



REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NOS.8862-8868 OF 2022

**JAIPUR VIDYUT VITARAN NIGAM
LIMITED AND ORS.**

...APPELLANT(S)

VERSUS

**RAJASTHAN TEXTILE MILLS
ASSOCIATION & ANR ETC.**

...RESPONDENT(S)

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECT

1. These are the statutory appeals under Section 125 of the Electricity Act, 2003 (for short, ‘the 2003 Act’) against a common judgment delivered by the Appellate Tribunal for Electricity (for short, ‘the APTEL’) in a group of appeals. The issue involved in these appeals relates to the determination of the Cross-Subsidy Surcharges (for short, ‘the CSS’) by the Rajasthan Electricity Regulatory Commission (for short, ‘the State Commission’). The determination was made under Section 42 (2) of the 2003

Act. The present appellants were the respondents before the APTEL. The respondents (appellants before the APTEL) are the industries/industrial units located in various parts of the State of Rajasthan, running their operations by availing their supply of electricity from connectivity through the State grid at EHT levels of 132/33/11 KV voltage. These industrial units were granted open access within the contract demand for drawing electricity through such open access, including from power exchanges. These industrial units (appellants before the APTEL) were aggrieved by the determination of the CSS made applicable from 1st December 2016 by the order passed on 1st December 2016 by the State Commission. Being aggrieved by the said order of the State Commission, the industrial units preferred statutory appeals before the APTEL. By the impugned judgment, the order of the State Commission was set aside. However, the APTEL clarified that the State Commission will be within its jurisdiction to undertake the process of revisiting the subject of the CSS 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.

2. The 2003 Act introduced the concept of open access, enabling the consumers/end users to procure electricity from sources other than the distribution licensees of the area where the premises of such end use are situated.

Earlier, electricity was generally procured only from distribution licensees.

3. There was a significant amount of cross-subsidisation of certain categories of consumers by other categories of consumers. The consumers benefitting from the subsidy include agricultural consumers, low-end domestic consumers and public works. They are known as subsidised consumers. The consumers paying for the subsidy include industrial consumers, commercial consumers, and high-end domestic consumers, and they are known as subsidising consumers. Allowing open access users to source electricity from sources other than distribution licensees benefited such subsidising consumers and would become a burden on the distribution licensee. The reason is that such customers stopped taking electricity from the distribution licensees, thereby reducing the distribution licensees' funds to subsidise the subsidised consumers. The CSS is, in a sense, compensation to the distribution licensees for being deprived of the subsidisation prevalent in the retail supply tariff. The CSS is a statutory charge payable by the consumers who decide to source electricity through open access from sources other than the distribution licensee of the area.

4. In exercise of the powers under Section 61 read with Section 181 of the 2003 Act, the State Commission notified the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2014 (for short, 'the Rajasthan Tariff Regulations, 2014'). Regulation 89 thereof deals with the cross-subsidy. Regulation 90 provides a formula for determining the CSS payable by the consumer opting for open access.

5. The State Commission determined the tariff for the Financial Year (FY) 2015-2016 by the tariff order dated 22nd September 2016. On 20th July 2016, the distribution licensees approached the State Commission by a petition praying for determination of the CSS under Section 42 (2) read with Sections 39 and 40 of the 2003 Act. While dealing with the said petition, the State Commission identified the issues for its consideration, including the issue as to whether distribution licensees were entitled to claim the CSS, and if so entitled to, what the appropriate formula for its determination is. The State Commission noted that the distribution licensees had not applied for fixation of tariff for the F.Y. 2016-2017, and the tariff petition for F.Y. 2015-2016 had been decided by the commission in September 2016 by holding that the tariff will be in force till the next tariff order. The commission observed that mere absence of tariff petition for F.Y. 2016-2017 will not restrict or prevent the State Commission

from determining the CSS for F.Y. 2015-2016 and apply the same for F.Y. 2016-2017 till new tariff petition for F.Y. 2016-2017 is filed and the CSS is revised based on the same. After hearing the respondents-consumers, the State Commission, by order dated 1st December 2016, determined the CSS payable entirely based on the tariff determined for F.Y. 2015-2016 by order dated 22nd September 2016. The State Commission proceeded to compute the rate of the CSS, taking note of the formula prescribed by Regulation 90 of the Rajasthan Tariff Regulations, 2014, fixing the CSS rate to Rs.1.63 per unit for 132 KV and above consumers, Rs.1.39 per unit for 33 KV consumers and Rs.0.83 per unit for 11 KV consumers of the large industrial service open access consumers category.

6. This order dated 1st December 2016, passed by the State Commission, was challenged by the respondents herein by preferring an appeal before the APTEL, which was allowed by the impugned judgment. In appeal, the APTEL relied upon its own decision dated 28th November 2014 in the case of ***Tata Power Company Limited v Maharashtra Electricity Regulatory Commission & Ors.***¹ as well as judgment dated 2nd December 2013 in the case of ***Reliance Infrastructure Limited (R-infra) v***

¹ Appeal No. 107 of 2013 (before the Appellate Tribunal for Electricity)

Maharashtra Electricity Regulatory Commission & Ors². The APTEL held that the State Commission completely brushed aside its decision in the case of ***Tata Power Company Limited¹***. The absence of a tariff petition for F.Y. 2016-2017 could not have been ignored. The APTEL relied upon its decision dated 18th May 2015 in the case of ***D.P. Chirania v Rajasthan Electricity Regulatory Commission & Ors³***. It was held that the State Commission should not have entertained the CSS petition until the distribution licensees provided authenticated and audited data, which was necessary not only for tariff fixation but also for determining the CSS. The APTEL further observed that the tariff petition for the control period of 2016-2017 was filed along with a petition for the subsequent control period of 2017-2018. Ultimately, the APTEL held that the impugned order of the State Commission resulted in a quantum jump in the rate of the CSS, which was against the policy enumerated in the 2003 Act, which requires the CSS rates to be progressively reduced. It was held that, as the distribution licensees have failed to explain the default in the timely filing of the tariff petitions, it would be unfair to give them the advantage of such a substantial increase in the CSS.

² Appeal No. 178 of 2011 (before the Appellate Tribunal for Electricity); 2013 SCC OnLine APTEL 150

³ Appeal No. 16 of 2014 (before the Appellate Tribunal for Electricity); 2015 SCC OnLine APTEL 75

The APTEL also observed that the tariff order dated 22nd September 2016 for F.Y. 2015-2016 had directed that it shall continue to be in force till the next tariff order, which was passed on 2nd November 2017. The CSS rates were part of the tariff regime put in place by the order dated 22nd September 2016. Therefore, the rates of the CSS should not have been altered till 2nd November 2017, when the new tariff order was passed.

SUBMISSIONS

7. The learned senior counsel appearing for the appellants did not dispute the proposition that the tariff determined for the earlier period would continue till the new tariff is determined. He pointed out that by the order dated 1st December 2016, the State Commission determined the CSS payable entirely based on the tariff determined for F.Y. 2015-2016 under the order dated 22nd September 2016 by computing the same as provided in the formula incorporated in Regulation 90. The learned senior counsel submitted that the CSS is relevant when the consumer of electricity in the area of the distribution licensee decides to source a part or whole of his electricity requirements from sources other than the distribution licensee. But for such power sourcing from outside sources, the said consumer would have contributed to the cross-subsidisation prevalent in the retail tariff. Therefore,

the CSS is the overriding consequential statutory obligation on such consumers to pay to the distribution licensee, which the 2003 Act considers necessary to compensate the distribution licensee. He pointed out that the CSS for the period from 1st December 2016 was based on the current tariff being charged during the period. This tariff was fixed by the State Commission by the tariff order dated 22nd September 2016. Learned senior counsel pointed out that the State Commission passed the next tariff order, including an order of the CSS applicable with effect from 1st November 2017, effectively maintaining both at the same level as before.

8. If there is a delay in determination of the revenue requirements of the distribution licensee concerning a particular financial year for any reason, the tariff prevalent as per the earlier tariff order will be the applicable tariff to the consumers and consequentially the CSS payable by the open access consumers will also be computed with reference to such prevalent tariff. As and when a new tariff is determined, the same applies prospectively, and the CSS applicable will also consequently get revised. He submitted that the respondents-consumers have not challenged the findings recorded in the tariff order dated 22nd September 2016.

9. The learned counsel submitted that the view of the APTEL that the CSS should have been determined simultaneously with the order dated 22nd September 2016 was hyper-technical and erroneous. He again submitted that the determination of the CSS by the order dated 1st December 2016 was based on the financials and the tariff as determined by the State Commission in the tariff order dated 22nd September 2016 and not on any other basis. He pointed out that the tariff order dated 22nd September 2016 was effective from 1st September 2016. He pointed out that the distribution licensees did not have to pay the higher CSS from 1st September 2016 to 30th November 2016.

10. The submission of learned senior counsel is that there is no stipulation which prevents the increase of the CSS in monetary terms. The only stipulation in the Rajasthan Tariff Regulations, 2014 is that the extent of cross-subsidy to any consumer category should be within the range of +/- 20% of the average cost of supply. The learned senior counsel distinguished the decision in the case of **Tata Power Company Limited¹** and **Reliance infrastructure Limited²**. He pointed out that in the case of **Tata Power Company Limited¹**, the State Commission, having access to the data and financials for the relevant period, proceeded to determine the CSS based on the prior date. Moreover, in the case of **Reliance**

infrastructure Limited², the APTEL has unequivocally stated that the CSS should be a derivative of the effective tariff applicable for the relevant period. He submitted that there are no adverse implications to the consumers by reason of the determination of the CSS subsequently by the order dated 1st December 2016.

11. The learned counsel appearing for the respondents supported the impugned judgment of the APTEL. By relying upon the tariff order dated 22nd September 2016, it was contended that the rates of the CSS were part of the tariff regime put in place by the previous order dated 22nd September 2016. Learned counsel invited our attention to the decision of the APTEL in the case of **Tata Power Company Limited¹**. The said decision categorically holds that the CSS has to be determined by the State Commission every year, along with the determination of the tariff. Even in the case of **Reliance Infrastructure Limited²**, the APTEL held that the State Commission must compute the CSS to meet the requirement of the current level of cross-subsidy. The learned counsel submitted that the decision of the APTEL in the case of **D. P. Chirania³** has been rightly applied. The learned counsel pointed out that the rates of the CSS could have been revisited only on 2nd November 2017, when the State Commission passed the subsequent tariff order.

CONSIDERATION OF SUBMISSIONS

12. In the light of these submissions, it is necessary to refer to the provision of Section 42 of the 2003 Act, which reads thus:

“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:

[Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 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.]

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply,

such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

(5) Every distribution licensee shall, within six months from the appointed date or date of grant of licence, whichever is earlier, establish a forum for redressal of grievances of the consumers in accordance with the guidelines as may be specified by the State Commission.

(6) Any consumer, who is aggrieved by non-redressal of his grievances under sub-section 5, may make a representation for the redressal of his grievance to an authority to be known as Ombudsman to be appointed or designated by the State Commission.

(7) The Ombudsman shall settle the grievance of the consumer within such time and in such manner as may be specified by the State Commission.

(8) The provisions of sub-sections (5), (6) and (7) shall be without prejudice to right which the consumer may have apart from the rights conferred upon him by those sub-sections.”

(emphasis added)

13. In the present case, the appellants are the distribution licensees. The duties of the distribution licensees have been specified in Section 42. Sub-Section (2) of Section 42 provides for the State Commission introducing open access. The first proviso to Sub-Section

(2) provides 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. The said surcharge is the CSS. The second proviso to Sub-Section (2) provides that the CSS shall be utilised to meet the requirements of the current subsidy level within the distribution licensee's supply area.

14. As far as the CSS is concerned, this Court in the case of **Sesa Sterlite Ltd. v. Orissa Electricity Regulatory Commission & ors⁴**, has laid down the rationale and purpose of levying the CSS. Paragraphs 25 to 29 of the said decision read thus:

25. While open access in transmission implies freedom to the licensee to procure power from any source of his choice, open access in distribution with which we are concerned here, means freedom to the consumer to get supply from any source of his choice. The provision of open access to consumers, ensures right of the consumer to get supply from a person other than the distribution licensee of his area of supply by using the distribution system of such distribution licensee. Unlike in transmission, open access in distribution has not been allowed from the outset primarily because of considerations of cross-subsidies. The law provides that open access in distribution would be allowed by the State Commissions in phases. For this purpose, the State

⁴ (2014) 8 SCC 444

Commissions are required to specify the phases and conditions of introduction of open access.

26. However open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross-subsidy and the fixed cost arising out of the licensee's obligation to supply. Consequent to the enactment of the Electricity (Amendment) Act, 2003, it has been mandated that the State Commission shall within five years necessarily allow open access to consumers having demand exceeding one megawatt.

(3) Cross-Subsidy Surcharge (CSS)—Its rationale

27. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge — one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts — one, on its ability to cross-subsidise the

vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects.

28. Through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the consumers, the provision of open access is expected to encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that the consumers do not go out of their fold to get supply from some other source.

29. With this open access policy, the consumer is given a choice to take electricity from any distribution licensee. However, at the same time the Act makes provision of surcharge for taking care of current level of cross-subsidy. Thus, the State Electricity Regulatory Commissions are authorised to frame open access in distribution in phases with surcharge for:

4. (vi)(a) current level of cross-subsidy to be gradually phased out along with cross-subsidies; and

(b) obligation to supply.”

(emphasis added)

15. Section 61 of the 2003 Act provides for the Regulatory Commission specifying the terms and conditions for determining a tariff. Under Section 181 of the 2003 Act, the State Commission is empowered to make regulations to carry out the provisions of the Act. Accordingly, the Rajasthan Tariff Regulations, 2014 have been framed. Regulation 2(a)(60) defines tariff as the schedule of charges for generation, transmission, wheeling and supply of electricity together with terms and conditions for application thereof. Under Regulation 2(a)(4), “Aggregate Revenue Requirement” means the requirement of the Licensee or Generating Company for recovery, through tariffs, of allowable expenses and return on equity capital pertaining to its Licensed/Regulated Business, in accordance with these Regulations. Regulation 11 provides for filing a petition for approval of the aggregate revenue requirement and the determination of the tariff. The procedure to be followed by the Commission for determining the tariff is in Part II of the regulations. Regulations 89 and 90 dealing with the CSS are relevant for our purposes, which read thus:

“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.”

(emphasis added)

Regulation 90 contains a formula for the determination of the CSS, which is based on the tariff payable by the relevant category of consumers. Thus, the CSS has to be determined based on the prevailing tariff rates. Neither in the provisions of the 2003 Act nor under the provisions of the Rajasthan Tariff Regulations, 2014, is there a provision which makes the determination of the CSS simultaneously with the determination of the tariff mandatory.

16. Now, we turn to the order dated 22nd September 2016 passed by the State Commission. By the said order, the tariff was fixed with effect from 1st September 2016, which was to remain in force till the next tariff order of the Commission. The appellants filed an application/petition before the State Commission to determine the CSS. The prayer in the said petition was for the determination of the CSS payable by open access customers to the distribution licensees in accordance with the provisions of the 2003 Act, the National Tariff Policy, 2016 and the Rajasthan Tariff Regulations, 2014. The petition was filed on 20th July 2016. The petition was decided by order dated 1st December 2016. The following three issues were considered by the Commission, which are as follows:

- (i) Whether Petitioners in law are entitled to claim Cross Subsidy Surcharge under the provisions of Electricity Act, 2003?
- (ii) If yes, whether the same shall be determined on the basis of formula specified in the RERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 or formula provided in new National Tariff Policy, 2016 and based on the values approved in the Tariff order dated 22.09.2016 which is in force?
- (iii) What is the Cross Subsidy Surcharge payable by Open access consumers?

17. The Commission answered the first issue by holding that the appellants (distribution licensees) were entitled to the CSS as may be determined by the Commission. The Commission held that in view of the decision of this Court in the case of **Sesa Sterlite Ltd.⁴**, no one can dispute the legal entitlement of the present appellants to the CSS. On the second issue, the State Commission specifically held that determination of the CSS will have to be made as per the formula provided under Regulation 90 of the Rajasthan Tariff Regulations, 2014, based on values approved in the F.Y. 2015-2016 tariff order. While dealing with the third issue, the commission specifically observed that the computation of the CSS will have to be made as provided in Regulation 90 based on the values approved in the current tariff order dated 22nd September 2016. It must be

noted here that there was no challenge to the order dated 22nd September 2016 fixing the tariff for F.Y. 2015-2016. The State Commission accordingly computed and determined the CSS rates. The Commission clarified that the CSS shall be levied and collected from the date of the order, i.e., 1st December 2016. The commission also directed that the order will remain in force till the CSS is re-determined by the Commission.

18. This order has been upset by the APTEL by the impugned judgment. In paragraph 18 of the impugned judgment, the APTEL observed that the information relating to the previous period could not be conceivably reflected in the current state of affairs. It was further observed that the tariff for F.Y. 2016-2017 and 2017-2018 was fixed by the order dated 2nd November 2017. The APTEL further observed that it is not clear why the exercise of the determination of the CSS could not coincide with the tariff determination. Further, in paragraph 19, the APTEL observed that the determination of the CSS could not have been done without examining the requirements of the current level of cross-subsidy. There is one more reason assigned by the APTEL. It was held that the tariff order dated 22nd September 2016 for the F.Y. 2015-2016 declared that it shall continue to be in force till the next tariff order, which was made only on 2nd November 2017.

19. We find no basis for the opinion expressed by the APTEL that determination of the CSS should coincide with the tariff determination. In the Rajasthan Tariff Regulations, 2014, under Regulation 2(a)(60), tariff has been defined as under:

“(60) “Tariff” means the schedule of charges for generation, transmission, wheeling and supply of electricity together with terms and conditions for application thereof;”

Thus, the determination of CSS is not necessarily a part of the tariff determination process. The CSS can be determined along with the tariff. But, it can be determined separately in accordance with Regulation 90 based on the prevailing rate of tariff. In fact, as per Regulation 90, the tariff payable by the relevant category of consumers is the basis for the CSS. Therefore, the APTEL committed an error by holding that the determination of the tariff and the determination of the CSS should always coincide. While determining rates of the CSS with effect from 1st December 2016, the commission relied upon the tariff fixed in terms of the order dated 22nd September 2016, which was the prevailing tariff as of 1st December 2016. The CSS is in the nature of compensation *qua* the tariff, which the distribution licensees would have received from the open access consumers but for their availing power from other sources. Hence, the CSS must be based on the

applicable retail tariff recoverable during the relevant period. That is precisely provided in Regulation 90. The State Commission determined the CSS based on the data and financials provided in the order dated 22nd September 2016. As provided in the said order dated 22nd September 2016, the same was to be in force until there was a fresh tariff determination. The order dated 22nd September 2016 continued to be in force till 2nd November 2017. Moreover, the perusal of the order dated 22nd September 2016 shows that the determination of the CSS was not undertaken while doing the exercise of tariff determination. In fact, by the further order dated 2nd November 2017 passed by the State Commission, the determination of the CSS has been made along with the determination of the tariff. Thus, the determination made by order dated 1st December 2016 remained in force until 2nd November 2017. The effect of the determination of the CSS from 1st December 2016 is that the respondents-consumers were not charged the CSS as per the order from 22nd September 2016 till 1st December 2016. We may also note that the petition for the determination of the CSS was filed when the petition for fixing the F.Y. 2015-2016 tariff was pending.

20. When the CSS was determined based on the prevailing rates of tariff, the APTEL ought not to have found fault with the Commission's determination of rates of the CSS.

21. In the circumstances, we find that the view taken by the APTEL is erroneous. Therefore, the impugned judgment of the APTEL cannot be sustained, and the same is accordingly set aside. Accordingly, the order dated 1st December 2016 passed by the State Commission is restored. Needless to add that the order dated 1st December 2016 was to remain in force only till 2nd November 2017.

22. Appeals are allowed on the above terms.

.....J.
(Abhay S. Oka)

.....J.
(Augustine George Masih)

**New Delhi;
April 29, 2025**