

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru S.Akshayakumar Chairman
Thiru G.Rajagopal Member
and
Dr.T.Prabhakara Rao Member

M.P.No.20 of 2016

Ski Carbon Black (India) Pvt. Ltd.,
Hi-Tech Carbon,
Gummidipoondi,
K-16, Phase-II,
SIPCOT Industrial Complex,
Gummidipoondi,
Thirvallur District – 601 201.

... Petitioner
(Thiru Rahul Balaji
Advocate for the Petitioner)

Vs.

TANGEDCO,
Represented by its Chairman,
No.144, Anna Salai,
Chennai – 600 002.

...Respondent
(Thiru M.Gopinathan
Standing Counsel for TANGEDCO)

Dates of hearing : 27-09-2016, 16-11-2016, 22-08-2017
and 25-10-2017

Date of Order : 13-03-2018

The M.P.No.20 of 2016 came up for final hearing on 25-10-2017. After hearing the learned Counsels for both the parties and after perusing the records, the Commission passes the following:-

ORDER

1. Prayer of the Petitioner in M.P.No.20 of 2016:-

The prayer of the Petitioner in the above M.P.No.20 of 2016 is to proceed to determine the Cross Subsidy Surcharge for the year 2016-17 in a time bound manner in accordance with the directives of the Hon'ble APTEL and fix the same in compliance with the directive of the National Tariff Policy that the surcharge shall not exceed 20% of the tariff applicable to the category of the consumers seeking open access and pass such further or other orders as the Commission may deem fit in the fact and circumstances of the case and thus render justice.

2. Facts of the Case:-

The petitioner owns a generating plant in the State of Tamil Nadu and is desirous of supplying surplus power from their plant to willing consumers through open-access. The present petition is being filed seeking directions from the Commission for fixation of the Cross Subsidy Surcharge for the State of Tamil Nadu, in compliance with the National Tariff Policy and the directions of the Hon'ble APTEL in various orders in the matter.

3. Contentions of the Petitioner:-

3.1. The Electricity Act, 2003 endeavors to introduce the concept of choice and facilitates free purchase of power by the consumer from any generator of his choice and to achieve this purpose generation of electricity has been completely de-licensed. This is why the Act has provided a very valuable right for non-discriminatory open access. Such a facility empowers the consumer to require from entities that own and operate the transmission and distribution systems, to

permit them to transfer power through these systems to the consumer seeking such facility from a generator of their choice. This is a valuable right that cannot be denied by the transmission or distribution licensee. However by virtue of section 39 (2) (d) (ii), section 40 (c) (ii), section 42 (2) and section 42 (4) of the Act the respective State Regulatory Commissions would permit such open access on the payment of the appropriate Cross Subsidy Surcharge under section 42 (2) or Additional Surcharge under section 42 (4).

3.2. Cross-subsidies in electricity tariff can be defined as a mechanism whereby some consumer groups are charged a higher tariff as compared to the cost of supplying power to them. The additional revenue generated from them is used to tide over the revenue shortfall from other consumer groups, who are charged lesser tariff as compared to the cost of supplying power to them. Cross subsidies are targeted at consumer groups who either do not have enough paying capacity or need to be supported for undertaking economic activities (e.g., agriculture, power looms, etc.), which in some way benefit the larger section of society. In case of cross subsidies, subsidisation is inbuilt in the tariff, unlike any external support (e.g., government funds) which is provided in the case of direct subsidy. Cross subsidy is a matter of tariff design, which can be adjusted depending on the intended level of cross-subsidisation. The levy of a cross subsidy surcharge is permitted under Section 42 (2) and Additional Cross Subsidy Surcharge under Section 42 (4).

3.3. When an industrial or commercial consumer decides to purchase power from an independent generator and not from the distribution licensee in that area, that distribution licensee loses the cross subsidy amount. The Cross Subsidy Surcharge

is imposed on the consumer to ensure that the distribution licensee does not pass on this additional amount to the domestic and agricultural consumers, which can result in a steep rise in the cost of power. Additional cross subsidy surcharge, levy of which is permitted under the provisions of section 42 (4) is meant to compensate the licensee for infrastructural facilities which it creates for a certain class of customers. The theory behind permitting this charge to be levied is that, when a consumer moves away from the licensee and avails power from any other generator the licensee must be compensated in some measure since the licensee has already incurred expenditure to set up infrastructure to supply power to the consumer.

3.4. High levels of Cross Subsidies result in wastage of economic resources. In the subsidized sectors, it encourages electricity consumption to a point where the value attached to incremental consumption is lower than the cost of supply. Lower power tariffs may result in indiscriminate pumping of ground water by farmers. On the other hand, higher tariffs (than the cost of supply) charged to commercial/industrial consumers pushes up their cost of product/services, which leaves them uncompetitive in today's era of globalisation. High cross subsidy may also lead to revenue loss for State utilities, as they incentivize industries to scale up 'captive power generation' to bypass the grid.

3.5. Cross subsidies are also a major hurdle in operationalization of open access in India. As per law consumers with load more than 1 MW are not bound to buy power from the distribution licensee and can source power from any generator. However large industrial users cannot switch to an alternate cheaper power supplier due to levy of high cross subsidies surcharge.

3.6. In Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission (2014) 8 SCC 444 the Hon'ble Supreme Court had occasion to examine at length provisions relating to Cross Subsidy Surcharge and additional surcharge. In Para 30 of the above judgment the Hon'ble Supreme Court stated as follows:-

"In a nutshell , CSS is a compensation to the distribution licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross-subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidising a low end consumer if he falls in the category of subsidising consumer. Once cross-subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross-subsidy within the area. A fortiori, even a licensee which purchases electricity for its own consumption either through a "dedicated transmission line" or through "open access" would be liable to pay cross subsidy surcharge under the Act. Thus, cross-subsidy surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such distribution licensee in whose area it is situated. Such surcharge is meant to compensate such distribution licensee from the loss of cross-subsidy that such distribution licensee would suffer by reason of the consumer taking supply from someone other than such distribution licensee."

3.7. One of the salient objectives of the electricity reforms beginning with the Electricity Act, 2003 (EA 2003) was reduction in the level of cross subsidies in tariff. The EA 2003, the National Electricity Policy, 2005 and the Tariff Policy, 2006 specify the framework to reduce cross subsidies in retail tariffs in India. The Act prescribes that cross subsidies in electricity tariffs should be reduced. Further, while differentiation in tariff across consumers was allowed with varying load factor, power factor, voltage, consumption and geographical location, it was envisioned that post reforms tariffs would progressively move towards cost of supplying electricity to these consumers.

3.8. Section 61 of the Electricity Act, 2003 prescribes the following in regard to tariff determination:

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

..... (f) multiyear tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;

..... (i) the National Electricity Policy and Tariff Policy.”

Section 62 of the EA 2003 states the following:

“... the Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply required or the geographical position of any area, the nature of supply and the purpose for which the supply is required”.

Section 65 states the following:

“ If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government”.

3.9. The National Electricity Policy: The National Electricity Policy (NEP) was first notified by the Government of India in compliance with section 3 of the Electricity Act, 2003. NEP acknowledges that cross subsidies had risen to unsustainable levels. Therefore, it is imperative to understand the various clauses of NEP and their implications on the roadmap for reduction in cross subsidies. The following clauses of NEP are relevant to this study:

Clause 1.2: "Electricity is an essential requirement for all facets of our life. It has been recognized as a basic human need. It is a critical infrastructure on which the socio-economic development of the country depends. Supply of electricity at reasonable rate to rural India is essential for its overall development. Equally important is availability of reliable and quality power at competitive rates to Indian industry to make it globally competitive and to

enable it to exploit the tremendous potential of employment generation. Services sector has made significant contribution to the growth of our economy. Availability of quality supply of electricity is very crucial to sustained growth of this segment."

Clause 5.5 discusses on the recovery of cost of, services and targeted subsidies.

Clause 5.5.3: "Over the last few decades cross-subsidies have increased to unsustainable levels. Cross subsidies hide inefficiencies and losses in operations. There is urgent need to correct this imbalance without giving tariff shock to consumers. The existing cross-subsidies for other categories of consumers would need to be reduced progressively and gradually. "

3.10. In Appeal No. 102 of 2010 in the matter of Tata Steel Ltd. Vs. Orissa Electricity Regulatory Commission & Another, the APTEL, after considering the provisions of the Electricity Act, 2003, the National Electricity Policy, Tariff Policy and the Regulations of the Appropriate Commission, concluded that no prejudice would have been caused to any category of consumers with regard to the issues of cross subsidy and cost of supply if:

- i. the cross subsidy calculated on the basis of cost of supply to the consumer category is not increased but reduced gradually,
- ii. the tariff of consumer categories is within $\pm 20\%$ of the average cost of supply except the consumers below the poverty line, and
- iii. tariffs of different categories of consumers are differentiated only according to the factors given in section 62 (3) and there is no tariff shock to any category of consumer.

3.11. In judgement on Appeal No.102 of 2010, it has stated that - *"According to the Tariff Policy, the tariff of all categories of consumers except those below poverty line have to be within $\pm 20\%$ of the total average cost of supply. The variation of tariffs of different category with respect to average cost of supply has not been correctly determined by the State Commission. The State Commission has erred in clubbing*

different consumer categories having different tariff in one category based on voltage of supply.”

3.12. In the Appeal Nos. 68 and 69 of 2008 preferred by the Multiplex Association of India against the Tata Power Co. Ltd. and Reliance Energy Ltd., the Hon'ble APTEL ruled the following-

“We observed ... that Section 62(3) of the Electricity Act directs that the Commission shall not show any undue preference to consumers of electricity while it does allow differentiation according to the consumer's (a) load factor, (b) power factor, (c) voltage, (d) total consumption of electricity during any specified period or the time at which supply is required, (e) the geographical position of any area, (f) the nature of supply and (g) the purpose for which the supply is required. We observed that the purpose of creating a new classification of LT-IX was not covered by any of the grounds on which the Commission could differentiate certain consumers on the ground that they indulge in 'unwarranted commercial consumption' or had 'a huge capacity to pay' or had potential to 'conserve energy'”.

3.13. In Appeal Nos. 29, 30, 31, 32 and 33 of 2008 preferred by various consumers of the newly created category of LT-IX versus MERC, MSEDCL and Reliance Energy Ltd., the Hon'ble APTEL observed that:

“The average cost of supply is modulated by numerous factors like AT&C losses, purchase cost of power, efficiency of operation, collection efficiency, theft of power, etc. In any case the percentage deviation of tariff fixed for subsidizing category of consumers with respect to average cost of supply should remain constant, if the cross subsidies is not reduced.”

3.14. In Appeal No. 931 of 2007 in SIEL Limited, New Delhi Vs PSERC & Ors the APTEL also emphasized the need for determination of category wise cost of supply. It stated that cost to supply a consumer category is not the same as average cost of supply for the distribution system as a whole and average cost of supply cannot be used in calculation of cross subsidy instead of actual cost of supply. The APTEL has

also not accepted the plea of SERCs that calculation of category wise cost of supply may not always be possible. The Hon'ble APTEL in Appeal No.102 of 2010 has *inter lia* held that it would be adequate to determine the voltage-wise cost of supply taking into account, the major cost element which would be applicable to all category of consumers connected to the same voltage level at different locations.

3.15. It is therefore, evident from the review of legal and regulatory provisions set out in the Electricity Act, 2003, National Electricity Policy, Tariff Policy and the judgments of the APTEL that:

- (a) The cross subsidy for a consumer category is the difference between cost to serve that category of consumers and average tariff realization of that category of consumers.
- (b) Cross subsidies should be calculated with reference to category-wise cost of supply and not average cost of supply.
- (c) The cross subsidies have to be reduced progressively and gradually to avoid tariff shock to the subsidized categories.
- (d) The tariff for different categories of consumer may progressively reflect the cost of electricity to the consumer category but may not be a mirror image of cost to supply to the respective consumer categories.
- (e) Cross subsidies may gradually be reduced but should not be increased for a category of subsidizing consumer.
- (f) The tariffs should be within $\pm 20\%$ of the average cost of supply by the end of FY 2010-11 to achieve the objective that the tariff progressively reflects the cost of supply of electricity.
- (g) The tariffs can be differentiated according to the consumer's load factor, power factor, voltage, total consumption of electricity during specified period or the time or the geographical location, the nature of supply and the purpose for which electricity is required.

3.16. In addition to the above, the Hon'ble APTEL, in its judgment in Appeal No.68 of 2015 dated 30-11-2015, in the matter of Indus Towers Ltd. Vs. TANGEDCO & Ors., inter-alia, directed that – “Further, the State Commission is directed to implement the Voltage wise/Category wise cost of supply in the next tariff order. The State Commission is also directed to implement the National Tariff Policy, Electricity Act, 2003 and directions of this Tribunal, that the cross subsidy of the subsidizing categories has to be reduced every year to bring it down to the level of $\pm 20\%$.” The Hon'ble APTEL further emphasized the need for the Commission to exercise its suo-moto powers should there be a delay on the part of the Respondent.

3.17. In this regard, a further important development is the issuance of the Tariff Policy dated 28.01.2016 by the Central Government, which is reproduced below:

“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 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 charged up to the relevant voltage level ; and (d) per unit cost of carrying regulatory assets, if applicable.

Surcharge formula:

$$S=T- \{C/(L/100)+D+R\}$$

where

S is the surcharge

T is the tariff payable by the relevant category of consumers, including reflecting the Renewable Purchase Obligation.

C is the per unit weighted average cost of power purchase by the Licensee, including meeting the Renewable Purchase Obligation.

D is the aggregate of transmission, distribution and wheeling charge applicable to the relevant voltage level.

L is the aggregate of transmission, distribution and commercial losses, expressed as a percentage applicable to the relevant voltage level.

R is the per unit cost of carrying regulatory assets.

Above formula may not work for all distribution licensees, particularly for those having power deficit, the State Regulatory Commissions, 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.

Provided further: that the Appropriate Commission, in consultation with the Appropriate Government, shall exempt levy of cross subsidy charge on the Railways, as defined in Indian Railways Act, 1989 being a deemed licensee, on electricity purchased for its own consumption.”

3.18. Since the rate of cross subsidy surcharge is fixed, it has a substantial impact upon the right of open access which is guaranteed under the Electricity Act 2003. However in Tamil Nadu the TANGEDCO has not filed any application before the Commission for determination of Cross Subsidy Surcharge. In view thereof, it is of utmost urgency that the Commission, in exercise of its suo-motu powers, take up the task of redetermination of the cross subsidy surcharge in line with the National Tariff Policy.

3.19. The Petitioner states that on the policy front, there are adequate guidelines that emphasize the need for winding down cross-subsidies. On account of policies of globalization, liberalization and privatization, the Petitioners have to compete in an international market. In such a system they enjoy no protection. Given the scenario, in order to effect a level playing field the Petitioner must be free of unnatural constraints and costs. The Petitioner states that for the reasons stated earlier the imposition of such high cross subsidy surcharge and cross subsidy additional surcharge is completely arbitrary and unreasonable.

4. Contentions of the Respondent:-

TANGEDCO in its affidavit dated 16-11-2016 has stated as below:-

4.1. Sections 39 (2) (d) (ii), 40 (c) (ii), 42 (2) and 42 (4) of the Electricity Act, 2003 specifies that the State Commission would permit open access on the payment of the appropriate cross subsidy surcharge under section 42 (2). Section 42 (2) specifies that the cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission. Regulation 85 of TNERC (Terms and Conditions Determination of Tariff) Regulations, 2005, specifies the following in regard to cross-subsidy:-

- (1) The difference between the cost to serve and the revenue realized from the consumer category at the approved tariff level is the cross subsidy. The consumer paying more than the cost to serve is subsidizing consumer and the consumer paying less than the cost to serve is the subsidized consumer.
- (2) The Commission may endeavour to hold the tariff of the subsidising categories at the nominal rates until the tariff to subsidized categories approaches the cost to serve such categories.
- (3) The Commission may endeavour to reduce the cross subsidy progressively in accordance with the roadmap to be notified by the Commission.

(4) In view of the necessity to make electricity affordable for households of very poor category, the domestic consumers including hut dwellers consuming 30 kWh per month may be designated as lifeline categories requiring minimum level of supply. The tariff for such category may be pegged at 50% of the cost to serve the domestic consumers.

4.2. M/s OPG Renewable Energy and Tamil Nadu Electricity Consumers Association filed an appeal before the APTEL challenging the tariff order issued by the Commission on 20-06-2013.

4.3. In the order dated 27-10-2014 in the said appeals, the APTEL directed the State Commission to notify road map for reduction of cross subsidy as per tariff policy after following due process of law.

4.4. The APTEL also directed the State Commission to determine the voltage wise cost of supply in the tariff order for the year 2015-16. The Commission has started the process to determine voltage wise cost of supply.

4.5. M/s Indus Towers has filed an appeal before the APTEL in Appeal No.68 of 2015 challenging suo-motu tariff order issued by the Commission on 11-12-2014 with the prayer to (1) to direct the State Commission to determine the tariff within the level of 120% of the average cost of supply (2) to direct the State Commission to determine the voltage wise and category wise cost of supply and to implement the same for the future years.

4.6. The APTEL by orders, dated 30-11-2015, dismissed the appeal petition and directed the State Commission to implement the voltage wise / category wise cost of supply in the next tariff order.

4.7. The State Commission was also directed that the cross subsidy of the subsidising categories has to be reduced every year to bring it down to the level of $\pm 20\%$.

4.8. The National Tariff Policy notified by the Ministry of Power in January 2016 specifies the following in regard to cross subsidy.

4.9. Clause 8.3.2 provides that for achieving the objective that the tariff progressively reflects the cost of supply of electricity, the Appropriate Commission would notify a road map 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.

4.10. Proviso to clause 8.5.1 specifies that the surcharge shall not exceed 20% of the tariff applicable to the category of the consumers seeking open access.

4.11. It is submitted that determination of cross-subsidy within $\pm 20\%$ level is the final objective which could not be achieved immediately. It could be reached over the period by reducing the cross subsidy level gradually. The cross subsidy of the subsidising categories has to be reduced every year in the manner as may be

specified by the Commission to bring it down to the level of $\pm 20\%$ of average cost of supply.

4.12. It is submitted that the present cross subsidy surcharge was determined in suo-motu tariff order No.9 dated 11-12-2014. much earlier to the issue of National Tariff Policy dated 28-01-2016.

4.13. It is always open to the petitioner to raise the issue in any subsequent tariff determination process that may be initiated by the Commission.

4.14. Clause 8.3.2 of National Tariff Policy provides that for achieving the objective that the tariff progressively reflects the cost of supply of electricity, the Appropriate Commission would notify a road map 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.

4.15. Proviso to clause 8.5.1 of National Tariff Policy specifies that the surcharge shall not exceed 20% of the tariff applicable to the category of the consumers seeking open access.

4.16. The cross subsidy level could not be brought within the level of $\pm 20\%$ immediately. It could be brought to the level of $\pm 20\%$ over the period in accordance with the roadmap to be notified by the Commission as envisaged in para 8.3.2 of Tariff Policy, 2016.

4.17. The Petitioner has to wait till notification of Regulations for roadmap for reduction of cross subsidy as envisaged in Electricity Act, 2003 based on the National Tariff Policy, 2016 by the Commission. Therefore, the present petition, before issue of notification of roadmap for reduction of cross subsidy, is a pre-matured one and as such liable to be dismissed.

5. Hearing held on 25-10-2017:-

In the hearing held on 25-10-2017, the Commission directed both the parties to file their Written Submissions within two weeks. But no Written Submissions are filed by both the parties.

6. Findings of the Commission:-

6.1. The prayer of the petitioner in this petition is to re-determine the cross subsidy surcharge in accordance with the National Tariff Policy, 2016 with a ceiling limit of 20% of the tariff for the relevant category of the consumers. Before proceeding to discuss the merits of the prayer of the petitioner, it is necessary to set out the background of the implementation with regard to determination of cross subsidy surcharge in accordance with the National Tariff Policy. This is necessitated, in view of the fact that the cross subsidy surcharge is interlinked with the cross subsidy and therefore, any reduction in the cross subsidy surcharge can be effected only when there is a corresponding reduction in the cross subsidy. It has been the view for quite some time that the National Tariff Policy has only a guiding force and it is not binding on the State Commissions. The judgement of the Hon'ble APTEL in Maruti Suzuki India Limited Vs Haryana ERC (Appeal No.200 of 2011, dated 04-10-2012) propounded the said position of law on the strength of the pronouncement of the

Hon'ble Apex Court in A.P.Transco Vs Sai Energy Renewable Pvt Limited [(2011) 11 SCC 34)]. However, subsequently there were directions from the APTEL to the Commission to determine the cross subsidy on the basis of National Tariff Policy in Appeal No.68 of 2015 in the matter of Indus Tower Limited (order dated 30-11-2015) and Appeal Nos.196 & 199 of 2013 in the matter of Tamil Nadu Spinning Mills Vs TNERC (order dated 27-10-2014) for notification of road map for reduction of cross subsidy as per National Tariff Policy. As a consequential measure of compliance, the Commission also notified a roadmap for reduction of cross subsidy in the tariff order issued in 2017 in T.P.No.1 of 2017 dated 11-08-2017. The Commission also determined the cross subsidy surcharge for the period 2017-18 in line with the National Tariff Policy in the said Tariff Petition dated 11-08-2017. However, the prayer of the petitioner is for inclusion of the period 2016-17 as well for the purpose of determination of cross subsidy surcharge in line with the National Tariff Policy. The orders issued by the Commission generally take effect prospectively and not retrospectively. The tariff orders issued by the Commission also normally take effect from the date on which it is issued. In this connection, it is to be noted that the cross subsidy surcharge has been dealt with as an allied issue in the tariff order and the orders in regard to cross subsidy surcharge are normally to take effect prospectively i.e., from the date of issue of tariff order.

6.2. However, the prayer of the petitioner in this petition seeks implementation of the National Tariff Policy in the matter of fixation of cross subsidy surcharge at the cap level of +20% for the year 2016-17 also. This raises a question whether the effects of tariff policy issued by the Government of India shall stand implemented from the date of its publication by Gol or from the date of order of the Commission.

In order to understand the issue fully, it is further necessary to examine the contours of National Tariff Policy and the concept of reduction of cross subsidy with a view to move towards \pm 20% of average cost of supply. Here again, it may be noted that there are two vital factors which require consideration. Firstly, in our opinion, the National Tariff Policy is only a visionary document which sets out the larger vision for development of electricity sector and rationalization of electricity tariff. We are of the view that the said policy does not have the mandatory force as equivalent to the regulations of the Commission especially with regard to immediacy of implementation of the policy issues contained therein. We have considered the contentions of the counsel for the petitioner that the National Tariff Policy is having a force of law. We have also gone through the judgement of the Apex Court in Energy Watchdog case (Civil Appeal Nos.5399-5400 of 2016, dated 11-04-2017) which is relied upon by the petitioner to support his case. However, we are of the considered view that the observations of the Apex Court in the Energy Watchdog case (Civil Appeal Nos.5399-5400 of 2016, dated 11-04-2017) that the provisions of the NTP have the force of law were made in a different context and would not fit into the present scheme of things. It may be seen that the Apex Court in the said case was examining the grant of compensatory tariff to a generator on account of necessity to buy imported coal in view of shortage of indigenous coal and in the said context, the Apex Court made an observation to the effect that the NTP has the force of law in view of the fact that the NTP was not considered in the decision taken by the appropriate authorities. However, the facts of the present case are different. The Commission has already implemented the NTP with regard to reduction of cross subsidy as directed by the APTEL, albeit, in a phased manner and also determined the cross subsidy surcharge at the level of +20% of average cost of supply as

postulated in the NTP in its T.P.No.1 of 2017 dated 11-08-2017. It may not be out of place here to mention that the judgement of the APTEL in Appeal No.200 of 2011 (order dated 04-10-2012) is the one which is directly addressing the point i.e., whether the NTP is binding on the Commission and whether the regulations of the Commission are subservient to the NTP. The APTEL has categorically observed on the basis of the judgement of the Apex Court in A.P.Transco Vs Sai Renewable Pvt. Ltd. [(2011)11 SCC 34] that the NTP is not binding on the Commission. In the said judgement, the APTEL also came out with a categorical pronouncement that the State Commissions ought to be guided by the Tariff Policy only at the time of framing regulations and thereafter the Commissions are bound only by their own regulations. The judgement of APTEL has also been pronounced on the strength of the judgement of the Supreme Court in PTC India Vs CERC [(2010) 4 SCC 603] wherein the APTEL interpreted the judgement of the Supreme Court to the effect that the regulations of the Commission are not subservient to the NTP and the Commissions shall be guided by the NTP, only while framing the regulations.

6.3. Having said so, we now proceed to examine whether there is any provision in the regulations of the Commission which makes it mandatory to implement the NTP from the date of its implementation. Obviously, we do not see any such provision to such effect. The regulation 85(3) of the Tariff Regulations of the Commission provides only for progressive reduction of cross subsidy in accordance with the road map to be notified by the Commission. The regulation 87 provides that till such time cross subsidy is eliminated, the open access consumer shall pay surcharge in addition to wheeling charges. Thus, a comprehensive reading of the regulations of the Commission make it patently clear that the surcharge shall be computed as per

the TNERC Open Access Regulations and there is no stipulation that the NTP is to be given effect from the date of its notification in the matter of cross subsidy surcharge or for that matter any other or all the provisions in the NTP. It is also conspicuous to note that even the tariff policy has no provision to the effect that the same is strictly implementable from the date of its publication. A combined reading of the NTP, the tariff regulations and the judgements of the APTEL in Appeal No.200 of 2011 dated 04-10-2012 which has been delivered on the strength of the decisions of the Apex Court in PTC India Limited and A.P.Transco's case would set out the position of law that it is only the regulations of the Commission which have to be followed for implementation of the cross subsidy surcharge. We are of the firm view that the NTP is a piece of visionary document for the guidance of the Commission and it is not having the force of law as the regulation of the State Commission has and more is to be implemented from the date of its publication. The petitioner, in our opinion, evenwhile placing reliance on Energy Watchdog case has not read the said judgement with reference to the judgements of the Apex Court in PTC India and A.P.Transco's case which have been referred to in the judgement of APTEL which would have made it clear that the NTP is only a policy document which is implementable only through the regulations of the Commission and not as such. The question of force of law with reference to NTP as discussed in the judgement of the Supreme Court in Energy Watchdog case should be seen in the context of total failure to consider the NTP which lead to the observations that NTP has the force of law. The instant case, before us stands on the different footing. Here the NTP has been considered and implemented as may be seen from the road map drawn for the reduction of cross subsidy and determination of surcharge for 2017-18. It is to be noted that the Commission is moving towards the object of NTP and there is no total

disregard of the provisions in the NTP so as to make the judgment in Energy Watchdog case applicable here. Further, it may be seen that for the purpose of drawing a road map for the reduction of cross subsidy and fixing cross subsidy surcharge at $\leq 20\%$ level certain pre-requisite such as collection of data from the licensee is required and for this purpose, the exercise can be taken up only upon filing the ARR or relevant details by the licensee.

6.4. Further, in the above Tariff Order also, Commission has determined the Cross Subsidy Surcharge for FY2017-18 as 20% of the ABR of that category of consumers.

6.5. Hence, Commission is consciously moving towards reduction of Cross Subsidy and is endeavouring and gradually move towards attaining the desired level of $\pm 20\%$ of the Average Cost of Supply (ACOS).

6.6. With respect to determination of Cross Subsidy Surcharge for FY 2016-17 as requested by the Petitioner based on the formula provided in the revised National Tariff Policy, 2016, it can be seen that the Suo-motu Tariff Order was issued on 11-12-2014, effective from 12-12-2014 and the next Tariff Order was issued on 11-08-2017 effective from 11-08-2017 and since there was no tariff order in-between, the Commission has not determined the Cross Subsidy Surcharge for 2016-17.

6.7. The revised National Tariff Policy was published on 28th January 2016 and the Petitioner has filed this petition seeking determination of CSS for FY2016-17 on 8th August 2016. Filing of ARR on or before 30th November is specified in 5(1) of the

Tariff Regulations, 2005. In respect of FY2017-18, TANGEDCO filed the Miscellaneous Petition No. 31 of 2016 seeking time extension upto January 31, 2017 as the participation in UDAY will have direct impact on the profitability of TANGEDCO. Commission granted the request of TANGEDCO. TANGEDCO filed the Tariff Petition on January 27, 2017 and the same was admitted by the Commission on January 31, 2017 vide T.P. No.1 of 2017. Upon filing of the Tariff Petition, Commission initiated the proceedings for Determination of Tariff and adopted the procedure for Tariff Order FY2017-18 as per section 62 and section 64 of the Electricity Act, 2003. In the said Petition, TANGEDCO has filed the ARR for FY2016-17 to FY2018-19. Commission determined the retail Tariff, wheeling charges and Cross Subsidy and Cross Subsidy Surcharge for FY2017-18 and notified the road map for reduction of Cross Subsidy to the level of $\pm 20\%$.

6.8. To determine the Cross Subsidy Surcharge for any year, ABR of that category and Average Cost of Supply of that year is required. Commission can determine this only based on the Aggregate Revenue Requirement of that year. In the Tariff Order dated 11-08-2017, Commission determined the ARR of FY2016-17 to FY 2018-19 and further determined the Tariff applicable to all classes of consumers (HT & LT) for FY 2017-18. The Commission in its Tariff Order in T.P. 1 of 2017, dated 11-08-2017, has determined the Cross Subsidy Surcharge for FY 2017-18 as per the formula specified in the National Tariff Policy dated 28-01-2016 restricting to 20% of ABR. The ABR reflects the revenue realizable in that category by the consumption of that category.

6.9. Finally, on 25-10-2017, Commission directed both the parties to file their written submissions within two week's time but both TANGEDCO as well as the

Petitioner have not filed any written submissions. Hence, it is construed that after issue of the Tariff Order dated 11-08-2017, there were no grievance with respect to both the parties in the matter of Cross Subsidy Surcharge determined by the Commission. As the Commission has determined the Cross Subsidy Surcharge for FY2017-18 limiting to 20% of ABR of that category of consumers, Commission has adhered to the guidelines issued in the National Tariff Policy dated 28th January 2016 while issuing the immediate next Tariff Order.

6.10. In addition to the determination of the CSS at 20% of ABR, Commission has also notified a road map for reduction of cross subsidy gradually to meet the +20% of Average Cost of Supply. In the Tariff Order itself it has been observed by the Commission that the Commission will endeavour to ensure that the above approved trajectory for reduction of cross-subsidy is adhered to the extent possible, subject to the above constraints, as no consumer category can be subject to a tariff shock, on account of reduction of cross-subsidy. In view of the same, we are to hold that the order of the Commission in regard to the implementation of cross subsidy surcharge shall take effect only from the date as mentioned in the order in T.P.No.1 of 2017 dated 11-08-2017 and not for the period prior thereto. The prayer of the petitioner for determination of cross subsidy surcharge for the period 2016-17 in line with NTP, therefore fails. In the result, the petition is dismissed.

7. Appeal

An appeal against this Order shall lie before the Appellate Tribunal for Electricity under section 111 of the Electricity Act 2003, within a period of 45 days from the date of receipt of a copy of this order by the aggrieved person.

(Sd)
(Dr.T.Prabhakara Rao)
Member

(Sd.....)
(G.Rajagopal)
Member

(Sd.....)
(S.Akshayakumar)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission