

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

W.V.M.P.No.1468 of 2016 in W.P.No.26609 of 2015

and

W.P.No.26609 of 2015

&

W.V.M.P.No.1447 of 2016 in W.P.No.26623 of 2015

and

W.P.No.26623 of 2015

COMMON ORDER:

Petitioners are Companies registered under the Companies Act and have industrial units located in the Azamabad Industrial Area of Hyderabad with separate Service Connection numbers.

THE PRAYER IN THE W.P.S

2. In these Writ Petitions they challenge the order dt.27-03-2015 passed by the Telangana Electricity Regulatory Commission (1st respondent) (for short 'the Commission') in O.P.No.76 of 2015 determining cross subsidy surcharge under Sections 39, 40 and 42 of the Electricity Act, 2003 (for short "the Act") for H.T-1 Industrial Segregated category open access consumers in 33 kv category. They also challenge demand for surcharge contained in (i) the revised C.C. Bills issued on 24-06-2015, 23-07-2015 and 06-08-2015 issued to the petitioner in W.P.No.26609 of 2015 and (ii) revised C.C. bills dt.07-06-2015, 12-07-2015 and 06-08-2015 issued to the petitioner in W.P.No.26623 of 2015.

THE BACKGROUND FACTS

3. As per Section 64 of the Act, the Telangana State Southern Power Distribution Company Limited (2nd respondent) (for short 'the Discom') filed an Aggregate Revenue Requirement (ARR) before the Commission on 07-02-2015. In the said proposals, the Discom proposed cross subsidy surcharge for H.T-1 Industrial Segregated category open access consumers at Rs.0.30 paise per kWh in 33 kv category. According to the Discom, it had proposed the Cross Subsidy Surcharge for different categories of consumers based on the National Tariff Policy.

4. In these Writ Petitions, we are concerned only with this particular category and not with other categories which are also subject matter of O.P.No.76 of 2015.

5. Directions were issued by the Commission to the Discom to publish a public notice in Telugu and English daily news papers, with regard to ARR and Tariff proposals for the financial year 2015-16, and such publication was made on 11-02-2015. The public notice also mentioned that the said Discom had also filed Cross Subsidy Surcharge for open access to the consumers in it's area for financial year 2015-16 and comments/suggestions were invited on the Filings made by the Discom from the stake holders/consumers mentioning the date and place of public hearings. The Filings of ARR and Tariff proposals made before the Commission were placed in the official

website of the Discom on 12-02-2015 and were also made available in the District Head Quarters and Corporate office, Hyderabad of the Discom for the stake holders/interested consumers for their reference and for filing comments/suggestions on the Filing made by the Discom.

CONTENTIONS OF COUNSL FOR PETITIONERS

6. Sri Vedula Venkatramana, learned Senior Counsel for petitioners contend that while the Discom had proposed Cross Subsidy Surcharge of Rs.0.30 ps per kWh of power for the H.T-1 Industrial Segregated open access consumers in 33 kv category, the Commission fixed the same in its order dt.27-03-2015 at Rs.1.29 ps per kWh for HT-1 Industry General in the HT Category and that this latter category covers the H.T-1 Industrial Segregated category open access consumers also.

7. Petitioners contend that Cross Subsidy Surcharge is *compensatory* in nature; as per the Filing of the Discom only Rs.0.30 paise per kWh was proposed as Cross Subsidy Surcharge for this category; that the Discom obviously felt that the said levy is sufficient to compensate it for the loss caused to it; and so, the Commission could not have fixed the Cross Subsidy Surcharge at Rs.1.29 ps per kWh particularly when there is no notice given to the consumers like the petitioners of the intention of the Commission to do so and they had no opportunity to object to it.

8. Petitioners contend that the fixation of the Cross Subsidy Surcharge at Rs.1.29 ps per kWh per HT-1 Industry General in HT Category 33 kV is arbitrary, illegal and contrary to Section 42 of the Act and is unsustainable.

9. Petitioners contend that since the proposals of the Discom which was published through the public notice indicated that only Rs.0.30 ps was per kWh was to be the Cross Subsidy Surcharge for HT-1 Industrial Segregated Category at 33 kV supply, the petitioners did not object to the same since they considered it to be not onerous; but if the Commission intended to enhance the same to Rs.1.29 ps per kWh, which is more than four times of the proposal of the Discom, it was incumbent on the part of the Discom to give public notice of its intention to do so, invite objections thereto and then proceed to decide it.

10. It is also pointed out that there are no reasons assigned in the impugned order by the Commission as to why it had decided to fix Cross Subsidy Surcharge for HT-1 Category Industry General 33 kV (including HT Category HT-1 Industrial Segregated category) supply at Rs.1.29 ps per kWh and since the Commission discharges quasi judicial functions, it is bound to give reasons for the same.

THE INTERIM ORDERS PASSED

11. On 21-08-2015, while admitting W.P.No.26609 of 2015, this Court passed the following order in W.P.M.P.No.34565 of 2015:

“In the identical circumstances, this Court passed orders in respect of the order passed by the A.P. Electricity Regulatory Commission directing the petitioner therein to pay the amount proposed by the Discom. In this case also, TSNPDCL and TSSPDCL proposed an amount of Rs.0.30 paise in respect of H.T-1 Industrial Segregated Category at 33 KV, whereas the Electricity Regulatory Commission fixed the same at Rs.1.29 Ps as cross-subsidy on the alleged ground that case is pending before the Apex Court in Civil Appeal Nos.4936-4941 of 2007 without implementing the National Tariff Policy. In the circumstances, there shall be interim direction to respondents 2 to 4 not to collect cross subsidy surcharge on the rate fixed by the first respondent. However, it is open to the respondents 2 to 4 to collect 0.30 paise in respect of the petitioners until further orders...”

12. W.V.M.P.No.1468 of 2016 is filed to vacate the same.

13. On 21-08-2015, while admitting W.P.No.26623 of 2015, this Court passed the following order in W.P.M.P.No.34583 of 2015:

“In the identical circumstances, this Court passed orders in respect of the order passed by the A.P. Electricity Regulatory Commission directing the petitioner therein to pay the amount proposed by the Discom. In this case also, TSNPDCL and TSSPDCL proposed an amount of Rs.0.30 paise in respect of H.T-1 Industrial Segregated Category at 33 KV, whereas the Electricity Regulatory Commission fixed the same at Rs.1.29 Ps as cross-subsidy on the alleged ground that case is pending before the Apex Court in Civil Appeal Nos.4936-4941 of 2007 without implementing the National Tariff Policy. In the circumstances, there shall be interim direction to respondents 2 to 4 not to collect cross subsidy surcharge on the rate fixed by the first respondent. However, it is open to the respondents 2 to 4 to collect 0.30 paise in respect of the petitioners until further orders...”

14. W.V.M.P.No.1447 of 2016 is filed to vacate the same.

15. Learned Advocate General appearing for the Discom and Sri J.Aswini Kumar, learned Standing Counsel for the Commission supported the order passed by the Commission.

CONTENTIONS OF RESPONDENTS

16. Firstly it is contended by respondents that the petitioners have a remedy under Section 111 of the Act to approach the appellate Tribunal for Electricity challenging the order passed by the Commission and in view of the existence of such alternative remedy, the Writ Petitions should be dismissed granting liberty to the petitioners to approach the appellate Tribunal for Electricity invoking Section 111 of the Act.

17. It is also contended that under Section 42(2) of the Act, Open Access has to be allowed to the willing consumers on payment of surcharge in addition to wheeling charges and the Commission is empowered to fix Cross Subsidy Surcharge. It is stated that after following the process of public hearing, the impugned order was passed. Reference is also made to Section 26(5) of the Electricity Reform Act, 1998 and it is stated that the Commission has the power to modify or alter the proposal filed by the Licensee and that in exercise of the said power, the Commission had modified the Cross Subsidy Surcharge proposal of the Discom and that the said fixation

by the Commission was in accordance with National Tariff Policy, which was approved by the Commission.

18. I have noted the contentions of the parties.

PETITIONERS NEED NOT AVAIL ALTERNATIVE REMEDY

19. It is not in dispute that the public notice which was published in the news papers by the Discom contained only the proposal put forth by it i.e proposing Rs.0.30 Ps per kWh for the 33 KV HT-1 Industrial Segregated category, and there was no public notice inviting objections for the Cross Surcharge Subsidy of Rs.1.29 ps kWh determined by the Commission for the 33 kV HT-1 Industrial General covering Category of HT-1 Industrial Segregated. Once such a proposal to fix the Cross Surcharge Subsidy for open access at Rs.1.29 ps per kWh for HT-1 Industry general in 33 kV was not published by the Discom and the Commission, gave no notice of it's intention to vary the same to Rs.1.29 ps per kWh , consumers like the petitioners would not file objections to the said proposal before the Commission.

20. So, the fixation of the Cross Surcharge Subsidy for open access for HT-1 Industry General in the 33 kV category at Rs.1.29 per kWh behind the back of the consumers, without notice to them and in clear violation of principles of natural justice.

21. Once there is a violation of principle of natural justice, it is settled law that existence of alternative remedy under Section 111 of the Act before the Appellate Tribunal for Electricity to challenge the order passed by the Commission need not be availed of by the petitioners and they can approach this Court under Article 226 of the Constitution of India (See **Whirlpool Corporation v. Registrar of Trade Marks**¹).

CROSS SUBSIDY SURCHARGE IS COMPENSATORY IN NATURE

22. It is also not in dispute that Cross Subsidy Surcharge for open access is to be determined by the Commission under the First proviso to sub-Section (2) of Section 42 of the Act.

THE DECISION IN Sesa Sterlite Limited

23. What is the nature of the Cross Subsidy Surcharge for open Access?

24. This was dealt by the Supreme Court in **Sesa Sterlite Limited Vs. Orissa Electricity Regulatory Commission and others**². The Supreme Court held that open access implies freedom to procure power from any source and *open access in transmission* means freedom to the licensees to procure power from any source. It held that the Act mandates that it shall be duty of the transmission utility/licensee to provide non-discriminatory open access to its

¹ (1998) 8 SCC 1

² (2014) 8 SCC 444

transmission system to every licensee and generating company, that such open access enables the licensees (distribution licensees and traders) and generating companies the right to use the transmission systems without any discrimination, and this would facilitate sale of electricity directly to the distribution companies.

25. It explained that *open access in distribution* (with which we are concerned in the instant case) means freedom to the consumers to get supply from any source of his choice. The provision of open access to consumers ensures right of the consumer to get supply from a person other than the distribution licensee of his area of supply by using the distribution system of such licensee. Unlike in transmission, open access in distribution has not been allowed from the outset primarily because of considerations of the cross-subsidies. The law provides that open access in distribution would be allowed by the State Commissions in phases. For this purpose, the State Commissions are required to specify the phases and conditions of introduction of open access. The Supreme Court explained that open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of the current level of cross-subsidy and the fixed cost arising out of licensee's obligation to supply. Consequent to the enactment of the Electricity (Amendment) Act, 2003, it has been mandated that the State Commission shall, within five years, necessarily allow open access to consumers having demand exceeding one megawatt.

26. The Supreme Court explained that the issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge – one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts – one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). It therefore declared that *the mechanism of surcharge is meant to compensate the licensee for both these aspects.*

27. The Supreme Court explained that through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. *It explained that cross subsidy surcharge is a 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 pay tariff applicable for supply which

would include an element of cross-subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low end consumer if he falls in the category of subsidizing consumer. Once a cross-subsidy surcharge is fixed for an area, it is liable to paid and such payment will be used for meeting the current levels of cross-subsidy within the area. According to the Supreme Court, *cross-subsidy is the charge payable by a consumer who opt to avail power supply through open access from someone other than such distribution licensee in whose area it is situated and such surcharge is meant to compensate such distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee.*

28. From the judgment in **Sesa Sterlite Limited** (2 supra), it is clear that a cross-subsidy surcharge is necessary for implementation of the provision of open access and it depends on judicious determination of surcharge by the State Commission. It is also clear that the mechanism of surcharge is meant to compensate Discoms on its ability to cross-subsidise the vulnerable sections of the society and also enable it to recover the fixed cost such licensee might have incurred as part of its obligation to supply electricity to that consumer on demand. It is a charge payable by a consumer who opts to avail power supply through open access from someone other than such

distribution licensee in whose area it is situated and it is meant to compensate such distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee.

WHETHER COMMISSION COULD HAVE FIXED CROSS SUBSIDY SURCHARGE AT A RATE HIGHER THAN WHAT WAS PROPOSED?

29. In view of the *compensatory* principle behind the fixing of surcharge for open access, the question arise whether it is open to the Commission to fix the same at Rs.1.29 ps per kWh for 33 KV HT-1 Industry General category when the Discom/liencess proposed only Rs.0.30 ps per kWh for HT-1 Industrial Segregated 33 kV supply.

30. In my opinion, when proposal for Cross Subsidy Surcharge is made under Section 62 of the Act by the Discom through a Filing before the Commission, it is expected that such filing would keep in mind the losses caused to the Discoms on Cross Subsidy Surcharge by reason of the consumer taking supply from someone other than the Discom. So, if the Discom felt that the levy of Rs.0.30 ps per kWh towards cross subsidy surcharge for open access for the HT-1 Industrial Segregated category for 33 kV supply would adequately compensate it for the loss which it would suffer on account of loss of cross subsidy, if consumers take supply from someone other than the Discom, the Commission is not empowered to alter the same and fix it 4 times more than what was proposed by the Discom.

31. This is akin to a situation where a plaintiff files a suit for recovery of a fixed sum of money and a Court grants him more than what he has asked for, which is impermissible.

32. Reliance on Section 26 (5) of the A.P.Electricity Reform Act, 1998 (which statute has been saved by the Schedule under Section 185(3)) by the Commission is also not tenable.

33. The said provision no doubt entitles the licensee and directed that the holder of each license granted to observe the methodologies and procedures specified by the Commission from time to time in calculating the expected revenue from charges which it is permitted to recover pursuant to the terms of its licence and in designing *tariffs* to collect those revenues.

34. Sub-section (5) of Section 26 states:

“(5) Every licensee shall provide to the Commission in a format as specified by the Commission at least 3 months before the ensuing financial year details of its calculation for that financial year, of the expected aggregate revenue from charges which it believes it is permitted to recover pursuant to the terms of its licence and thereafter it shall furnish such further information as the Commission may reasonably require to assess the licensee’s calculation. Within 90 days of the date on which the licensee has furnished all the information that the Commission require, the Commission shall notify the licensee either-

*(a) that it accepts the licensee’s **tariff** proposal and revenue calculations, or*

*(b) that it does not consider the licensee’s **tariff** proposals and revenue calculations to be in accordance with the*

methodology or procedure in its licence, and such notice to the licensee shall,-

(i) specify fully the reasons why the Commission considers that the licensee's calculation does not comply with the methodologies or procedures specified in its licence or is in any way incorrect, and

(ii) propose a modification or an alternative calculation of the expected revenue from charges, which the licensee accept."

35. It is clear that Section 26 of the A.P.Electricity Reform Act, 1998 deals with *tariff* and not with *cross subsidy surcharge*. While cross subsidy surcharge for open access is compensatory in nature, as has been held in **Sesa Sterlite Limited** (2 supra), fixing a tariff is to be done in the manner indicated in Section 61 by keeping in mind several factors indicated therein.

"61. Tariff regulations.- *The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensee;*
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- (d) safeguarding of consumes' interest and at the same time, recovery of the cost of electricity in reasonable manner;*

- (e) *the principles rewarding efficient in performance;*
- (f) *multi-year tariff principles;*
- (g) *that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;*
- (h) *the promotion of co-generation and generation of electricity from renewable sources of energy;*
- (i) *the National Electricity Policy and tariff policy:..”*

36. Thus, *tariff fixation is not a compensatory exercise unlike cross-subsidy surcharge for open access which is only compensatory.*

Therefore, the Commission could not have applied Section 26(5) of the Act to alter the proposal made by the Discom and enhance the said surcharge to four times what was proposed by the Discom.

37. Such action on the part of the Commission would also be clearly arbitrary and without jurisdiction.

ORDER OF THE COMMISSION GIVES NO REASON FOR VARYING THE PROPOSAL OF THE DISCOM

38. There is also no dispute that the order passed by the Commission does not contain any reasons stating why the Commission chose to vary the Cross Surcharge Subsidy proposal made by the Discom. The Commission, while determining the cross subsidy surcharge for open access acts as a quasi judicial body and is bound to give reasons also for varying the proposal made by the Discom and granting more than

4 times what the Discom had proposed. Absence of reasons also vitiates it's order.

THE CONCLUSION

39. In this view of the matter, the writ Petitions are allowed and the order dt.27-03-2015 of the Commission in so far as fixation of the cross-subsidy surcharge for HT-1 Industry General category for 33 kV supply is declared as contrary to the law, arbitrary, unsustainable and is accordingly set aside; and the cross-subsidy surcharge for HT-1 Industry General category for 33 kV supply is declared as Rs.0.30 ps per Kwh as was sought by the Discom for the financial year 2015-16. Consequently, the demands raised by the Discom on the petitioners on the basis of the order dt.27-03-2015 passed by the Commission are declared illegal and are also set aside.

40. Consequently, W.V.M.P.No.1468 of 2016 in W.P.No.26609 of 2015 and W.V.M.P.No.1447 of 2016 in W.P.No.26623 of 2015 are dismissed. No costs.

41. As a sequel, miscellaneous applications pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 29-10-2018
Vsv/*