

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 182 of 2011

Dated: 30th May, 2012

Present: MR. JUSTICE P. S. DATTA, JUDICIAL MEMBER
MR. V J TALWAR, TECHNICAL MEMBER,

IN THE MATTER OF:

1. M/s. Rajasthan Steel Chambers
C/o Savitri Concast Ltd,
F-876, Road No. 14, V.K.I. Area, Jaipur-302013
2. Rajasthan Vidyut Vikas Sansthan,
D – 70, Pawan Path , Laxman Marg,
Hanuman Nagar, Vaishali nagar, Jaipur-302021
3. Sh. G.L. Sharma,
House No. 3552, Rasta Govind Rajiyon Ka,
Near Kabir Bhawan, Purani Basti, Jaipur-302001Appellants

VERSUS

1. Rajasthan Electricity Regulatory Commission
Vidyut Viniyamak Bhawan,
Near State Motor Garage,
Sahakar Marg, Jaipur– 302005
2. Jaipur Vidyut Vitran Nigam Ltd.
Vidyut Bhawan, Janpath, Jyoti Nagar,
Jaipur -302 055Respondents

Counsel for the Appellant: Mr M.G. Ramachandran
Ms Swapana Sheshadari

Counsel for the Respondent : Mr R K Mehta for R-1
Mr Pradeep Misra for R-2

JUDGMENT

PER MR. V J TALWAR TECHNICAL MEMBER

1. The Appellant No. 1 – Rajasthan Steel Chambers is an association of industries. The Appellant No. 2 is a Non Governmental Organization which has been established in the year 2010. The Appellant No. 3 appears as an individual and is a retired employee of erstwhile Rajasthan State Electricity Board. The Rajasthan Electricity Regulatory Commission (State Commission) is the 1st Respondent. Jaipur Vidyut Vitran Nigam Limited (Distribution Licensee) is one of the distribution licensees in the state of Rajasthan and is the 2nd Respondent herein.
2. On 4.1.2011 the 2nd Respondent Distribution Licensee filed a Petition for determination of its Annual Revenue Requirements and revision of Retail Supply Tariff under Section 62 and 64 of the Electricity Act for the Financial Year 2011-2012. In accordance with the provision of Section 64(2) of the Electricity Act, 2003, the Electricity Board published the abridged form of its application inviting objections and comments from the stake holders. The 1st Appellant, Rajasthan Steel Chambers filed its objections before the State Commission on 04.02.2011 contending, inter alia, that the tariff to be determined should be in accordance with the provisions of the Electricity Act, 2003, and the level of cross subsidy should not be increased. The 2nd Appellant and 3rd Appellant also filed objections before the State Commission on 8.2.2011.
3. On 8.9.2011 the State Commission passed tariff order determining the Annual Revenue Requirements (ARR) and revision of retail

tariff supply for the financial year 2011-2012 for 2nd Respondent Distribution Licensee.

4. Being aggrieved with the impugned order dated 8.9.2011, the Appellants have filed this appeal.
5. The learned Counsel for the Appellants made elaborate submissions which are summarised below:
 - a. The impugned order has been passed in violation of the provisions of the Electricity Act, 2003, the National Electricity Policy the National Tariff Policy and the various decisions of this Tribunal to determine the cost to supply and based thereon, the tariff applicable to the different classes of consumers. The impugned order is also violative of Regulation 126 (2) of the Rajasthan Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009.
 - b. Section 61 of the 2003 Act mandates the State Commission to frame the tariff regulations specifying terms and conditions for determination of tariff. Section 61(g) of the Act requires the State Commission to ensure that the tariff progressively reflects the cost of supply and the cross subsidies are reduced progressively. Again, Section 61(i) stipulates that while framing the regulations, the State Commission shall be guided by the Tariff Policy notified by the Central Government in accordance with section 3 of the Act.
 - c. In the impugned order, there is absolutely no discussion on the issues of reduction in cross subsidy, linkage of tariffs to

the cost to supply and compliance with Section 61 (g) and National Tariff Policy notified by the Central Government. The State Commission has not worked out even the average cost of supply in the impugned order.

- d. In order to verify as to whether the cross subsidies with reference to average cost of supply has been reduced or not, the Appellants have made the calculations and determined average cost of supply for the year 2004-05 and for the year 2011-12 in accordance with the Regulation 126 of the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2009.
- e. Average cost of supply has been worked out by dividing total approved revenue to be recovered by total sales of energy during the corresponding period. Accordingly, the Average Cost of Supply for the year 2004-05 worked out to be Rs 3.53/kWh and for the year 2011-12, Average Cost of supply would work out to be Rs 4.07/kWh only.
- f. Thus during the year 2004-05, the cross subsidy from subsidizing categories viz., non domestic category small industry category, medium industry category and large industry category consumers with reference to the average cost of supply was at a level of 61.39% 32.03%, 25.25% and 18.92% respectively. The State Commission instead of reducing the cross subsidy and to bring it within the permissible range of $\pm 20\%$ of the average cost of supply has increased it.

- g. In the case of large industry category the cross subsidy has been increased from +18.92% to + 29.48%. Similarly, in the case of medium industry category it has increased from + 25.25% to +37.84% and in the case of small industry also, cross subsidy has been marginally increased from +32.03% to + 33.91% in the Tariff order dated 8.9.2011.
- h. In fact, the impugned order increases the existing level of cross subsidy. The State Commission has not even calculated the average cost of supply or shown the increase / decrease in the level of cross subsidy in the impugned order.
6. The learned counsel for the State Commission refuted the contentions of the Appellant and submitted that the state Commission has passed the impugned order in consonance with various provisions of the Act, Tariff Policy and its own tariff regulations. The learned counsel has also raised preliminary objections on maintainability of the Appeal and made the following reply supporting his contentions on maintainability of appeal and also on merits of the case:
- a. While the 1st Appellant is an Association of Steel Industries whose members are affected by the impugned order, 2nd & 3rd Appellants claim to be public interest litigants. It is the settled principle of law that only persons having commonality of interest can join as plaintiffs or Appellants. The Appellants in present case do not have any commonality of interest. In fact, there is conflict of interest between the 1st Appellant challenging the cross subsidization and the 3rd Appellant having filed objections in the interest of domestic category of

consumers, major beneficiaries of the cross subsidization. The Appeal is, therefore, liable to be dismissed for misjoinder of parties.

- b. Since the 1st Appellant did not raise the issue of cross subsidy before the State Commission, the present Appeal on the ground of Cross Subsidy is, therefore, not maintainable.
- c. The Appeal filed by Appellant No. 1 & 2 is not maintainable since they do not claim to have been authorized by any class of consumers who may have been primarily affected by the impugned order to file the Appeal.
- d. The Commission has calculated the average cost of supply by taking into account the Annual Revenue Requirement divided by total energy sold, which works out to Rs.5.25/Unit. The Annual Revenue Requirement has to be met by the revenue from sale of electricity and other sources like subsidy including retention of electricity duty and other income etc.
- e. The Appellant has erroneously calculated the average cost of supply by dividing only the revenue realization from sale of electricity at retail supply tariff by total energy sold which comes to Rs.4.07/Unit. This, in fact, is the average realization rate from sale of electricity and not the average cost of supply.

7. The learned counsel for the 2nd Respondent Distribution Licensee supporting the contentions of the 1st Respondent has made the following submissions:
- (i) The present Appeal is not maintainable on behalf of three Appellants jointly as the cause of action to all the three Appellants are separate and distinct. Nothing has been shown in the Appeal as to how the Appellant Nos. 2 and 3 are aggrieved by the impugned tariff order. Hence in view of decision of Hon'ble Supreme Court in CERC Vs. Gajendra Haldea & Ors. reported in 2009 ELR (SC) 0508, Appeal is not maintainable on behalf of Appellant Nos. 2 and 3.
 - (ii) The main point urged in the Appeal is that the tariff determined by Respondent No. 1 for the replying Respondent for the year 2011-2012 is bad for the reason that cross subsidy in respect of various categories of consumers is more than \pm (plus/minus) 20%.
 - (iii) Tariff of the 2nd Respondent was determined in the year 2001 and thereafter it was again revised in the year 2004-2005 by an order dated 17.12.2004. But the tariff in respect of industries was not revised and thus the tariff of members of 1st Appellant was not revised for 10 years though the cost of supply has increased manifold.
 - (iv) The cross subsidy in respect of any category of consumer has to be determined with reference to average cost of supply of the 2nd Respondent. The Appellants have calculated the average cost of supply taking into consideration the total amount realized through tariff i.e. Rs.

6465 crores by dividing the same from total energy sold i.e. 15874 MU and thus arrived at a rate of Rs. 4.07 per unit. On that basis it has been contended that cross subsidy is more than $\pm 20\%$ and thus the tariff order is bad. The contention of the Appellant is erroneous and is liable to be rejected outright for the reason that Average cost of supply is to be determined taking into account total revenue requirement of the licensee and divided by total sale during the corresponding period.

- (v) That average cost of supply which is necessary to be determined for the purpose of calculating cross subsidy has not been defined under the Act, however as per definition notified in Wikipedia, the definition of Average Cost in Economics is as follows:-

“In economics, average cost or unit cost is equal to total cost divided by the number of goods produced (the output quantity, Q). It is also equal to the sum of average variable costs (total variable costs divided by Q) plus average fixed costs (total fixed cost divided by Q). Average costs may be dependent on the time period considered (increasing production may be expensive or impossible in the short term, for example). Average costs affect the supply curve and are a fundamental component of supply and demand.

Average Cost= Total Cost/Quantity”

- (vi) The revenue gap which has been approved by the Commission forms part of aggregate revenue requirement of the licensee, hence while calculating the average cost of supply the same cannot be excluded.

(vii) The average cost of supply of a licensee has to be determined by dividing aggregate revenue requirement with total number of units sold i.e. Rs. 8334 Crores divided by 15874 MU which comes to Rs. 5.25 per unit. On the basis of this average cost of supply the cross subsidy has to be determined and Respondent No. 1 in his reply dated 13.02.2012 has produced that cross subsidy except the agricultural consumers and non-domestic category is within the parameters $\pm 20\%$. It is further submitted that in case of Appellant the cross subsidy is within the prescribed norms, hence the Appeal is liable to be dismissed.

8. In the light of the above rival contentions, the following questions may arise for consideration:

- i. Whether the Appeal in its present form is maintainable?
- ii. What is correct method of determining the Average Cost of Supply?
- iii. Whether the State Commission has acted consistent with the provisions of the Electricity Act, the policies notified by the Central Government under Section 3 of the Electricity Act, 2003, the Tariff Policy and the Tariff Regulations, 2009 in determining the appropriate cost to supply and in dealing with cross-subsidies in the tariff?

9. We will now deal with each of the questions framed above one by one. The first question for consideration **relates to maintainability of the appeal.**

10. Both the Respondents have alleged that the Appellants herein do not have interest in common. In fact, interests of 1st Appellant, who represents subsidizing category of consumers, is in direct conflict with the interest of 3rd Appellant who claims to represent subsidized consumers. Accordingly, the appeal is liable to be rejected on the ground of misjoinder.
11. We do not agree with the contention of the Respondents. Mere presence of the 2nd & 3rd Appellant in the memo of Appeals would not change the character of the Appeal.
12. True, the Appellant no. 3 is a mere consumer but since he has not preferred any separate appeal, and has chosen to be arrayed as one of the Appellants and principally with the Appellant no. 1, the question of misjoinder becomes an academic one particularly when he has not ventilated any separate grievance in this Appeal. We are concerned with the grounds of Appeal and his presence does not matter much.
13. We are also not impressed by the plea adopted by the 1st Respondent that since the 1st Appellant had not raised the issue of cross subsidy before the State Commission, the same cannot be raised in Appeal before this Tribunal. The licensee is required to publish its proposals submitted before the State Commission the abridge form inviting comments from all the stake holders under Section 64(2) of the Act. Accordingly, the stake holders submit their comments/objections to the proposals of the licensee. There could be circumstances where a person is not affected by the proposals of the licensee but could get aggrieved by the final order of the State Commission. Further, any person aggrieved by the

final order of the State Commission could approach this Tribunal in Appeal for redressal of its grievance.

14. The question is answered against the Respondents accordingly.
15. Next question for consideration is: **what is the correct method of determining the Average Cost of Supply?**
16. According to the Respondents the Average Cost of Supply is to be calculated by dividing the Aggregate Revenue Requirement of the licensee by total energy sold during the corresponding period. The State Commission has approved Total ARR for the licensee at Rs 8334 Crores. The Average Cost of Supply would be Rs. 8334 Crores divided by 15874 MU which comes to Rs. 5.25 per unit.
17. According to the Appellants, Average Cost of Supply is determinant of total recoverable revenue through tariff approved by the State Commission. Accordingly, the Appellants have calculated the average cost of supply taking into consideration the total amount realized through tariff i.e. Rs. 6465 Crores by dividing the same from total energy sold i.e. 15874 MU and thus arrived at a rate of Rs. 4.07 per unit. The Appellants have also referred to the provisions of Tariff Regulations 2009 in support of this contention.
18. The contention of the Appellants that the Average Cost of Supply is the ratio between total recoverable revenue through tariff and total sale of energy is misconceived and is liable to be rejected for the following reasons:
 - i. This Tribunal in Appeal No. 131 of 2008 in the matter of Inorbit Malls (India) Pvt. Ltd., Mumbai Vs. Maharashtra Electricity Regulatory Commission, Mumbai and

Maharashtra State Electricity Distribution Company, Mumbai reported in 2009 ELR APTEL 0864 has held as under:-

“9. Let us first examine the extent of hike in the Tariff for the three Appellants. The average cost of supply is determined by taking into account the total Revenue requirement of the Licensees divided by the total energy sold”

- ii. Average cost of supply and average revenue recovery rate are two distinct aspects of tariff determination exercise. As the name itself suggests, the ‘cost of supply’ is the total revenue required by the licensee to meet its universal obligation to supply electricity to the consumers. Average cost of supply would, therefore, be the total revenue requirement divided by total energy sold. Average revenue recovery rate or average tariff is total revenue recoverable by the licensee through approved tariff divided by the energy sold by the licensee during the corresponding period. What the Appellants have suggested is actually average revenue recovery rate or average tariff and not the average cost of supply.
- iii. The issue in hand be viewed from another angle. The whole reforms process purported to be achieved by the 2003 Act and the Tariff Policy would be derailed if the contention of the Appellants is accepted. One of the hallmarks of the 2003 Act and the Tariff policy is progressive reduction of category wise cross subsidy. Cross subsidy for a particular category is to be calculated as difference between (i) the tariff applicable to the relevant category of consumers and (ii) the cost of the distribution licensee to supply electricity to the consumers of

the applicable class. Here, tariff applicable to the relevant category is the ratio between the total revenue recovered from that particular category through tariff and energy sold to that category. If cost of supply for the same category is also, as suggested by the Respondents, the ratio between total revenue recovered from the category through approved tariff and total sale to that category, then the category wise cost of supply would be same as average tariff (revenue recovery rate) for the same category and cross subsidy under all circumstance would be equal to zero. Let us explain the above proposition through the actual values taken from the impugned tariff order as per Table given below:

Consumer Category	Energy Sales in (MU)	Revenue as per impugned order (Rs. Crore)	Category wise cost of supply* (Rs/kWh)	Average Tariff for the category (Rs /kWh)	Category wise Cross Subsidy
1	2	3	$4=3/2$	$5=3/2$	5-4
Domestic	3697	1650	4.46	4.46	0.0%
Non-Domestic	1117	724	6.48	6.48	0.0%
Public St. Light	99	48	4.85	4.85	0.0%
Agriculture (M)	4080	624	1.53	1.53	0.0%
Agriculture (F)	578	86	1.49	1.49	0.0%
Small Industry	268	146	5.45	5.45	0.0%
Med. Industry	651	365	5.61	5.61	0.0%
Large Industry	4046	2134	5.27	5.27	0.0%
Public W/W (S)	240	107	4.46	4.46	0.0%
Public W/W (M)	26	14	5.38	5.38	0.0%
Public W/W (L)	130	67	5.15	5.15	0.0%
Mixed Load	533	282	5.29	5.29	0.0%
Ele. Traction	409	218	5.33	5.33	0.0%
Totals	15,874	6,465	4.07*	4.07	0.0%

*As per the Respondent's submissions that the average cost of supply is to be determined by dividing total recoverable revenue recovered through approved tariff by total energy sold.

19. Principles for determining the average cost of supply and category wise cost of supply has to be the same. It cannot be claimed that while determining the average cost of supply one has to consider total recoverable revenue from the approved tariff and while determining category wise cost of supply one has to consider the cost of the distribution licensee to supply electricity to the consumers of the applicable category of consumers.
20. The question is answered against the Appellants accordingly.
21. The third question for consideration is as to **whether the State Commission has acted consistent with the provisions of the Electricity Act, the policies notified by the Central Government under Section 3 of the Electricity Act, 2003, Tariff Policy and Tariff Regulations, 2009 in determining the appropriate cost to supply and in dealing with cross-subsidies in the tariff.**
22. Admittedly, the State Commission has not determined the average cost of supply, category wise cost of supply and the cross subsidy elements in the impugned order. Section 61(g) of the Act stipulates that the tariff progressively reflects the cost of supply and also reduces the cross subsidies. Thus it is essential that these parameters are determined and appropriately reflected in the tariff orders. However, we are not inclined to remand back the impugned order on this technical ground and would like to examine the issue as to whether the cross subsidies have been reduced and brought to within $\pm 20\%$ of average cost of supply.
23. The 1st Respondent State Commission in its reply has provided a table showing category wise cross subsidies as per last tariff order

dated 17.12.2004 and the impugned order dated 8.9.2011. The said table is set out below:

Category	2004-05 (after increase) Average Cost of Service Rs 4.12/kWh					2011-12(after increase) Average Cost of Service Rs 5.25/kWh				
	Sales MU	Revenue Rs. Crore	Av. Tariff Rs./ Unit	Realisation as % of Av.COS	Cross Subsidy (%)	Sales MU	Revenue Rs. Crore	Av Tariff Rs./ Unit	Realisation as % of Av. COS	Cross Subsidy
Non Domestic	500	285.43	5.71	138.53	38.53	1117	724	6.48	123.48	23.48
Small Industry	193	90.48	4.69	113.77	13.77	268	146	5.45	103.86	3.86
Medium Industry	321	142.4	4.44	107.65	7.65	651	365	5.61	106.93	6.93
Large Industry	1288	541.41	4.20	102.01	2.01	4046	2134	5.27	100.46	0.46
PWW (M)	24	10.06	4.19	101.72	1.72	26	14	5.33	101.52	1.52
PWW (L)	82	34.84	4.25	103.10	3.10	130	67	5.19	98.85	-1.15
Bulk Supply to Mixed Load	98	41.94	4.28	103.85	3.85	533	282	5.28	100.58	0.58
Electric Traction-Railways	268	109.8	4.10	99.42	-0.58	409	218	5.32	101.35	1.35

24. Perusal of the above table would reveal that cross subsidies have been reduced for all the subsidising categories. It also reveals that cross subsidies have been brought within the permissible limit of $\pm 20\%$ of average cost of supply except for the non-domestic category. Thus the essential requirement in reducing the cross subsidies and bringing them within $\pm 20\%$ of average cost of supply has been achieved except for one category of consumers.
25. Thus the essential requirements of the Act and the Tariff Policy have been achieved. This question is also answered against the Appellants accordingly.

26. In the light of our above findings, we do not find any reason to interfere with the impugned order of the State Commission. The Appeal is accordingly dismissed being devoid of merits. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice P. S. Datta)
Judicial Member

Dated: 30th May, 2012

REPORTABLE/~~NOT REPORTABLE~~