

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**APPEAL NO. 14 OF 2017  
APPEAL NO. 49 OF 2017  
APPEAL NO. 54 OF 2017  
APPEAL NO. 167 OF 2017  
APPEAL NO. 168 OF 2017  
APPEAL NO. 169 OF 2017  
&  
APPEAL NO. 170 OF 2017**

Dated: **15.09.2022**

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson  
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

**APPEAL NO. 14 OF 2017**

**In the matter of:**

**THE RAJASTHAN TEXTILE MILLS ASSOCIATION**

B-1, Nawalkha Apartment, Bharat Mata Path  
Jamnalal Bajaj Marg, C-Scheme,  
Jaipur-302001

.... Appellant(s)

***VERSUS***

**1. RAJASTHAN ELECTRICITY REGULATORY  
COMMISSION**

*Through its Secretary*

Vidyut Viniyamak Bhawan,  
Sahkar Marg, Near State Motor Garage,  
Jaipur – 302005

**2. JAIPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*

Vidyut Bhawan,  
Jyoti Nagar,  
Jaipur – 302005

**3. AJMER VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*

Hathi Bhata, City Power House,  
Jaipur Road, Ajmer– 305001

**4. JODHPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
New Power House, Industrial Area  
Jodhpur-342003

.... Respondent(s)

Counsel for the Appellant (s) : Mr. Anand K Ganesan

Counsel for the Respondent (s) : Mr. Raj Kumar Mehta  
Ms. Himanshi Andley for R-1

Mr. M. G. Ramachandran, Sr. Adv.  
Ms. Poorva Saigal  
Mr. Shubham Arya  
Ms. Shikha Sood  
Mr. Ravi Nair  
Ms. Richa Singh for R-2 to 5

**APPEAL NO. 49 OF 2017**

**In the matter of:**

**VEDANTA LIMITED**

[Formerly known as 'Cairn India Limited)

*Through its authorized representative*

3<sup>rd</sup> & 4<sup>th</sup> Floor, Vipul Plaza,  
Suncity Road, Suncity, Sector-54,  
Gurugram, Haryana – 122 011

.... Appellant(s)

**VERSUS**

**1. RAJASTHAN ELECTRICITY REGULATORY  
COMMISSION**

*Through its Secretary*

27, Sahakar Marg, Jyothi Nagar, Lalkothi  
Jaipur – 302007, Rajasthan

**2. JAIPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Chairman*

2, Kalwar Rd, Krishna Colony, Jhotwara,  
Jobner, Rajasthan – 302012

**3. AJMER VIDYUT VITARAN NIGAM LIMITED**

*Through its Chairman*

Vidyut Bhawan,  
Panchsheel Nagar, Makarwali Road,  
Ajmer– 305004, Rajasthan

**4. JODHPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Chairman*

New Power House, Industrial Area

Jodhpur-342003, Rajasthan

.... Respondent(s)

Counsel for the Appellant (s) : Mr. Matrugupta Mishra  
Ms. Ritika Singhal

Counsel for the Respondent (s) : Mr. Raj Kumar Mehta  
Ms. Himanshi Andley for R-1

Mr. M. G. Ramachandran, Sr. Adv.  
Ms. Poorva Saigal  
Mr. Shubham Arya  
Ms. Shikha Sood  
Mr. Ravi Nair  
Ms. Richa Singh for R-2 to 5

**APPEAL NO. 54 OF 2017**

**In the matter of:**

**1. M/S LORD CHLORO ALKALI LIMITED**

A-264, 1<sup>st</sup> Floor, Defence Colony,  
New Delhi-110024

**2. M/S. SUNIL HEALTHCARE LIMITED**

17,18, Old Industrial Area,  
Alwar-301001, Rajasthan

**3. M/S. SYNERGY STEELS**

55-B, Rama Road Industrial Area,  
New Delhi – 110015

....Appellant(s)

**VERSUS**

**1. RAJASTHAN ELECTRICITY REGULATORY  
COMMISSION**

*Through its Secretary*

Vidyut Viniyamak Bhawan,

Sahkar Marg, Near State Motor Garage,

Jaipur – 302005

**2. JAIPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
Vidyut Bhawan,  
Jyoti Nagar, Jaipur – 302005

**3. AJMER VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
Hathi Bhata, City Power House,  
Jaipur Road, Ajmer– 305001

**4. JODHPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
New Power House, Industrial Area  
Jodhpur-342003

.... Respondent(s)

Counsel for the Appellant (s) : Mr. Anand K Ganesan for App.1-3

Counsel for the Respondent (s) : Mr. Raj Kumar Mehta  
Ms. Himanshi Andley for R-1

Mr. M. G. Ramachandran, Sr. Adv.  
Ms. Poorva Saigal  
Mr. Shubham Arya  
Ms. Shikha Sood  
Mr. Ravi Nair  
Ms. Richa Singh for R-2 to 5

**APPEAL NO. 167 OF 2017**

**In the matter of:**

**AMBUJA CEMENT LTD.**

Rabriyawas,  
Tehsil, Jaitaran,  
District Pali (Rajasthan)

.... Appellant(s)

**VERSUS**

**1. JAIPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
Vidyut Bhawan,  
Janpath,  
Jaipur – 302005

**2. JODHPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
New Power House, Industrial Area  
Jodhpur-342003 (Rajasthan)

**3. AJMER VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
Vidyut Bhawan,  
Panchsheel Nagar, Makarwali Road,  
Ajmer– 305004, Rajasthan

**4. RAJASTHAN ELECTRICITY REGULATORY COMMISSION**

*Through its Secretary*  
Vidyut Viniyamak Bhawan,  
Sahkar Marg, Near State Motor Garage,  
Jaipur – 302005

.... Respondent(s)

Counsel for the Appellant (s) : Mr.P.N. Bhandari  
Mr. Paramhans Sahani

Counsel for the Respondent (s) : Mr. M. G. Ramachandran, Sr. Adv.  
Ms. Poorva Saigal  
Mr. Shubham Arya  
Ms. Shikha Sood  
Mr. Ravi Nair  
Ms. Richa Singh for R-1 to 3

Mr. Raj Kumar Mehta  
Ms. Himanshi Andley for R-4

**APPEAL NO. 168 OF 2017**

**In the matter of:**

**ULTRATECH CEMENT LIMITED**

(Unit: Kotputli Cement Works),  
V & P.O. Mohanpura,  
Tehsil, Kotputli  
District Jaipur-303108  
(Rajasthan)

.... Appellant(s)

**VERSUS**

**1. JAIPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
Vidyut Bhawan, Janpath, Jaipur – 302005

**2. JODHPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
New Power House, Industrial Area  
Jodhpur-342003 (Rajasthan)

**3. AJMER VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
Vidyut Bhawan,  
Panchsheel Nagar, Makarwali Road,  
Ajmer– 305004, Rajasthan

**4. RAJASTHAN ELECTRICITY REGULATORY COMMISSION**

*Through its Secretary*  
Vidyut Viniyamak Bhawan,  
Sahkar Marg, Near State Motor Garage,  
Jaipur – 302005

.... Respondent(s)

Counsel for the Appellant (s) : Mr. P.N. Bhandari  
Mr. Paramhans Sahani

Counsel for the Respondent (s) : Mr. M. G. Ramachandran, Sr. Adv.  
Ms. Poorva Saigal  
Mr. Shubham Arya  
Ms. Shikha Sood  
Mr. Ravi Nair  
Ms. Richa Singh for R-1 to 3

Mr. Raj Kumar Mehta  
Ms. Himanshi Andley for R-4

**APPEAL NO. 169 OF 2017**

**In the matter of:**

**ULTRATECH CEMENT LIMITED**

(Unit: Birla White Works),  
P.O. - Kharia Khangar, Tehsil :  
Bhopalgarh,  
District Jodhpur-342006  
(Rajasthan)

.... Appellant(s)

**VERSUS**

**1. JAIPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
Vidyut Bhawan, Janpath, Jaipur – 302005

**2. JODHPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
New Power House, Industrial Area  
Jodhpur-342003 (Rajasthan)

**3. AJMER VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
Vidyut Bhawan,  
Panchsheel Nagar, Makarwali Road,  
Ajmer– 305004, Rajasthan

**4. RAJASTHAN ELECTRICITY REGULATORY COMMISSION**

*Through its Secretary*  
Vidyut Viniyamak Bhawan,  
Sahkar Marg, Near State Motor Garage,  
Jaipur – 302005

.... Respondent(s)

Counsel for the Appellant (s) : Mr. P.N. Bhandari  
Mr. Paramhans Sahani

Counsel for the Respondent (s) : Mr. M. G. Ramachandran, Sr. Adv.  
Ms. Poorva Saigal  
Mr. Shubham Arya  
Ms. Shikha Sood  
Mr. Ravi Nair  
Ms. Richa Singh for R-1 to 3

Mr. Raj Kumar Mehta  
Ms. Himanshi Andley for R-4

**APPEAL NO. 170 OF 2017**

**In the matter of:**

**ULTRATECH CEMENT LIMITED**

(Unit: Aditya Cement Works)  
Sawa Shambhupura Road,  
Adityapuram,  
District Chittorgarh-312622  
(Rajasthan)

**VERSUS**

**1. JAIPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
Vidyut Bhawan, Janpath, Jaipur – 302005

**2. JODHPUR VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
New Power House, Industrial Area  
Jodhpur-342003 (Rajasthan)

**3. AJMER VIDYUT VITARAN NIGAM LIMITED**

*Through its Managing Director*  
Vidyut Bhawan,  
Panchsheel Nagar, Makarwali Road,  
Ajmer– 305004, Rajasthan

**4. RAJASTHAN ELECTRICITY REGULATORY COMMISSION**

*Through its Secretary*  
Vidyut Viniyamak Bhawan,  
Sahkar Marg, Near State Motor Garage,  
Jaipur – 302005

.... Respondent(s)

Counsel for the Appellant (s) : Mr. P.N. Bhandari  
Mr. Paramhans Sahani

Counsel for the Respondent (s) : Mr. M. G. Ramachandran, Sr. Adv.  
Ms. Poorva Saigal  
Mr. Shubham Arya  
Ms. Shikha Sood  
Mr. Ravi Nair  
Ms. Richa Singh for R-1 to 3

Mr. Raj Kumar Mehta  
Ms. Himanshi Andley for R-4

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

**PER HON'BLE MR JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON**

1. The appellants represent industrial units located in various parts of State of Rajasthan running their operations by availing of supply of electricity through connectivity to the State Grid at EHT levels of



132/33/11 KV voltage, they also having been granted *open access* within the contract demand drawing electricity through such *open access* including from power exchanges. They are aggrieved and have come up by these appeals, assailing the legality, correctness and propriety of the determination of *Cross-Subsidy Surcharge* (“CSS”) made applicable from 01.12.2016 by order passed on 01.12.2016 by respondent *Rajasthan Electricity Regulatory Commission* (hereinafter referred to as “RERC” or “the State Commission”), **the prime contention being that such determination could not have been made in absence of a tariff petition for the corresponding Control Period i.e. Financial Year (FY) 2016-2017**, the increase in the CSS from the earlier rate of 18 paise, 13 paise and 5 paise for 132 KV consumers, 33 KV consumers and 11 KV consumers to Rs.1.63, Rs.1.39 and Rs.0.83 per unit respectively, being contrary to the basic principles governing the subject, violative of the mandate of section 42 of the Electricity Act, 2003, envisaging progressive reduction of such levy.

2. The appeals are resisted by the respondents which include *Jaipur Vidyut Vitaran Nigam Limited*, *Jodhpur Vidyut Vitaran Nigam Limited*, and *Ajmer Vidyut Vitaran Nigam Limited*, the three distribution licensees operating in the State of Rajasthan.

3. The Electricity Act, 2003, came on the statute book on 10.06.2003, one of the major reforms thereby ushered in being inclusive of the right to *open access*. The objectives of this legislation include development of electricity industry, promotion of competition therein, protection of interest of the consumers at large and supply of electricity to all areas, rationalization of electricity tariff, the subject being regulated, *inter alia*, through transparent policies regarding subsidies, it being supported by efficient and environmentally benign policies. The enactment has established the requisite machinery, placing the crucial activities, particularly the transmission, distribution and trading under control of the regulatory authorities viz. the Electricity Regulatory Commissions (“ERCs” – Central or State or Joint for more than one State). The appropriate Commissions (Central, State or Joint) have been conferred with the responsibility of framing the tariff regulations in terms of guidance provided by section 61 and also for determination of tariff (section 62) for supply of electricity by a generating company to distribution licensee or for transmission or wheeling or retail sale of electricity. The tariff determination exercise is governed by detailed provisions contained in Part-VIII of the Act, it being the responsibility of the concerned generating company, or the licensee, to make appropriate application in the prescribed manner.

4. The subject at hand concerns CSS which is connected to the right to *open access* in relation to the distribution licensee which are governed by provisions contained in Part-VI of the Electricity Act. The provisions relating to the transmission utilities, as appearing in Part-V of the enactment (particularly sections 39 and 40), also stipulate levy of surcharge or cross-subsidy of similar nature. In the present context, the provision contained in section 42 of the Electricity Act, 2003, is relevant, the same quoted, to the extent necessary, as under:

*“Section 42. (Duties of distribution licensee and open access): --- (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.*

*(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 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 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.”*

...

*(Emphasis supplied)*

5. It may be noted here that the law, as originally enacted, had mandated that the surcharge of the nature mentioned above shall not only be “*progressively reduced*” but also “*eliminated*”. By amendment carried through Act 26 of 2007, brought in force from 15.06.2007, the words “*and eliminated*” were omitted from all relevant provisions including section 42 quoted above. Be that as it may, there can be no denial as to the fact that the public policy reflected in this legislation still expects the surcharge and the cross-subsidy in the nature mentioned above, leviable, as in the case of *open access*, on *open access* consumers, is to be “*progressively reduced*”.

6. Concededly, prior to the passing of the impugned order dated 01.12.2016, the tariff order issued on 22.09.2016 by RERC for Control Period of FY 2015-2016 was applicable. The rates of CSS under the previous determination were, as noted at the outset, 18 paise per unit for 132 KV consumers, 13 paise per unit for 33 KV consumers and 5 paise per unit for 11 KV consumers. The tariff order dated 22.09.2016 had been passed by the State Commission on the petitions (no.553-554/2015) of the three distribution licensees on the subject of determination of *Annual Revenue Requirement* (“ARR”), retail supply tariff of *Discoms* for FY 2015-2016, approval of true-up of ARR for FY

2013-2014 and investment plan for FY 2015-2016. It declared in the concluding Para (6.15.8) that the said tariff order shall come into force from 01.09.2016 and remain in force “*till the next tariff order*”, all existing provisions which were not being modified by the said order “*to continue to be in force*”.

7. It may be noted here itself that the tariff order for following Control Periods (2016-2017 and 2017-2018) was passed by the State Commission on 02.11.2017, it having adopted the cross-subsidy for various consumer categories at existing levels (which means the regime introduced by the impugned order), there being no proposal presented by the distribution licensees for revision on such account at that stage.

8. During the period the tariff order dated 22.09.2016 was prevailing, and while petition for tariff order for next Control Period beginning with FY 2016-2017 was awaited, the distribution licensees approached the State Commission by petition (no. RERC/817/2016) praying for determination and approval of cross-subsidy surcharge under section 42(2), read with sections 39 and 40, of the Electricity Act, 2003. Objections were filed to the said petition including to the following effect (as quoted in the impugned order):

*“ii) It is submitted that if the distribution licensees require a fresh CSS to be determined, it has to necessarily be along with the petition for determination of retail supply tariff as per Regulation 11(5) (g) of RERC Tariff Regulations 2014 which requires the distribution*

*licensees to provide the details of the cross-subsidies, both existing and at also the proposed tariffs along with the tariff petition, as proposed Cross Subsidy forms the basis of determination of Cross Subsidy Surcharge. They cited the case of Tata Power Company Ltd v. Maharashtra Electricity Regulatory Commission & Ors, Appeal No. 107 of 2013 and batch, dated 28/11/2014, ... ”*

**9.** The Commission identified the issues that had arisen for its consideration broadly including the question as to whether distribution licensees were entitled to claim CSS and if so, the appropriate formula for such determination, besides the extent of liability towards CSS on the part of *open access* consumers. Dealing with the objections in the above nature as to impermissibility of such determination of CSS for FY 2016-2017, in absence of tariff petition for the corresponding period, the Commission held as under:

*“35. There is no dispute that the Petitioners are yet to file Tariff Petition for the year 16-17 and the Tariff Petition for FY 15-16 has been decided by the Commission in September 2016 only and the same will be in force till next tariff order. In other words, the same tariff will continue for FY 2016-17. Therefore, present petition may also be considered by the Commission as petition for year FY 2015-16 and proceed accordingly. In the Commission’s view, mere absence of Tariff Petition for FY 2016-17 will not restrict the Commission from determining CSS for FY 2015-16 and apply the same for FY 2016-17 till new Tariff Petition for FY 2016-17 is filed and CSS is revised based on the same.”*

*(Emphasis supplied)*

**10.** Having rejected the objection founded on failure on the part of the distribution licensees to approach the Commission for tariff determination for FY 2016-2017, the Commission proceeded to compute the rate of

CSS taking note, *inter alia*, of the formula prescribed for such purpose by regulation 90 of RERC Tariff Regulations, 2014, raising the CSS rate to Rs.1.63 per unit for 132 KV consumers, Rs.1.39 per unit for 33 KV consumers, and Rs.0.83 per unit for 11 KV consumers of large industrial service *open access* consumers category (there being similar determination in relation to two other categories viz. non-domestic service and mixed load/bulk supply). There were objections to the proposed *increase* in the CSS against the legislative mandate. In this context, the Commission observed thus:

*“ 47.The Objectors have contended that CSS as may be determined shall not be more than existing CSS as law contemplates that CSS shall be progressively reduced rather than being increased. On the other hand, if the Petitioner’s prayer is accepted, the CSS will increase rather than getting reduced.*

*48.There is no dispute on the legal position that the CSS should be reduced progressively but the reduction should relate to the actual cost and not to historical facts. While determining CSS in the present order, the Commission has to rely on the present values and accordingly has taken the values as approved in its Tariff order for FY 2015-16. The CSS determined in the order is in accordance with the spirit of the Act on Cross Subsidy Surcharge.”*

*(Emphasis supplied)*

**11. It is well settled that the purpose of levy of cross-subsidy surcharge is to enable meeting the burden of exceeding cross-subsidy in the system, its determination being based on approval of tariff by the State Commission which is connected to cost of supply. A fortiori, the determination of CSS is to coincide with the determination of tariff by the**

regulatory Commission for the relevant year, it being not possible to pass it on historical costs or historical determination of tariff. The tariff regulations framed by the State Commission – Rajasthan Electricity Regulatory Commission (Terms and Conditions of Determination of Tariff) Regulations, 2014 – prescribe in detail the scheme and the manner of determination of various costs including CSS in the ARR proceedings, there being a close link between the two.

**12.** The subjects of *cross-subsidy* and *cross-subsidy surcharge* are specifically dealt with, including as to the prescribed formula for CSS, in regulations 89 and 90 as under:

**“89. Cross subsidy**

- (1) *The average cost of supply and realization from a category of consumer shall form the basis of estimating the extent of cross subsidy for that consumer category.*
- (2) *The Commission shall endeavour to determine the tariff in such a manner that it progressively reflects the average cost of supply and the extent of cross subsidy to any consumer category is within maximum range of +/- 20% of average cost of supply:*

*Provided that consumers below poverty line who consume below specified level say 50 units per month may receive special support through cross-subsidy. Tariff for such designated group of consumers shall be at least 50% of the average cost of supply.*

**90. Cross-subsidy Surcharge**

*The surcharge payable by consumers opting for open access on the network of the distribution licensee or transmission licensee will be determined by the Commission as per the following Formula:*

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



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

*margin excluding liquid fuel source and renewable energy sources*

D is the wheeling charge

L is the system losses of distribution licensee for the applicable voltage level, as a percentage:

*Provided that if S is computed to be negative as per above Formula, S shall be considered as zero."*

**13.** Pertinent to note that these regulations are placed in Part-VII (regulations 72 to 93) of the tariff regulations dealing with "*tariff for determination: wheeling and retail supply of electricity*". The exercise includes approval of the loss levels at various voltages (regulation 76) and determination of wheeling charges (regulation 86), each a key input for determination of CSS. Regulation 73 mandates the tariff regulation to be filed in accordance with Part-II (general principles), it including the requirements of filing of a petition for approval of ARR and determination of tariff by detailed provisions contained in regulation 11 which, to the extent relevant, may be extracted as under:

***"11. Petition for approval of ARR and determination of tariff***

- (1) *The applicant shall submit the forecast of Aggregate Revenue Requirement, expected revenue from existing tariff and proposed tariff for the ensuing year of the Control Period, accompanied by fees applicable. The format for furnishing information for calculating expected revenue and expenditure and for determining tariff shall be as laid down by the Commission from time to time by a separate order:*

*Provided that application for approval of ARR and determination of tariff for the first year of the Control Period, i.e., FY 2014-15 by every Generating Company and Licensee shall be filed immediately within four weeks of notification of these Regulations in the official gazette:*

*Provided further that for the first year of the Control Period, i.e., FY 2014-15, the Commission may extend the applicable tariff of FY 2013-14 for a period not exceeding three months by a separate order on an interim basis, subject to adjustment as per the Tariff Order for FY 2014-15.*

(2) *The applicant shall develop the forecast of Aggregate Revenue Requirement using assumptions relating to the behaviour of individual variables that comprise the Aggregate Revenue Requirement during the year.*

(3) *The applicant shall develop the forecast of expected revenue from tariff and charges based on the following:*

...

c) *In the case of a Distribution Licensee, estimates of quantum of electricity supplied to consumers and to be wheeled on behalf of Distribution System Users for ensuing financial year within the Control Period;*

d) *Prevailing tariffs as on the date of making the application.*

...

(5) *The petition shall include the following:*

a) *A statement of the current tariff and all applicable terms and conditions and expected revenue from the current tariff for the ensuing year or the period for which the tariff is to be determined;*

b) *A statement containing full details of subsidy received, or due from the State Government, the consumers to whom it is directed, and showing how the subsidy is reflected in the current and proposed tariff applicable to those consumers. This statement shall also include the tariff calculated without consideration of the subsidy for those consumers. The subsidy calculations shall also compare the situation for the period for which the tariff is to be implemented;*

...

- f) *In case of a distribution licensee, detailed calculations of voltage-wise cost of supply, exclusive of external subsidies and cross subsidies in respect of each category of consumer;*
- g) *A statement showing calculations of the amount of cross subsidy in the existing tariff and in the proposed tariff;*  
... ”

**14.** It is clear from the above that the distribution licensee is required to provide to the Commission the details of cross-subsidy, both existing as also in the proposed tariffs, alongwith the tariff petition.

**15.** Admittedly, the objectors (essentially the appellants herein) had brought to the notice of the State Commission the reasoning of this tribunal in the case of *Tata Power Company Limited v. Maharashtra Electricity Regulatory Commission and Ors.* (appeal no.107/2013) decided by judgment dated 28.11.2014 (see the extract in Para 8 above).

The relevant part of the said decision may be quoted with advantage:

*“18. The second issue is regarding the validity of CSS determined by the State Commission.*

*19. We find that the State Commission has used the formula for CSS as per the Tariff Policy. There is no dispute regarding the formula used. The Tribunal in judgment dated 02.12.2013 in Appeal no. 178 of 2011 has also upheld the validity of the formula as per Tariff Policy for determination of CSS. Therefore, the formula used in the impugned order is correct.*

*20. We find that the State Commission has used the components of the Tariff viz., tariff payable by the relevant category of consumers, weighted average cost of power purchase of top 5% at margin excluding liquid fuel based generation and renewable energy, wheeling charges and system losses for the applicable voltage level as per the values approved in the order dated 15.06.2012 in case no. 180 of 2011 for the FY 2011-12. However, these parameters were determined for the FY 2011-12. No fresh determination for these*

parameters were made for the FY 2013-14 (May to August 2013) for which CSS has been determined. When there was no fresh determination of tariff and power purchase cost, how the CSS could have been re-determined?"

21. Let us now examine the Open Access Regulations, 2005.

22. Current level of cross subsidy is defined as under:

*“Current level of cross subsidy means for each financial year, for each approved tariff category and/or tariff sub-category of the Distributions Licensee, and/or for each tariff slab with each such tariff category/sub-category, the difference between the approved revenue from the sale of electricity for such financial year, for each such tariff category/sub-category/tariff slab and the approved cost of supply of electricity to such tariff category/sub-category/tariff slab, where such difference is a positive value.”*

23. Regulation 13.1 provides that cross subsidy surcharge shall be based on the current level of cross subsidy.

24. Regulation 13.5 stipulates that the Distribution Licensee shall for each financial year submit full details of the calculation of the current level of cross subsidy together with its application for determination of tariff submitted to the Commission in accordance with the provisions of clause (d) of sub-Section (1) of Section 62 of the Act.

25. Thus, the CSS has to be determined by the State Commission every year along with determination of tariff for computing the current level of cross subsidy.

26. In judgment dated 02.12.2013 in Appeal no. 178 of 2011, this Tribunal found fault with the methodology adopted by the State Commission in calculating the average billing rate for various categories by using the actual sale for the previous year. The Tribunal also did not allow re-determination of the CSS retrospectively. The findings of the Tribunal in Appeal no. 178 of 2011 also would apply to this case.

27. In the impugned order, the State Commission has determined the CSS for first quarter of FY 2013-14 w.e.f. 10.05.2013. The CSS should have been determined along with determination of ARR and tariff for the FY 2013-14. In the present case, the State Commission re-determined CSS based on the order dated 15.06.2012 determining the tariff for FY 2011-12. The State Commission has also determined the CSS in the MYT tariff order dated 22.08.2013 for the control period FY 2013-14 to FY 2015-16 with effect from 10.05.2013 onwards (FY 2013-14) is not valid in law.”

*(Emphasis supplied)*

**16.** Earlier, by judgment dated 02.12.2013 in the matter of *Reliance Infrastructure Limited (R-Infra) v. Maharashtra Electricity Regulatory Commission and Ors.* (appeal no.178/2011), dealing with similar dispute, this tribunal referring to the earlier quoted provision contained in section 42 of Electricity Act, had observed as under:

*“54. Bare reading of the above provision would indicate that open access in distribution is coupled with CSS. The State Commission has to compute CSS to meet the requirement of current level of cross subsidy. There cannot be any open access with CSS determined by the State Commission and the State Commission is bound to determine the CSS with every change in tariff and cost of supply.*

...

*56. The State Commission’s contention that it had worked out CSS in its 2006 order as ‘Zero’ and the same would hold good unless it was modified. This contention of Commission is misplaced for the reason that as per 2nd proviso to Section 42 of the 2003 Act, the State State Commission was required to compute CSS with every change in tariff or cost of supply, the two essential component of CSS. The State Commission had adopted the Tariff Policy formula and computed negative CSS in the year 2006 using the data for that year. Since CSS thus worked out was negative, the State Commission fixed CSS at ‘Zero’. However, it would not mean that CSS would always remain negative year after year and effective value of CSS would remain ‘Zero’. Even if so, the State Commission was required to work out and demonstrate that CSS remained ‘Zero’.*

...

*60. I. The CSS can only be determined with the figures for the current year as per the law (2nd proviso to Section 42 of the 2003 Act). Anything done outside this requirement is patently illegal. Hon’ble Supreme Court in its judgment dated 30.9.2013 in Selvi J Jayalalitha Vs Government of Karnataka 2013(12) SCALE 234 has held that when a statute provides that a thing is to be done in a particular way, it has to be done in that way only and no other way. In view of the clear provision of 2nd proviso to Section 42, there cannot be any other view on this issue.*

...

*III. The State Commission had used actual revenue recovered from various category of consumers during FY 2010-11 and divided it with actual sale to those category during the same period. This approach is completely wrong and dehoes any logic. While passing the tariff order for FY 2009- 10 the Commission must have the figures for expected revenue from every category and sale to such category. The Commission should have used these figures approved in the tariff order to arrive at Average Billing Rate or effective Tariff during the relevant year.*

...”

17. On careful scrutiny of the impugned order, we find that the State Commission has consciously ignored the decision in the case of *Tata Power Company Limited* (supra). The absence of tariff petition for FY 2016-2017 could not have been glossed over. The delayed determination of tariff for FY 2015-2016 was no reason to relieve the State Commission of its responsibility of timely determination of tariff for the following period as well. Such approach is in the teeth of the directions given by this tribunal by judgment dated 18.05.2015 in the matter of *D. P. Chirania v. Rajasthan Electricity Regulatory Commission & Ors.* (appeal no.16/2014), in terms of which the State Commission could and should not have entertained the tariff petition till the time the distribution licensees provided authenticated and audited data, necessary not only for tariff fixation but also for CSS. The relevant part of the decision in *D. P. Chirania* (supra) reads as under:

“12.5 The learned State Commission, in para 2.2.3 of the impugned order, dated 8.8.2012, has clearly observed that Discoms should take energy audit seriously and the State Commission directed the Discoms to segregate technical and commercial losses and to come

out with an action plan for implementation of energy audit and segregation of technical and commercial losses. The State Commission in its order, dated 6.6.2013, also observed that Discoms have not taken energy audit seriously and instead of preparing an action plan, the Discoms had simply indicated factual position in the matter. It has further been submitted on behalf of the State Commission that as a result of constant monitoring by the Commission, the Discoms have initiated the process namely; a project enabling DT metering for computing energy audit and programme for net work analysis and distribution losses is going on under RAPDRP for urban areas of 30000 or more population in the State. The exact technical losses at various voltage level would be possible only after the completion of metering at the incoming side of all the sub-stations. The analysis for segregation of losses is expected to come after the installation of DT metering and metering on the incoming side of all the 33/11 KV sub-stations. It has further been submitted by the State Commission that in order to accelerate the process further, M&P wing along with Revenue wing has been made agency for carrying out activities pertaining to implementation of energy audit & segregation of technical & commercial losses and the task of energy auditing has been awarded to a consultant.

12.6 Merely making submissions by the State Commission is not sufficient for the purpose of this Appeal. If the Commission passes some order, it is duty bound to get the same order executed and implemented in letter and spirit by all the concerned like power generator or the distribution licensee or consumer, etc. The State Commission should take the implementation and compliance of its earlier orders seriously without allowing any one to disobey the same, otherwise the orders passed by any Electricity Regulatory Commission would have no legal efficacy leaving any one to comply it or not to comply with it. No one should at all be allowed to make non-compliance of any of the orders passed by the State Commission, otherwise, that would create indiscipline and that would further encourage the others who are complying with the same order in letter and spirit not to obey the same.

12.7 In the instant Appeal, as we have stated above, the Appellant only is seeking a direction to the State Commission to not to accept any future ARR and/or retail tariff revision petition from the Distribution Licensee without having complete data and the audited accounts accompanied with the petition. We think that this submission has legal force and the same should be accepted. Therefore, we find it our duty to direct the State Commission not to accept any ARR or retail tariff revision petition from any of the Distribution Licensees in the State without complete data and audited accounts because there should after all be a transparency in the same. The Discoms cannot be allowed to flout this candid and genuine demand of the Appellant. If the State Commission, in the impugned order, dated 8.8.2012, had observed that Discoms should take energy audit seriously and directed them to segregate technical

and commercial losses and to come out with an action plan for implementation of energy audit and segregation of technical and commercial losses, it was still bounden duty of the State Commission to get the said direction implemented and complied with in letter and spirit and there should be no leniency by the State Commission in relaxing or allowing any Distribution Licensee to flout the same directions.

12.8 The learned State Commission, even after making the observation and giving directions in para 2.3 of the impugned order, dated 8.8.2012, and without caring to carry out the said directions in its further order, dated 6.6.2013, again observed that Discoms have not taken energy audit seriously and instead of preparing an action plan, the Discoms have simply indicated the factual position in the matter. In these circumstances, the State Commission is not expected to further show extra ordinary leniency towards Distribution Licensees, Respondent Nos. 2 to 5 herein, by allowing them disobedience of the repeated directions of the State Commission. There should be an active and proper action on record to justify the non-compliance of the aforesaid directions in the aforesaid orders of the State Commission and merely making the observations in its orders would not serve the purpose.

.....

15. In view of the above discussions and considering the nature of the prayers made by the Appellant in the Appeal Memorandum, we direct the State Commission not to accept any future ARR petition or retail tariff revision petition from the Discoms without complete data and audited accounts. We further direct the State Commission to take action against the Discoms for non-compliance of the aforesaid directives of the State Commission considering the provisions of Section 24 of the Electricity Act, 2003 or other relevant provisions of law and regulations as the State Commission deems fit and proper. With these directions, the instant appeal being Appeal No. 16 of 2014 is accordingly disposed-of without any order as to costs.

(Emphasis supplied)

**18.** It bears repetition to say here that the cross-subsidy surcharge is to be determined bearing in mind the principle that it is to be “utilized to meet the requirements of current level of cross-subsidy within the area of supply” [section 42(2)]. The Commission has been clearly conscious of this legislative guidance, as is clear from the observation in Para 48 of



the impugned order (quoted above), equating the data utilized for tariff order for the preceding Control Period with “*current values*”. It, however, ignored the fact that the information relating to the previous period could not conceivably reflect the current state of affairs. The tariff petition for Control Period 2016-2017 was filed alongwith the petition for subsequent Control Period 2017-2018. Later, that petition resulted in the tariff order being passed on 02.11.2017. It is not clarified as to why the exercise for determination of CSS could not be coincided with the tariff determination or if there was an urgency as to why the timelines prescribed by the regulations could not be strictly adhered to for timely filing of the tariff petition. The splitting of the two comes across as part of an agenda where to secure increase of cross-subsidy surcharge without presenting data for proper determination of tariff.

**19.** In our view, the delinking of the process on the two subjects must be held to have vitiated the end result, also for the reason that the impugned order has resulted in quantum jump in the rate of CSS, which is antithetical to the public policy expecting the cross-subsidy surcharge to be “*progressively reduced*”. This could not have been done without examining the requirements of “*current level of cross-subsidy*”, a satisfaction which could not have been reached without the current data. Since the distribution licensees have failed to give any valid reasons for

default in timely filing of the tariff petitions, it would be unfair to give them advantage of such substantial increase in the CSS on the basis of an order secured in breach of the norms.

**20.** There is one more reason why the impugned order cannot be validated. As already noted, the tariff order dated 22.09.2016 for FY 2015-2016 had declared that it shall continue to be in force “*till next tariff order*”. The next tariff order came only on 02.11.2017. The rates of CSS were part of the tariff regimen put in position by previous order dated 22.09.2016. Rates of CSS could and should not have been tinkered with till the issuance of the next tariff order, an event which occurred only on 02.11.2017, which, we may reiterate, would have been the appropriate stage to revisit (if necessary and justified) the subject.

**21.** The appellants have also questioned the correctness of the application of the prescribed formula for determination of CSS by the impugned order. In view of the approach we take, for the reasons already set out above, we would avoid any comment on such objections of error in application of formula in the present proceedings. We reserve the contentions of both sides on the subject for scrutiny in appropriate proceedings in future.

**22.** For the foregoing reasons, we find the manner in which the impugned order has been passed to be unfair, unjust and violative of the

procedure and norms prescribed thereof. It is, therefore, set aside and hereby vacated. We must, however, clarify that the State Commission will be within its jurisdiction to undertake the process of revisit to the subject of cross-subsidy surcharge vis-à-vis distribution licensees operating in the State of Rajasthan as and when it takes up the exercise of tariff determination in future, in accordance with law.

**23.** The appeals are allowed in above terms.

**Pronounced in open court on this 15<sup>TH</sup> Day of September 2022**

**(Sandesh Kumar Sharma)**  
Technical Member

**(Justice R.K. Gauba)**  
Officiating Chairperson

*tp*