Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.140 OF 2011

Dated: 14th Nov, 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MRV J TALWAR, TECHNICAL MEMBER

In the Matter of:
M/s. Reliance Infrastructure Limited.,
Reliance Energy Centre,
Santacruz (East,
Mumbai-400 055 ……. Appellant

Versus

1. **Maharashtra Electricity Regulatory Commission**
   Commission, World Trade Centre No.1,
   13th floor, Cuffe Parade, Colaba,
   Mumbai-400 001

2. **Mumbai Grahak Panchayat,**
   Sant Dnyaneshwar Marg,
   Vile Parle (West)
   Mumbai-400 056.

3. **Prayas,**
   C/o. Amrita Clinic,
   Athawale Corner
   Karve Road, Pune-411 004.

4. **Thane Belapur Industries,**
   Post: Ghansoli,
   Navi Mumbai-400 071

5. **Vidarbha Industries Association,**
   Civil Lines,
   Nagpur-400 041.

6. The Tata Power Company Limited
Bombay House, 24, Homi Mody Street
Mumbai-400 001.

7. Mumbai International Airport Pvt. Ltd.,
Chatrapati Shivaji International Airport,
1st Floor, Terminal 1B, Santa Cruz(East)
Mumbai-400 099.

….. Respondent(s)

Counsel for Appellant: **Mr J J Bhatt Sr. Advocate**
Ms Anjuli Chandrurkar
Mr Hasan Murtaja
Mr. D J Kakalia
Mr. Aditya Panda

Counsel for the Respondent: **Mr Buddy A Ranganathan**
Ms. Richa Bharadwaja
Ms. Kanika Agnihotri
Mr. Karan Minocha for R-1
Mr K Venugopal,Sr Advocate
Mr M G Ramachandran
Mr. Sitesh Mukherjee
Mr. Abijeet Kumar Lala
Mr. Shamtanu Singh
Ms. Anusha Nagarajan
Ms. Prerna Priyadarshini for R-6

J U D G M E N T

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

1. The Reliance Infrastructure Limited (RInfra), is the Appellant herein.

2. The Appellant has filed this Appeal challenging certain portion of the Impugned Order dated 29.7.2011 passed by

the Maharashtra State Commission in the matter of RInfra-D Annual Performance Review for the Financial Year 2009-10 and ARR Petition for the Financial Year 2010-11.

3. The facts leading to this Appeal in brief, are as follows:

(a) The Appellant is a Distribution Licensee. The First Respondent is the State Commission.

(b) The State Commission passed the Tariff Order in case No.25 and 53 of 2005 in the Petition filed by the Appellant on 13.10.2006. In this order, the Target Distribution Loss Level for the Financial Year 2006-07 was approved at 11.52%.

(c) As against this order, the Appeal has been filed in Appeal No.251 of 2006 before this Tribunal.

(d) Ultimately, this Tribunal by the Judgment dated 4.4.2007, set-aside the order of the State Commission and directed the State Commission to ensure that the Distribution Losses target for the Financial Year 2006-07 is maintained at 10.01%.

(e) The State Commission while passing the Multi Year Tariff in case No.75 of 2006 in the order dated 24.4.2007, directed the Appellant to submit Technical Loss Study Report. The State Commission observed in the Order that the Direct Loss Level would be corrected

based on the Technical Loss Study Report to be submitted by the Appellant.

(f) Against this order, an Appeal was filed in Appeal No.90 of 2007 before this Tribunal on 28.5.2007.

(g) While the Appeal No.90 of 2007 was pending before this Tribunal, the Appellant, as directed earlier, submitted the Technical Loss Study Report before the State Commission.

(h) This Tribunal ultimately rendered the judgment on 11.12.2007 in Appeal No.90 of 2007 holding that the Distribution Loss Target should be maintained at 12.1% for the Financial Year 2007-08 and Loss Level for the Financial Year 2008-09 and 2009-10 to be reviewed after scrutinising the Technical Study Report.

(i) The State Commission on 4.6.2008 passed the Tariff Order in case No.66 of 2007 for the Financial Year 2008-09 in which Truing-Up for the Financial Year 2006-07 and Annual Performance Review for the Financial Year 2007-08 was done.

(j) In this order, the State Commission changed the Target Distribution Loss Level for the Financial Year 2007-08 of 11% and for the Financial Year 2008-09 at 10.75%, based on the Actual Distribution Loss of 11.25% for the Financial Year 2006-07.

(k) As against this order, the Appellant had filed an Appeal No.117 of 2008 on 18.7.2008 for a limited ground for directing the State Commission to give effect to the judgment of this Tribunal in Appeal No.251 of 2006.

(l) While this Appeal was pending, the State Commission passed the Tariff Order on 15.6.2009 in case No.121 of 2008 for the Financial Year 2009-10 in which Truing-UP for the Financial Year 2007-08 and APR for the Financial Year 2008-09 was done. In this order, the State Commission had followed its earlier order dated 4.6.2008.

(m) This Tribunal took-up the matter in Appeal No.117 of 2008 and heard the parties and rendered the judgment on 28.8.2009. In the judgment, this Tribunal held that the Distribution Loss Target for the Financial Year 2006-07 should be maintained at 12.1% based on its earlier judgment dated 4.4.2007 in Appeal No.251 of 2006.

(n) On 8.11.2010, the State Commission raised certain queries as a part of the Tariff Determination process in relation to the cost of Working Capital for the Financial Year 2006-07 to 2009-10. These particulars

and clarifications had been furnished by the Appellant on 12.11.2010.

(o) On 14.2.2011, the Appellant filed a Petition in case No.72 of 2010 for Truing-Up for the Financial Year 2008-09 including the re-truing up for the Financial Year 2006-07 and 2007-08 for the purpose of re-computing the efficiency gains and Distribution Loss on the ground that this Tribunal had already given its judgment in Appeal No.251 of 2006, Appeal No.19 of 2007 and Appeal No.117 of 2008 on this issue.

(p) Ultimately, the State Commission passed the impugned order on 29.7.2011 giving effect to this Judgment of this Tribunal in Appeal No.251 of 2006 and Appeal No.117 of 2008 for the Financial Year 2006-07. However, for the Financial Year 2007-08 and Financial Year 2008-09, the State Commission once again maintained the Distribution Loss Target at 11% and 10.75% respectively based on its earlier order dated 4.6.2008 in case No.66 of 2007. In fact, the Appellant had claimed the Target Loss of 12.1% for the Financial Year 2007-08 and 11.85% for the Financial Year 2008-09. However, this has been rejected.

(q) Now, the present Appeal dated 12.9.2011 has been filed before this Tribunal challenging the Target

Distribution Losses for the Financial Year 2007-08 and Financial Year 2008-09 in the impugned order.

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

(a) Exemption of Group-III Consumers from payment of Cross Subsidy Surcharge to the Appellant.

(b) Sharing of savings in Interest on Working Capital;

(c) Consideration of interest on delayed payments on tariff income;

(d) Wrong estimation of Distribution Loss during the Financial Year 2007-08 and 2008-09.

5. Let **us deal with** each of the **issues**.

6. The First Issue is this: "**Whether the Cross Subsidy Surcharge can be recovered from the erstwhile consumers of the RInfra-D (Group III Consumers) who were connected to the wires of the Appellant and were receiving supply from the Appellants who had migrated to the Tata Power Distribution for receiving supply from the Tata Power Distribution System through the wires of the Tata Power Distribution System?**

7. The finding given by the State Commission on this issue in the impugned order is as follows:

"*Such consumers will not have to pay the charges for recovery of Cross Subsidy Surcharge since they are no longer consumers of RInfra-D, either for wires or supply, and charges can be levied by a licensee only on a consumer*".

8. Assailing the findings on this issue, the learned Senior Counsel for the Appellant has made the following submissions:

(a) The above finding rendered by the State Commission is contrary to the provisions of the Act as well as the definition of the word "consumer". This definition would make it clear that in order to become the consumer of electricity, a person must be supplied with electricity for his own use and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of the licensee. Thus, a person who has switched over from RInfra-D is a consumer of electricity. Such a consumer can be made to compensate for the loss of cross subsidy to the distribution having license within the area where the consumer is situated as per Second Proviso to Section 42 (2).

(b) In order to be liable to pay Cross Subsidy Surcharge to a distribution licensee it is necessary that such distribution licensee must be a distribution licensee in respect of the area where the consumer is

situated. It is not necessary that such consumer should be connected only to such distribution licensee. It would suffice if such a consumer is a "consumer" within the aforesaid definition.

(c) By its very nature Cross Subsidy Surcharge is compensatory charge and does not depend upon the use of distribution licensee. That apart, Section 40 of the Electricity Act, 2003 dealing with the duties of a Transmission Licensee would show that in order to be liable to pay the Cross Subsidy Surcharge, it is not necessary that consumers should be connected to the Distribution network of the particular supplier only. On the other hand, it provides that where a consumer seeks to off take supply on using the Open Access on a transmission line, he is liable to pay Cross Subsidy Surcharge.

(d) Once a Cross Subsidy Surcharge is fixed for an area, it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area.

(e) The reliance of Rule-4 of the Electricity Rules 2005 to contend that Section 40 when it relates to transmission lines the said transmission lines are deemed to be a part of the Distribution Licensee's

network. This is wrong. Rule 4 does not contemplate a situation whereby the lines of a transmission licensee are used by consumer to obtain supply directly from a supplier.

(f) Admittedly, the Tata Distribution failed to fulfil its Universal Service Obligations of laying network to supply electricity for several decades. It is only to facilitate consumer choice that an interregnum arrangement was arrived at without giving Tata Distribution a free hand to choose and pick the consumers it liked to create an imbalance in the area of supply between distribution licensees that would result in creating a monopoly in favour of TPC-D and ultimately destroying the very concept of consumer choice.

9. In order to substantiate these pleas, the learned Senior Counsel for the Respondent has cited the following authorities:

(a) Chhattisgarh State Power Distribution Company Limited v/s Aryan Coal Benefication Private Limited and others : Judgment dated 9th February 2010 in Appeal No 119 of 2009 :

b) OCL India Ltd v/s Orissa Electricity Regulatory Commission and others: Judgment dated 3rd September 2009 in Appeal No 20 of 2009:

c) Chhattisgarh State Power Distribution Co. Ltd v/s Salasar Steel and Private Limited and others: Judgment dated 28th April 2010 in Appeal No 32 of 2009 :

d) DLF Utilities Ltd v/s Haryana Electricity Regulatory Commission and others: Judgment dated 3rd October 2012 in Appeal No 193 of 2011.

10. The learned Counsel for the State Commission has made elaborate submissions refuting the various contentions urged by the Appellant. They are as follows:

(a) The immediate issue in the present appeal is the challenge to the impugned order insofar as it holds that Group III consumers are not liable to pay Cross Subsidy Surcharge. The definition of the consumer as appearing in Section 2 (15) of the Electricity Act, 2003 would make it clear that the Group III consumer, i.e. a person receiving supply for its own use from a licensee through the distribution system of same licensee, is the consumer of that licensee. In this case, Group III Consumer connecting a supply from Tata Power through the Distribution System of Tata

Power. Thus, such a person who is not connected with the works of the Appellant, once having disconnected from the distribution system of the Appellant, will not make such a person fall within the definition of 'consumer'.

(b) When such person is connected to Tata Power and is receiving supply from Tata Power, there could be no question of the Appellant seeking to claim any right to levy Cross Subsidy Surcharge under Section 42 (3) of the Act on such a person. It is not even the case of the Appellant the Group III Consumers are availing Open Access from the Appellant. In that event, the consumers are not liable to pay Cross Subsidy Surcharge to the Appellant.

(c) The Appellant is only relying upon the findings of this Tribunal where the Cross Subsidy Surcharge has been held to be a compensatory charge that is leviable even when there is no Open Access. The Ratio of these judgments cited by the Appellant would be of no help to the Appellant for the reasons that none of the above said judgments dealt with the issue of parallel licensing, where there is a consumer in the common license area of two distribution licensees, like the situation at present. All the judgments cited by the Appellant dealt with a factual situation where a

Dedicated Transmission Lines was used by a generating plant to supply electricity to its consumers who were situated in the area of a single distribution licensee. Therefore, all the aforesaid judgments proceeded on the presumption that if the consumer in those cases was taking supply through a Dedicated Transmission Line, the sole distribution licensee in the area who would normally have the legitimate expectation of supply to such consumer would have lost the opportunity to supply electricity to such consumer.

(d) The Act envisages "two or more" distribution licensees in an area of supply. Hence, the problem will be aggravated manifold because if there are many distribution licensees in an area of supply. If the principle of compensatory charge in such situation were to be applied, it is not only the Group III consumers who would be liable to pay Cross Subsidy Surcharge, but even in a situation where a new consumer were to enter the common license area and take a brand new connection from either of the licensees the other licensee may claim Cross Subsidy Surcharge even from such new consumer. Such a situation could never be contemplated under the Act.

(e) The Appellant has sought to rely on Section 40 (c) (2) of the Act to substantiate its arguments that even when a consumer is connected to the Transmission Licensee and not connected to the Distribution Licensee then it still has to pay the Cross Subsidy Surcharge. The above contention is wrong. The above argument ignores the impact of Rule 4 of the Electricity Rules, 2005. According to this Rule, even though a consumer could be connected to the Transmission Licensee, he would by a deeming provision to be deemed to be connected to the Distribution System of the licensee in whose area the premise is situated. Hence, the reliance by the Appellant on Section 40 does not hold good.

(f) In any event, it is submitted that the 3rd proviso to Section 40 (c) (2) provides that the manner of payment and utilization of the Surcharge shall be "specified" by the appropriate Commission. In the impugned Order the Commission has undertaken the exercise to "determine" the liability to pay Cross Subsidy Surcharge under section 42 (ii) first provisos. Therefore, the principle which may be applicable to the Cross Subsidy Surcharge (to be "specified") under Section 40 may not be stretched to apply to the Cross

Subsidy Surcharge determined under Section 42 (2) of the Act.

11. The other Respondents have also made their submissions in defending the impugned order in refusing the claim for Cross Subsidy Surcharge.

12. We have carefully considered the submissions of the Appellant as well as the Commission and the other Respondents.

13. As mentioned earlier, the learned Senior Counsel appearing for the Appellant has relied upon few judgments of this Tribunal and provisions of Section 40 of the Act, which suggests that Cross Subsidy Surcharge is payable even where there is no use of Distribution System of the Distribution Licensee.

14. On the other hand, the learned Counsel for the State Commission has strenuously contended that these judgments of this Tribunal have no application in case of parallel licensee.

15. Therefore, in view of the rival contentions, we will now deal with the judgments cited by the learned Senior Counsel for the Appellant one by one.

16. In the first case the Appellant has relied upon the judgment dated 9th February, 2010 in Appeal No.119 of 2009 in the

matter of Chhattisgarh State Power Distribution Company Limited v/s Aryan Coal Benefication Private Limited and others.

17. We shall now refer to the relevant portion of the findings in the above judgments which is as under:

> *"……..*
>
> *6. The learned counsel for the State Commission also has elaborately made his submissions in justification of the findings rendered by the State Commission in the impugned order. Two questions that may arise for consideration in these Appeals are as follows:*
>
> ***i) Whether the State Commission is correct in holding that the Aryan Plant is liable to pay cross subsidy charges for past use of the electricity generated by it for supply to its own coal washeries to the distribution licensee and consequently the parallel operation charges which were paid earlier by the Aryan Plant to the distribution licensee shall be adjusted towards the said cross subsidy charges for the past use.***
>
> ***ii) Having regularized the past use by directing to pay cross subsidy charges, whether the State Commission is correct in holding that the Aryan Plant is liable to apply for Open Access or to obtain the license for supply of power to its own coal washeries for the future use through its own dedicated line?***
>
> *……*

14. It cannot be disputed that when the power plant from which electricity is made available is a captive power plant, no cross subsidy charge is payable. In the same way, if it is not a captive power plant then the cross subsidy is payable. Since Aryan Plant was not paying Cross Subsidy Surcharge, on the finding that it is not a captive power plant, the Aryan Plant had been asked to pay the Cross Subsidy Surcharge for the past use, especially when the plant itself filed an application before the State Commission in Petition No. 11 of 2008 stating that it was prepared to pay the Cross Subsidy Surcharge.

15. The Distribution licensee cannot have any grievance in regard to the order directing the Aryan Plant to pay the cross subsidy charge towards the past use, since the Distribution Licensee in fact is actually benefited, since it is getting Cross Subsidy Surcharge which is higher than the parallel operation charges which was being paid earlier. Once it is held that the generating plant was not operating as a captive generating plant then there was no liability to pay parallel operation charges.

16. Section 42 (2) deals with two aspects; (i) Open Access (ii) cross subsidy. Insofar as the Open Access is concerned, Section 42 (2) has not restricted it to Open Access on the lines of the distribution licensee. In other words, Section 42 (2) cannot be read as a confusing with Open Access to the distribution licensee.

17. ***The Cross Subsidy Surcharge, which is dealt with under the proviso to sub-section 2 of Section 42, is a compensatory charge. It does not depend upon the use of Distribution licensee's line. It is a charge to be paid in compensation to the distribution licensee irrespective of whether its***

line is used or not in view of the fact that but for the Open Access the consumers would have taken the quantum of power from the licensee and in the result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers. *On this principle it has to be held that the Cross Subsidy Surcharge is payable irrespective of whether the lines of the distribution licensee are used or not."*

18. The Second case the Appellant has relied upon is in the judgment dated 3rd September, 2009 in Appeal No.20 of 2009 in the matter of OCL India Ltd v/s Orissa Electricity Regulatory Commission and others. The relevant portion of the judgment which contains the question and findings are set out below:

".....

5. The Appellant, having been aggrieved over the finding of the State Commission regarding the Appellant's liability to pay the cross subsidy charge to the WESCO*, the 3rd Respondent, has filed this appeal.*

.....

*10. In the light of these rival contentions the main question that arises for consideration is this-**whether the Appellant is liable to pay the cross subsidy charges to the WESCO, the distribution licensee in the area of supply during the period from 30.03.2008 to 30.04.2009 when the WESCO was***

not in a position to supply additional power demanded by the Appellant*?*

…

17. ***It is settled law that the underlying philosophy behind levy of surcharge is that the consumer must compensate for the loss of cross subsidy to the distribution licensee.*** *It cannot be disputed that the tariff is designed by the State Commission keeping in view of the aforesaid principle. Therefore, it cannot be contended that the surcharge is not payable even after availing the status of the Open Access customer. Mere submitting the application for availing the power is not enough to put the entire responsibility on the distribution licensee."*

19. The next case the Appellant has relied upon is the judgment dated 28th April, 2010 in Appeal No.32 of 2009 in the case of Chhattisgarh State Power Distribution Co. Ltd v/s Salasar Steel and Private Limited and others. The relevant portion of the judgment is as follows:

".....

11. The Cross Subsidy Surcharge, which is referred to in the proviso to sub section (2) of section 42 of the Act, is a compensatory charge. It does not depend upon use of distribution licensee's lines. ***It is a charge to pay any compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the Open Access the consumer would have taken the quantum of power from the distribution licensee***

and in the result the consumer would have paid tariff applicable for such supply which would include an element of Cross Subsidy Surcharge on certain other categories of consumers. *On this principle, it has to be held that Cross Subsidy Surcharge is payable irrespective of whether the lines of the distribution licensees are used or not.*

12. As a matter of fact, the State Commission has directed the respondents to pay the Cross Subsidy Surcharge to the Appellant being distribution licensee which would be in the interest of the consumers. To this effect, this Tribunal has given a judgment in Appeal No. 119 of 2009; Chhattisgarh State Distribution Company Limited versus Aryan Coal Benefication dated 09.02.10. Therefore, the second contention also would fail".

20. In the 4th Case, the Appellant has relied upon the judgment dated 3rd October 2012 in Appeal No 193 of 2011 in the matter of DLF Utilities Ltd v/s Haryana Electricity Regulatory Commission and others. The relevant portion of the judgment is as follows:

"1. The appeal presents a pure legal question as to whether the appellant which is a Company engaged in the generation of electricity is liable to pay cross-subsidy surcharge even when no Open Access has been availed of by it and uses its own dedicated transmission lines and does not use the network of Dakshin Haryana Bijli Vitran Nigam Ltd., the respondent No.2 herein. The Haryana Electricity Regulatory Commission by the impugned order dated 11.08.2011 held that even though Open Access on the distribution system of the respondent No.2 was not

availed of by the appellant it was required to pay cross-subsidy surcharge in view of the fact that the appellant has been providing electricity to the owners of seven commercial buildings who are allegedly engaged in the business of leasing out space to numerous tenants so as to enable them to operate their respective businesses.

.....

22.....So far as the issue in the present appeal is concerned, there is no conflict between Jindal Steel and Aryan Coal. The argument of the CSEB was that the supply from a CPP or even under section 10 (2) is permissible only when the same is made by use of the grid or the transmission lines of the distribution licensee by use of Open Access, and unless Open Access is availed of supply cannot be made. This contention was negated by the Tribunal holding that it will not be correct to say that even if electricity generated by a CPP or a generation company can be supplied to a consumer without the use of the grid such a supply will not be permissible. The observation was made in that context. What has been provided in sub-section (2) of section 9 has been incorporated through amendment by the Amending Act 26 of 2007 with the qualification that in case of a captive generating plant no license is required for the purpose and the Tribunal after discussing the effect of amendment in section 9 of the Act vis-s vis section 10 held that Section 10 even before the aforesaid amendment did not allow distribution.

21. The perusal of the facts and findings given in the above judgment would indicate the following aspects with regard to the issue:

(a) The Cross Subsidy Surcharge, which is dealt with under the proviso to sub-section 2 of Section 42, is a compensatory charge.

(b) The philosophy behind levy of surcharge is that the consumer must compensate for the loss of cross subsidy to the distribution licensee.

(c) The Cross Subsidy Surcharge has to be paid in compensation to the distribution licensee irrespective of whether its line is used or not in view of the fact that but for the Open Access the consumers would have taken the quantum of power from the licensee and in the result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers.

(d) Therefore, it cannot be claimed that the surcharge is not payable even after availing the status of the Open Access customer.

22. So, the facts of the above cases would reveal that there was only one Distribution Licensee in the area where the consumer is located. None of these cases involves the parallel licensing area, like the present case.

23. The principle laid down in these cases is that the Cross Subsidy Surcharge is a charge to be paid in compensation to the distribution licensee irrespective of whether its system

is used or not in view of the fact that but for the Open Access the consumers would have taken the quantum of power from the licensee and in the result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers. This principle laid down by this Tribunal in these cases, cannot be applied to the instances involving common area of supply of two (or more) distribution licensees.

24. No doubt, the Cross Subsidy Surcharge is a compensatory charge. When a subsidizing consumer takes supply from any other source by seeking Open Access, the amount of cross subsidy it was paying to the licensee would also be lost. This would put burden on remaining consumers particularly the subsidized consumers. In order to mitigate the loss of cross subsidy, the legislature has introduced the concept of Cross Subsidy Surcharge. It cannot be said that the Cross Subsidy Surcharge is required to compensate the distribution licensee of the area. In fact, the Cross Subsidy Surcharge is required to compensate the subsidized consumers of the distribution licensee.

25. The rational provided in the findings that but for the Open Access the consumers would have taken the quantum of power from the licensee and in the result, the consumer would have paid tariff applicable for such supply which

would include an element of cross subsidy of certain other categories of consumers would not be applicable to situation of the present case.

26. One of the objects of the 2003 Act is to promote competition. The above doctrine, if applied to areas having more than one distribution licensee, would defeat the purpose of the competition. Presently, most parts of the country are served by one distribution licensee only. Sixth proviso to Section 14 of the Act provide for multiple distribution licensee in the same area of supply through own distribution network. Therefore, second distribution licensee in any area will have to lay down its own network and all the consumers, who would opt to take supply from new licensee, will have to pay Cross Subsidy Surcharge of the existing licensee. This would make competition in distribution impossibility.

27. If the doctrine of *'but for the Open Access the consumers would have taken the quantum of power from the licensee'* in situation of multiple licensee were to be applied, it is not only the Group III consumers who would be liable to pay Cross Subsidy Surcharge, but even where a new consumer were to enter the common license area and take a brand new connection from either of the licensees, the other licensee may claim Cross Subsidy Surcharge even from

such new consumer. Such a situation could never be contemplated under the Act.

28. Similarly, if a new consumer in the common license area were to seek Open Access for supply of electricity from outside the common license area at transmission level, both the distribution licensees of the area would claim for payment of Cross Subsidy Surcharge, since such a consumer would be depriving both the distribution licensees of the Cross Subsidy.

29. In other words, if the doctrine of 'but *for the Open Access the consumers would have taken the quantum of power from the licensee'* in situation of multiple licensee were to be applied, even Group I consumers i.e. those connected to RInfra and receiving supply from RInfra may well face a demand for Cross Subsidy Surcharge from Tata Power on the ground that but for the RInfra such consumers would have taken supply from the Tata Power. Similarly, RInfra may claim Cross Subsidy Surcharge from the existing consumers of Tata Power on the ground that but for the Tata Power, those consumers would have taken supply from RInfra. This is not contemplated under the law.

30. The Appellant has relied upon the provisions of Section 40 of the 2003 Act in support of its claim for Cross Subsidy Surcharge from Group III consumers. The Appellant has

contended that the even Section 40 of the Act provides that usage of the distribution network is not essential for the claim of Cross Subsidy Surcharge from the consumers. This submission is misconceived.

31. Let us now quote Section 40 of the Act which reads as under:

> ***"40. Duties of transmission licensees.***—*It shall be the duty of a transmission licensee—*
>
> *…*
>
> *(c) To provide non-discriminatory Open Access to its transmission system for use by—*
>
> *(i) Any licensee or generating company on payment of the transmission charges; or*
>
> *(ii) any consumer as and when such Open Access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:*
>
> *Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:*

32. The reading of the above Section would clearly indicate that the Open Access in transmission system to any consumer is to be provided when the Commission has permitted Open Access in the distribution. Hence, it cannot be said that

Open Access in transmission to consumer is independent of distribution.

33. There is some rationale behind the above provision. The definition of Distribution system given in Section 2(19) of the Act read with Rule 4 of Electricity Rules 2005 would clearly indicate that any electrical system connecting with consumer's premises is a part of distribution system. Section 2(19) of the Act is extracted below:

> *(19) "distribution system" means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers;*

34. Rule 4 of Electricity Rules 2005 is quoted below:

> ***"4. Distribution system.**—The distribution system of a distribution licensee in terms of sub-section (19) of section 2 of the Act shall also include electric line, sub-station and electrical plant that are primarily maintained for the purpose of distributing electricity in the area of supply of such distribution licensee notwithstanding that such line, sub-station or electrical plant are high pressure cables or overhead lines or associated with such high pressure cables or overhead lines; or used incidentally for the purposes of transmitting electricity for others."*

35. The reading of the above two provisions would make it clear that any electrical system connecting delivery point on the

transmission line and the consumer's premises is a part of distribution system of the distribution licensee.

36. There cannot be supply of electricity without the use of distribution system.

37. The Appellant's challenge in this Appeal to the findings of the State Commission in the Impugned order is that the consumers who have switched over from the Appellant (RInfra-D) to Tata Power Company and receive supply of electricity on Tata Power's Electricity lines are not liable to pay Cross Subsidy Surcharge to the Appellant.

38. The Appellant's main contention is that even if a consumer is no longer connected to Appellant's distribution infrastructure, the consumer would still liable to pay Cross Subsidy Surcharge to the Appellant since such surcharge is compensatory in nature and is payable by all consumers who choose to take supply from any other entity other than the original distribution licensee from whom they were taking supply.

39. Let us now see the findings rendered by the State Commission in the impugned order on this issue:

> "……..
>
> *However, the Commission is of the view that it is necessary to give a ruling on the issue of applicability of the cross-subsidy surcharge, i.e., it is necessary to*

identify which set of consumers will be liable to pay the cross-subsidy surcharge. Based on the material available to the Commission, submissions of the stakeholders on this issue, and the Commission's analysis of the issues involved, the Commission hereby rules as under in this regard:

a) Had there been no migration of consumers, and all the consumers had continued to be connected to RInfra-D for receiving supply from RInfra-D, this issue would not have arisen, as there would have been no loss of cross-subsidy due to migration. The issue of levy of cross-subsidy surcharge has arisen because of the loss of cross-subsidy on account of migration of consumers from RInfra-D to TPC-D, in terms the Commission's Interim Order dated October 15, 2009 in Case No. 50 of 2009 considering the Judgment of the Hon'ble Supreme Court of India dated July 8, 2008 in Civil Appeal No. 2898 of 2006 with Civil Appeal No.s 3466 and 3467 of 2006, wherein the Hon'ble Supreme Court ruled as under:

> *"The concept of wheeling has been introduced in the 2003 Act to enable distribution licensees who are yet to instal their distribution line to supply electricity directly to retail consumers,* ***subject to payment of surcharge in addition to the charges for wheeling*** *as the State Commission may determine. ..."(****emphasis added****)*

b) The consumers can be classified into three Groups as elaborated in Section 6.3 above.

c) As elaborated in Section 6.3 above, out of the total consumer base of 1.59 lakh consumers who have 'migrated' from RInfra-D to TPC-D till June 30, 2011, only 5031 consumers are connected on TPC-D network, while the remaining 1.54 lakh consumers continue to be connected to RInfra-D network.

d) Given this background, the applicability of the cross-subsidy surcharge for the above Groups and the rationale for the same are discussed below:

i) Group I: will not have to pay the cross-subsidy surcharge, since they continue to be consumers of RInfra-D, both for Wires as well as Supply, and are paying the extant cross-subsidy through their tariff

ii) Group II: will have to pay the cross-subsidy surcharge, since they continue to be consumers of RInfra-D for Wires, and cross-subsidy surcharge has to be levied, to meet the requirements of current level of cross-subsidy.

iii) Group III: will not have to pay the cross-subsidy surcharge, since they are no longer consumers of RInfra-D, either for Wires or Supply, and charges can be levied by a licensee only on a 'consumer'.

e) Since the scheme of migration has been formulated in accordance with the above-referred Hon'ble Supreme Court judgment, the cross-subsidy surcharge will be applicable from the date of migration, till such time the respective

consumer disconnects from the distribution network of RInfra.

The applicability of charges for recovery of regulatory assets and the cross-subsidy surcharge is summarised in the following matrix:

S.No.	***Particulars***	***Applicability of Charges to***		
		Group I	***Group II***	***Group III***
1.	***Charges for recovery of Regulatory Assets***	***Yes***	***Yes***	***No***
2.	***Cross Subsidy Surcharge***	***No***	***Yes***	***No***

Note*:*
Group I: *Consumers who are receiving supply from RInfra-D through RInfra-D's wires*

Group II: *Consumers who are receiving supply from TPC-D through RInfra-D's wires*

Group III*: Consumers who are receiving supply from TPC-D through TPC-D's wires*

40. The immediate issue in the present Appeal is the challenge to the impugned order in so far as it holds that Group III consumers are not liable to pay Cross Subsidy Surcharge.

41. At the outset, it shall be stated that Group III consumers cannot be construed to be consumers of the Appellant. For this, we need to refer to the definition of the consumer as found in Section 2 (15) of the Electricity Act, 2003 which reads as under:

"(15) "Consumer" means any person who is supplied with electricity for his own use ***by a licensee*** *or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity* ***with the works of a licensee****, the Government or such other person, as the case may be"..*

42. The above definition would make it clear that the Group III consumer i.e. a person receiving supply for its own use from a licensee. In this case, Group III consumer is receiving supply from the Tata Power. Therefore, the Group III consumer is a consumer of the Tata Power. Merely, because such a person is not any more connected with the works of the Appellant, after having disconnected from the Distribution of the Appellant will not make such a person fall within the definition of the consumer. Since, the consumer is connected to the Tata Power Company for the purpose of receiving supply, such a person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee would render such a person, is connected to the distribution system of Tata Power Company Limited.

43. When such a person is connected to Tata Power with the works of a licensee and receiving supply from Tata Power, there could be no question of the Appellant seeking to

claim any right to levy Cross Subsidy Surcharge u/s 42 (3) of the Act on such a person.

44. It is not the case of the Appellant that Group III consumers are availing Open Access from the Appellant and are thus liable to pay Cross Subsidy Surcharge to the Appellant. The Appellant is only relying upon the findings of this Tribunal in a series of judgment where the cross subsidy charges have been held to be compensatory charge which is leviable.

45. The above said judgments would not be applicable to the present facts of the case for the following reasons:

(a) None of the judgments cited by the Appellant dealt with the issue of parallel licensing like the situation found in the present case.

(b) None of those judgments dealt with the issue where there is a consumer in the common license area of two distribution licensees;

(c) None of those judgements dealt with the issue of consumer connected with the network of one licensee and receiving supply from such licensee having to pay Cross Subsidy Surcharge to another licensee in the same area of supply.

(d) All those judgements only dealt with the factual situation where a dedicated transmission lines was used by a generating plant to supply electricity to its consumers who were situated in the area of a single distribution licensee.

(e) All those judgments proceeded on the presumption that if the consumer in those cases was taking supply through dedicated transmission lines, such a consumer was depriving the sole distribution licensee of the revenue and in that event such a consumer would have to pay the Cross Subsidy Surcharge to the sole distribution licensee.

(f) All these judgments proceeded on the basis that by the consumer taking supply through a Dedicated Transmission Line, the sole distribution licensee in the area who would normally have the legitimate expectation of supply to such consumer would have lost the opportunity to supply electricity to such consumer. Therefore, these judgments are of no use to the Appellant in the present case.

46. The principle of Cross Subsidy Surcharge being a compensatory charge would not at all be applicable to the present case for the **following reasons:**

(a) In the case of a consumer in the common license area of the two distribution licensees such consumer has the right to choose to take supply from one licensee or the other;

(b) By choosing one licensee over the other such a consumer has not deprived the other licensee of its tariff since in a parallel licensing situation neither of the distribution licensee could claim a right or monopoly over any consumer;

(c) In a parallel licensee situation, the mere fact that a consumer chooses one of the two licensees does not lead to the deprivation to the other licensee.

(d) If such other licensee is not deprived of the business of such consumer there cannot be no question of such other Distribution Licensee having to be compensated by the consumer for not taking supply from it.

47. Under those circumstances, the contention of the Appellant cannot be accepted.

48. If the Appellant's contentions were to be accepted, there may be analogous situation. Those **situations are as follows:**

(a) If a consumer in the common license area were to seek Open Access for supply of electricity from outside the common license area, on the principle of compensatory charge, both the distribution licensees of the area may claim for payment of Cross Subsidy Surcharge, since such a consumer would be depriving both the distribution licensees.

(b) The Act envisages "two or more" Distribution Licensees in an area of supply. Hence, the problem will be aggravated manifold because if there are many distribution licensees in an area of supply, then if the Appellant's argument is accepted, such a consumer may have to pay Cross Subsidy Surcharge to all the Distribution Licensees in the area. In such a situation, the life blood of the Act and all the statutory provisions relating to Open Access will be rendered otiose and inoperative.

(c) If the principle of compensatory charge in such situation were accepted, it is only the Group III consumers who would be liable to pay Cross Subsidy Surcharge but even in a situation where a new consumer were to enter the common license area and take a brand new connection from one of the licensees, the other licensees may claim Cross

Subsidy Surcharge even from such a new consumer. That cannot be the objective of the Act.

(d) If the Appellant's arguments were to be accepted, even Group I consumers i.e. those connected to Appellant and receiving supply from Appellant may well face a demand for Cross Subsidy Surcharge from Tata Power and vice versa on the ground that the licensee to whom the consumer is not connected and is not taking supply from has been deprived of Cross Subsidy Surcharge.

(e) Similarly, if the Appellant's contentions were to be accepted even a consumer who surrenders his connection and moves out of the license area and connects to another distribution licensee in another State would still continue to be liable to pay Cross Subsidy Surcharge to the original distribution licensee simply because by surrendering his connection he has deprived the original distribution licensee of the tariff.

49. These situations in fact would certainly defeat the objective of the Electricity Act, 2003.

50. Section 43 of the Electricity Act imposes an obligation upon a distribution licensee to supply electricity upon demand to any person whose premises are situated within the area of supply of such distribution licensee and provide electric

plant and electric lines for such purpose if required. In the case of multiple distribution licensees in the same area of supply, the said obligation is applicable to each distribution licensee in the concerned area of supply. The consumer thus has the legal right and complete freedom to seek supply of electricity from any of such multiple distribution licensees operating in the same area of supply. In fact, the purpose of multiple distribution licensees operating in the same area of supply is to promote competition and offer the consumers a choice of supply of electricity.

51. The consumer base is dynamic and the consumers are not tied to the business of any particular licensee and have a right to choose between the competing distributions licensees in the same area of supply. Imposition of Cross Subsidy Surcharge upon consumers, who exercise such choice, in effect renders the choice granted to the consumers illusory.

52. The migration of consumers from one distribution licensee to another distribution licensee is inherent in the concept of parallel licensing. Therefore, imposing any Cross Subsidy Surcharge or any other conditions for such migration is contrary to the 6th proviso of Section 14, Section 43 and Section 50 of the Act.

53. The Cross Subsidy Surcharge, if at all, can only be imposed in a case where a consumer seeks to source electricity through Open Access under Section 42 (2) read with Section 42(3) of the Act. The migration of a consumer from one distribution licensee to a parallel distribution licensee in the same area of supply, having no connection whatsoever, with the first distribution licensee is not Open Access under the above provisions and cannot be subject to payment of Cross Subsidy Surcharge.

54. This can be viewed from yet another angle as well.

55. Cross Subsidy Surcharge is a charge that is compensatory in nature for loss of cross subsidy caused to a distribution licensee, when a consumer seeks Open Access and moves out of the regulated tariff regime and is freed from the burden of bearing the cross subsidy of a distribution licensee. In this case, the consumer is not an Open Access consumer but it is a consumer who receives supply of electricity from the Tata Power, another Distribution licensee u/s 43 of the Act through the network of the same licensee. The consumer has to pay the charges for consumption of electricity at the tariff determined by the State Commission which also includes the element of cross subsidy. In such circumstances, there cannot be any justification for requiring a consumer of the Tata Power

to bear the additional burden of compensating the Appellant by way of Cross Subsidy Surcharge.

56. The imposition of Cross Subsidy Surcharge upon Group III consumers has no legal basis under the Act. The Act does not contain any provision allowing a distribution licensee to levy any charges upon consumers who have completely severed their relationship with the distribution licensee. The Act does not prescribe imposition of Cross Subsidy Surcharge upon Group III consumers merely on account of such consumers having been connected to such distribution licensee.

57. By seeking imposition of Cross Subsidy Surcharge on Group III consumers, the Appellant in fact seeks to impose a condition or severance of relationship by a consumer with the Appellant. It is relevant that Section 50 of the Act provides for formulation of a supply code by the state Commission pursuant to which the State Commission had issued the Maharashtra Electricity Regulatory Commission (Electricity Supply Code and other Conditions of Supply) Regulations, 2005 ("**Supply Code"**). Clause 6.6 of the Supply Code entitles a consumer to terminate its agreement of supply with the distribution licensee by giving notice of 30 days. There is no provision in the Supply Code enabling a distribution licensee to impose any charges upon a consumer on account of disconnection of

such consumer. In terms of the Act and Supply Code, upon severance of the relationship between a distribution licensee and its consumer, the consumer is only liable in respect of payment of its past dues to the distribution licensee. Thus, the claim for Cross Subsidy Surcharge upon Group III consumers who are disconnected from the Appellant amounts to imposing a condition for disconnection. This is not justified or permitted under the Act or the Supply Code.

58. In fact, the Appellant's claim to Cross Subsidy Surcharge would imply that it seeks to be compensated for loss of consumers to a competing distribution licensee. For this, there is no statutory basis.

59. Section 62 (1) (d) of the Act, 2003 provides that in case of distribution of electricity in the same area of supply by two or more distribution licensees, the State Commission may fix only maximum ceiling of tariff for retail sale of electricity. Section 61 of the Act mandates that while determining tariff, the State Commission is required to be guided by the factors that encourage competition and safeguard the interests of the consumers.

60. In view of the above circumstances, in a situation where there are parallel distribution licensees, the State Commission can regulate the tariff and charges payable by

a consumer in a manner that promoted competition and consumer choice.

61. Thus, the imposition of Cross Subsidy Surcharge upon consumers who have completely severed their relationship with the Appellant is contrary to such mandate under the Act.

62. As indicated above, the consumer has got the right to move to such distribution licensee of his choice which is more efficient and offers more competitive prices. Similarly, such consumers have also freedom to switch back to the original distribution licensee namely the Appellant if the Appellant offers more competitive prices and efficient service. The imposition of Cross Subsidy Surcharge upon Group-III consumers would grossly undermine the economic rational and advantage that a consumer derives by migrating to a more efficient distribution licensee offering lower tariffs. Seeking to impose Cross Subsidy Surcharge on the consumers would be extremely onerous and also severely impact the consumers of the Tata Power.

63. A distribution licensee has a Universal Supply Obligation (USO) under Section 43 of the Electricity Act to supply electricity to any consumer within its area of supply who makes a demand. The sixth proviso to Section 14 of the

Act expressly recognizes that there can be more than one distribution licensee for a given area. Tata Power being a Distribution Licensee under the Act in its licensed area is therefore, under same obligation as the Appellant to supply electricity to all consumers seeking supply from it in their common area of supply.

64. Section 45 read with Section 62 of the Act mandates that the charges levied by such distribution licensee from the consumers for supply of electricity in discharge of its Universal Service Obligation under Section 43 is required to be in accordance with the tariff determined by the State Commission under Section 61 of the Act. Thus, the supply of electricity by a Distribution Licensee to a consumer pursuant to Section 43 falls within a regulated tariff regime.

65. Unlike a Distribution licensee mandates u/s 43, a supplier supplying electricity through Open Access, is not under a statutory obligation to supply to and every consumer who demands supply from it, it has no Universal Service Obligation. Such a supplier is therefore, free to choose whichever consumer it wishes to take, once Open Access is granted to the said consumer.

66. In the instant case, we find that the Tata Power's relationship with Group III consumers is established u/s 43 of the Act is not disputed. Therefore, such consumers are

already liable to pay regulated tariff to the Tata Power including the element of cross subsidy to subsidize its consumers. In such a scenario, levy of Cross Subsidy Surcharge by the Appellant on Group III consumers has no basis under the Act, merely on account of being its erstwhile consumers.

67. In a case of supply of electricity other than under Section 43 of the Act, the supplier supplying electricity through Open Access is not in the same position as a distribution licensee supplying u/s 43 of the Act in discharge of its Universal Service Obligation. Such a supplier does not have a Universal Service Obligation under Section 43 of the Act. In such a scenario, the Cross Subsidy Surcharge is justified as a measure of ensuring a level playing field between such supplier and the distribution licensee.

68. On the other hand, in case of parallel distribution licensees as in the present case, both the licensees are subject to Universal Service Obligation. As such, they are required to supply electricity at regulated tariff fixed by the State Commission. Such tariff recoverable by both licensees already has an element of cross subsidy built in it. Hence, there is no justification for surcharge to be levied upon a consumer who migrates from one licensee to the other, as a compensatory measure.

69. The above position finds support in the various provisions of the Act itself as explained below:

(a) Section 42 (2) provides for the grant of Open Access by the State Commission as a right that may be exercised by the consumers to seek supply of electricity from any person other than the area of Distribution Licensee subject to payment of Cross Subsidy Surcharge.

(b) Section 10(2) deals with the duties of generation companies. It has been expressly made subject to Section 42(2) of the Act. Thus, a generating company may supply electricity directly to a consumer subject to Open Access Regulations u/s 42 (2).

(c) As a result, a consumer who receives supply of electricity from a generating company would be subject to levy of a Cross Subsidy Surcharge regardless of whether the network of the distribution licensee is used or not.

Therefore, there is a statutory basis for levy of Cross Subsidy Surcharge on a consumer who receives supply of electricity from a generating company pursuant to Section 10(2) of the Act.

(d) On the other hand, there is no provision in the Act that makes a consumer who switches over to a

parallel distribution licensee in exercise of his right under Section 43 of the Act liable to pay Cross Subsidy Surcharge to the erstwhile Distribution Company.

70. In view of the above reasoning, the findings rendered by the State Commission that the Appellant would not be entitled to recover Cross Subsidy Surcharge from Group III consumers, is perfectly justified.

71. The **Second Issue** raised by the Appellant is **relating to the Sharing of Savings in Interest on Working Capital.**

72. While hearing the matter, both the parties have agreed that this issue is fully covered in favour of the Appellant in the judgment dated 10.9.2012 in Appeal No.202 and 203 rendered by this Tribunal.

73. In view of the submissions made by the parties, this issue does not survive.

74. The **Third Issue** is relating to **Interest on Delayed Payment on Non-Tariff Income.**

75. It is pointed out by the Appellant that the State Commission in its Affidavit in reply has admitted that such amounts have to be restated and added back to the ARRs of the respective years to undo the effect of double counting and the Appellant may pray for the same while submitting its

Petition for the next year and in that event, the State Commission will make the necessary adjustments.

76. On the basis of the reply, the learned Counsel for the State Commission has endorsed the statement found available in the reply made by the State Commission.

77. In view of the reply of the State Commission, we are of the view that this issue no longer survives.

78. Now the **4th Issue** before us for consideration is regarding **Wrong Estimation of Distribution Loss during Financial Year 2007-08 and Financial Year 2008-09 in the Impugned Order dated 29.7.2011.**

79. According to the Appellant, the directions given by this Tribunal in Appeal No.90 of 2007 with regard to Distribution Loss have not been implemented since in the said judgment, this Tribunal directed the State Commission to maintain the Distribution Loss Target at 12.1% for FY 07-08 and loss levels for FY 08-09 and FY 09-10 to be reviewed only post the availability of technical study report. But, the State Commission despite submission of the technical study report by the Appellant reduced the target distribution loss target for FY 2007-08 to 11% and for FY 08-09 at 10.75% based on actual distribution loss of 11.25% for FY 06-07 by maintaining the Distribution Loss at 11% and 10.75% for FY 07-08 and for FY 08-09

respectively, though the Appellant had claimed Target Loss of 12.1% for FY 07-08 and 11.85% for FY 08-09.

80. While opposing these contentions of the Appellant, the learned Counsel for the State Commission has made submissions in justifications of the impugned order which are two pronged. Firstly, the Commission's order dated 4.6.2008 in Case No. 66 of 2007, where by the Commission had fixed the distribution loss target for FY 2007-08 to 11% and for FY 08-09 at 10.75% based on actual distribution loss of 11.25% for FY 06-07. This order was not challenged by the Appellant. Therefore, this has attained finality. Accordingly, the State Commission has maintained the distribution loss reduction level for FY 2007-08 and FY 2008-09 at the same level. This cannot be challenged now.

81. Secondly, since the actual target loss during the Financial Year 2006-07 was 11.25%, the State Commission had no other option but to reduce it marginally to 11% for the Financial Year 2007-08.

82. For considering these rival contentions, it would be desirable to record the chronology of the events to understand the import of the **issue as under**:

(a) **3.10.2006**: MERC passed Tariff Order in Case No. 25 of 2005 and 53 of 2005 dated 03.10.2006 for FY 06-07 and allowed distribution loss at 11.52%.

(b) **04.04.07**: This Tribunal passed Judgment in Appeal No. 251 of 2006 dated 04.04.2007 and allowed distribution loss of 12.1% **based on Appellant's submission that it could not achieve the distribution loss of 11.52% as MERC had disallowed certain capital expenditure**.

(c) **24.04.07**: MERC passed Multi Year Tariff (MYT) Order in Case No. 75 of 2006 dated 24.4.2007 for FY 07-08, FY 08-09 and FY 09-10 and projected a distribution loss of 11.5% for Financial Year 2007-08 and asked the Appellant to conduct a technical loss study.

(d) **11.12.07**: This Tribunal passed Judgment in Appeal No.90 of 2007 dated 11.12.2007 allowed distribution loss to be retained at 12.1% for FY 2007-08 and loss levels to be reviewed after availability of Technical Study Report and installation of electrostatic meters in place of mechanical meters. The relevant portion of the judgment reads as under: "**There was no finding in the judgment with respect to the loss levels of FY 2008-09".**

(e) **04.06.08**: The MERC passed a Tariff Order in Case No.66 of 2007 dated 04.6.2008 **(APR 2007-08 & Tariff for 2008-09) restated distribution loss target at 11% for FY 2007-08 on the basis of actual distribution loss of 11.25% in FY 2006-07.**

(f) **15.06.09** The MERC passed Order in case No.121 of 2008 dated 15.6.**2009 (True Up 2007-08, APR 2008-09 & Tariff for 2009-10)** and considered target distribution loss as 11% for FY 2007-08 and calculated efficiency loss w.r.t actual losses of 11.04%. **No Appeal was preferred by the Appellant against this order. The Appellant has contended that it did not file appeal against this order due the fact that Appeal No. 171 of 2008 was already before this Tribunal on the same very issues. This contention of the Appellant is not tenable.**

(g) **28.08.09** : This Tribunal passed the judgment in Appeal No.117 of 2008 dated 28.8.2009 (Against Tariff Order dated 4.6.2008 in Case No.66 of 2007) and was pleased to allow distribution losses at 12.1% for FY 2006-07. In the said Appeal No.117 of 2008, the Appellant had **prayed for setting of target distribution loss as 11.25%.** However, the Judgment in Appeal No.117 of 2008 dated 28.8.2009 did not contain a finding on distribution losses for FY

2007-08. The only finding is in respect of the Distribution Losses for FY 2006-07. Thus, the findings of the Commission relating to loss figures for 2008-08 and 2008-09 have attained finality.

(h) **29.07.11** The MERC passed Order in case No.72 of 2010 dated 29.7.2011 (**True Up for 2008-09, APR 2009-10 & Tariff for 2010-11)** reiterated the MERC Order 15.6.2009 and considered distribution losses for FY 2007-08 as 11% as against the Appellant's request for consideration of 12.1% target loss level. This is the Impugned Order in the present Appeal.

83. From the above factual details, the following aspects would emerge:

(a) The Commission fixed target distribution level for the Appellant for FY 2006-07 on 3.10.2006 i.e. after half of the year was over.

(b) On 4.4.2007, the Commission fixed the loss reduction trajectory at 11.5%,11% and 10.75% for FY 2007-08, FY 2008-09 and FY 2009-2010 respectively.

(c) On 4.6.2008 the Commission reduced the distribution loss reduction targets for FY 2007-08 to 11% and for 2008-09 to 10.75% as against 11.5% and 11% for FY 2007-08 and FY 2008-09 respectively. Target Loss Level for FY 2007-08 reduced after the year was over.

It also reduced the target level for FY 2008-09 during the period itself.

84. The analysis of the above chronology of events would indicate that the Commission had been fixing distribution loss reduction targets for a particular period after the said period is over.

85. On a perusal of the Commission's Tariff Regulations, it is clear that the Commission, in order to approve the ARR of a licensee for each financial year of the control period, ascertains distribution losses and provides a trajectory of reduction based on the potential of reduction of loss. Having already factored in potential reduction, any further reduction is rewarded as efficiency gains and any failure to achieve the approved loss as per the trajectory is treated as efficiency loss.

86. In the light of the aforesaid, for any Control Period, the Commission is expected to ascertain the potential of reduction of technical & commercial loss so as to fix the trajectory under Regulation 16 so that the licensee is aware of the expectation of the Commission for distribution loss reduction target in the system. The licensee thus endeavours to better the known trajectory provided for since any variation therein would entitle the licensee to efficiency gain.

87. Such trajectory is to be provided at the beginning of the Control Period since it would entail regulatory certainty to all stakeholders.

88. The distribution licensee acts on the basis of the prefixed targets which are fixed at the beginning of the Control Period and such trajectory would not be subject to any change depending upon the actual performance of the licensee during the entire control period or prior period thereto. Otherwise the sanctity of the trajectory given as per the Regulations is lost.

89. The Appellant in this Appeal is seeking to rely upon and enforce the findings of this Tribunal in Appeal No.90 of 2007 against the order dated 4.4.2007 which was the MYT order. However, in respect of the loss level for FY 2007-08, the APR order of 4.6.2008 i.e. the trued up number has not been disturbed by this Tribunal. Furthermore, the final true-up number of loss levels for FY 2007-08 in the Order dated 15.6.2009 has also not been challenged by the Appellant.

90. The question that arises is whether in the present Appeal against the true-up for 2008-09, APR for 2009-10 and Tariff for 2010-11, the Appellant could seek to contend that the MYT Projection number for FY 2007-08 would have

precedence over the Trued Up number for that year which has not been challenged.

91. The very fact that the actual losses have been significantly lower than the distribution losses trajectory stipulated by the State Commission would show that the State Commission has been careful while stipulating the loss rejection trajectory taking note of the fact that the Appellant has already earned a significant amount of efficiency gain on this account.

92. According to the State Commission, the actual intrinsic losses in the system were lower than that projected by the Appellant. Hence, the trajectory of distribution losses considered by the State Commission for the Financial Year 2007-08 and Financial Year 2008-09 are based on the trued-up figures.

93. It is true that the very purpose behind fixing the distribution loss target is to ensure that the Distribution losses in the system are constantly reduced. If the target of distribution losses for subsequent years were not reduced despite the lower figures of distribution loss having actually being achieved by the licensee in the previous years, such situation would lead to undue benefits in the hands of the licensee at the cost of the consumer. It is also true that the target for loss reduction has to be fixed before the start of

the year. Reducing the target after the end of the year would amount to penalising the licensee who had achieved better loss reduction than the previously set target.

94. The Commission had changed the loss reduction target for FY 2007-08 and 2008-09 in its Order dated 4.6.2008 and kept at the same level in its Order dated 28.8.2009 truing up for FY 2007-08 and FY 2008-09. The order dated 28.8.2009 has not been challenged by the Appellant and, therefore, the loss figures adopted in this order have attained finality. Accordingly, the same cannot be questioned now in this Appeal.

95. **<u>Summary of Our Findings:</u>**

a) No doubt, the Cross Subsidy Surcharge is a compensatory charge. When a subsidizing consumer takes supply from any other source by seeking Open Access, the amount of cross subsidy it was paying to the licensee would also be lost. This would put burden on remaining consumers particularly the subsidized consumers. In order to mitigate the loss of cross subsidy, the legislature has introduced the concept of Cross Subsidy Surcharge. The rational provided in the findings that *but for the Open Access the consumers would have taken the quantum of*

power from the licensee **and in the result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers would not be applicable to situation having more than one licensee.**

b) One of the objects of the 2003 Act is to promote competition. The above doctrine, if applied to areas having more than one distribution licensee, would defeat the purpose of the competition. Presently, most parts of the country are served by one distribution licensee only. Sixth proviso to Section 14 of the Act provide for multiple distribution licensee in the same area of supply through own distribution network. Therefore, second distribution licensee in any area will have to lay down its own network and all the consumers, who would opt to take supply from new licensee, will have to pay Cross Subsidy Surcharge of the existing licensee. This would make competition in distribution impossibility.

c) The Commission has changed the loss reduction target for FY 2007-08 and 2008-09 in its Order dated 4.6.2008 and kept at the same levels in its Order dated 28.8.2009 truing up for FY 2007-08

and FY 2008-09. The order dated 28.8.2009 has not been challenged by the Appellant and, therefore, the loss figures adopted in this order have attained finality. Accordingly, the same cannot be questioned now in this Appeal.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 14th Nov, 2013

√REPORTABLE/~~NON-REPORTABALE~~