



IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,
AT NEW DELHI
[APPELLATE JURISDICTION]

APPEAL NO. OF 2015

IN THE MATTER OF:

Appeal under section 111 of the Electricity Act, 2003 challenging the order dated 15.04.2015 passed in O.P.no. 08 of 2015 (*Suo-motu*) by the Hon'ble Andhra Pradesh Electricity Regulatory Commission regarding Determination of Surcharge and Additional Surcharge under Section 39, 40 and 42 of the Electricity Act, 2003 for Financial Year 2015-16

AND IN THE MATTER OF:

Open Access Users Association

... APPELLANT

VERSUS

Andhra Pradesh Electricity
Regulatory Commission & Ors

....RESPONDENTS

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AND IN THE MATTER OF:

Open Access Users Association,
2ND Floor, D21 Corporate Park, Sector- 8,
Dwarka, New Delhi - 110075

... APPELLANT

VERSUS

1. Andhra Pradesh Electricity Regulatory Commission,
4th Floor, Singareni Bhavan,
Red Hills, Hyderabad – 500 004
2. Southern Power Distribution Company of A.P. Ltd.,
Shrinivasapuram, Tiruchanoor Road,
Tirupati – 517503,

Chittor District – Andhra Pradesh

3. Eastern Power Distribution Company of A.P. Ltd.
P & T Colony,
Sethammadhara – 530 013,
Visakhapatnam - Andhra Pradesh

...RESPONDENTS

APPEAL UNDER SECTION 111 OF THE ELECTRICITY ACT,
2003 AGAINST THE IMPUGNED ORDER DATED
15.04.2015 PASSED IN O.P. NO. 08 of 2015 (SUO-MOTU)
BY THE HON'BLE ANDHRA PRADESH ELECTRICITY
REGULATORY COMMISSION

MOST RESPECTFULLY SHOWETH:

1. DETAILS OF APPEAL:

- (a) The present Appeal has been preferred by Open Access Users Association against the order dated 15.04.2015 (herein to be referred as "impugned order") passed in O.P. no. 08 of 2015 (Suo-motu) by the Hon'ble Andhra Pradesh Electricity Regulatory Commission (hereinafter to be referred as "Respondent Commission") regarding Determination of Cross Subsidy Surcharge and Additional

Surcharge under Section 39, 40 and 42 of the Electricity Act, 2003 (hereinafter to be referred as "2003 Act") for Financial Year 2015-16.

- (b) The Appellant is a Registered Society formed under the Societies Registration Act, 1860. The Appellant was registered as Society on 04.08.2012. The main objective of the Appellant is to safeguard the interests of the open access consumers all over India. The Appellant aims to create a responsible forum to highlight consumer awareness on various types of Open Access Charges levied by different States and their implications. The Appellant also aims at adhering to safety, security & commercial issues to all Open Access consumers in the Power Market. The members of the Appellant association are aggrieved by the impugned order, hence, the Appellant has preferred the present appeal for redressal of the grievances of its members.
- (c) The Appellant has filed the present Appeal to challenge findings and wrongful calculation of Cross Subsidy Surcharge by the Respondent Commission which it arrived

while determining the Cross Subsidy Surcharge and Additional Surcharge under Section 39, 40 and 42 of the Electricity Act, 2003 for Financial Year 2015-16 in O.P. No. 08 of 2015 (Suo-motu). The Respondent Commission has arbitrarily and abruptly increased the Cross Subsidy Surcharge from Rs 0/- to Rs. 2.39/- without providing any reason, whatsoever, and it has also failed to substantiate the same with any figures and calculations. Further, the Respondent Commission has arrived at Cross Subsidy Surcharge while ignoring the National Tariff Policy, 2006. Therefore, the same being arbitrary and erroneous deserves to be quashed and set aside.

A copy of the impugned order dated 15.04.2015 passed by the Respondent Commission in O.P. No. 08 of 2015 is annexed hereto and marked as ANNEXURE A-1.

2. DATE ON WHICH THE ORDER APPEALED AGAINST IS COMMUNICATED AND PROOF THEREOF, IF ANY

The Impugned Order was published in the Respondent Commission's website on 15.04.2015.

3. THE ADDRESS OF THE APPELLANT FOR SERVICE IS THAT OF ITS ADVOCATE AS SET OUT HEREUNDER:

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4. THE ADDRESS OF THE RESPONDENTS FOR SERVICE OF ALL NOTICES IN THE APPEAL ARE SET OUT HEREUNDER:

1. Andhra Pradesh Electricity Regulatory Commission,
4th Floor, Singareni Bhavan,
Red Hills, Hyderabad – 500 004
2. Southern Power Distribution Company of A.P. Ltd.,
Shrinivasapuram, Tiruchanoor Road,
Tirupati – 517 503,
Chittoor District – Andhra Pradesh
3. Eastern Power Distribution Company of A.P. Ltd.
P & T Colony,

Sethammadhara – 530 013,
Visakhapatnam - Andhra Pradesh

5. JURISDICTION OF THE APPELLATE TRIBUNAL

The Appellant declares that the subject matter of the appeal is within the jurisdiction of this Hon'ble Tribunal.

6. FACTS OF THE CASE:

1. The Appellant is a registered Society formed under Societies Registration Act, 1860. The Appellant was registered as Society on 04.08.2012. The main objective of the Appellant is to safeguard the interests of the open access consumers all over India. The Appellant aims to create a responsible forum to highlight consumer awareness on various types of Open Access charges levied by different States and their implications. The Appellant also aims at adhering to safety, security & commercial issues to all Open Access consumers in the Power Market.
2. Respondent No. 1 is the Andhra Pradesh Electricity Regulatory Commission constituted under section 82 of the Electricity Act, 2003.

Respondents No. 2 and 3 are the two distribution licensees, Southern Power Distribution Company of A.P. Ltd (hereinafter to be referred as "SPDCL") and Eastern Power Distribution Company of A.P. Ltd (hereinafter to be referred as "EPDCL"). Both the Respondents No. 2 and 3 would collectively be referred to as "Distribution Licensees".

3. That the Respondent No. 2 SPDCL and Respondent No. 3 EPDCL have included the proposal for determination of Cross Subsidy Surcharge (hereinafter to be referred as "CSS" for Open Access transactions along with the ARR/FPT filings for determination of Tariff for retail sale of electricity during the Financial Year 2015-16 with the Respondent Commission.
4. The Respondent Commission issued public notice on 07.02.2015 inviting suggestions/ objections from the public and the stakeholders on the petition of the Distribution Licensees for Determination of ARR/FPT for FY 2015-16. The Respondent Commission held public hearings on 23.02.2015 to 28.02.2015 and on 04.03.2015.

5. On 23.03.2015, the Respondent Commission has passed an order regarding Determination of Aggregate Revenue Requirement and Retail Supply Tariff Order for Financial Year 2015–16.

A copy of the order dated 23.03.2015 passed by the Respondent Commission is annexed hereto and marked as ANNEXURE A-2.

6. That on 15.04.2015 the Respondent Commission passed the impugned order regarding Determination of Surcharge and Additional Surcharge for the FY 2015- 16 in violation of the provisions of National Tariff Policy and the Electricity Act, 2003, without paying any heed to the objection raised by the Stakeholders and other participants before the Respondent Commission. The Appellant is aggrieved by the conclusion drawn by the Respondent Commission in the impugned order and such impugned order also suffers from gross illegality and based upon erroneous surmises without having any substantiation as to the calculation and the methodology on which the CSS has been determined.

7. Being aggrieved by the impugned order, the Appellant is constrained to file the present Appeal.

7. (a) FACTS IN ISSUE

- i. The Appellant is aggrieved by the impugned order, since the Respondent Commission while calculating the Cross Subsidy Surcharge has ignored the formula and methodology prescribed under the National Tariff Policy, 2006 (hereinafter to be referred as "NTP") and has actually acted contrary to the objectives of the 2003 Act and hence, violated regulatory framework. The formula provided in the NTP is statutory in nature and the same is required to be followed as a method in consonance with the objective of 2003 Act than the "Embedded Cost" Method as adopted by the Respondent Commission. In essence, the Respondent Commission has ignored the NTP which is in consonance with the 2003 Act and adopted the "Embedded Cost" formula which would have adverse impact on the Open Access regime. Further, the Respondent Commission has nowhere indicated the statutory source behind adopting embedded cost formula.

- ii. The NTP2006 has been issued under Sec. 3 of the 2003 Act. It has a statutory flavour. Such proposition of law is no more res integra and in the absence of any formula or methodology provided or prescribed by a State Commission in any of its regulation, such State Commission is bound to abide by the formula prescribed under NTP.
- iii. The Appellant is further aggrieved by the impugned order, since the Respondent Commission has wrongly calculated the CSS while placing reliance on the "Embedded Cost" Method. The Respondent Commission has made grave mistakes while calculating CSS by using 'Embedded Cost' methodology which amounts to determination of very high CSS..
- iv. In case the CSS is worked out in the manner computed by the Respondent Commission, the Consumer will have to pay more in case it wishes to utilize open access from sources other than the distribution licensee. On the other hand in case the CSS formula as prescribed under the NTP

is employed, the consumer is not burdened with unreasonable CSS and at the same time the interest of the distribution licensee is taken care of.

- v. It is further stated that though the legislative intent of 2003 Act give impetus to competition, the Respondent Commission by the impugned order, by taking recourse to the "Embedded Cost" to work out the CSS, has acted contrary thereto. If the Respondent Commission goes for overkill by imposing burdensome CSS for Open Access, it will hit generation of generators who will not increase capacity, as it will be hard to find consumers willing to buy expensive power. The formula detailed in NTP shows the path for calculating CSS from the consumers, who are permitted Open Access. The idea is that it should not be so hefty that consumers are discouraged from utilizing the source of power of their choice otherwise the competition and open access will be eliminated, which will go against the very grain of the 2003 Act.
- vi. In view of the above, it is submitted that the Respondent Commission, while calculating the cross subsidy surcharge

has acted contrary to paragraph 8.5.1 of the NTP and violated the provisions of 2003 Act.

- vii. It is further submitted that the Respondent Commission has arbitrarily imposed "additional surcharge" at 10 % on open access for all voltages level in uniform manner without drawing any difference between voltage levels. Further, the Respondent Commission has levied "additional surcharge" without stating that there won't be any surcharge in absence of any stranded capacity. It may be pertinent to highlight that in Andhra Pradesh there is surplus for most of the time, therefore, it would be erroneous to impose additional surcharge on uniform basis when there is no stranded capacity. Further, it is not always the case that the open access consumer would be using grid of distribution licensee. Further, the Respondent Commission has delegated the function to determine the additional surcharge on the Distribution Licensee which in terms of the 2003 is not permissible and also amounts to breach of statutory duty.

(b) QUESTIONS OF LAW:

The Appellant submits that the grounds of appeal by itself elaborate the questions of law, which requires determination. In any event, and without prejudice to the grounds of appeal, the questions of law, which are raised by the Appellant, can be summarized as follows:

- A. Whether the Respondent Commission has erred in ignoring the paragraph 8.5.1 of the NTP while calculating the CSS?
- B. Whether the Respondent Commission has wrongly adopted the "Embedded Cost" method which is in violation to the surcharge computation formula prescribed in the Tariff Policy in paragraph 8.5.1?
- C. Whether the Respondent Commission erred in calculating and determining CSS by following "Embedded Cost" method?
- D. Whether the Respondent Commission has violated provisions stipulated in sections 61(i) and 86(4) of the Electricity Act 2003 by not adhering to the principle

enunciated in the Tariff Policy for computation of cross subsidy surcharge?

- E. Whether the Respondent Commission has acted in violation of the provisions of the Electricity Act, 2003, by not following the principles laid down in the Tariff Policy while calculating the cross subsidy surcharge?
- F. Whether the Respondent Commission by passing the impugned order has created a deterrent for the consumers to avail and exercise their statutory right to open access guaranteed under the Electricity Act, 2003?
- G. Whether the impugned order suffers from gross irregularity by violating the objective and spirit with which the Electricity Act, 2003 has come into existence and the same being passed in violation of the provisions of section 42 of the Electricity Act, 2003?
- H. Whether the Respondent Commission violated Section 42(2) of the Electricity Act 2003 by increasing the Cross Subsidy Surcharge which is determined in absolute term?

- I. Whether the Respondent Commission has violated Section 42(4) read with Para 8.5.4 of Tariff Policy while determining Additional Surcharge on Suo-motu basis ?
 - J. Whether Respondent Commission erred in determination of Additional Surcharge and delegating the same to the Distribution Licensee ?
 - K. Whether the Respondent Commission has instead of making policies and framework for promotion of generation and amelioration of open access use in the State, acted to the contrary by imposing such exorbitant and excessive cross subsidy surcharge with an objective to create an impediment in exercise of the right to avail open access enshrined under section 42 of the 2003 Act ?
8. GROUND OF APPEAL:

Being aggrieved by the impugned order dated 15.04.2015, the Appellant craves leave to file the present appeal, inter alia, on the following grounds amongst other:

A. The Respondent Commission while determining the Cross Subsidy Surcharge has extracted para 8.5.1 of the Tariff Policy, which enumerates the formula on the basis of which Cross Subsidy Surcharge shall be calculated. The surcharge calculation has various components and factors, to be taken into consideration by the Respondent Commission. The Respondent Commission under paragraph 5 of the impugned order has referred to the formula provided under NTP as a mere formality without neither intending nor implementing such formula in its letter and spirit. The Respondent Commission has not considered the components and factors as detailed in the NTP and arbitrarily calculated CSS based on erroneous and illegal methodology, "Embedded Cost". The formula detailed in NTP shows the path for calculating CSS from the consumers, who are permitted Open Access. The idea is that it should not be so hefty that consumers are discouraged from utilizing the source of power of their choice otherwise the competition and open access will be eliminated,

which will go against the very grain of the 2003 Act. The Respondent Commission has failed to appreciate that such formula in the absence of any formula prescribed under any of its own regulation, is binding while calculating CSS. The formula provided under paragraph 8.5.1 of NTP is statutory in nature and the same has been formulated in exercise of power under section 3 of the 2003 Act and the legality and implication of such formula has been subjected to judicial scrutiny before this Hon'ble Tribunal for time without number, and such formula has been held to be tested through time to be judicious and reasonable.

The Hon'ble Supreme Court (Constitution Bench) in PTC India Limited v. Central Electricity Regulatory Commission: (2010) 4 SCC 603 held that the tariff policy is mandatory. Paras 18 & 19 of the SCC in PTC India Limited case (Supra) read as follows:-

“18. Section 3 of the 2003 Act requires the Central Government, in consultation with the State Governments and the Authority, to prepare the National Electricity Policy as well as tariff policy for development of the power system based on optimum utilization of resources. The Central and the State Governments are also vested with rule-making powers under Sections 176 and 180 respectively, while the “Authority” has been defined under Section 2(6) as the regulation-making power under Section 177. On the other hand, the Regulatory Commissions are vested with the powers to frame policy, in the form of regulations, under various provisions of the 2003 Act. However, the Regulatory Commissions are empowered to frame policy, in the form of regulations, as guided by the general policy framed by the Central Government. They are to be guided by the National Electricity Policy, the tariff policy as well as the National Electricity Plan in terms of Sections 79(4) and 86(4) of the 2003 Act (see also Section 66).

19. In this connection, it may also be noted that the Central Government has also, in exercise of its power under Section 3 of the

2003 Act, notified the tariff policy with effect from 6-1-2006. One of the primary objectives of the tariff policy is to ensure availability of electricity to consumers at reasonable and competitive rates. The tariff policy tries to balance the interest of consumers and the need for investments while prescribing the rate of return. It also tries to promote trading in electricity for making the markets competitive. Under the tariff policy, there is a mandate given to the Regulatory Commissions, namely, to monitor the trading transactions continuously and ensure that the electricity traders do not indulge in profiteering in cases of market failure. The tariff policy directs the Regulatory Commissions to fix the trading margin in a manner which would reduce the costs of electricity to the consumers and, at the same time, they should endeavour to meet the requirement for investments."

It is submitted that the Section 86 (4) of the said Act of 2003 clearly provides that in discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity

Plan and Tariff Policy published under Section 3 of the said Act of 2003.

B. That it is most respectfully submitted that the NTP has been issued under Sec. 3 of the 2003 Act. It has a statutory flavour. The Respondent Commission is required to abide by the NTP. The NTP and other Tariff Policies are prepared by the Central Government in consultation with the various Authorities working for development of the power system. The main aims of such policies are to achieve optimal utilization of its resources such as coal, natural gas, nuclear substances and hydro and renewal resources of energy. Optimal utilization of resources will take place only when generator is assured of the use of the wires for transmitting electricity to the licensees and consumers. In this context open access assumes importance. In case when the Open Access is made available for transmitting electricity to the end-user at a cost which is higher than the cost at which the

distribution licensee of the area supplies energy to the consumers, then the very concept of Open Access becomes meaningless. In case, when the cost to use Open Access is high, there cannot be optimal use of capacities and resources. The optimal use of capacities and resources is the mandate of Section 3 of the 2003 Act.

C. The formula/methodology adopted by the Respondent Commission to calculate CSS in the impugned order is wrong. In this connection, "Embedded Cost" methodology as provided under paragraph 7 of the impugned order: -

- a. The approved ARR/Expenditure for a tariff year is apportioned to different consumer categories based on class load and coincidence factors, capacities, sales, losses, etc.
- b. The revenue from sale of electricity at the tariff approved by the Commission (along with other revenue) is computed for each consumer category.

- c. Based on allocated costs and revenues, the cross subsidy amounts available have been computed as difference between revenue and cost for each consumer category and
- d. The cross subsidy surcharge per unit is computed by dividing the available cross subsidy with the sales volume approved for each consumer category.

The Respondent Commission instead of adopting the formula prescribed by the NPT at para. 8.5.1 has adopted the above formula. If the Respondent has adopted the formula prescribed by the NTP then the CSS would have been as follows - :

Station	Location	Quantum-MU's	Power Purchase Cost (Rs/unit)-C	L %	C(1+L%)
RTPP- Stage III	AP- Intra State	116.58	7.13	11.81%	8.0
Other Short Term And D to D Purchase's	Intra State	819.5	5.7	11.81%	6.4
		936.1			6.57

Voltage Level	Energy Charge	Weighted Avg	D	C(1+L%)+D	CSS
11kv	6.02	6.57	0.33	6.90	-0.88

33kv	5.57	6.57	0.02	6.59	-1.02
132kv	5.15	6.57	0	6.57	-1.42

The above-referred tables clearly highlights that, if the formula prescribed by the NTP would have been considered by the Respondent Commission then the CSS would have come as (-)0.88 for 11 K, (-)1.02 for 33 KV and (-)1.42 for 132 KV.

Therefore, the impugned order suffers from illegality and the same deserves to be set aside being violative of the formula prescribed under the Tariff Policy and the same is mandatory and binding on the Respondent Commission.

D. It is submitted that the Respondent Commission has wrongly calculated the CSS while placing reliance on the "Embedded Cost" Method. It is submitted that the Respondent Commission have adopted "Embedded Cost" methodology vide its order dated 29.08.2006 citing reason that the Commission is

adopting this methodology since this methodology is based upon principle of 'revenue neutrality'. Relevant part of said order dated 29.08.2006 is extracted below:

"9. While examining these views the argument of 'revenue neutrality' expressed by GoAP merits consideration. The Commission agrees with GoAP that introduction of competition cannot be at the cost of financial viability of the utilities. Currently, the Tariff Order, which ensures that the Distribution Licensees costs are fully recovered, is based on the projections made by the Licensees on the expected sales to various consumer categories. Revenue neutrality would require that subsidizing load migrating to Open Access is matched by appropriate fresh load moving in or is compensated by means of Surcharge. On this count and considering the GoAPs view, the Commission prefers to continue with the existing methodology of fixing the Cross-subsidy Surcharge for FY2006-07 based on embedded cost."

E. It is submitted that the cross subsidy surcharge can only be less than or equal to the cross subsidy amount. The principle of 'revenue neutrality' for determination of surcharge is to compensate the DISCOM the loss of cross subsidy from the consumers who opt for open access, and not to allow the DISCOMs to claim a profit in the garb of imposing cross subsidy surcharge. Clearly, the said principle implies that in no event the cross subsidy surcharge can be greater than actual cross subsidy required. The Respondent Commission while calculating the CSS has also included the demand charges/ fixed charges along with the energy charges which are variable in nature. It is submitted that the objective of the CSS is to compensate the distribution licensee for the loss in cross subsidy of a consumer availing open access power. As such, open access consumer in Andhra Pradesh are already paying the fixed cost to their respective Discoms as calculated and billed on the basis of the contract demand, notwithstanding the quantity of energy tied up through open access.

Therefore, the open access consumers are subjected to payment of fixed charges of the discoms and in addition to that taking into consideration such fixed charges while computing the Tariff amounting to imposing the same cost twice on the consumers. Therefore, the fixed charges component has to be done away with while computing Tariff of the relevant consumer category by taking into consideration variable cost/ energy charges only. This will also in line with the principle of 'revenue neutrality'.

F. It is submitted that the Open Access consumers pays the Fixed Charges on consumption of power through Open Access. Therefore, the same should not be considered for calculating the revenue/tariff for Open Access consumer category. It is submitted that If fixed cost is not considered as part of revenue/tariff, then the CSS gets reduced by around 50 P/Kwhr for both EPDCL and SPDCL HT.I.(A) consumers which is evident from the below table.

EPDCL CONSUMER HT I(A)

Parameter	Amount	Unit
<u>Tariff-Fixed Cost</u>	<u>6.26</u>	<u>Rs/Kwhr</u>
Cost of Supply	5.05	Rs/Kwhr
<u>CSS</u>	<u>1.21</u>	<u>Rs/Kwhr</u>

Parameter	Amount	Unit
<u>Tariff-Fixed Cost</u>	<u>5.80</u>	<u>Rs/Kwhr</u>
Cost of Supply	4.96	Rs/Kwhr
<u>CSS</u>	<u>0.84</u>	<u>Rs/Kwhr</u>

Parameter	Amount	Unit
<u>Tariff-Fixed Cost</u>	<u>5.38</u>	<u>Rs/Kwhr</u>
Cost of Supply	4.78	Rs/Kwhr
<u>CSS</u>	<u>0.60</u>	<u>Rs/Kwhr</u>

SPDCL CONSUMER HT I(A)

Parameter	Amount	Unit
<u>Tariff-Fixed Cost</u>	<u>6.26</u>	<u>Rs/Kwhr</u>
Cost of Supply	5.17	Rs/Kwhr
<u>CSS</u>	<u>1.09</u>	<u>Rs/Kwhr</u>

Parameter	Amount	Unit
<u>Tariff-Fixed Cost</u>	<u>5.80</u>	<u>Rs/Kwhr</u>
Cost of Supply	4.94	Rs/Kwhr
<u>CSS</u>	<u>0.86</u>	<u>Rs/Kwhr</u>

Parameter	Amount	Unit
<u>Tariff-Fixed Cost</u>	<u>5.38</u>	<u>Rs/Kwhr</u>
Cost of Supply	4.71	Rs/Kwhr
<u>CSS</u>	<u>0.67</u>	<u>Rs/Kwhr</u>

It may not be out of place to state that the Respondent Commission has calculated CSS for HT.I.(A) category as a whole without differentiating it on KV level. Needless to say that if the calculation is to say that the average Cost of Supply of HT.I.(A) – 11 KV, 33 KV and EHT consumers based on FY 2016 tariff order, then the same comes out to Rs. 4.90/Kwhr as shown below:

SPDCL

Cost of Supply	ARR Rs Cr	MU
11 KV	1082.89	2095.46
33 KV	2261.71	4578.31
EHT	1711.39	3635.33
Average Cost of Supply	4.90	Rs/Kwhr

EPDCL

Cost of Supply	ARR Rs Cr	MU
11 KV	801.44	1585.99
33 KV	745.1	1501.55
EHT	1680.63	3512.7
Average Cost of Supply	4.89	Rs/Kwhr

From the above cost of supply, if the weighted average (weights based on contribution to ARR for FY 2016 of 11KV, 33KV and EHT consumer under HT.I.(A)) tariff is deducted then, the CSS of EPDCL HT.I.(A) consumers as a whole comes out to Rs. 0.81/Kwhr and for SPDCL HT.I.(A) consumers as Rs. 0.85/Kwhr. The same can be substantiated with the following tables - :

EPDCL

Cost of Supply	ARR Rs Cr	MU
Average Cost of Supply	4.89	Rs/Kwhr
Wtd Avg Tariff - Fixed Cost	5.69	Rs/Kwhr
CSS 2	0.81	Rs/KWWhr

SPDCL

Cost of Supply	ARR Rs Cr	MU
Average Cost of Supply	4.90	Rs/Kwhr
Wtd Avg Tariff - Fixed Cost	5.76	Rs/Kwhr
CSS 2	0.85	Rs/KWWhr

If the said discrepancy is allowed to continue the same will also be a detriment to the smooth implementation of open access as guaranteed by section 42 of the Electricity Act, 2003. A provision of a statute have to be interpreted in a manner so as to give effect to the objective with which the statute has come into existence.

- G. It is submitted that apart from above mentioned basic discrepancy in principle followed by the respondent commission, the CSS arrived by the Respondent Commission on the basis of the "Embedded Cost" methodology is not accurate as there are various inconsistencies and discrepancies. As discussed above the CSS is calculated in following manner while adopting the "Embedded Cost" approach:

- I. Approved ARR/Expenditure for a tariff year is apportioned to different consumer categories based on class load and coincidence factors, capacities, sales, losses etc

- II. The revenue from sale of electricity at the tariff approved by the Commission (along with other revenue) is computed for each consumer category.
- III. Based on allocated costs and revenues, the cross subsidy amounts available is computed as the difference between revenue and cost for each consumer category.
- IV. The cross subsidy surcharge per unit is computed by dividing the available cross subsidy with the sales volume approved for each consumer category.

The CSS based on "Embedded Cost" approach as calculated by the Respondent Commission for SPDCL and EPDCL in the impugned order is as follows:

Cross Subsidy Surcharge Calculations for FY2015-16

Consumer Category	Sales, mu		Allocated Cost, ₹ cr.		Revenue, ₹ cr.		Cross Subsidies ₹ cr.		Surcharge (₹/unit)	
	SPDCL	EPDCL	SPDCL	EPDCL	SPDCL	EPDCL	SPDCL	EPDCL	SPDCL	EPDCL
LT-I: Domestic	6776.73	4325.65	4433.80	2803.47	2393.41	1436.02	0.00	0.00	0.00	0.00
LT-II: Non-Domestic/Commercial	1442.33	739.57	973.50	488.28	1340.12	694.93	366.62	206.65	2.54	2.79
LT-III: Industrial	1377.22	853.04	812.81	502.27	971.83	553.20	159.02	50.94	1.15	0.60
LT-IV: Cottage Industries	33.52	1.82	20.12	1.14	13.75	0.88	0.00	0.00	0.00	0.00
LT-V: Agriculture	8020.16	1936.33	3547.48	901.57	99.13	35.48	0.00	0.00	0.00	0.00
LT-VI: Street Lighting and PWS	540.52	233.90	368.91	186.58	303.70	139.26	0.00	0.00	0.00	0.00
LT-VII: General	80.93	45.92	54.72	34.34	58.65	33.77	3.94	0.00	0.49	0.00
LT-VIII: Temporary Supply	1.04	0.74	0.71	0.58	1.03	0.76	0.32	0.18	3.10	2.42
HT-I(A): Industrial	9763.38	4070.90	4789.36	2013.37	7121.69	2854.72	2332.33	841.36	2.39	2.07
HT-I(B): Ferro-alloys	545.73	2529.34	266.62	1213.80	282.55	1243.54	15.93	29.73	0.29	0.12
HT-II: Others	674.33	654.86	344.33	333.88	654.69	610.03	310.36	276.15	4.60	4.22
HT-III: APTs, BSTs and Rly. Stns.	Average of HT-I(A): Industry and HT-II:Others						36.82	4.78	2.53	2.36
HT-IV(A): Lift Irrigation	318.86	57.89	149.09	24.53	190.20	35.39	41.11	10.86	1.29	1.88
HT-IV(B): Composite Water Schemes	26.40	2.14	12.67	0.91	12.96	1.10	0.28	0.19	0.11	0.91
HT-V: Railway Traction	830.02	732.54	458.18	407.12	558.25	496.67	100.07	89.55	1.21	1.22
HT-VI: Townships & Colonies	46.50	34.36	27.15	19.38	28.43	21.55	1.28	2.18	0.27	0.63
HT-VII: Green Power	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
HT-VIII: Temporary	16.62	0.00	8.41	0.00	15.00	0.00	6.59	0.00	3.97	0.00
HT-IX: RESCOs	310.13	275.98	142.13	129.36	9.33	30.95	0.00	0.00	0.00	0.00

H. At the outset it submitted that the Respondent Commission in the impugned order has not substantiated the calculation and the basis on which CSS has been arrived at and the figures of sales, revenue etc. reflecting in the impugned order are not approved in the tariff order dated 25.03.2015 E.g. Sales, revenue etc., of HT-I(B) Ferro Alloys category is not approved in Tariff Order separately.

It is submitted that the Respondent Commission has not included and considered the Cost of Service while calculating the Tariff. However, the same has been considered and included by the Respondent Commission while calculating the Cross Subsidy Surcharge which is an apparent error on face of the record and also arbitrary.

The Respondent Commission has suddenly increased the Cross Subsidy Surcharge from Rs. 0/- to Rs. 2.39/- per kwh without providing any reasons and it has also failed to substantiate the same with any figures and calculations. This is antithesis to the scheme of the 2003 Act as provided under section 42 which allows only reduction of cross subsidy surcharge.

The Respondent Commission has calculated the CSS while adopting the "Embedded Cost" approach, based on the approved figures for FY 2016, cost of service (CoS) as provided at pg 123 and pg 124 of tariff order dtd. 23 March 2015, the CoS value is provides for HT I

(A) - 11 KV, 33 KV and 132 KV for EPDCL and SPDCL consumers.

However, the Respondent Commission has failed to categorise the consumers on the basis of voltage level as required under the Embedded Cost method in the impugned order which is basic purpose behind calculation of Cost of service. It would be evident to mention that the Respondent Commission is determining CSS on the basis of voltage level since 2005, however in the impugned order Commission has deviated from its own methodology. Though the Respondent Commission claims to have categorized the consumers on the basis of capacities, class load, voltage etc., however, no information is available on these factors and how they are applied while allocating ARR to different costs thereby these factors have been applied arbitrarily while calculating CSS. Therefore, the Respondent Commission has not only erroneous departed from the NTP formula but also failed to

implement Embedded Cost method as it said to have adopted in the impugned order.

In the light of above it submitted that the Respondent Commission has even erred and committed gross irregularities while calculating the CSS even while employing "Embedded Cost" approach. Therefore, the impugned order deserves to be quashed and set-aside.

- I. It is submitted that the Respondent Commission has arbitrarily and erroneously decided to adopt the embedded cost method/approach for determination of the cross subsidy surcharge for 2015-16 based on available data relating to the Tariff Order on Retail Sale of Electricity for FY 2015 – 2016 dated 23.03.2015. Further, the Respondent Commission has committed a gross irregularity while concluding at paragraph 10 , pg. 3 of the impugned order that the licensees have not demonstrated any need to change the method, i.e. from embedded cost method/approach to formula provided in NTP for FY 2015-16. While on the contrary at paragraph 6 of the impugned

order the Respondent Commission has recorded the calculation and submissions made by the distribution licensees for determination of CSS by following the formula provided under paragraph 8.5.1 of the NTP. The Appellant also challenges such calculations and submissions being made by the distribution licensees as provided in paragraph 6 of the impugned order. The Appellant reserves its rights to substantiate its objection pertaining to such calculations being made by the distribution licensees as and when the need arises, with the leave of this Hon'ble Tribunal.

It is submitted that the Respondent has failed to discharge its statutory obligations. Further, the Respondent Commission has to make adjudication on its independent analysis and reasons. It cannot decide anything on the whims and fancies of the distribution licensee without considering interest of the consumers and Electricity Sector at large. Such kind of irregularity vitiates the whole purpose creating a Regulatory Commission and hurts the larger interest of consumers and society. Therefore, in the light of the same, the impugned order deserves to be

dismissed and the Respondent Commission may be directed to provide its own analysis and reasons rather than simply relying upon the whims and fancies of the Respondent Commission. The Respondent Commission has itself rendered its order illogical and unreasonable by making such contradictory and inconsistent observations.

- J. The Respondent Commission in para 8 and 9 of the impugned order has referred to the judgment passed by this Hon'ble Tribunal and subsequent stay order being passed by the Hon'ble Supreme Court of India. It is pertinent to mention herein that the Hon'ble Supreme Court vide its order dated 05.05.2008 in Civil Appeals No. 4936-4941 of 2007 was pleased to stay the operation of the order passed by this Hon'ble Tribunal in relation to the Appellant in the matter. However, as per the settled principle of law unless specifically expressed, stay of operation of an impugned order does not render any prohibition or restriction in the implementation of the principle enunciated by the order stayed. Therefore, there has been no stay of the principle enunciated by this Hon'ble Tribunal in Civil Appeal No. 1079 of 2008. Further,

the Respondent Commission has failed to indicate any contextual nexus between reference to the above pending case to the computation of CSS for FY 2015-16.

K. It is further submitted that the Respondent Commission has arbitrarily imposed "additional surcharge" at 10 % on open access for all voltages level in uniform manner without drawing any difference between voltage levels. Further, the Respondent Commission has levied "additional surcharge" without stating that there won't be any surcharge in absence of any stranded capacity. It may be pertinent to highlight that in Andhra Pradesh there is surplus for most of the time, therefore, it would be erroneous to impose additional surcharge on uniform basis when there is no stranded capacity. Further, it is not always the case that the open access consumer would be using grid of distribution licensee. The open access consumer can directly take power from the network of transmission licensee. Further, the Respondent Commission has delegated the function to determine the additional surcharge on the Distribution Licensee which in terms of

the 2003 is not permissible and also amounts to breach of statutory duty.

- L. It is submitted that section 42(2) of Electricity Act, 2003 provides that, there should have been a constant endeavour on the part of the Respondent Commission to reduce the cross subsidy surcharge on a progressive basis. In this context relevant portion of the Electricity Act, 2003 is furnished hereunder.

"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 subsidy, 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 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 surcharges shall be utilized 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 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:

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”

It is submitted that the Respondent Commission was required to present the future road map for eliminating cross subsidy and also to compute the cost of supply at the supplied voltage. However, the Respondent Commission rather than making the progressive reduction has increased the Tariff

substantially which resulted in significant increase in the cross subsidy surcharge. There has been a rise of approximately 239% in the CSS for industrial consumers in comparison to the CSS made applicable in financial year 2015-16. A perusal of the impugned order would suffice that no analysis or reasoning ever adduced by the Respondent Commission to substantiate such geometrical increase in the CSS. The Respondent Commission has also failed to brought any statistics or peculiar circumstances said to have been occurred in the industry which resulted in such abnormal increase in the value of CSS.

The National Tariff Policy casts obligations on the State Commissions not to lay down the amount of cross subsidy surcharge in a manner which eliminates the competition and the Open Access User is discouraged from opting other distribution Company. The Relevant portion of the National Tariff Policy is produced below for ready reference - :

" 8.5 Cross-subsidy surcharge and additional surcharge for open access

8.5.1 National Electricity Policy lays down that the amount of cross-subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access. A consumer who is permitted open access will have to make payment to the generator, the transmission licensee whose transmission systems are used, distribution utility for the wheeling charges and, in addition, the 17 cross subsidy surcharge. The computation of cross subsidy surcharge, therefore, needs to be done in a manner that while it compensates the distribution licensee, it does not constrain introduction of competition through open access. A consumer would avail of open access only if the payment of all the charges leads to a benefit to him. While the interest of distribution licensee needs to be protected it would be essential that this provision of the Act, which requires the open access to be introduced in a time-bound manner, is used to bring about competition in the larger interest of consumers".

The Respondent Commission despite being aware of the mandates of the National Tariff Policy has increased the Cross Subsidy Surcharge substantially which is contrary to the objectives of the National Tariff Policy and would eliminate the competition. Further, the Open Access Users would be discouraged and dis-incentivized from moving to the other distribution licensees which would defeat the whole purpose of Open Access, since the Respondent Commission by increasing the CSS amount has in reality nullified the option of the consumers to opt for open access. If a consumer finds the power procured from open access sources costlier than the cost at which energy is available from the discoms, it automatically creates a restraint in the open access market and dis-incentivizes the consumers from availing open access.

M. That it is the duty of the Respondent Commission to pass necessary regulation so as to reduce surcharge and cross subsidies as per section 181 of Electricity Act, 2003. The

relevant portion of the Electricity Act, 2003 is reproduced below:

“181. (1) The State Commissions may, by notification, make regulations Consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely: -

(j) Reduction of surcharge and cross subsidies under second provision to sub-clause (ii) of clause (d) of sub-section (2) of section 39

m) Reduction of surcharge and cross subsidies under second provision to sub-clause (ii) of clause (c) of section 40

(p) Reduction of surcharge and cross-subsidies under the third proviso to sub-section (2) of section 42"

From the above it is submitted that while framing regulations for determination of cross subsidy surcharge the Respondent Commission has to keep in mind the intent of the Electricity Act, 2003 as well as the Tariff Policy. It is a settled principle that regulations are framed in order to implement the parent act and not to evolve any other principle which is contrary thereto. Further, the Electricity Act, 2003 was enacted and made effective in 2003, still the Respondent Commission has not specified any framework/ procedure for reduction of cross subsidy and the surcharge. However, the Respondent Commission has till date neither formulated any road map nor any regulation or specification for determination of CSS. It is high time that Respondent Commission should come up with a detailed mandate as to the determination of CSS.

The present appeal is not catering to any issues to be adjudicated inter-vivos, rather the appeal is challenging the very modus and the approach of the Respondent Commission towards CSS, since the outcome of the impugned findings in the impugned order has a far reaching impact on the industry as a whole and the open access consumers in particular.

N. It is submitted that the Respondent Commission has failed to adopted the formula for calculation of cross subsidy surcharge as prescribed in the Tariff Policy. Further, as per section 61(i) of the Electricity Act, 2003 the Respondent Commission shall be guided by the National Electricity Policy and Tariff Policy. The Tariff Policy is a guideline prepared after due consultation with the authorities and stakeholders. Therefore, it has statutory flavour. The Policies are made in consonance with the spirit and the objective of the Electricity Act, 2003, in order to ensure optimum utilization of the resources and to establish a robust electricity market driven by competition and efficiency. Therefore, the computation of cross subsidy

surcharge formula prescribed under the Tariff Policy is binding since the Respondent Commission has itself adopted the Tariff Policy formula in the impugned order. The Respondent Commission on the contrary, even after extracting the relevant paragraphs of the Tariff Policy dealing with the computation of cross subsidy surcharge formula, made categorical deviation from the same while implementing the formula.

- O. For that the impugned order is passed in violation of the spirit and objective of the Electricity Act, 2003. By not following the Tariff Policy, despite adopting the formula prescribed in the said Policy, the Respondent Commission precludes the generators and consumers in the State of Andhra Pradesh from availing the vested right of open access, which is one of the glaring features of the Electricity Act, 2003 since as per the impugned order the cross subsidy surcharge which has been computed is acting as a deterrent against the EHT consumer so far as availing the right to open access is concerned. Apart from providing an incentive to the private generators, the provision of open access ensures fair competition in the electricity

market, in absence of which the objective enshrined under the preamble would be reduced to platitude.

P. The Respondent Commission is under the statutory duty to levy reasonable charges by following the principles laid down under the Act so that entrepreneurs come forward to set up generation plants, distribution and transmission system.

Q. The Electricity Act, 2003 makes provisions for achieving the objectives with which the Act has come in to force, however the Respondent Commissions are vested with power to implement such provisions of the Electricity Act, 2003, in its true letter and spirit for the implementation of such policy mandates. However with the impugned order the Respondent Commission has acted in a manner contrary to the objectives, the Electricity Act, 2003 contemplates to achieve. Instead of making ways for progressively reducing the cross subsidy surcharge, the Respondent Commission by passing the impugned order has put excessive burden on the open access users, thereby denying the rights and benefits vested in them

under the Electricity Act, 2003. The formula as prescribed under the Tariff Policy and as adopted by the Respondent Commission is made in a manner, so that upon implementation the consumer is not burdened with unreasonable cross subsidy surcharge and at the same time the interest of the distribution licensee are taken care of. Therefore the impugned order deserves to be set aside since the Respondent Commission has not implemented the cross subsidy surcharge formula in its true letter and spirit.

9. MATTERS NOT PREVIOUSLY FILED OR PENDING WITH ANY OTHER COURT

The Appellant submits that no proceedings are pending before any court of law between the Appellant and the Respondents with regard to the subject matter of the present appeal.

10. SPECIFY BELOW EXPLAINING THE GROUNDS FOR SUCH RELIEF (S) AND THE LEGAL PROVISIONS, IF ANY, RELIED UPON

As mentioned in Para 9 of the present appeal.

11. DETAILS OF INTERIM APPLICATION, IF ANY,
PREFERRED ALONG WITH APPEAL

Application for exemption from filing certified copy of the impugned order and Application seeking Leave to file an Appeal

12. DETAILS OF APPEAL/S, PREFERRED BEFORE THIS APPELLATE TRIBUNAL AGAINST THE SAME IMPUGNED ORDER/DIRECTION, BY RESPONDENTS WITH NUMBERS, DATES, AND INTERIM ORDER, IF ANY PASSED IN THAT APPEAL

N. A.

13. DETAILS OF INDEX

An index containing the details of the documents in chronological order relied upon is enclosed.

14. LIST OF ENCLOSURES

A copy of the Impugned Order dated 15.04.2015 passed by the Respondent Commission in O.P. No. 8 of 2015 is annexed hereto as ANNEXURE A-1

A copy of the order dated 23.03.2015 passed by the Respondent Commission is annexed hereto as ANNEXURE A-2.

15. THE ORDER APPEALED AS COMMUNICATED IN ORIGINAL IS FILED? IF NOT, EXPLAIN THE REASON FOR NOT FILING THE SAME

An application for exemption from filing certified copy of the impugned order is filed along with this Appeal.

16. APPELLANT/S IS READY TO FILE WRITTEN SUBMISSIONS/ ARGUMENTS BEFORE THE FIRST HEARING AFTER SERVING THE COPY OF THE SAME ON RESPONDENTS

The Appellant undertakes to file written submissions, if so directed by the Hon'ble Tribunal.

17. COPY OF MEMORANDUM OF APPEAL WITH ALL ENCLOSURES HAS BEEN FORWARDED TO ALL RESPONDENTS AND ALL INTERESTED PARTIES, IF SO, ENCLOSE POSTAL RECEIPT/COURIER RECEIPT IN ADDITION TO PAYMENT OF PRESCRIBED PROCESS FEE

No copy of the Appeal is being sent to the Respondent in advance.

18. MATERIAL PARTICULARS/DETAILS WHICH THE APPELLANT(S) DEEMS NECESSARY:

The material particulars are those which are filed along with the appeal. Should it be necessary, the Hon'ble Tribunal may call for the record of the proceedings before the Commission in the present matter.

19. RELIEF SOUGHT:

In view of the facts mentioned in Para 7 and 8 above, questions of law and grounds set out in Para 9, the Appellant most humbly prays for the following reliefs:

- a. To set aside the impugned order dated 15.04.2015 passed in O.P. No. 08 of 2015 by the Hon'ble Andhra Pradesh Electricity Regulatory Commission; and
- b. Pass such other and further Orders as the Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

42

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY,

AT NEW DELHI

[APPELLATE JURISDICTION]

APPEAL NO. OF 2015

IN THE MATTER OF:

Open Access Users Association

APPELLANT

VERSUS

Andhra Pradesh Electricity Regulatory
Commission & Ors.

RESPONDENTS

AFFIDAVIT

I, Anirban Mondal, S/o Jayanta Kumar Mondal, aged about 25 years, working for gain at Open Access Users Association working as Law Officer of the Appellant, R/o D-36, 2nd Floor, Sector 8, Dwarka, New Delhi - 110075, do hereby solemnly affirm and state as follows.

1. That I am the authorized representative of the Appellant in the abovementioned matter, I have been dealing with the matters relating to the above mentioned case and I am conversant with the facts of the case.
2. I have read the accompanying Appeal and I say that its contents are true to my knowledge and belief and based on records which are believed to be true and correct.
3. The annexures filed along with Appeal are true copies of their respective originals.

Anirban Mondal
DEPONENT

VERIFICATION:

I, the deponent above named do hereby verify that the contents of the above affidavit are true to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this day of July, 2015.

Anirban Mondal
DEPONENT

VAKALATNAMA
BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY,
AT NEW DELHI

[APPELLATE JURISDICTION]

APPEAL NO. OF 2015

IN THE MATTER OF:

Open Access Users Association

... APPELLANT

VERSUS

Andhra Pradesh Electricity Regulatory
Commission & Ors.

... RESPONDENTS

I, Anirban Mondal, Authorised Officer of the Appellant in the above Appeal do hereby appoint and retain **Mr. Matrugupta Mishra, Ms. Shikha Ohri, Mr. Hemant Singh, Mr. Tabrez Malawat, Ms. Meghana Aggarwal, Mr. Tushar Nagar Advocates**, of **M/s Praxis Counsel**, Advocate/s to appear, plead and act for me/us in the above appeal/ petition and to conduct and prosecute all proceedings that may be taken in respect thereof and applications for return of documents, enter into compromise and to draw any moneys payable to me/us in the said proceeding and also to appear in all applications for review and for leave to the Supreme Court of India in all applications for review of judgement.

Place: New Delhi

Date:

Meghana
01/22/14

Anirban Mondal
Signature of the Party



Executed in my presence.

Shikha Ohri

"Accepted"

[Matrugupta Mishra] [Shikha Ohri] [Hemant Singh]

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Shikha Ohri
Hemant Singh

Shikha Ohri

Signature with date

(Name and Designation)