

No.: N/49/16

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,
BENGALURU**

Dated : 5th January, 2017

Present:

Shri M.K. Shankaralinge Gowda	..	Chairman
Shri H.D. Arun Kumar	..	Member
Shri D.B. Manival Raju	..	Member

RP No.4 / 2016

BETWEEN:

Doddannavaar Global Energy Pvt. Ltd. (DGEPL),
19/1, "Shet Heights", 3rd floor,
1 Main, Vyalikaval,
Bengaluru - 560003 ..

PETITIONER

[Represented by Smt. Poonam Patil, Advocate]

AND:

Bangalore Electricity Supply Company Limited,
K.R. Circle,
Bengaluru – 560 001 ..

RESPONDENT

[Represented by Shri Shahbaaz Husain, Advocate]

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ORDERS

- 1) This is a Review Petition filed under Regulation 8 of the KERC (General and Conduct of Proceedings) Regulations,2000, read with Section 94 of the Electricity Act 2003, requesting to review the Tariff Order dated 30.3.2016 issued in respect of BESCO to provide for the following reliefs:

- (a) To reconsider and modify the Tariff Order of the BESCOM dated 30.03.2016 passed by this Commission, by eliminating the Cross-Subsidy Surcharge as was done during 2009-12 financial years;
- (b) In the alternative, to reconsider and modify the Tariff order of the BESCOM dated 30.03.2016 passed by this Commission, by eliminating Demand Charges component from the Average Revenue Realization (ARR),

OR

To reconsider and modify the Tariff order of the BESCOM dated 30.03.2016 passed by the Commission by adopting the Maharashtra model (MERC) Cross Subsidy Surcharge, wherein Demand Charges are included in Average Billing Rate (ABR) and reduced in Contract Demand of Open Access Consumers;

- (c) To provide Wind Power generators the same concession/benefits as Solar Power generators in the State and uphold the spirit of competition in the field; and
 - (d) To grant such other order, relief as this Commission deems fit in the facts and circumstances of the case in the ends of justice.
- 2) The material facts urged by the Petitioner in support of its prayers may be stated as follows:
- (a) The Petitioner, a Company registered under the Companies Act,1956 was initially sanctioned the implementation of 15 MW Wind Power Project at Jainapur, Chennanadaddi Toranahalli and Chinchini villages, Chikkodi Taluk, Belgaum District by the State Government vide its order dated 12.02.2009, which was commissioned in September, 2009. Subsequently, the State Government accorded approval for establishment of additional 83 MW vide its order dated 14.07.2010 and 26.08.2011 out of which, the Petitioner has commissioned 32 MW during 2012, thus totally commissioning 47 MW.

- (b) That Petitioner was encouraged to invest in Wind Power Plants in view of cap on the Cross-Subsidy Surcharge (hereinafter referred to as 'CSS') from the year 2009. That as the generic rates offered by the Distribution Companies were not suitable, the Petitioner-Company has been on open access, from the time of commissioning its Plants.
- (c) That however, the CSS came to be reintroduced by the Commission under its Tariff Order dated 30.04.2012 (for the Financial year 2013) by which the State's Wind Power Plants, including that of the Petitioner who had invested based on non-existence of CSS, were hit by such re-imposition.
- (d) That whereas, the Commission was empowered to allow open access on payment of a surcharge to be determined by it under the provisions of Section 42 of the Electricity Act,2003 (hereinafter referred to as the 'Act'), the same provision also required that such surcharge shall be progressively reduced. That however, the CSS, which was reduced in the Financial Year 2013 at 11 paise for the 11 / 33 kV consumers and at 43 paise for the 66 kV consumers, are at 81 paise at 118 paise, respectively, in FY-17.
- (e) That the Commission, in determination of tariff (charges) for open access, had to consider the following guidelines with the National Tariff Policy, 2006:

“8.5 Cross-subsidy surcharge and additional surcharge for open acces.

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.”

- (f) That the Commission after considering the application of the Distribution Licensee regarding APR for the Financial year 2010 and approval of ERC for the Control Period Financial years 2011 to 2013, had observed that the CSS will not be levied till further orders. That the Distribution Licensee during Tariff determination for Financial Year 2012 had specifically sought for levying of CSS which was rejected by the Commission.
- (g) That however, the Distribution Licensee in its Tariff application for Financial year 2013 had requested for levy of CSS, pursuant to which

the Commission in its order reintroduced CSS and continued such charges in the subsequent Tariff Orders, though the Distribution Licensees had not proposed the same in their tariff applications.

- (h) That although the Act, in order to bring a regime where the electricity generators and consumers have the freedom of choosing each other without any restriction, provides for a non-discriminatory open access, the CSS has been an obstacle in achieving it. High CSS makes open access procurement financially unviable, as compared to supply from the distribution licensee.
- (i) That the CSS for renewable energy is high in Karnataka as compared to other States. Whereas the CSS was 80% from 2012 to 2015 and 75% in 2016 of CSS worked out as per the formula in Karnataka, it is 25% in Maharashtra and Telangana, 50% in Tamil Nadu and Nil in Madhya Pradesh.
- (j) That reintroduction of the CSS and its subsequent increase goes against the tenet of National Policy and the mandate under the Act, which envisages that the CSS shall be brought down progressively. That the CSS cannot be more than 20% of the applicable tariff to the category of consumers seeking open access. That in the tariff order dated 30.03.2016 surcharge at 75% has been imposed.

- (k) That as per the computation methodology adopted by the Commission, demand charges is included in the computation of ARR but not included in the cost of supply. That Demand Charges are collected separately in the monthly bills of HT consumers resulting in collection of demand charges twice. That if the demand charges are included in the ARR, then the demand charges should not be billed in the monthly bills of HT consumers who opt for Open Access, as demand is met by the Open access generators. That the CSS for the HT consumers should be computed excluding the demand charges from the ARR (tariff).
- (l) That the contract demand in the monthly bills should be reduced to the extent of power opted under open access as in Maharashtra.
- (m) That the impugned Order suffers on account of placing the Wind Power Plants at a disadvantageous position *vis-à-vis* Solar Power Plants, to which wheeling charges, banking charges and CSS are waived, contrary to the Act and the National Electricity Policy. That this discrimination between one form of Renewable energy and the other is not permissible. That Solar Power Producers with concessions could sell under Open Access at Rs.5.50 per unit *vis-à-vis* the wind power producers who could sell at Rs.3.97 per unit. That the Petitioner would realize only Rs.3.97 per unit which is less than the generic Wind Tariff of Rs.5.00 per unit [Rs.4.50 per unit plus Rs.0.50 per unit]. That the APTEL in its Order in Appeal No. 87/2015 dated 26.05.2016, has held that there is

a need to support RE in any form and such plants must be supported in the event of threat to their existence.

- (n) That Group Captive is now permitted and such generators do not pay CSS and tax. That Wind Power Plants being infirm are best qualified to be treated as captive generators, as power cannot be sold in power exchanges or traded in other states.
 - (o) That the impugned Order is detrimental to all Wind Power Plants in the State. The fallout of high CSS is that, it opens opportunities to solar and group captive transactions.
- 3) The Respondent through its counsel has made the following submissions opposing the Petition:
- (a) That Petitioner has no *locus standii* under law to file the above Petition, as no real cause of action is forthcoming from the Petition. That even if it is assumed that the Petitioner has a factual grievance by levy of CSS, it has no *locus standii* to file the above Petition, as it has absolutely no legal grievance.
 - (b) That the Solar and the Wind are entirely different fields of energy, independent of each other, and their tariffs are incomparable as the parameters involved in determination of tariff are vastly different.

- (c) That while Wind energy is supplied to the Electricity Supply Companies (ESCOMs) and consumers in large quantity (10% of total electricity), relatively negligible units of solar energy (0.25% of total electricity) is available, which reiterates and accentuates the inequality between Solar and Wind. That keeping the objective of the Act and the factual circumstances in mind, incentives are being provided to solar generators. That such classification in furtherance of the objective of the Act is in compliance with Article 14 of the Constitution of India and the same cannot be challenged.
- (d) That disallowing the CSS will defeat competition, as the competition is between the Petitioner and the Respondent to supply energy to the end consumers. That when the CSS is imposed on the Respondent for supplying energy to HT consumers, the same has to be imposed on the Petitioner as CSS, to ensure competition. That if CSS is removed without removing the cross-subsidization, it would discourage competition, as rates of the Respondent would be naturally higher. That Section 42 of the Act unequivocally establishes that CSS is required to meet the cross-subsidy and in the absence of the same, it would cause unjust financial burden on the Respondent.
- (e) That the comparison of the CSS of a few States drawn by the Petitioner is wholly misleading, as power purchase cost of various States vary on account of various factors and different States consider different factors in tariff determination. That the prayer of the Petitioner to

eliminate the CSS is not supported by any facts and logic. That the requirement of subsidizing agricultural and domestic consumers vests equally on the Respondent and the Petitioner. That therefore, elimination of such charges for Petitioner in isolation is against the principles of competition and natural justice. That elimination of the CSS has not been advocated by any of the applicable legal provisions as on date. That the Petitioner cannot exploit and abuse its position as private generator by seeking elimination of the CSS, especially when the Respondent is required to supply energy to Open Access consumers as a guarantor, in the event of Petitioner being unable to supply power.

- (f) That reduction of the CSS without reduction in the cross-subsidies defies logic behind cross-subsidization.

- (g) That the claim of the Petitioner that, the Respondent is claiming double demand charges from consumers is erroneous and false for the reason that demand charges are conceptually inbuilt in the variable costs recovered by the Respondent. The cost of power purchased from private generators is divided in the ratio of 30 : 70 towards fixed/demand charges and variable charges, respectively, while the Respondent is obligated to distribute the fixed/demand charges and variable charges in the ratio of 10:90 respectively. Hence, by virtue of existing framework, the Respondent is forced to collect 20% of fixed charges through variable charges. In view of HT consumers opting for

Open Access, the demand charges/fixed charges, to the extent they are inbuilt in variable charges will not be recovered by the Respondent, if the prayer of the Petitioner on demand charges is allowed.

- (h) That the Petitioner's reference to Maharashtra on demand charges, cannot be imported to Karnataka, as Karnataka and Maharashtra have two different systems involving different charges. That MERC levies reliability charges on consumers who are guaranteed round the clock supply and also provides for distribution cost in the ratio of 30 : 70 between fixed and variable charges, which practices and concepts are absent in Karnataka.
- (i) That the Petitioner's request to consider it as Captive Generator, is against the legal definition of Captive Power Plant and is baseless.
- (j) That Petitioner's averment that, it ventured to supply under open access, only because there was no CSS being levied at the time of commissioning of its Plant, is baseless, as no guarantee was placed either by the Commission or by the Government that no CSS would be ever charged.
- (k) That the Petition cannot be challenging the statutory provisions providing for imposition of CSS through the Review Petition. The Respondent has prayed for dismissal of the Petition in entirety.

4) We have perused the records and heard the counsel for both the sides. The following issues would arise for our consideration.

(1) Whether reintroduction of CSS on open access consumers from financial year 2013 onwards is against any of the provisions of the Electricity Act 2003 or the National Tariff Policy or any Public Policy?

(2) Whether the computation of CSS is incorrect and in violation of any approved methodology?

(3) Whether imposition of CSS is discriminatory on wind energy as solar power is exempted?

(4) What Order?

5) We proceed to answer these issues as follows:

6) **ISSUE No.(1):** *Whether reintroduction of CSS on open access consumers from financial year 2013 onwards is against any of the provisions of the Electricity Act 2003 or the National Tariff Policy or any Public Policy?*

(a) The argument of the Petitioner against the reintroduction of CSS from the financial year 2013 is two-fold. Firstly, it is contended that it is violative of the provisions of the Electricity Act, 2003 and the Tariff Policy issued under the Act and also the policy of this Commission itself. Secondly, it has adversely affected the Petitioner, who had made investments when it was not imposed.

- (b) We have earlier extracted the relevant portion of the National Tariff Policy referred to by the Petitioner in support of its contention.
- (c) The Respondent has strongly refuted the Petitioner's contentions.
- (d) We note that the issue of re-introduction of CSS was challenged earlier by Sarovar Energy Pvt. Ltd., in Appeal No 186 of 2012 and BMM ISPAT Ltd., in Appeal No. 187 of 2012 before the Hon'ble Appellate Tribunal for Electricity (ATE), wherein the Commission and the BESCOM were made as Respondents. The Hon'ble ATE, in its order dated 03.09.2013, has held as follows:

"41. The State Commission was of the view that it had made Cross Subsidy Surcharge zero since the 2009 Tariff Order in order to encourage the Open Access and to incentivize the consumers in the State to purchase power from outside the State at reasonable rates. This would relieve the utilities of the extra burden of high cost energy under the situation of power shortage prevailing then. The decision which was taken by the State Commission in that period to keep the Cross Subsidy surcharge as zero was taken keeping in view the situation prevailing at that time when those orders were passed.

42. However, the circumstances that existed at the time of passing of the earlier orders in 2009, 2010 and 2011 and the circumstances that prevailed in State at the time of the passing of the present impugned order are completely different and therefore, the State Commission decided to reintroduce the Cross subsidy surcharge. In fact, the State Commission in the impugned order has taken into consideration the methodology set out in the KERC (Open Access Regulations), 2004.

43. The Electricity Act, 2003 provides for levy of Cross Subsidy Surcharge. The National Tariff Policy clearly mandates that the Regulatory Commissions ought to strike a balance between the requirements of the commercial viability of Distribution Licensees and the Consumer interest. Therefore, the application filed by the Distribution Licensee requesting for reintroduction of the Cross Subsidy Surcharge is in keeping with the statutory mandate of the Act.

44. That apart, the issue of previous year cross subsidy surcharge was determined at zero level cannot be a relevant issue in this matter since every tariff order is a fresh tariff order which needs to be judged by the applicable legal provisions and taking into consideration the prevailing circumstances. As such, there is no infirmity in the findings given in the impugned order on this issue."

- (e) With the major objections of the Petitioner against reintroduction of CSS having already been repelled by the Hon'ble ATE in the cases cited above, the only other objection that needs consideration is, whether the reintroduction can be reviewed because of its adverse impact on the Petitioner's investment in the State.
- (f) We find force in the Respondent's contention that, no assurance about non-introduction of the CSS was held out by this Commission or even the State Government so as to make the Petitioner invest in the State. As rightly contended by the Respondent, though the Petitioner may have a factual grievance against the imposition of the CSS, its imposition cannot be faulted on that ground. For the above reasons, we answer Issue No.(1) in the negative.

- 7) **ISSUE No.(2)** : Whether the computation of CSS is incorrect and in violation of any approved methodology?
- (a) The Petitioner has contended that the inclusion of demand charges in ARR would amount to double charging of the demand charges.
- (b) The Petitioner, in its rejoinder, has further contended that, as per the tariff filing made by the Respondent, BTPS-3 power purchase cost, which is higher, had to be considered at 5% margin instead of BTPS-2 cost. On this, we would clarify here itself that, this Commission has calculated the CSS based on the approved power purchase costs for FY 17 and not on the figures as filed by the Distribution Licensee, including the Respondent. As per the approved figures, BTPS-2 tariff at Rs.4.78 per unit which is higher than BTPS-3 tariff of Rs.3.12 per unit has been considered. Thus, there is no error in the figures adopted for computation of CSS.
- (c) Further, we note that, this Commission after considering similar objection filed by the Petitioner at the time of hearing of Tariff Petition filed by the Respondent for FY 17, has recorded in the Tariff Order 30.3.2016 that, it is determining the CSS as per the methodology specified in MYT Regulations.

- (d) As explained in the Tariff Policy, 2006 the CSS, to put it simply, is the difference between: (i) the tariff applicable to the relevant category of consumers; and (ii) the cost of the Distribution Licensee to supply electricity to the consumers of that applicable class. The tariff for this purpose would include both the energy charges (which in the case of subsidizing categories includes cross-subsidy) and the demand charges payable by the consumers. The Petitioner's contention is that the same component of the demand charges should also be included in the cost of supply. As the objective of the CSS is to compensate the Distribution Licensee to meet its requirement of the current levels of cross-subsidy, from the consumer who opts for open access, the computation of the cost of supply as sought by the Petitioner would not meet that objective. The Hon'ble ATE, in its Order dated 26.5.2016 in Appeal No.181 of 2015, has upheld the similar computation of CSS by the Meghalaya State Electricity Regulatory Commission.
- (e) Thus, it is clear that the methodology adopted by this Commission is correct and is not violative of any approved methodology. Therefore, the question of adoption of the Maharashtra Model would not arise as sought by the Petitioner, that too in a Review Petition. For the above reasons, we answer Issue No.(2) in the negative.

8) **ISSUE No.(3)**: *Whether imposition of CSS is discriminatory on wind energy as solar power is exempted?*

(a) The Petitioner has contended that Wind energy is discriminated with only Solar power being granted the benefit of exemption from payment of the CSS. It is contended that, both being renewable sources, they need to be incentivized equally, although wind energy deserves a better treatment because of its higher infirmity and the costs of solar plants dropping. That the concept of competition laid down in the Act and Tariff Policy is defeated by promoting only solar power generation.

(b) As admitted by the Petitioner, though both Solar and Wind energy are renewable sources, they are distinct in terms of technology, its cost, reliability and level of monitoring. While the Wind power technology has matured and cost has stabilized with investments having almost reached the saturation point, the Solar power is not in the same league. Recognizing this, the National Tariff Policy and other Policies have sought to promote solar power by giving it special focus.

(c) We are in agreement with Respondent's contention that, exemption in respect of the CSS made available to Solar energy is not discriminatory. We also note that, such a contention cannot be raised in a Review Petition. For the above reasons, we answer the Issue No.(3) in the negative.

9) **ISSUE No.(4)**: *What Order?*

For the foregoing reasons, we pass the following:

ORDER

The Review Petition stands dismissed.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER