

**JOINT ELECTRICITY REGULATORY COMMISSION  
FOR THE STATE OF GOA AND UNION TERRITORIES  
GURGAON**

**Quorum**

Shri M.K. Goel, Chairperson  
Smt. Neerja Mathur, Member

**Review Petition No. 241/2017**

**Date of Hearing: 10.10.2017**

**Date of Order: 07.11.2017**

**In the matter of:**

Review Petition under Section 94(1) (f) of the Electricity Act, 2003 read with Section 74 of the JERC (Conduct of Business) Regulations, 2009 seeking review of the Order dated 16.05.2017 in Petition No. 224/2017 and for re-determination of Cross subsidy Surcharge as well as the voltage wise wheeling charges levied on Open Access consumers.

**And in the matter of:**

Open Access Users Association,  
2<sup>nd</sup> Floor, D-21, Corporate Park, Sector -8, Dwarka,  
New Delhi.

... Petitioner

**And in the matter of:**

The Electricity Department,  
Government of Puducherry,  
137, Nethaji Subhash Chandra Bose Salai,  
Puducherry – 605 001.

... Respondent

**Present**

**For the Petitioner**

1. Shri Vedant Sonkhiya, Legal Officer, Open Access User
2. Shri Sanjeev Kumar Trivedi, Advocate, Open Access User

**For the Respondent**

1. Shri T. Chanemougam, Executive Engineer, ED,EDP
2. Shri A. Thilagaraj, Jr. Engineer, EDP

### ORDER

The Review Petitioner, through this amended Review Petition, has sought review of the Impugned Tariff Order dated 16.05.2017 in Petition No. 224/2017 on the following issues:-

- I. Cross Subsidy Surcharge
- II. Wheeling Charges

#### REVIEW PETITIONER'S SUBMISSIONS:

Shri Sanjeev Kumar Trivedi, Learned Counsel for the Review Petitioner submitted that the Cross Subsidy Surcharge was to be determined as per the guidelines / terms and conditions laid down in the Tariff Policy, 2016 notified by the Government of India on 28.01.2016 under Section 3 of the Electricity Act, 2003. The said Tariff Policy, 2016 has provided an indicative formula for determination of Cross Subsidy Surcharge but has left the actual formula for determination of surcharge to each State Commission. Para 8.5.1 of the Tariff Policy, 2016 provides as under:-

*"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 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.*

*SERCs may calculate the cost of supply of electricity by the distribution licensee to consumers of the applicable class as aggregate of (a) per unit weighted average cost of power purchase including meeting the Renewable Purchase Obligation; (b) transmission and distribution losses applicable to the relevant voltage level and commercial losses allowed by the SERC; (c) transmission, distribution and wheeling charges up to the relevant voltage level; and (d) per unit cost of carrying regulatory assets, if applicable,*

**Surcharge Formula:**

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

*Above formula may not work for all distribution licensees, particularly for those having power deficit, the State Regulatory Commission, while keeping the overall objectives of the Electricity Act in view, may review and vary the same taking into consideration the different circumstances prevailing in the area of distribution licensee.*

*Provided that the surcharge shall not exceed 20% of the tariff applicable to the category of the consumers seeking Open Access”.*

The Learned Counsel repeatedly put emphasis on proviso to Para 8.5.1 of the Tariff Policy, 2016 which provides that the Surcharge should not exceed 20% of the tariff applicable to the category of the consumers seeking Open Access.

Further that, the Commission has fixed tariff for EHT Industry and HT Industry at Rs 5.90/kWh and Rs 6.33/kWh respectively. According to the proviso to Para 8.5.1 of the Tariff Policy, the maximum Cross Subsidy Surcharge for EHT Industry and HT Industry should be Rs 1.19/kWh and Rs 1.26/kWh respectively. However, the Commission has fixed the Cross Subsidy Surcharge for the EHT Industry and HT Industry at Rs 1.77/kWh and Rs 2.01/kWh respectively. It is clear from the above that the Commission has fixed the Cross Subsidy Surcharge for the EHT Industry and HT Industry without any consideration of maximum ceiling limit of 20% fixed by the Tariff Policy, 2016. The said determination of Cross Subsidy Surcharge for EHT Industry and HT Industry has caused substantial financial burden on the consumers availing Open Access.

The Learned Counsel further submitted that the Commission has fixed wheeling charges on provisional basis as there was no material / data provided by the Electricity Department, Puducherry. This tantamounts to passing a non reasoned order and such determination of the wheeling charges is prima facie in violation of the principle of Natural Justice.

The Learned Counsel further submitted that for all practical purposes the determination of wheeling charges was final although it has been stated to be “provisional”. Though the Commission directed the Respondent to provide actual voltage wise losses and voltage wise assets for the Financial Year 2016-17 along with the Tariff Petition for FY 2018-19, but there would be no occasion for the Commission to determine wheeling charges even when the actual voltage wise losses and voltage wise assets for the current year are submitted.

The Learned Counsel further submitted that the wheeling charges for EHT, HT and LT level fixed by the Commission are higher than the rates proposed by the Respondent which in turn has financially burdened all the Open Access consumers.

The Learned Counsel further submitted that the ratio for apportionment of wheeling cost has also been drastically changed from 49:9:42(EHT:HT:LT) to 12.16:35.58:52.25, although no data has been made available to the Commission to justify this change. There is no material data available on record to suggest the sharp decline effected in respect of EHT losses from 49 to 12.16 (approx. 80%) or the increase in HT losses from 9 to 35.58.

**RESPONDENT'S SUBMISSIONS:**

Shri T. Chanemougam, Executive Engineer, Electricity Department, Puducherry opposed the arguments advanced by the Learned Counsel for the Petitioner. The arguments advanced on behalf of the Respondent are based on Para 8.3(2) of the Tariff Policy, 2016, the consultation paper on issues pertaining to Open Access dated 24.08.20-17 of the Ministry of Power and APTEL's Order dated 02.12.2013 in Appeal No. 178/2011 and Order dated 26.11.2014 in Appeal No. 294/2013 respectively.

Para 8.3(2) of the Tariff Policy provides as follows:-

*"For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the Appropriate Commission would notify a roadmap such that tariffs are brought within  $\pm 20\%$  of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy".*

Clause 3.6 of the consultation paper on issues pertaining to Open Access of the Ministry of Power provides as under:-

*"The Tariff Policy, 2016 mandates SERCs to determine roadmap for reduction of cross subsidy and bring tariff at  $\pm 20\%$  Average Cost of Supply, however it restricts Cross Subsidy Surcharge at 20% of the consumer tariff. In case the consumer tariff is more than 120% of Average Cost of Supply, DISCOM will not be able to recover losses through Cross Subsidy Surcharge in case consumer opts for open access. It is essential for SERCs to implement both Para 8.3 (2) and Proviso to Para 8.5.1 of the Tariff Policy, 2016 simultaneously. If one of the provisions could not be implemented due to some reason, the second provision should also not be implemented to that extent".*

APTEL's Order dated 02.12.2013 in Appeal No. 178/2011 in "Summary of Findings" Para II provides as under:-

*“ The contention of the State Commission that Tariff Policy provide that the Cross Subsidy Surcharge not be so enormous to suffocate the competition is misplaced. The Act mandated the State Commission to determine the Cross Subsidy Surcharge to meet the requirement of current level of cross subsidy. We have to keep in mind that the Cross Subsidy Surcharge is paid by the subsidizing consumers only. This Tribunal in catena of cases has held that Cross Subsidy Surcharge is compensatory in nature. It is meant for to compensate the loss suffered by the remaining subsidized low-end consumers. Thus, in the scenario of mass changeover of consumers, the cross subsidy Surcharge has also to be such that exodus of subsidizing consumers does not load the remaining low end consumers heavily. The State Commission has to balance the interest of all the consumers, the plea taken by the State Commission in Appeal No. 132/2011 and accepted by this Tribunal in its judgment”.*

Further APTEL’s Order dated 26.11.2014 in Appeal No. 294/2013 Para 60 provides as under:-

*“The above observation of this Tribunal would indicate that if the exercise of determination of Cross Subsidy Surcharge is in accordance with the law, then the consequences are irrelevant the law required the payment of Cross Subsidy Surcharge which has been determined in accordance with the law....”*

The Respondent further submitted that wheeling charges have been determined according to the methodology adopted by the Commission for all the Union Territories and State of Goa under its jurisdiction, and as per Clause 33 of the JERC (Multi Year Distribution Tariff) Regulations, 2014. Accordingly, the Commission has undertaken a prudence check and allocated the cost for calculation of wheeling charges based on the ARR as approved in the Impugned Tariff Order.

The Respondent further submitted that the Tariff Policy, 2016 provides guidelines which are not binding on the Commissions whereas the Electricity Act, 2003 is binding on all the Commissions. Thus, the Tariff Policy, 2016 cannot prevail upon the Electricity Act, 2003.

In view of the above, the Respondent requested the Commission to dismiss the Review Petition.

#### **COMMISSION’S ANALYSIS**

The Commission has considered the submissions made by the Review Petitioner and the Respondent. It has also re-examined the Impugned Tariff Order dated 16.05.2017, Tariff Policy, 2016 and the entire records placed before it along with relevant provisions of the Electricity Act, 2003 and Rules & Regulations made thereunder.

With the enactment of the Electricity Act, 2003, the State Electricity Regulatory Commission has been vested with powers for reviewing its decisions, directions and Orders under Section 94 (1) (f) of the Electricity Act, 2003 read with Order 47, Rule 1 of the Code of Civil Procedure. The instant application, made before the Commission, for review of its decisions, directions and Orders, and therefore, derives its scope and authority from the aforesaid section of the Electricity Act, 2003 read with Order 47, Rule 1 of the Code of Civil Procedure.

*Section 94 of the Electricity Act, 2003 provides that:*

*"The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:-*

*.... (f) reviewing its decisions, directions and orders;"*

Under Section 94 (1) (f) of the Electricity Act, 2003 Order / Judgment may be open to review, inter alia, if there is a mistake or an error apparent on the face of record. An error, which is not self evident has to be detected by process of reasoning and such an error can hardly be said to be an error apparent on the face of the record, justifying the Commission to exercise its power of review under the above said Section of the Electricity Act, 2003.

The Commission had deliberated on the issues raised in this Petition in detail. Paras 8.5.1 and 8.3(2) of the Tariff Policy, 2016 were also duly considered by it at the time of passing the Impugned Tariff Order.

The Commission had taken a conscious decision on the issues raised in the Review Petition and after due consideration of all the submissions made during the public hearing as well as in the Tariff Petition, had determined the Cross Subsidy Surcharge and wheeling charges for the Review Petitioner. The Commission is not convinced with the submissions of the Review Petitioner on issue no. 1 i.e. Cross Subsidy Surcharge. The Review Petitioner has failed to make out any case for Review on this issue. The Commission is of the view that the power of Review can be exercised only within the domain prescribed under section 94(1)(f) of the Electricity Act, 2003 and Order 47, Rule 1 of the Code of Civil Procedure. The Review can be done only for rectification of an error apparent and glaring on the face of record, or on discovery of new and important matter or evidence which, after due diligence was not within knowledge and could not be produced at the time of making the order. The Commission noticed that there is neither any error apparent nor any new matter or evidence was produced by the Review Petitioner which was not within the knowledge of the Review Petitioner at the time of making the Order. The Commission is therefore of the considered view that this issue does not qualify for review. In such circumstances, the Review Petition on issue no. 1 is liable to be dismissed.

The Commission has considered the submissions of the Review Petitioner on issue no. 2 regarding wheeling charges. It has re-examined the Impugned Order. The Commission is not inclined to accept the submissions on calculation/ratio of wheeling charges as there is no error in the calculations. At the same time, the Commission has noted that inadvertently an error has crept in the fourth Para of the Commission's analysis in Table 7.4 at page 92 of the Impugned Tariff Order. The Commission rectifies the error as under:-

On page 92 of the Impugned Tariff Order dated 16.05.2017 in the first line of the 4<sup>th</sup> Para of the Commission's analysis, the word 'Provisionally' appearing before "approve the losses for EHT at 1%" is deleted.

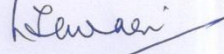
Accordingly, the Review Petition is partly allowed on issue no. 2 and is dismissed on issue no. 1.

Ordered accordingly.

Sd/-  
(NEERJA MATHUR)  
MEMBER

Sd/-  
(M.K. GOEL)  
CHAIRPERSON

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(KEERTI TEWARI)  
SECRETARY

कीर्ति तिवारी/Keerti Tewari  
सचिव/Secretary  
संयुक्त विद्युत विनियामक आयोग  
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राज्य और संघ राज्य क्षेत्रों  
State of J&K & Union Territories  
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