has erred in allowing amortization of accumulated losses against the provisions of the Regulations?
 - viii) Whether the subsidy payable by the State Government on account of tariff fixed for Agriculture consumers has not been assessed properly thus passing on the resultant burden on the HT Industrial consumers?
9. The first question is regarding making available the documents furnished by the distribution licensee in

response to the clarification sought by the State Commission, in public domain.

9.1 According to the Appellant the correspondence exchanged between the State Commission and the distribution licensee subsequent to filing of the petition should have been available in the public domain.

9.2 According to the Respondent no. 1 the above correspondence was with regard to clarifications sought by the State Commission in the process of prudence check which is not required to be made available to the consumers. The clarifications relate to working of the Respondent no. 1 to substantiate the facts and figures given in the tariff petition.

9.3 According to the learned counsel for the State Commission, the clarifications were part of prudence

check done by the State Commission before the ARR is finalized. The tariff order was issued by the State Commission after seeking advice from the Members of the State Advisory Committee and eliciting public response through conducting of public hearings at major cities of the State. The public notice in regard to such hearings was published in leading newspapers and public was afforded an opportunity to hear its views. Therefore, the contention of the Appellant that the procedure followed by the State Commission in determining the tariff was against the principles of natural justice is untenable. According to the Regulations, only the petition and the documents furnished alongwith the petition are required to be made available to the public.

9.4 Let us first examine Section 64 of the Electricity Act, 2003 regarding procedure for tariff order. The relevant part of Section 64 is reproduced below:

“64. Procedure for tariff order.—*(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.*

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,—

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application”.

Thus, according to Section 64, the applicant has to publish the application in such abridged form and manner as specified by the Appropriate Commission. Further the State Commission has to issue the tariff order after considering all suggestions and objections received from the public.

9.5 Let us now examine the Regulations of the State Commission in this regard. The relevant Regulation-7 of the Tariff Regulations is reproduced as under:

“7. Decision on Application

- (1) The application received in complete shape shall be registered and numbered as provided for in the TNERC Conduct of Business Regulations.*

- (2) The applicant shall publish, for the information of public, the contents of the application in an abridged form in English and Tamil newspapers having wide circulation and as per the direction of the Commission in this regard. **The copies of Petition and documents***

filed with the Commission shall also be made available at a nominal price, besides hosting them in the website.

- (3) The applicant shall furnish reply to the objection / suggestion if any received from the public direct to the objector with a copy to the Commission.***
- (4) The Commission may conduct its proceedings in accordance with the provisions of the Tamil Nadu Electricity Regulatory Commission – Conduct of Business Regulations, 2004.***
- (5) The Commission shall, within one hundred and twenty days from the date of receipt of application, issue tariff order taking **all the possible suggestions and objections into consideration.*****
- (6) The Commission may also reject the application for determination of tariff for reasons to be recorded in writing if the application is not in accordance with the provisions of the Act, Codes or Regulations made thereunder or the provision of any other law in force for the time being”.***

Thus, according to the Regulation, the applicant has to publish the contents of the application in abridged form in the newspapers and copies of the petition and documents filed with the Commission shall also be

made available at nominal price besides hosting them in the Website.

9.6 We notice that the petition was filed on 17.11.2011 before the State Commission. The public notice as approved by the State Commission inviting objections/suggestions was published in the newspapers on 2.12.2011. The copies of tariff petition was also made available for sale to the public and the petition was also hosted on the website of the State Commission on 25.11.2011. The petition was also placed before the State Advisory Committee on 27.1.2012. Thereafter, the State Commission held four public hearings at different places between 30.1.2012 and 10.2.2012. The State Commission has considered the objections/suggestions given by the stakeholders. Thus, the procedure as laid down under Section 64 of the 2003 Act and the Regulations was followed.

9.7 We notice that the State Commission has sought certain clarifications from the distribution licensees and the correspondence exchanged between them between 27.11.2011 and 23.3.2012 are listed as an Annexure to the impugned order.

9.8 According to the Respondents, the clarifications sought by the State Commission and replied by the distribution licensee was in the process of prudence check of the ARR petition filed by the licensee. For example, the State Commission sought copy of certain vouchers for expenditure and details of power procurement by the distribution licensee which was supplied by the Respondent no.1. According to the Respondents, the clarifications given by the distribution licensee do not in any way prejudice the interest of the Appellant. On the other hand, as a result of the prudence check, the State

Commission could reduce the revenue requirement projected by the distribution licensee. If such correspondence is made public and comments of the public is obtained on such correspondence, the tariff fixation exercise will become very long and it would not be possible to issue tariff order within one hundred and twenty days from receipt of the application as laid down under sub-section (3) of Section 64 of the 2003 Act.

- 9.9 We are in agreement with the contentions of the State Commission that the clarification sought by the Commission and reply furnished by the licensee in the process of prudence check need not be put to public notice for suggestions/objections. Section 64 of the Electricity Act also envisages publication of the application filed by the licensee in abridged form as specified by the Commission. The Regulations also

provide for publication of the application in an abridged form as per the directions of the Commission and making available copies of the petition and the documents filed on payment besides hosting them on website. However, the Regulations do not provide making available to public the replies to the clarifications sought by the Commission in the process of prudence check of the data furnished with the petition by the licensee.

- 9.10 The Appellant has also not been able to clearly specify how they were prejudiced by non-availability of the clarifications furnished by the distribution licensee on the queries raised by the State Commission in the process of prudence check or point out any particular discrepancy in the facts and figures in the tariff petition and that given in the tariff order. The Appellant has

challenged the specific findings of the State Commission by which it has been aggrieved in this Appeal which have been dealt with in this judgment.

9.11 The tariff determination proceedings are not adversarial proceedings like adjudication of disputes u/s 86(1) (f) of the Act and the State Commission has to apply prudence check to the documents submitted by the licensee in support of its claim for ARR tariff and in the process it can seek clarification from the licensee.

9.12 Thus, we do not find any reason to set aside the impugned order only because the clarifications furnished by the licensee on the queries raised by the Commission in the process of prudence check was not put in public domain in this case.

9.13 Having decided the issue in this Appeal, we want to give certain directions to the State Commission on this issue for future.

9.14 In order to avoid any controversy in future and for maintaining complete transparency in tariff determination process, the State Commission may consider to review and amend its Regulations so as to put any information furnished by the licensee or generating company to the State Commission subsequent to filing of the petition on its website, in view of the fact that justice is not only to be done but also appears to be done.

10. The second issue is regarding proportionate reduction of demand charges in view of Restriction & Control Measures on supply to the HT consumers.

10.1 According to the Appellant, the State Commission should not have allowed recovery of full demand charges when the power supply to the HT Industrial consumers has been restricted due to Restriction & Control Measures.

10.2 According to the learned counsel for the State Commission, 60% of the costs of the Respondent no. 1 are fixed in nature and recovery of some minimum portion of fixed costs has to be allowed through Demand charges. Section 45(3) of the 2003 Act also provides for levy of fixed charges in addition to the charges for actual energy supplied. The Demand charges allowed by the State Commission is only 13% of total cost allowed. The demand charges are meant to recover the fixed cost incurred by the Respondent no. 1 and therefore, cannot be linked to consumption of

electricity. If the demand charges are reduced, it will only shift to energy charges as ARR and tariff recovery has to be matched. The supply code also does not provide any rebate if load shedding is resorted to.

- 10.3 We notice that the tariff for the HT consumers is a two part tariff comprising Demand charges and Energy charges. The Demand charges have to be levied on the kVA demand actually recorded in the month or 90% of the sanctioned demand whichever is higher. However, whenever the restriction & control measures are in force, the billable demand in case of two part tariff for any month will be actual recorded maximum demand or 90% of the demand quota, as fixed from time to time through restriction & control measures, whichever is higher.

10.4 Thus, the State Commission in the impugned order has restricted the Demand charges to actual recorded maximum demand or 90% of demand quota whichever is higher during the period when restriction & control measures are in vogue. Thus, if the HT consumer restricts its maximum demand to the demand quota fixed due to restriction & control measures, it is not required to pay Demand charges on the basis of the sanctioned demand.

10.5 The Appellant wants that the demand charges should be reduced in some proportion to the load shedding carried out by the distribution licensee or unscheduled interruption in power supply.

10.6 We do not find any Regulations which provide for reduction of Demand charges due to load shedding or

unscheduled interruption in power supply for some period.

10.7 Imposition of Demand charges are perfectly legal. The Demand charges are imposed on the basis of maximum demand actually recorded or 90% of the demand quota during the period of restriction and control. We do not find any illegality in the impugned order in this regard.

11. The third issue is regarding creation of separate tariff category for the Textile Industry.

11.1 According to the Appellant the State Commission should have created a separate category for Textile Industry instead of covering it under HT consumer category.

11.2 According to learned counsel for the State Commission, the Appellant had stated in their submissions that they were in the process of filing a separate petition before the State Commission seeking separate categorization for Textile Industry. However, till date the Appellant had not approached the State Commission with a petition seeking separate category for Textile Industry. Further, the State Commission has also addressed in the impugned order the issue of non-classification of various requests by various consumers in separate consumer categories.

11.3 Let us examine objection/suggestion filed by the Appellant before the State Commission regarding separate tariff for Textile Industry. The relevant paragraph is reproduced below:

“The textile industry is the only industry consuming power 24 hours x 7 days with constant load throughout the year. Therefore, our Association is in the process of filing a separate petition before the Hon’ble Commission praying for a separate power tariff rate for the Textile Industry. The load factor of textile industry is 95-98% whereas other major industries load factor are very low in terms of maximum demand. Hence, Textile Industries are more helping to Demand Side Management of TANGEDCO.

Load Factor of other industries

<i>Cement Industry</i>	<i>:</i>	<i>7-75%</i>
<i>Steel & Strip mill</i>	<i>:</i>	<i>40-45%</i>
<i>Automobile Industry</i>	<i>:</i>	<i>60-65%</i>
<i>Sugar Industry</i>	<i>:</i>	<i>70-80%</i>

We humbly pray the Hon’ble Commission to treat the aforesaid petition as the part and parcel of our suggestions with regard to tariff revision.”

Thus, the Appellant sought creation of a separate category for Textile Industry as it had a high load factor of 95% to 98% but wanted to file a separate petition for the same; perhaps to justify a separate lower tariff for them.

11.4 The State Commission has made the following observations on the requests received from a number of consumers for separate categorization:

“2.1.482 As regards submission by different consumers for creation of new categories is to protect their own interest, the past experience has shown that whenever the Commission created some new categories, the same was challenged on the ground that such creation of new category was neither proposed by the Utility nor the public or the concerned consumer was put to notice. In the result such matters were remanded to the Commission for reconsideration by the concerned Appellate authorities. Hence, in case the distribution licensee feels the justification and necessity for the creation of a new category, then it should submit the necessary data on consumer and consumption pattern and also ensure that the categorisation is in accordance with the criteria for differentiation provided under Section 62(3) of the EA 2003, for the Commission's consideration.”

Thus, the State Commission did not consider it necessary to create new category for the Appellant's category.

11.5 Section 62(3) of the Electricity Act, 2003 provides that the State Commission may differentiate the tariff

according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

11.6 We find that the State Commission has created one main category for High Tension supply consumers under which four sub-categories viz. HT Tariff 1A, 1B, IIA and II B, IV and V have been created for different types of HT consumers. The Textile Industry has been under HT 1A category which is applicable to all manufacturing and industrial establishments and registered factories.

11.7 Thus, we do not find any illegality in categorization of the HT consumers. If the State Commission has not

chosen to differentiate the consumers in a particular category on the basis of load factor, this could not be considered as violation of Section 62(3) of the 2003 Act.

- 11.8 We do not find adequate justification in the proposal of the Appellant for creating a separate tariff category. However, we give liberty to the Appellant to put up a detailed proposal for creating a separate tariff category for textile industry with full justification during the public consultation process in the future tariff proceedings and the State Commission shall consider the same and pass a reasoned order as per law.

12. The fourth issue is regarding fixing a tariff for the Appellant's category at a rate higher than that sought by the distribution licensee in its petition.

12.1 The contention of the Appellant is that the State Commission could not have decided a higher tariff than that prayed for by the distribution licensee.

12.2 According to learned counsel for the State Commission, the tariff determination as contemplated under Section 62 of the Act is a comprehensive term which may involve reduction in tariff from that proposed by the licensee, maintaining status quo, increase the tariff, change the tariff category or change terms and conditions of tariff, etc. The State Commission is empowered to determine the tariff under Section 62 and the State Commission is not bound by the proposal of the distribution licensee. Further, the State Commission has suo motu powers to revise the tariff as has been held by the Tribunal in O.P. no. 1 of 2011. The power to modify the proposal made by the distribution licensee in regard to rate of tariff applicable

to a particular category is analogous to suo motu powers with regard to determination of tariff.

- 12.3 Learned counsel for the State Commission has further submitted that after carrying out prudence check of the ARR, the State Commission has computed the allowable pass through cost and then determined tariff to enable recovery of the computed cost. The determination of tariff is an exercise based on revenue requirement and prudence check of the same and the tariff determination cannot be put in a straitjacket formula as contended by the Appellant. He also referred to the observation of the Tribunal in its judgment in Appeal no. 192 & 206 of 2010 in regard to suo motu tariff revision without a request from the distribution licensee.

12.4 We are in agreement with the contentions of the Learned Counsel for the State Commission. The State Commission has powers to determine tariff suo motu, without a proposal from the distribution licensee. This Tribunal in O.P. 1 of 2011 has given directions to the State Commission to initiate the suo motu proceeding to determine tariff in case of non-submission of a petition for tariff determination by the distribution licensee in time. The State Commission is also not bound by the tariff proposal of the distribution licensee and has to fix the tariff as per the provisions of the Electricity Act and the Regulations, Thus, the tariff fixed by the Commission as per law could be higher, lower or same as proposed by the licensee.

12.5 The State Commission after prudence check has to determine the ARR and the expected revenue gap for the ensuing year before deciding the retail supply tariff.

The tariff is then determined by a number of iterations keeping in view various factors such as cross subsidy, variation from average cost of supply, variation in tariff from the existing level and various factors specified under Section 62(3) of the Electricity Act, etc. There can not be a direct formula for determination of tariff.

12.6 Thus, we do not find any merit in the contentions of the Appellant on this issue.

13. The fifth issue is regarding increase in cross subsidy.

13.1 According to the Appellant the cross subsidy for HT consumers has been increased from 17% to 47% and the State Commission has also failed to comply with the directions given by the Tribunal regarding determination of voltage wise cost of supply in Appeal no. 192 of 2010.

13.2 According to learned counsel for the State Commission, the cross subsidy with respect to average cost of supply for Industries was 122% for the FY 2010-11 as per the tariff order dated 31.7.2010 which has been increased to 147% in the impugned order. However, the Tariff Order dated 31.7.2010 for FY 2010-11 was not a matching Tariff Order in which large gap was left between the revenue requirement and ARR allowed whereas the impugned order was issued for the entire ARR without leaving any revenue gap. However, in the impugned order while the tariff of Appellant was increased by 19%, the increase in tariff to some of the subsidized categories was Domestic 42%, Huts 400%, Power looms 130% and Agriculture 589%. Further increase to subsidized categories would give great tariff shock to these categories. The contribution of major LT consumers towards cost was also raised from 54% to 80%. Further, the voltage wise cost of supply could not

be determined as the distribution licensee could not supply the requisite data. The essential requirement laid down in Section 61(g) of the Act in regard to tariff being progressively reflecting the cost of supply and also reduction in cross subsidy could be verified only from the next tariff order of the State Commission.

13.3 We notice that the first tariff order was given by the State Commission on 15.3.2003. Thereafter, the tariff was determined only by order dated 31.7.2010 for FY 2010-11 after a lapse of seven years. During these seven years, the accumulated losses of the distribution licensee increased manifold. However, the State Commission did not allow recovery of the accumulated losses of the previous years in the tariff and decided that the financial losses of the previous years would have to be addressed by restructuring with intervention of the State Government. The State Commission

decided to leave revenue gap and create regulatory assets in the anticipated revenue during the control period 2010-11 to 2012-13. For the years 2010-11 and 2011-12, the State Commission had left revenue gap of Rs. 7904.04 crores and Rs. 6062.24 crores respectively. Thus, the tariff for FY 2010-11 was fixed after leaving huge revenue gap which was uncovered by tariff even though the tariff was determined after a lapse of seven years.

13.4 Let us now examine the directions of the Tribunal in judgment dated 28.7.2011 in Appeal no. 192 of 2010 in which the tariff order dated 31.7.2010 was challenged.

“13.4. The fourth issue is regarding cost to serve each category of consumer. We have noticed that the State Commission has not determined the cost of supply according to its Regulations as also the variation in tariff of different categories of consumers with reference to average cost of supply. In the absence of this information, we are not able to verify that the tariff of categories of consumers is within $\pm 20\%$ of the average

cost of supply and whether the cross subsidy has been reduced or increased with respect to the previous year. The issue regarding cost of supply has been dealt with in this Tribunal's Judgment dated 30th May, 2011 in Appeal Nos. 102, 103 and 112 of 2010 in the matter of Tata Steel Limited vs. Orissa Electricity Regulatory Commission, etc. Accordingly, the State Commission is directed to determine the voltage wise cost of supply within six months from the date of this Judgment to ensure that in the future tariff orders cross subsidies for different categories of consumers are determined according to the Regulations and the cross subsidies are reduced as per the provisions of the Act. The State Commission is also directed to determine the variation of tariff of different categories of consumers with respect to average cost of supply and provide consequential relief, if any, to the appellant's consumer category in terms with our findings after hearing all concerned."

- 13.5 We notice that that State Commission has estimated the voltage wise cost to serve in the impugned order but has not determined the cross subsidy with respect to voltage wise cost to serve and has directed the distribution licensee to carry out some data collection exercise for computing accurate cost of supply and

submit a study report on computation of consumer category wise and voltage wise cost to serve.

- 13.6 It is noticed that the State Commission has increased the tariff of the subsidized categories considerably. The increase in the tariff of various subsidized categories as given in Table 227 of the impugned order is as under:

LT Domestic	:	40%
Hut	:	755%
Power Looms	:	143%
LT Agriculture	:	593%

LT Total	:	48%

Thus, we agree with the contention of the State Commission that the State Commission has increased the tariff of the subsidized categories considerably and further increase would have caused greater tariff shock to these categories.

13.7 We find that if the tariff of Appellant's category is kept within plus 20% of the average cost of supply it may require increase in tariff of subsidized LT consumers by 110% of the pre-revised tariff causing greater tariff shock to them. This would be evident by following:

i)	Consumption of industries category IA	13545 MU
ii)	Revenue at the revised tariff of Rs. 7.32 per kWh	9914 crores
iii)	Tariff at + 20% of average cost of supply (Rs.4.99 per kWh)	Rs. 6 per kWh
iv)	Revenue at Rs. 6 per kWh	8127 crores
v)	Loss of revenue from industries category IA	1787 crores
vi)	Consumption of LT subsidized consumers	29709 MU
vii)	Increase in average tariff to recover loss of revenue from industrial category IA	Rs. 0.60 per kWh
	(v)	
	(----- x 10)	
	(vi)	

viii)	Average tariff of subsidized LT consumers after tariff increase	Rs. 2.86
ix)	Increased average tariff required to cover the loss of revenue	Rs.3.46 per kWh
x)	Average tariff of subsidized LT consumers prior to revision	Rs.1.65 per kWh
xi)	Desired average increase in LT tariff to cover loss of revenue %age	About 110%
xii)	Average increase allowed to LT subsidized category	About 73%

Thus, against present average increase of about 73% allowed to the subsidized LT categories, the increase required to bring the HT, IA category alone to + 20% of average cost of supply would be about 110%. If other subsidizing consumers had to be brought within +20% or average cost of supply, the required increase in tariff in the subsidized categories would have been much higher.

13.9 Let us now examine the findings of the State Commission in the impugned order

“9.7.2 The Commission notes that the present level of cross subsidisation of LT category consumers has been brought down from 46% to 20%, which is a huge shift towards the final goal of +20% of Average Cost of Supply.

9.7.3 Retail Tariff in State of Tamil Nadu was not revised for a period from FY 2003-04 to FY 2009-10, on account of non filing of the tariff petition by erstwhile TNEB. Increase in average cost of supply has been sought by TANGEDCO, in this Tariff Petition. Cross-subsidy has been in existence historically even in the period where there was no tariff revision. The Commission also observes that tariff that was charged to most of the categories of consumers was below average cost of supply. Hence, now when the TANGEDCO has sought actual pass through of revenue gap in the form of Tariff Increase and Regulatory Asset, the impact on each category of consumers is significant. The Commission has attempted to reduce the cross-subsidy between the consumer categories in this Order, by rationalising the tariff for subsidised categories and suitably adjusting the tariff for subsidising categories, vis-à-vis the prevailing average cost of supply, while at the same time, trying to ensure that there is no tariff shock to any

consumer category. However, since the average cost of supply has been increasing steadily, the average tariff increase required to meet the revenue gap is also increasing, and hence, the subsidising consumers have not been able to experience tariff reduction in absolute terms.”

13.10 In the circumstances of the case, we feel that the State commission has tried to increase the tariff of the subsidized categories substantially so as to reduce the component of cross subsidy. The comparison of charge in cross subsidy with the previous tariff order for FY 2010-11 may not give correct picture as in the previous tariff order the tariffs were not increased adequately to meet the revenue gap and a huge revenue gap was left uncovered. The State Commission has already increased the tariff of subsidized categories substantially and further increase would have caused greater tariff shock to them which may not be desirable.

13.11 Accordingly, we are not inclined to interfere in the tariff determined by the State Commission. However, the State Commission is directed to determine the voltage-wise cost of supply and corresponding cross subsidy for each category of consumer in the future tariff order.

14. The Sixth issue is relating to excessive peak hour charges.

14.1 According to the Appellant, the State Commission ought to have provided for equal treatment of peak hours and off-peak hours consumption.

14.2 According to Ld. Counsel for the State Commission, there is shortage during peak hours and there is no surplus power during off-peak hours due to power shortage prevailing in the State since the year 2008. Hence, levy of surcharge for peak hours which has

been in vogue since 1997 is justified. However, inspite of prevailing shortage during off-peak hours too, rebate of 5% has been allowed to maintain statuesque in the rates for surcharge during peak hours and rebate during off-peak hours.

14.3 Let us examine the findings of the State Commission.

The relevant extracts are as under:

“9.9.4.2 The Commission is of the opinion that sufficient data is not available to assess the impact of the additional hour in Peak hours, and hence the Commission is continuing with the existing TOD slabs. The TANGEDCO is directed to submit data on ToD consumption alongwith the next Tariff Application along with proper justification and consideration by the Commission. Depending on the impact and response to the ToD tariffs, the Commission may consider extending the ToD tariffs duration.”

“9.9.4.3 The Commission does not agree with the suggestion that peak hour tariff and night hour rebate should be treated on equal footing. During the peak hours, marginal cost of power procurement is very high and being in revenue neutral regulated business, a pass through

mechanism has to be made available to the utility to recover its cost and also to disincentivise the avoidable consumption during the period. Though for the night hours the Utility would be operating its base load plants to cater to the off peak load, which are built into the tariff of the consumer, there is no equitable avoidance of cost for the Utility vis-à-vis peak hour consumption.”

14.4 We notice that the State Commission has provided for 20% extra charge on energy charges for the energy consumed during peak hours i.e. 6:00 AM to 9:00 AM and 6:00 PM to 9:00 PM for the HT industrial consumers. On the other hand the HT industrial consumers are allowed a reduction of 5% in the energy charges for the consumption during off-peak hours i.e. from 10:00 PM to 5:00 AM, as an incentive for night hours consumption. These charges/incentive have been continuing from the past. However, the State Commission has decided to maintain the rates which were prevailing earlier and has not decided the rates

based on some study. We find that the State Commission has provided disincentive for peak hours drawal in view of high cost of procurement of expensive power during peak hours and balance demand. However, incentive for off-peak hours has been continued despite shortage during the off-peak hours.

- 14.5 The aim of providing differential tariff for peak and off-peak hours is to shift load from peak to off-peak hours with a view to optimize the generation capacity and minimize the cost of power procurement for the distribution licensee. However, in the absence of a specific study for pricing of electricity at off-peak and peak hours, the weighted average of energy rates for the peak, off-peak and normal hours (other than peak and off-peaks) should be equal to the average energy rate decided for a particular category of consumer. In the present case when no specific study for peak/off-

peak pricing has been carried out, the energy rate of the tariff decided by the Commission for the Appellant's category is lower than the weighted average rate of energy for peak, off-peak and the normal hours.

14.6 We also notice that the Restriction and Control Measures are also in vogue in the State and the HT industrial consumers are allowed a small quota of demand and energy during the peak hours. The drawal in excess of the specified quota results in imposition of penal rates at substantially higher rate than the normal rates. The State Commission may also consider whether in view of the Restriction and Control Measures and penal rates of excess drawal over the peak hours demand and energy quota whether there is any purpose of having a differential energy tariff for peak and off-peak hours.

14.7 We, therefore, direct the State Commission to reconsider and re-determine the differential pricing of energy during peak and off-peak hours. Accordingly, the matter is remanded back to the State Commission.

15. The seventh issue is regarding amortization of accumulated losses.

15.1 The Appellant has argued that the amortization of accumulated losses is against direction of the Tribunal in Appeal no. 192 of 2010.

15.2 Let us examine the treatment given by the State Commission to the accumulated revenue gap of Respondent no.1.

15.3 The State Commission has indicated that the accumulated revenue gap upto the date of unbundling of the Electricity Board on 1.11.2010 is Rs.17207.30 crores. Thereafter, the revenue gap upto 31.3.2013 is

Rs. 34503.32 crores. The State Commission has left the matter of accumulated losses upto the date of unbundling by the Government of Tamil Nadu with its suggestion that the restructuring of successor entities should not result in increase in tariff to consumers. The successor entities including Respondent no.2 have also not claimed any relief on account of accumulated losses prior to unbundling on 1.11.2010 in the tariff petition. The State Government has also informed that they have in principle agreed with the report of the Commission for amortization of the Regulatory Asset.

- 15.4 The expected revenue gap w.e.f. 1.11.2010 and upto the end of the control period i.e. upto 31.3.2013 is Rs.34503.32 crores. The State Commission has directed to amortize the revenue gap from 1.11.2010 to 31.3.2013 over a period of 5 years commencing from the year 2013-14 onwards. Once the Regulatory Asset

is arrived at, 1/5th of the Regulatory Asset would be amortized along with the carrying cost. The State Commission has decided that when the tariff order for 2014-15 is done, the Regulatory Asset would be reworked and 1/4th of such Regulatory Asset would be amortized in that tariff order and so on until the entire Regulatory Asset is amortized.

15.5 The State Commission has also stated as under regarding necessity of providing the Regulatory Asset.

“9.8.2...The amortization is in-principle approved to be met by Government of Tamil Nadu as per their letter (Ms.) No. 32 dated 25-03-2012 as enclosed in Ann IX. The Commission is of the view that creation of Regulatory Asset could not be avoided in view of the accumulation of Regulatory Asset over a period due to phenomenal load growth, less addition to the generating capacity, high power purchase costs, increase in costs and non filing of tariff petition. If the tariff was to be increased for the entire revenue gap it would have resulted in a tariff shock to all categories of consumers. It is also to be noted that the current tariff hike is to the tune of Rs 7875 Crore which translates into 37% percentage over the previous tariff on an average.”

15.6 Thus, the State Commission has allowed only a part of revenue gap estimated for the period 2010-13 in the tariff to avoid excessive tariff hike.

15.7 Let us now examine the findings of this Tribunal in Appeal no. 192 of 2010. Tribunal had noted that the State Commission has created regulatory assets on the estimated revenue gap for the control period 2010-13 without its amortization along with the interest charges.

The directions given in the judgment are as under:

“8.13. Now that the first year of the Control Period is already over, the regulatory asset created for the first year of the control period can not undone. It has become a reality. However, its amortization along with the interest charges has to be carried out as per the provisions of the Act, Policy and the Regulations. We accordingly direct the State Commission to true up the ARR for the FY 2010-11 and give consequential directions for recovery of the revenue gap derived after the true up alongwith the carrying cost within a period of three years, the period prescribed in the Regulations. The true-up exercise should be initiated by the State Commission immediately.”

15.8 We find that the State Commission has only done the preliminary true up for FY 2010-11 and has estimated the revenue gap expected during 2011-12 and 2012-13 at the existing tariff. Part of the revenue gap has been met from the increase in tariff during FY 2012-13 as decided in the impugned order. However, the balance with carrying cost has been proposed to be amortized in five instalment from FY 2013-14 onwards. The State Commission has given reasons for not allowing entire expected revenue gap in the tariff and allowing recovery in future over five years.

15.9 We find that the Appellants have not indicated how they are prejudiced by the decision of the State Commission. We, therefore, do not want to interfere with the order of the State Commission on this issue.

16. The last issue is regarding incorrect assessment of the subsidy to be given by the State Government on account of agriculture consumption.

16.1 According to the Ld. Counsel for the Appellant the subsidy should have been 18077 crores computed on the basis of information regarding no. of agriculture consumers (20 lakh) and connected load of 103.30 lakh HP at LT IV Tariff at Rs.1750 per HP. Applying another standard of projected energy sales for 2012-13 of 11,546 MUs and applying approved tariff of 130 paise per kWh, the subsidy should be 15009.80 crore.

16.2 We find that there is an error in computation of subsidy relating to consumption of agricultural consumers by the Appellant. The total revenue expected from agriculture consumers as per the tariff order is 1950 crores and therefore the subsidy can not be of the order

of 18077 crores or 15009 crores as indicated by the Appellant. This error was pointed out by us to the Ld. Sr. Counsel of the Appellant. According to the Respondent no. 1, the subsidy given by the State Government covered the revenue gap due to agriculture consumption.

- 16.3 Thus, we do not find any merits in the contention of the Appellant relating to subsidy.

17. Summary of our findings:

- i) **We find that the State Commission has followed the procedure for determination of tariff as laid down under Section 64 of the 2003 Electricity Act and the Regulations and we do not find any reason to set aside the impugned order only because the clarifications furnished by the licensee on the queries raised by the Commission in the process of prudence check were not put in**

public domain. However, in order to avoid any controversy in future in maintaining complete transparency and tariff determination process, the State Commission may consider to review and amend its Regulations so as to put any information furnished by the licensee or generating company to the State Commission subsequent to filing tariff petition on its website.

- ii) We notice that the demand charges are imposed on the basis of maximum demand actually recorded or 90% of the demand quota fixed during the period of restriction and control. We do not find any Regulations which provide for reduction of Demand charges due to load shedding or unscheduled interruption in power supply for some period. We do not find any illegality in the impugned order.

- iii) We do not find any adequate justification in the proposal of the Appellant for creating a separate

tariff category for textile industry. However, we give liberty to put up a detailed proposal to create separate category for textile industry with full justification during the public consultation process in future tariff proceedings and the State Commission shall consider the same and pass a reasoned order as per law.

iv) We do not find any infirmity in the State Commission determining a tariff higher than that proposed by the distribution licensee in its proposal in the petition filed before the State Commission.

v) We notice that the State Commission has increased tariff of the subsidized categories considerably. The tariff of LT domestic consumer

has been increased by 40% and that of agricultural consumer by 593%. The average tariff of the subsidized category has been increased by about 73% which is quite substantial. In order to keep the tariff of the Appellant's category alone within +20% of the average cost of supply it might require increase in tariff of subsidized LT consumer by about 110% of the pre-revised tariff causing greater shock to them. If other subsidizing consumers have to be brought within +20% of the average cost of supply, the required increase in tariff in the subsidized categories would have been much higher. The comparison of change in cross subsidy with the previous tariff order for FY 2010-11 where the large revenue gap was left uncovered in the tariff would not give a correct picture. Accordingly, we are not inclined to interfere in the tariff determined by the State

Commission. However, the State Commission is directed to determine the voltage-wise cost of supply and corresponding cross subsidy for each category of consumers in the next tariff order.

- vi) The aim of providing differential tariff for peak and off-peak hours is to shift load from peak to off-peak hours with a view to optimize the generation capacity and minimize the cost of power procurement for the distribution licensee. However, in the absence of a specific study on pricing of electricity for different time blocks the weighted average energy rate for peak, off-peak and normal hours (other than peak and off-peak) should be equal to the average energy rate decided for a particular category of consumer. In the present case when no specific study for**

pricing of electricity has been carried out, the energy rate of tariff decided by the Commission for the Appellant's category is lower than the weighted average rates of energy for peak, off-peak and normal hours. It is also to be considered whether in view to the Restriction and Control Measures and penal rates for withdrawal in excess of peak hours demand and energy quota, whether there is any purpose of having a differential tariff for peak and off-peak hours. We, therefore, direct the State Commission to reconsider and re-determine the differential price of electricity for peak and off-peak hours. Accordingly, the matter is remanded back to the State Commission.

- vii) We do not find any infirmity in the order relating to amortization of estimated revenue gap during the FY 2011-12 and 2012-13.

viii) We do not find any merits in the contentions of the Appellant regarding subsidy relating to agriculture.

18. In view of above, the Appeal is party allowed to the extent that the matter regarding differential tariff for peak and off-peak hours is remanded to the State Commission with necessary directions to reconsider and re-determine the energy rates for peak and off-peak hours. No order as to cost.

19. Pronounced in the open court on this 9th day of April, 2013.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

√
REPORTABLE/NON-REPORTABLE

mk