

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NO. 17 of 2016 &  
I.A. NOS. 35 OF 2016 & 838 OF 2017**

**Dated : 5<sup>th</sup> August, 2019**

**PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**In the matter of:**

**Tata Power Delhi Distribution Limited**  
NDPL House, Hudson Line,  
Kingsway Camp  
Delhi-110 009

.... **Appellant**

**VERSUS**

- 1. M/s Duggar Fiber Pvt. Ltd.**  
C-10, S.M.A., Co-op Industrial Estate Ltd.,  
G.T. Karnal Road  
New Delhi-110 033
- 2. Delhi Electricity Regulatory Commission**  
Viniyamak Bhawan  
C-Block, Shivalik, Malviya Nagar  
New Delhi-110 017
- 3. State Load Despatch Center**  
Through its General Manager  
33kV Grid S/Stn., SLDC Building,  
DTL, Minto Road,  
New Delhi-110002

.... **Respondents**

Counsel for the Appellant(s) : Mr. Alok Shankar  
Mr. Mahip Singh

Mr. Anurag Bansal (Rep.)

Counsel for the Respondent(s): Mr. M.K. Pandey  
Mr. Ankit Kumar  
Mr. Sanghmitra Nanda for R-1

Mr. Manu Seshadri  
Mr. Samarth Chowdhury  
Ms. Tanvi Rana for R-2

## **J U D G M E N T**

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

1. Tata Power Delhi Distribution Limited (in short, the “**Appellant**”) has filed the present Appeal, under Section 111 of the Electricity Act, 2003 (“**Electricity Act**”) assailing the correctness of the **impugned Order** dated 23.12.2015 passed by Delhi Electricity Regulatory Commission, New Delhi (in short, “**State Commission**”) in Petition No. 43 of 2015 wherein the State Commission while adjudicating a petition under Section 62(6) and 142 of the Electricity Act, 2003 directed refund of alleged excess cross subsidy surcharge collected from Respondent No.1/ M/s Duggar Fibers Pvt Ltd (hereinafter called “**DFPL**”).

### **2. Brief facts of the Appeal:**

2.1 Tata Power Delhi Distribution Limited (in short, “**Appellant**”), is a company under the provisions of Companies Act, 1956. The Appellant is a joint venture of the Tata Power Company Limited and Delhi Power Company Limited (fully owned by the Government of NCT of Delhi) with majority shareholding of 51% being with the Tata Power Company Limited. The Appellant came into existence as a power distribution licensee after implementation of reform package initiated by the Government of

NCT of Delhi in July, 2002.

- 2.2** M/s Duggar Fiber Pvt Ltd. (in short, "**1<sup>st</sup> Respondent**"), is a consumer of the Appellant/TPDDL.
- 2.3** Delhi Electricity Regulatory Commission (in short, "**Respondent Commission**"), 2<sup>nd</sup> Respondent herein was established under the provisions of the Electricity Regulatory Commission Act, 1998 empowered to make regulations for implementation of Open Access and the Appellant and Respondent No.1, herein are obligated to abide by the same. The State Commission is also empowered to levy a surcharge on the cost of wheeling to meet the fixed costs of the distribution licensee in whose area the Open Access consumer is embedded.
- 2.4** 3<sup>rd</sup> Respondent herein is State Load Despatch Centre, Delhi which is mandated with the responsibilities to ensure safe, efficient and coordinated operation of the State Grid.
- 2.5** The Appellant, aggrieved by the impugned order dated 23.12.2015 passed by the State Commission in Petition No. 43 of 2015, has preferred the instant appeal before this Tribunal under Section 111 of the Electricity Act, 2003 on the following questions

of law.

- A. Whether the Delhi Commission failed to discharge its statutory obligation in determine the cross subsidy surcharge for the year FY 2014-15?
- B. Whether the appellant could ignore the weighted average cost of power purchase in Tariff Order of FY 2014-15 and continue to charge CSS as per Tariff Order of FY 2013-14?
- C. Whether the impugned order would result in revenue loss to the Appellant and would thus be contrary to the established norm of revenue neutrality required to be maintained in all open access transactions?
- D. Whether the impugned Order frustrates the very purpose for which cross subsidy surcharge is levied on an open access consumer?
- E. Whether the RPO Regulations can be made applicable to consumers who don't fall within the applicability clause expressly incorporated therein?
- F. Whether the Delhi Commission was right in holding that the Appellant had violated its directions, despite ratifying the same in the meeting dt. 23.06.2015?
- G. Whether the Delhi Commission could have passed the impugned Order without due process under S. 142 of the Act?

The Appellant has sought the following reliefs in the instant Appeal:

- (a) Admit the present Appeal; and

- (b) Set aside the impugned order dated 23.12.2015 passed by Ld. Delhi Commission directing return of excess cross subsidy surcharge; and/or
- (c) Pass such further or other order(s) as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case.

**3. The written submissions filed by the learned counsel, Mr. Alok Shankar, appearing for the Appellant are as under:**

**3.1** The present Appeal was filed against the Order dated 23.12.2015 passed by the 2<sup>nd</sup> Respondent/Respondent Commission in Petition No. 43 of 2015 wherein the State Commission while adjudicating a petition filed under Section 62(6) and 142 of the Electricity Act, 2003 (in short, "**Act**") directed refund of alleged excess cross subsidy surcharge collected from 1<sup>st</sup> Respondent - M/s Duggar Fibers Pvt. Ltd.

**3.2** In terms of Sections 42(2) to 42(4) of the Act, State Commissions are obligated to introduce Open Access in their jurisdiction under such terms and conditions as deemed fit. The State Commissions while determining wheeling charges for open access are required to have due regard for all relevant factors including cross subsidies and other operational constraints and may appropriately compensate these in the form of surcharge. The Respondent

Commission has been empowered to make regulations for implementation of Open Access and the Appellant herein is obligated to abide by the same; in other words upon issuance of the Regulations every distribution licensee is required to grant open access to all eligible person(s) on request. The State Commission is also empowered to levy a surcharge on the cost of wheeling to meet the fixed cost of the distribution licensee in whose area the Open Access consumer is embedded.

**3.3** In terms of the mandate of the Act, the Respondent Commission on 03.01.2006 notified the DERC (Terms and Conditions for Open Access) Regulations, 2005. As per Regulation 12(1) of the DERC (Terms and Conditions for Open Access) Regulations, 2005, Open Access consumers are required to pay open access charges as determined by the Commission or Nodal Agency.

**3.4** The Respondent Commission issued order dated 29.08.2008 for Determination of Transmission and Wheeling Charges, Cross Subsidy Surcharge, additional surcharge and other applicable surcharge under Open Access ("**2008 Open Access Order**") and directed as follows:

*13. As far as Distribution Companies are concerned, the main objective seems to be adoption of the principle of "revenue*

*neutrality” thereby implying that any loss in the revenue arising on account of the introduction of Open Access to be passed on through the ARR.*

*(i) The Cross-Subsidy Surcharge shall be calculated based on the surcharge formula laid down in Para 8.5 of the Tariff Policy issued by the Govt. of India.*

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

*Where S is the surcharge*

*T is the Tariff payable by the relevant category of consumers;*

*C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power*

*D is the Wheeling charge*

*L is the system Losses for the applicable voltage level, expressed as a percentage.*

**3.5** The Respondent Commission order dated 29.08.2008 was modified vide order dated 24.12.2013 and so as to issue the order on Determination of Transmission and Wheeling Charges, Cross Subsidy Surcharge, additional surcharge and other applicable charges under Open Access (“**2013 Open Access Order**”).

**3.6** The Respondent Commission, vide the 2013 Open Access Order, reiterated the principles in the 2008 order and laid down the following in relation to the cross subsidy surcharge:

***Cross Subsidy surcharge.***

*i. The Cross Subsidy surcharge shall be calculated based on the surcharge formula laid-down in Para 8.5 of the Tariff Policy issued by the Government of India with some assumptions taking into account some state specific issues, as specified in this order.*

*ii. Since the tariff for each category of consumers is fixed by the Commission on year-to-year basis, the surcharge shall also be decided on a year-to-year basis.*

*iii. The reduction in Cross Subsidy needs to be done duly taking into account the reduction in AT&C losses and improvement in the Performance. The Commission observes that the primary aim in Delhi has been to reduce the AT&C losses from high level of 48% to 57% to a level of about 12%-13% (BRPL 12.5%, BYPL 14.5%, TPDDL 11.5% & NDMC 9.85%) by 31st March, 2015.*

*iv. The Wheeling charges shall also vary from year-to-year on account of investments made in the sector for meeting the load growth, AT&C loss reduction and improving the performance.*

*v. Keeping in view all the above points, it is felt that it shall be appropriate to determine the surcharge on a yearly basis either along with the tariff exercise or separately.*

*vi. For calculation of the Cross Subsidy surcharge using the formula stipulated in the Tariff Policy of the Government of India, the weighted average cost of power purchase considering top 5% at the margin excluding Liquid Fuel based generation, Renewable Power and overdrawl at UI rates is to be considered. However, Merit Order Despatch of these stations is also required to be taken into account for calculating the surcharge.*

*vii. The Commission has not stipulated any merit order operation in the Tariff Order in view of the fact that all the Power Purchase Agreements which are operative at present, are being fully utilized for meeting the requirements of Delhi. Any surplus arising either during a day or during any season is mostly banked with others and re-used whenever shortages are faced in the Delhi system. However, optimum scheduling is being ensured at the time of scheduling, on a daily basis, by the SLDC, as stipulated in the Delhi Grid Code/Electricity Act, 2003.*

*viii. Based on the data available in Tariff Order for the DISCOMs issued by the Commission, the Commission has calculated the Cross Subsidy surcharge applicable to different consumers at different voltages/and different class of consumers along with certain assumptions which are indicated in Annexure – 2. Accordingly, the charges indicated in Annexure – 3, 4 & 5 shall be payable by the Open Access consumers by way of Cross Subsidy surcharge in the*

*TPDDL, BRPL & BYPL areas respectively. Wherever the cross subsidy surcharge worked out in Annexures 3, 4 & 5 is negative, no cross subsidy surcharge shall be payable by the OA consumer.*



**3.7** A bare perusal of the formula stated above would clarify that computation of Cross Subsidy Surcharge would be determined on the basis of four factors i.e. (i) **T** which is the Tariff payable by the relevant category of consumers; (ii) **C** is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power; (iii) **D** is the Wheeling charge; and (iv) **L** which is the system Losses for the applicable voltage level, expressed as a percentage. A review of any retail supply tariff order would indicate that all the above factors are specifically identified in each tariff order and are invariably different from the previous year order.

**3.8** Accordingly, the Respondent Commission has consistently acknowledged that the Cross subsidy surcharge is required to be determined annually in line with the formula specified in the National Tariff Policy. A bare perusal of the formula in the Tariff Policy adopted by the Respondent Commission would demonstrate that all the ingredients of the formula were specific to tariff order every year. In the event cross subsidy surcharge was levied at any rate other than that which would be determined as per the formula in the tariff order, the same would lead to under recovery of the annual revenue

requirement of the distribution licensee and ultimately impact the tariff for supply of power to the subsidized categories of consumers.

- 3.9** Applying the formula in the Tariff Policy on the numbers in the Tariff Order for FY 2013-14, the Respondent Commission determined the surcharge at 26.37 paise/kWh as per the prevailing tariff for the FY 2013-14 which was determined vide order dated 31.07.2013. No open access materialized during the FY 2013-14.
- 3.10** Reading the DERC Open Access Regulations, 2008; Open Access Order and the 2013 Tariff Order, there was no doubt that the Cross Subsidy Surcharge Amount had to be determined as per the numbers in the Tariff Order and had to be done every year.
- 3.11** The Respondent Commission on 23.07.2014 pronounced the ARR and Retail Tariff Order for FY 2014-15. However, notwithstanding the direction issued by it in the previous year tariff order, to determine Cross Subsidy Surcharge annually either with the Tariff Order or separately, the Respondent Commission did not notify the Cross subsidy surcharge applicable for the FY 2014-15.
- 3.12** Respondent No.1 obtained NOC for short term purchase of power for the period 15.03.2014 to 06.08.2014. However, no power was

scheduled during this period. After the issuance of the Tariff Order for FY 2014-15, Respondent No.1 on 10.09.2014 again sought to procure short term power for the period 01.10.2014 to 29.03.2015 by seeking open access.

**3.13** The first Respondent made the application for short term open access covered by Tariff Order for the period FY 2014-15 after the date of issue of the Tariff Order. The Appellant/TPDDL on the one hand was obligated under the open access order to process the application within 12 working days and on the other hand was obliged to make best efforts to recover the entire Annual Revenue Requirement approved by the Respondent Commission. Recovery of the entire Annual Revenue Requirement requires recovery of not just tariff from each of the consumers of the Applicant but also Cross Subsidy Surcharge from all open access customers.

**3.14** Since, denial of open access on the ground of non-availability of rates for cross subsidy surcharge for FY 2014-15 would have been more onerous (not just on the consumer but system per se because the total power purchase cost would reduce), appellant acting in good faith processed the application for open access informing Respondent No.1 that the Cross Subsidy Surcharge shall be

collected provisionally on basis of the applicable Tariff Order i.e. the order applicable to FY 2014-15 subject to adjustment, if any upon Cross Subsidy Surcharge being notified by the Commission as per the applicable tariff order. The Respondent No.1 provided the bank guarantee for payment security as per the calculations on basis of the numbers available under the Tariff Order for FY 2014-15. In the event the open access request was not processed, the Appellant would have been treated to be in violation of the Open Access Regulations. The Appellant applied the Open Access Regulations in letter and spirit by processing the application for open access and then requesting DERC to notify the Cross Subsidy Surcharge applicable in accordance with the Tariff Order for FY 2014-15.

**3.15** Despite being fully briefed about the method of arriving at the Cross Subsidy Surcharge being provisionally charged by the Appellant vide letter dated 02.12.2014 and furnishing bank guarantee as per the computation in the applicable tariff order, Respondent No.1, objected to the bill raised as per the revised Cross Subsidy Surcharge and requested the Appellant to raise the bill as per the Cross Subsidy Surcharge determined vide order dt. 24.12.2013. The Appellant responded to the letter from Respondent No.1, again explaining the rationale under which the said Cross Subsidy

Surcharge was being charged as well as the fact that the Bank Guarantee issued by Respondent No.1 in favour of the Appellant, was furnished as per the Cross Subsidy Surcharge determined as per the weighted average cost of power purchase in the Tariff order for FY 2014-15.

- 3.16** The Respondent Commission, vide its order dated 18.05.2015 (after the FY 2014-15 was over), vested the power for determination of the Cross Subsidy Surcharge with the State Load Despatch Centre. State Load Despatch Centre on 12.06.2015 determined the Cross Subsidy Surcharge for FY 2015-16 on 12.06.2015. It is, however, pertinent to note, that the Tariff for FY 2015-16 was not in force at that time, the same only having been notified on 29.09.2015. After the Tariff Order for FY 2015-16 was issued in September 2015, the State Load Despatch Centre in October, 2015 again notified the Cross Subsidy Surcharge for FY 2015-16. The Cross Subsidy Surcharge notified by State Load Despatch Centre on 12.06.2015 should, therefore, relate to the period for which Tariff Order of FY 2014-15 and in the event the rate specified in the said tariff order is applied there is no “excess cross subsidy surcharge” recovered by the Appellant and that notified by the State Load Despatch Centre

after the direction of the Respondent Commission were exactly same.

**3.17** Despite being aware of the tariff order, discussing the issue with the Appellant and agreeing to pay Cross Subsidy Surcharge as per the applicable tariff order, the Respondent No. 1 herein filed the petition for refund of alleged excess amount charged through Cross subsidy Surcharge, read with DERC (Terms and Conditions for Open Access) Regulations, 2005 and DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012, u/s 62 (6) and Section 142 of the Electricity Act, 2003 bearing number 43 of 2015 before the Respondent Commission, seeking the following prayers:

- “(i) Direct the Respondent (TPDDL) to refund the excess cross subsidy surcharge to Petitioner along with applicable interest.*
- (ii) Direct the Respondent (TPDDL) to refund the amount towards the exempted cross subsidy in RPO Regulations for procuring green power in Open Access.*
- (iii) Issue instructions to Respondent to credit the above amount in the next monthly Electricity Bill of the consumer.*
- (iv) Non-compliance of the provisions of Hon’ble DERC Order (on Open Access charges) by the Respondent shall be dealt as per section 142 of the Electricity Act.*
- (v) Issue such direction for the smooth implementation of Open Access and promotion of Competition in the sector.*
- (vi) Pass such other orders and directions which this Hon’ble DERC deems fit considering the present facts and circumstances of the case.”*

**3.18** A meeting was held at the office of the Respondent Commission on 23.06.2015 to discuss issues in relation to open access. In the said meeting Respondent No.1 pointed out that the Discoms have charged Cross Subsidy Surcharge as per their own determination. The appellant herein explained the rationale for such revision. The Appellant submitted its stance in relation to the revision of the Cross Subsidy Surcharge in line with prevailing Tariff Order, which was ratified by the Respondent Commission. The relevant portion of the minutes is extracted hereunder for ready reference:

*2. Imposition of Cross Subsidy Surcharge*

*IERS submitted that DISCOMs are imposing cross subsidy surcharge as per their own determination, who are not authorised to determine these charges by their own.*

*TPDDL submitted that the rates have not been revised after issue of Tariff Order in 2014. Hence if Cross Subsidy Surcharge is levied at earlier rates, it shall put extra burden on the embedded consumers.*

*The Commission agreed with this view of TPDDL and observed that now SLDC has been authorised to compute cross subsidy surcharge every year as per the formula given in National Tariff Policy "T- [C (1+L/10-0)+D" and the values of parameters given in Tariff Order of respective year.*

**3.19** The Respondent Commission not just endorsed the provisional charging of Cross Subsidy Surcharge from Respondent No.1 as per the applicable tariff order, it also affirmed the fact that under recovery of Cross Subsidy Surcharge shall have adverse impact on

the embedded consumers. After the view of the Ld. Commission was clarified there was no occasion for the learned DERC to take a diametrically opposite stand and pass the impugned order.

**3.20** The matter was listed for hearing on 09.12.2015, wherein the Ld. Delhi Commission heard both parties and passed the Impugned Order. The Commission *inter-alia* held that the Respondent No.1 is entitled to exemption of Cross Subsidy Surcharge to the extent of 6.2% of the open access volume. The relevant extracts are contained hereinbelow:

*6. On the issue of exemption of 6.2% of open access volume, it is clear from the Regulation 9(4) of the DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012 that Open access consumer receiving electricity from renewable energy sources shall be exempted from the cross-subsidy surcharge determined by the Commission from time to time to the extent of RPO.*

**3.21** The Respondent Commission had directed refund of alleged 'excess' CSS recovered by the Appellant. The relevant extracts are contained herein below:

*7. Considering the submissions made by the parties, the Commission observes that the Respondent No. 1 has violated the provisions of DERC (Terms and Conditions for Open Access) Regulations, 2005, and the DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012; and directed the Respondent no. 1 to refund the excess amount charged towards Cross Subsidy Surcharge from the Petitioner within one month.*



**3.22** The two issues that arise for consideration in the present appeal are:

- (a) Whether DERC (Terms and Conditions for Open Access) Regulations, 2005, and the DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012 regulations are applicable to Respondent No.1? and
- (b) Whether the appellant violated DERC regulations by provisionally charging Cross Subsidy Surcharge on a rate computed as per the formula approved and the applicable Tariff Order?

**3.23** It is a matter of record that Respondent No.1 procured power from Timarpur Okhla Waste Energy Plant and waste to heat energy generating stations are treated as renewable source of energy. A bare perusal of the applicability clause of the DERC (RPO) Regulations confirms that qua open access customers, the regulations are applicable only if power is procured from conventional sources of electricity. In other words if an open access customer is procuring power from a renewable source of electricity (such as waste to heat generating station) the RPO regulations would not be applicable to such procurement. Regulation 3 of the RPO Regulations is extracted hereunder for ready reference:

*3. Applicability:*

*These Regulations shall apply to:*

*(i) Distribution Licensee(s) operating in the National Capital Territory of Delhi*

*(ii) Any Captive user, using other than renewable energy sources exceeding 1 MW; and,*

*(iii) Any Open Access Consumer with a contract Demand exceeding 1 MW from sources other than renewable sources of energy.*

**3.24** Since an open access customer procuring power from renewable source of electricity is already contributing towards increasing the total consumption of renewable energy, such entities are not to be burdened with additional obligations under the RPO Regulations. As per Regulation 4 of the RPO Regulations each entity which are required to comply with the Regulations is required to purchase solar and non-solar renewable power at a specified percentage in each year. Every obligated entity shall meet its RPO target by way of its own generation or by way of purchase from other licensee(s)/source(s) or by way of purchase of Renewable Energy Certificate(s) or by way of combination of any of the above options.

**3.25** Further, the fact that the RPO Regulations are not applicable on open access customers procuring power from renewable generating stations has been confirmed by the Respondent Commission itself

vide email dated 04.01.2016 addressed to Respondent No.1. The relevant part of the email is extracted hereunder for ready reference:

*Regulation 6 &8 of the DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012 provides that these regulations shall apply to Any Open Access consumer with a contract demand exceeding 1 MW from sources other than renewable sources of energy.*

- 3.26** A perusal of the applicability provision read with the clarification issued by DERC itself confirms that the RPO Regulations have no applicability on open access customers procuring power from renewable source such as waste to heat station.
- 3.27** In the event, the RPO Regulations have no applicability on entities such as Respondent No.1; there is no question of exemptions available under the Regulations being extended to Respondent No.1 when they are not required to comply with other substantive obligations under the Regulations. It is submitted that the finding in the impugned order that the Appellant has violated DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012 by not making available the exemptions under the Regulations to Respondent No.1 is clearly bad in law and liable to be set-aside.

**3.28** Both Respondent Commission and the Respondent No.1 have submitted that the Appellant did not have power to revise the Cross Subsidy Surcharge on its own and by doing so it has assumed the jurisdiction vested in the Commission. However, the Respondent Commission has neither explained how an open access application was to be dealt with in the event no cross subsidy surcharge rate has been notified nor has it explained, why it failed to notify Cross Subsidy Surcharge for the entire FY 2014-15 or respond to the repeated requests by the Appellant for notifying Cross Subsidy Surcharge.

**3.29** Since the Respondent Commission has failed to notify the Cross Subsidy Surcharge applicable for FY 2014-15; and an application for seeking open access was received, the appellant theoretically had two options (a) to reject the open access application stating that rate of cross subsidy surcharge is not available or (b) process the application and provisionally calculate the Cross Subsidy Surcharge as per the formula approved by the Commission and numbers as notified by the Respondent Commission in the Tariff Order for FY 2014-15 and true-up any difference as and when the Respondent Commission notifies the Cross Subsidy Surcharge rates. Appellant processed the application for open access, started billing Cross

Subsidy Surcharge to Respondent No.1 on provisional basis and write to the DERC to notify the Cross Subsidy Surcharge in terms of the applicable Tariff Order. There was no reason to believe that Cross Subsidy Surcharge for entire FY 2014-15 would never be notified.

**3.30** The principles of revenue neutrality and recovery of entire ARR of the distribution licensee in whose area open access is being sought is a settled principle of open access not just in Delhi but across the Country. Therefore the fact that Cross Subsidy Surcharge could not have been charged at rates determined on the previous year tariff order cannot be disputed.

**3.31** The Appellant duly informed Respondent No.1 about the basis of computation of Cross Subsidy Surcharge for the duration of open access, Respondent No.1 then accepted the same and furnished the payment security bank guarantee on that basis, the Respondent Commission endorsed the basis of levy of Cross Subsidy Surcharge in meeting on 25.06.2015, despite all of the above, DERC passed the impugned order holding that the Appellant has recovered excess Cross Subsidy Surcharge. The finding is not just without basis, but also is arbitrary and bad in law.

**3.32** The present case is best example of applicability of *doctrine of acceptance sub silentio* which has been relied on by the Supreme Court in various cases including *LML Ltd vs State of UP (2008) 3 SCC 128*. The SC in the said judgment held as under:

*43. We may also notice that the Commission did not take any decision despite repeated communications by the Power Corporation. If in a situation of this nature where the licensee wanted some alteration in the tariff, it was expected of it to take a decision forthwith. It should not have whiled away the time and allowed the Power Corporation to proceed with its proposal. Such a conduct on part of the Commission may invite the doctrine of acceptance sub silentio.”*

**3.33** It is evident that the Appellant acted in utmost good faith and relied on directions of the Respondent Commission that Cross Subsidy Surcharge shall be based on tariff order for relevant year and it shall be notified after the issue of the tariff order while processing the application for open access. However, the impugned order completely ignored the fact that the charge which was provisionally billed by the Appellant was exactly the same as was determined by State Load Despatch Centre after being authorised by the Respondent Commission to do so. Clearly the action of the appellant in processing the application and billing on provisional basis balanced the interest of both i.e. open access customer and embedded consumers.

**3.34** The instant submission should be read together with other pleadings filed on behalf of the Appellant and in light of the above it is clear that the impugned order is bad in law and is liable to be set-aside.

**4. Written submissions filed by the learned counsel, Mr. Ankit Kumar, appearing for the 1<sup>st</sup> Respondent/M/s Duggar Fibre Private Limited are as under:**

**4.1** The Appeal has been entirely misconceived by the Appellant and it has not interpreted the Open Access orders dated 24.12.2013, 18.05.2015 and RPO Regulations, 2012 in its truest sense. The Appellant has committed the jurisdictional breach of the powers of the Respondent Commission as the exclusive jurisdiction to determine the Open Access Charges, e.g. wheeling Charges, Cross Subsidy Surcharge, Additional Surcharge, Transmission Charges etc vests with the Respondent Commission. The Consumers are required to pay the Open Access Charges as determined by the Respondent Commission as per Section 42 of the Electricity Act, 2003 and the DERC Order dated 24.12.2013 and 18.05.2015. Relevant quotes of the Electricity Act are as follows:

*“(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due*

*regard to all relevant factors including such cross-subsidies,  
and other operational constraints”*

**4.2** The Appellant has only quoted the piecemeal reading of the order dated 24.12.2013 and has misinterpreted certain quotes of the Order which is mentioned below:

*“12....(1) Cross Subsidy Surcharge.....(v) Keeping in view of all the above it is felt that it shall be appropriate to determine the surcharge on a yearly basis either among the Tariff Exercise or separately.” This quote is very much clear in itself. It clearly states that the charges are to be determined either through a tariff exercise or through a separate notification. It is a known fact that neither the commission has revised the Cross Subsidy Charges in its Tariff Exercise nor has issued a separate notification after the order dated 24.12.2013. But, the Appellant has itself collected the increased amount of the CSS on its own for which it was not at all authorized, and so they have usurped the Jurisdiction of the Hon’ble Delhi Electricity Regulatory Commission (DERC). So, they refund the CSS amount along with cost. Therefore, the charges are to remain the same or intact till the DERC revises the same. As, there was no ratification of Cross Subsidy Surcharge (CSS) by the Hon’ble DERC, so if CSS is not revised then the charges have to remain intact.*

Regulation 19 of the Open Access Order dated 24.12.2013 lucidly states that the charges determined by the Commission would be applicable from the date of the issue of the order and shall remain in force till revised. Relevant quotes of the Order are mentioned below-

*“19. The charges decided by this Order would be applicable from the date of issue of the Order and shall remain in force till revised”*



The given Regulation removes all the ambiguities regarding the revision of the Cross Subsidy Surcharge amount. So, the allegations of the Appellant are not at all valid and are irrelevant in the present context.

Moreover, the Delhi Electricity Regulatory Commission (DERC) via its Order dated 18.05.2015 has authorized the SLDC to determine or evaluate the Cross Subsidy Surcharge. In other words, they have been entrusted with the responsibility to determine/revise the Cross Subsidy Surcharge. However, the Appellant itself calculated the Cross Subsidy Surcharge, thereby causing jurisdictional breach of the Delhi Electricity Regulatory Commission (DERC). The Appellant has charged extra Cross Subsidy Surcharge (CSS) for the period starting from 2<sup>nd</sup> October 2014 till 17<sup>th</sup> May, 2015. So, the Cross-Subsidy Amount shall be refunded by the Appellant to the Respondent No.1 as they have not been entitled to revise the Cross Subsidy amount by itself. They should be made accountable for usurping the jurisdiction of the Respondent Commission/DERC.

- 4.3** The Respondent No.1 (the Consumer) being aggrieved by the act of the Appellant regarding the levying of excess Cross Subsidy

Surcharge amount, raised the issue before the Appellant through letters dated 01.12.2014, 08.12.2014, 27.12.2014 and 10.02.2015 stating the excess recovery of the CSS Amount. It is also to be observed that the Appellant never approached the Respondent Commission regarding the resolving of this issue until the Respondent No.1 approached the Commission questioning the illegal stand of the Appellant:

The Appellant was very well aware of the fact that the Respondent Commission has not revised the Cross Subsidy Surcharge amount for the FY-2014-15, but, then also they calculated the CSS amount themselves which they were not at all authorized to do so.

The Respondent No.1 herein, being aggrieved by the illegal act of the Appellant, filed a petition before the Respondent Commission (Petition No. 43/2015). The Respondent Commission found the Appellant to be guilty for the violations committed by the Appellant, through its final order dated 23.12.2015.

- 4.4** After the DERC order dated 24.12.2013, the Commission notified another order dated 18.05.2015 where it authorized SLDC to calculate and determine the CSS. It had never given the authority to the Appellant to impose Cross Subsidy Surcharge retrospectively. In

terms of the Electricity Act, 2003, the Respondent Commission shall introduce open access, determine wheeling charges and shall have due regard to all the factors of Open Access including Cross Subsidies (Section 42(2) of the Electricity Act, 2003). The Nodal Agency, who is the SLDC affirms the stand of the Respondent No.1 that the authority to calculate CSS does not rest with the Appellant and that their act of charging excess amount from the Respondent No.1 was invalid as the power to calculate /revise the CSS was with the Respondent Commission for the duration 24.12.2013 to 17.05.2015. it was only through the notification dated 18.05.2015, that the Respondent Commission/DERC authorized SLDC to calculate the CSS after every new notification of tariff order. There are also few judgments of the Supreme Court relating to breach of Jurisdiction of the Court, who is authorized to hear the matter. They are:

- (i) *JasbhaiMotibhai Desai v. Roshan Kumar, Haji Bashir Ahmed &Ors* [1976 AIR 578, 1976 SCR (3) 58]
- (ii) *Whirlpool Corporation v. Registrar of Trademark Mumbai* [ 26 October 1998]

**4.5** Moreover, the SLDC also affirmed the stand of the Respondent No.1 in its submission made before the Respondent Commission/DERC

in Petition No. 43 of 2015. Relevant extracts of the SLDC comments are as follows:

*“19. The charges decided by this order would be applicable from the date of issue of order and shall remain in force till revised. As per the above order, SLDC was not authorized to take any action regarding the computation and revision of the Cross Subsidy Surcharge.”*

**4.6** The comments of the SLDC are very much clear in itself as it can be easily construed that the period (02.10.2014- 17.05.2015) during which the Appellant has charged excess CSS was not valid as the power to levy or determine the CSS solely rests with the Respondent Commission/DERC or the SLDC w.e.f Order dated 18.05.2015. By doing such an Act, the Appellant has not just violated the provisions of the Electricity Act,2003 but also the guidelines of the DERC Open Access Order of 2013. So, the excess CSS amount should be refunded to the Respondent No.1 through CSS.

**4.7** The revised Cross Subsidy can only be made applicable from 18.05.2015, but, the Appellant has itself calculated the CSS for the period 2<sup>nd</sup> October 2014 to 17<sup>th</sup> May 2015, which is an illegal step taken by the Appellant for which they should be made liable and hence, the extra amount should be refunded to the Consumer along with the interest.

**4.8** The Appellant time and again had made reference to the letter dated 23.06.2015. It is worth mentioning that the commission in this meeting had only clarified its stand on determination of CSS. It was decided that the CSS shall be levied considering the tariff components notified through its Tariff Order and SLDC has been provided with the Authority to calculate CSS after every notification of the Tariff order by the Commission. This meeting has nothing to do with the consumer. It was a general meeting. The meeting was done to discuss issues relating to Open Access in general. The Respondent Commission neither notified to determine /impose CSS on retrospective basis nor authorized the Appellant to retrospectively levy CSS on its own. Moreover, the meeting dated 23.06.2015 was held only after notification of the Open Access order dated 18.05.2015. So, this meeting has no relevance to the current issue of levying extra CSS from the consumer by the Appellant. The Appellant is trying to satisfy its mischievous intentions by making reference to this letter in order to gain mileage to prove their stand which is illegal as they have breached the jurisdiction of the Respondent Commission to determine the Cross Subsidy Surcharge Amount.

**4.9** The Respondent No.1 consumed the renewable electricity from the Timarpur Okhla Waste Energy Plant, and is not under the obligations to comply with the Regulation 3 of the Renewable Purchase Obligations (RPO) Regulations, 2012. But, it is entitled by the DERC for an exemption of 6.20% according to Regulation 9(4) of the DERC RPO Regulations 2012. Relevant quotes of the DERC RPO & REC (Framework implementation) Regulations, 2012 are mentioned below:

*“3.....(iii)- the regulations shall apply to any open access consumer with a contract demand exceeding 1 MW from sources other than renewable sources of energy.”*

*“9(4) Open Access Consumer receiving electricity from renewable energy sources shall be exempted from the Cross-subsidy surcharge determined by the commission from time to time to the extent of RPO.”*

**4.10** RPO compliance is applicable on obligated entities' which include Open Access consumers taking supply of more than 1 MW from sources other than renewable sources of power and the Respondent No.1 take their entire supply of more than 1 MW from Timarpur Okhla Waste Energy Plant. The Appellant has just interpreted the statute of Regulations in parts and not as a whole and has not understood the spirit of law. As per the Appellant's interpretation, DERC (RPO & REC framework implementation) Regulations, 2012 are limited to and applicable only to the buyers – the obligated

entities (Regulation No.3) which are Distribution Licensee, Captive consumers and Open Access Consumers.

**4.11** The Appellant has misinterpreted the DERC “Renewable Purchase Obligation and Renewable Energy Regulations, 2012” by stating that these regulations does not apply to the Respondent No.1. However, if we interpret this regulation in its truest sense, we will reach to the conclusion that there shall be no Renewable Purchase Obligation on those consumers who are already procuring energy from the Renewable Sources of Energy. In the present context, the Respondent No. 1 is already consuming electricity from the “Waste to Energy Plant”. According to clause 9(4) of this Regulation, the consumer shall be given Cross Subsidy Exemption towards the extent of RPO.

**4.12** In the present context, the Appellant has made limited interpretation of these Regulations as it has not interpreted the other part which is that this regulation shall also be made applicable on all Renewable Energy Certificates (RECs) applicable on all Renewable Energy Generators, Power Exchanges, Nodal Agencies. If the Appellant, makes a partial interpretation of this Regulation then the whole purpose of this Regulation will be defeated. So, in order to satisfy

their contentions, they are making partial interpretations of this Regulation.

**4.13** The Appellant in their Appeal contended that the Respondent Commission has passed the impugned order without the “Due Process” under Section 142 of the Electricity Act, 2003. The issue revolving the methods of treatment under Section 142 of the Act does not arise as the Appellant was never penalized by the Respondent Commission. Their contention that they have not been treated by the Respondent Commission under Section 142 of the Electricity Act, 2003 is not at all justified. So, they are contradicting their own interpretations that they have not been treated under due process under Section 142 of the Act.

**4.14** In light of the aforesaid contentions, it is most humbly prayed to this Tribunal to reject the present Appeal as they have usurped the exclusive jurisdiction of the Respondent Commission. Hence, they have violated the provisions of the Electricity Act and the guidelines specified by the Respondent Commission. So, if any delay is caused in refunding the excess CSS by the Appellant, it would cause an insurmountable amount of loss to the Respondent No.1.



**5. Written submissions filed by the learned counsel, Mr. Manu Seshadri, appearing for the Respondent Commission/DERC are as under:**

**5.1** The present Appeal has been filed by the Appellant to challenge the Impugned Order dated 23.12.2015 in Petition No. 43 of 2015 passed by the Respondent Commission whereby and wherein the commission had held that the actions of the Appellant in computing and charging Cross Subsidy Surcharge (CSS) upon the Respondent No. 1 were in violation of the provisions of DERC (Terms and Conditions for Open Access) regulations, 2005, and the DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012 and directed the Respondent No. 1 to refund the excess amount charged towards Cross Subsidy Surcharge.

**5.2** Section 42 and 86(1) of the Electricity Act, 2003 mandates the commission to determine the Cross Subsidy Surcharge. The provisions have been reproduced hereunder for ready reference:

***“Section 42. (Duties of distribution licensee and open access):***

***---***

*(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant*

*factors including such cross subsidies, and other operational constraints:*

*Provided that 1[such open access shall be allowed on payment of a surcharge] in addition to the charges for wheeling as may be determined by the State Commission:*

*Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee :*

*Provided also that such surcharge and cross subsidies shall be progressively reduced 2[\*\*\*] in the manner as may be specified by the State Commission:*

*Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:*

*3[Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.]*

**Section 86. (Functions of State Commission): ---**

*(1) The State Commission shall discharge the following functions, namely: -*

*(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:*

*Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;”*

**5.3** The Commission notified the Delhi Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005 in terms of Section 42(2) of the Act.

- 5.4** The Commission issued order dated 29.08.2008 for determination of Transmission and Wheeling Charges, CSS, Additional Surcharge and other applicable charges under the Open Access observing that CSS would be calculated based on the surcharge formula laid down in Para 8.5 of the Tariff Policy, 2006. It is categorically stated that since the tariff for each category of consumers is fixed by the Commission on year to year basis, the surcharge shall also be decided on year to year basis by the Commission.
- 5.5** Further, on 24.12.2013, the Respondent Commission issued order for Determination of Transmission and Wheeling Charges, CSS, Additional Surcharge and other applicable charges under the Open Access Regulations stating that the surcharge will be determined at 26.37 paise/kWh for an Industrial Consumer as per the formula contained in the National Tariff Policy, 2006 and as per the prevailing tariff for the FY 2013-14.
- 5.6** It was clearly stated in the order dated 24.12.2013 that the CSS notified by this Commission shall remain in force till it is revised. The relevant portion of order dated 24.12.2013 has been reiterated below:

*“19. The Charges decided by this order would be applicable from the date of issue of the Order and shall remain in force till revised.”*

**5.7** The Respondent No. 1 who is an Open Access consumer of Delhi, filed a petition before the Respondent Commission claiming that the Appellant has charged extra CSS by revising the rates on its own without any authority and has also withheld the amount towards exempted CSS of 6.2% of open access volume consumed by the consumer as per the DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012.

**5.8** As per the mandate of the Electricity Act, 2003 the authority to revise the surcharge is with the Commission. Therefore, the charges decided by the Commission are applicable from the date of issue i.e. 24.12.2013 and shall remain in force till it is revised and Appellant has no authority to revise the same. The computation of CSS is the domain of the State Commission which has also been upheld by the Hon'ble Supreme Court in its judgment *Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission (2014) 8 SCC 444*. There relevant portion is extracted hereunder:

*“26. However open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross-subsidy and the fixed cost arising out of the licensee’s obligation to supply.”*

**5.9** It is also admitted by the Appellant that it is not vested with the authority to revise the CSS on its own and that the authority to revise the same is vested with the Commission. The relevant portion of the Impugned Order recording the admission of the Appellant that it does not have power to revise the CSS is as follows:

*“5. ...Respondent No. 1 admitted the fact and agreed that it has not been authorized to revise Cross Subsidy Surcharge on its own and the authority is vested with either Commission or Respondent No. 2.”*

This is further evident from the fact that the Appellant vide its various letters dated 05.01.2015, 17.02.2015, 12.03.2015 and 08.04.2015 had requested the Respondent Commission to revise the CSS in terms of the tariff order dated 23.07.2014 for the FY 2014-2015. Hence, the Appellant knowing that it has no jurisdiction to revise the CSS acted on its own and charged a higher rate of CSS from the Open Access Consumer. The Appellant has violated the provisions of the DERC (Terms and Conditions for Open Access) Regulations, 2005 and hence liable to refund the excess amount charged towards CSS.

**5.10** Due to the admission of the Appellant of its own wrong doing and that the authority to revise CSS vests with the Commission, the direction of the Commission to waive off the excess CSS as

computed by the Appellant is by the consent of the parties. It is a settled law that a consent order cannot be challenged and on this ground alone the present Appeal is liable to be dismissed. The reliance is placed upon *Katikara Chintamani Dora v. Guntreddi Annamanaidu (1974) 1 SCC 567* [Para 61-63]; *Daljit Kaur and Another v. Muktar Steels Pvt. Ltd. and Ors (2013) 16 SCC 607*.

**5.11** Since Respondent No. 1 is procuring open access power as a green power from renewable energy source, it has to comply with the DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012. As per Regulations 9(4) of the said DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012:

*“Open access consumers receiving electricity from the green renewable energy sources shall be exempted from the cross subsidy surcharge determined by the Commission from time to time to the extent of RPO”*

**5.12** Hence, under the DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012, the Appellant was held liable to return the excess amount charged towards the CSS from Respondent No.1. Therefore, in light of the above, it is prayed that the present Appeal be dismissed with costs

6. We have heard learned counsel for the Appellant and learned counsel for the Respondents at considerable length of time and carefully gone through the written submissions along with relevant material available on record during the proceedings. On the basis of pleadings and submissions, the following main issues emerge in the instant appeal for our consideration:

- (A) Whether the action of the Appellant in calculating the provisional Cross Subsidy Surcharge (CSS) on its own and charging the same to the respondent consumer is justified in law?
- (B) Whether the Respondent Commission has rightly held that the Appellant has acted in violation of the Regulations of the State Commission relating to Open Access and Renewable Power Obligation (RPO)?

**OUR CONSIDERATION & FINDINGS:**

**7. Issue No. (A)**

**Whether the action of the Appellant in calculating the provisional Cross Subsidy Surcharge (CSS) on its own and charging the same to the respondent consumer is justified in law?**

- 7.1 Learned counsel for the Appellant submitted that Cross subsidy Surcharge is required to be determined annually by the State Commission in line with the formula specified in the National Tariff Policy. He, further, submitted that applying the formula stipulated in the Tariff Policy on the numbers in the Tariff Order for FY 2013-14, the Respondent Commission determined the surcharge at

26.37 paise/kWh as per the prevailing tariff for the FY 2013-14. However, no open access was materialized during the FY 2013-14. Learned counsel for the Appellant vehemently submitted that the Respondent Commission on 23.07.2014 pronounced the ARR and Retail Tariff Order for FY 2014-15 but, did not notify the Cross subsidy surcharge applicable for the FY 2014-15.

- 7.2** Learned counsel further contended that the first Respondent made the application for short term open access covered by Tariff Order for the period FY 2014-15 after the date of issue of the Tariff Order and as per the Regulations, the Appellant was obligated to process the application for open access within 12 working days and, simultaneously, it was obliged to make best efforts to recover the entire Annual Revenue Requirement (ARR) approved by the Respondent Commission. As the Commission had not notified Cross Subsidy Surcharge rate for FY 2014-15, the Appellant on its own computed the same based on the parameters prevailing in the Tariff Order for FY 2014-15 subject to its adjustment later on after true up. Accordingly, these computations for Cross Subsidy Surcharge were informed to the Respondent for which it did not object and rather submitted the requisite bank guarantee in line with terms and conditions of the



open access. Learned counsel was quick to submit that despite agreeing to pay Cross Subsidy Surcharge as per the provisional calculations by the Appellant, Respondent No.1 objected to the bills raised by the Appellant and demanded for the refund of the excess Cross Subsidy Surcharge recovered in the process.

**7.3** Learned counsel for the Appellant, further, submitted that the Respondent Commission, vide its order dated 18.05.2015 (after the FY 2014-15 was over), vested the power for determination of the Cross Subsidy Surcharge with the State Load Despatch Centre. The State Load Despatch Centre on 12.06.2015 determined the Cross Subsidy Surcharge for FY 2015-16 whereas the tariff for FY 2015-16 was not in force at that time, the same having been notified only on 29.09.2015.

**7.4** The petition, preferred by the first Respondent, was heard by the State Commission on 09.12.2015, after which the impugned Order was passed. The Commission *inter-alia* held that the first Respondent is entitled to exemption of Cross Subsidy Surcharge to the extent of 6.2% of the open access volume. The relevant extracts are reproduced as below:

*“6. On the issue of exemption of 6.2% of open access volume, it is clear from the Regulation 9(4) of the DERC (Renewable*

*Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012 that Open access consumer receiving electricity from renewable energy sources shall be exempted from the cross-subsidy surcharge determined by the Commission from time to time to the extent of RPO”.*

**7.5** Learned counsel for the Appellant contended that since the Respondent Commission has failed to notify the Cross Subsidy Surcharge applicable for FY 2014-15; and an application for seeking open access was received, the appellant theoretically had two options (a) to reject the open access application stating that rate of cross subsidy surcharge is not available or (b) process the application and provisionally calculate the Cross Subsidy Surcharge as per the formula approved by the Commission and numbers as notified by the Respondent Commission in the Tariff Order for FY 2014-15. Keeping the said scenario in mind and to enable the Respondent to avail open access, the appellant processed the application and started billing Cross Subsidy Surcharge to Respondent No.1 on provisional basis. The Appellant, in turn, wrote to the State Commission to notify the Cross Subsidy Surcharge in terms of the applicable Tariff Order on a number of occasions and there was no reason to believe that Cross Subsidy Surcharge for entire FY 2014-15 would never be notified by the Commission.

**7.6** Learned counsel, to substantiate his submissions, relied upon the judgment of Hon'ble Supreme Court in case of *LML Ltd v State of UP (2008) 3 SCC 128*, and stated that the present case is best example of applicability of doctrine of acceptance sub silentio wherein the Hon'ble Supreme Court has held as under:

*“43. We may also notice that the Commission did not take any decision despite repeated communications by the Power Corporation. If in a situation of this nature where the licensee wanted some alteration in the tariff, it was expected of it to take a decision forthwith. It should not have whiled away the time and allowed the Power Corporation to proceed with its proposal. Such a conduct on part of the Commission may invite the doctrine of acceptance sub silentio.”*

**7.7** Learned counsel for the Appellant vehemently submitted that the Appellant acted in utmost good faith and relied on directions of the Respondent Commission that Cross Subsidy Surcharge shall be based on tariff order for relevant year and it shall be notified after the issue of the tariff order while processing the application for open access. Learned counsel was quick to point out that the impugned order completely ignored the fact that the Cross Subsidy Charge which was provisionally billed by the Appellant was exactly the same as was determined by State Load Despatch Centre after being authorised by the Respondent Commission.

- 7.8** Learned counsel for the Appellant, while summing-up his arguments, submitted that the appellant in processing the open access application and billing on provisional basis balanced the interest of open access customer as well as embedded consumers and keeping this aspect in view, the impugned Order passed by the State Commission is bad in law and is liable to be set-aside.
- 7.9** *Per-contra*, learned counsel for the Respondent Consumer and the Respondent Commission submitted that Regulation 19 of the Open Access Order dated 24.12.2013 lucidly states that the charges determined by the Commission would be applicable from the date of the issue of the order and shall remain in force till revised. As per the Act and subsequent Regulations notified by the State Commission, all the charges including Cross Subsidy Surcharge are to be determined by the Commission or its authorized agency such as State Load Despatch Centre (SLDC).
- 7.10** Learned counsel pointed out that in the instant case the Appellant itself calculated the Cross Subsidy Surcharge against the prevalent regulations of the Commission thereby causing jurisdictional breach of the State Commission. In the process, the

Appellant has charged additional Cross Subsidy Surcharge for the period starting from 02.10.2014 till 17.05.2015 and, accordingly, the extra amount collected by the Appellant shall be refunded to the Respondent No.1 as the Appellant was not at all entitled to revise the Cross Subsidy Charge by itself.

**7.11** Learned counsel for the first Respondent submitted that being aggrieved by the act of the Appellant regarding the levying of excess Cross Subsidy Surcharge raised the issue before the Appellant through letters dated 01.12.2014, 08.12.2014, 27.12.2014 and 10.02.2015. However, inspite of such repeated objections, the Appellant neither responded nor approached the Commission for resolving the issue until the first Respondent approached the Commission questioning the illegal action of the Appellant.

**7.12** Learned counsel for the Respondents vehemently submitted that the Appellant was very well aware of the fact that the Commission has not revised the Cross Subsidy Surcharge for the FY-2014-15, but, then also it calculated the Cross Subsidy Surcharge itself which they were not at all authorized to do so.

- 7.13** Learned counsel contended that the State Commission vide its Order dated 18.05.2015 authorized SLDC to calculate and determine the Cross Subsidy Surcharge but it had never given the authority to the Appellant to impose Cross Subsidy Surcharge as per revised calculation retrospectively.
- 7.14** Learned counsel was quick to submit that SLDC also affirms the stand of the first Respondent in its submission made before the State Commission during the proceedings of the Petition No. 43/2015. The submissions of SLDC before the State Commission clearly indicate that the period (02.10.2014 - 17.05.2015) during which the Appellant has charged excess Cross Subsidy Surcharge was not valid as the power to levy or determine the Cross Subsidy Surcharge solely rests with the Commission or the SLDC w.e.f. 18.05.2015. By doing such an Act, the Appellant has not just violated the provisions of the Electricity Act but also the Regulations of the State Commission and its various orders.
- 7.15** Learned counsel reiterated that at best, the revised Cross Subsidy Charges can only be made applicable from 18.05.2015 only and not retrospectively as done by the Appellant.

**7.16** Regarding reliance of the Appellant on the Minutes of Meeting dated 23.06.2015, learned counsel for the Respondents submitted that this meeting had nothing to do with the consumers and the meeting was held to discuss the issues relating to open access in general. Moreover, said meeting was held only after notification of the open access order dated 18.05.2015 and as such, this meeting has no relevance to the current issue of levying extra Cross Subsidy Surcharge on the consumers by the Appellant. Learned counsel emphasized that in view of the illegal action of the Appellant, the instant appeal deserves to be dismissed.

**OUR FINDINGS:**

**7.17** We have carefully considered the rival contentions of both the parties and also took note of the various judgments relied upon by learned counsel for the parties. It is not in dispute that as per the Electricity Act and various Regulations of the State Commission, the responsibility for computation and imposition of Cross Subsidy Charges to the open access consumers rests with the appropriate Commission or its authorized agency and none else.

**7.18** The controversy in the instant case has arisen mainly due to the fact that the State Commission did not notify rate of Cross

Subsidy Charges for FY 2014-15 for which upon receipt of an application to grant open access the Appellant on its own computed Cross Subsidy Charge based on the numbers of the prevailing tariff order and started billing as per the same to the respondent consumer.

- 7.19** In a scenario of its kind, when the Respondent Commission failed to compute the relevant Cross Subsidy Surcharge for a particular year and to discharge its obligations under the Act for grant of open access, the Appellant in good faith processed the application for open access and, simultaneously, also calculated provisional Cross Subsidy Surcharge of that year based on the prescribed formula and approved numbers in the tariff order. While processing the application for grant of open access may be considered as an act of obligation on the part of the Appellant but, at the same time calculations of Cross Subsidy Surcharge on its own and levying the same on the respondent consumer cannot be justified in the eyes of law as the same amounts to jurisdictional breach of the powers of the State Commission by a licensee.



**7.20** Keeping all these facts in view, we are of the opinion that the Appellant ought not to have revised Cross Subsidy Surcharge on its own without consent/approval of the State Commission. As per the tariff order, the State Commission has clearly stipulated that the rates of Cross Subsidy Surcharge notified shall be applicable from the date of the said order and shall remain valid till the same is revised by the Commission. In other words, pending notification of Cross Subsidy Surcharge by the Commission, the Appellant should have charged the previous Cross Subsidy Surcharge subject to its true-up and not any other rate computed on its own.

**7.21** In view of these facts, we are of the considered opinion that the action of the Appellant was not justified in the eyes of law which amounts to jurisdictional breach of the powers of the Respondent Commission. Accordingly, we find no infirmity or perversity in the impugned Order and intervention of this Tribunal does not call for.

**8. Issue No. (B)**

***Whether the Respondent Commission has rightly held that the Appellant has acted in violation of the Regulations of the State Commission relating to open access and Renewable Power Obligation (RPO)?***

**8.1** Learned counsel for the Appellant contended that the first Respondent has procured power from Timarpur Okhla Waste Energy Plant a waste to heat energy generating station which is treated as renewable source of energy. However, a bare perusal of the applicability clause of the DERC (RPO) Regulations confirms that for open access customers, the regulations are applicable only if power is procured from conventional sources of electricity. For ready reference, Regulation 3 of the RPO Regulations is extracted hereunder:

*3. Applicability:*

*These Regulations shall apply to:*

*(i) Distribution Licensee(s) operating in the National Capital Territory of Delhi*

*(ii) Any Captive user, using other than renewable energy sources exceeding 1 MW; and,*

*(iii) Any Open Access Consumer with a contract Demand exceeding 1 MW from sources other than renewable sources of energy.*

**8.2** Learned counsel for the Appellant further submitted that every obligated entity shall meet its RPO target by way of its RE own generation or by way of purchase from RE sources or by way of purchase of Renewable Energy Certificates or by way of combination of any of the above options. Further, the fact that the RPO Regulations are not applicable on open access

customers procuring power from renewable generating stations has been confirmed by the Respondent Commission vide its email dated 04.01.2016 addressed to the first Respondent which inter-alia states as under:

*“Regulation 6 &8 of the DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012 provides that these regulations shall apply to Any Open Access consumer with a contract demand exceeding 1 MW from sources other than renewable sources of energy.”*

**8.3** Learned counsel for the Appellant vehemently submitted that in the event, the RPO Regulations have no applicability on entities such as Respondent No.1; there is no question of exemptions available under the Regulations being extended to Respondent No.1. As such, the finding in the impugned order that the Appellant has violated DERC (Renewable Purchase Obligation and Renewable Energy Certificate framework implementation) Regulations, 2012 by not making available the exemptions under the Regulations to Respondent No.1 is clearly bad in law.

**8.4** *Per-contra*, learned counsel for the Respondents submitted that the RPO compliance is applicable on obligated entities' which include Open Access consumers availing power supply of more than 1 MW from sources other than renewable sources

of power whereas, Respondent No.1 took their entire supply of more than 1 MW from Timarpur Okhla Waste Energy Plant (a RE generation plant). As such, the first Respondent, took its entire power from the renewable energy sources and is not under the obligation to comply with Regulation 3 of RPO Regulations, 2012.

**8.5** As such, the first Respondent, having consumed the entire renewable electricity from the renewable energy sources, is not under the obligations to comply with the Regulation 3 of the Renewable Purchase Obligations (RPO) Regulations, 2012 and it is entitled for an exemption of 6.20% on the Cross Subsidy Charge according to Regulation 9(4) of the DERC RPO Regulations 2012.

**8.6** Learned counsel was quick to point out that the Appellant has in fact interpreted statute of regulations in piecemeal and not in its entirety. Further, he contended that while interpreting the RPO Regulations in its true spirit, it is clearly evident that there shall be no RPO obligation on those consumers who are already procuring their energy from the renewable sources of energy. In the present context, the first Respondent is,

therefore, duly entitled to the Cross Subsidy exemption as per Clause 9(4) of the RPO Regulations, 2012 towards the extent of RPO.

- 8.7** Learned counsel reiterated that in view of the facts, as stated supra, the Appellant has rightly been held liable to return the excess amount charged towards the Cross Subsidy Surcharge from the first Respondent and no intervention by this Tribunal is therefore required.

**OUR FINDINGS:**

- 8.8** We have critically analyzed the contentions of learned counsel for the Appellant and learned counsel for the Respondents and also took note of the provisions in various Regulations of the State Commission and its finding in the impugned Order.
- 8.9** It is relevant to note that the provisions under RPO Regulations, 2012 notified by the State Commission are crystal clear as far as its applicability in respect of the open access consumers who are availing power more than 1 MW from renewable energy sources based generating stations. These Regulations provide a subsidy of 6.2% to the extent of RPO for such open access consumers who avail their supply of power from renewable energy sources.

In the instant case, it is an admitted fact that the first Respondent has availed its entire supply of power from waste to heat generating station located at Timarpur Okhla which is considered as renewable energy sources based generating plant. Instead of providing an exemption to the extent of RPO (6.2%) as applicable under the RPO Regulations of the State Commission, the Appellant has charged excess Cross Subsidy Charge.

**8.10** In the light of the above, we are of the considered opinion that the Appellant by misinterpreting the DERC RPO Regulations, 2012 has penalized the first Respondent by levying extra Cross Subsidy Surcharge without considering the entitled exemption as per the said Regulations.

**8.11** The State Commission has correctly held that the Appellant is liable to refund the excess charged Cross Subsidy Charges and we do not feel necessary to interfere with the decision of the State Commission.

**9.** The impugned Order passed by the State Commission is well founded and well reasoned. Hence, interference by this Tribunal does not call for. Accordingly, we answered both the issues against the Appellant as devoid of merits.

**ORDER**

For the forgoing reasons, as stated above, the instant Appeal, being Appeal No. 17 of 2016, filed by the Appellant is dismissed as devoid of merits and the issues raised in this Appeal are answered against the Appellant.

Accordingly, the impugned Order dated 23.12.2015 passed by Delhi Electricity Regulatory Commission in Petition No. 43 of 2015 is hereby upheld.

**IA NO. 35 OF 2016 &  
IA NO. 838 OF 2017**

In view of the Appeal No. 17 of 2016 on the file of the Appellate Tribunal for Electricity, New Delhi being dismissed, the reliefs sought in the IAs, being IA Nos. 35 of 2016 & 838 of 2016, do not survive for consideration.

Order accordingly.

Parties to bear their own costs.

**PRONOUNCED IN THE OPEN COURT ON THIS 5<sup>TH</sup> DAY OF AUGUST, 2019.**

**(S.D. Dubey)  
Technical Member**

**(Justice Manjula Chellur)  
Chairperson**

√ **REPORTABLE**  
vt