

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,  
AT NEW DELHI  
[APPELLATE JURISDICTION]  
APPEAL NO. OF 2015

**IN THE MATTER OF:**

Appeal under section 111 of the Electricity Act, 2003 challenging the order dated 17.04.2015 passed in Case No. 30 of 2014 by the Hon'ble Madhya Pradesh Electricity Regulatory Commission regarding Determination of Aggregate Revenue Requirement and Retail Supply Tariff Order for Financial Year 2015 - 16.

**AND IN THE MATTER OF:**

Open Access Users Association

**...APPELLANT**

**VERSUS**

Madhya Pradesh Electricity  
Regulatory Commission & Ors.

**...RESPONDENTS**

WITH

I.A. NO. OF 2015

(Application for exemption from filing certified copy of impugned order)

AND

I.A. NO. OF 2015

(Application for ex-parte ad interim relief)

**PAPERBOOK**

**VOLUME - I**

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**THROUGH**

**MATRUGUPTA MISHRA/HEMANT SINGH  
SHIKHA OHRI/TABREZ MALWAT/MEGHANA AGGARWAL  
ADVOCATES FOR THE APPELLANT**

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**NEW DELHI  
DATE:**



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**THROUGH**

**MATRUGUPTA MISHRA/HEMANT SINGH/ SHIKHA OHRI  
TABREZ MALWAT/MEGHANA AGGARWAL  
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**NEW DELHI  
DATE: 17-06-2015**

## SYNOPSIS

A

The present Appeal has been preferred by Open Access Users Association against the order dated 17.04.2015 (herein "impugned order") passed by the Hon'ble Madhya Pradesh Electricity Regulatory Commission (herein "Respondent Commission") in Case No. 30 of 2014.

The Appellant is a registered Society formed under the Societies Registration Act, 1860. The Appellant was registered as Society on 04.08.2012. The main objective of the Appellant is to safeguard the interests of the open access consumers all over India. The Appellant aims to create a responsible forum to highlight consumer awareness on various types of Open Access Charges levied by different States and their implications. The Appellant also aims at adhering to safety, security & commercial issues to all Open Access consumers in the Power Market. Though before the Respondent Commission the Appellant did not file its representation in its own name, however, the representation of its Members Stakeholders was made by another society in the name and style of Electricity Consumer Society, having its registered office at M. P. State Board, Industrial Estate, Polo Ground, Indore, Madhya Pradesh.

The Appellant has filed the present Appeal to challenge findings and wrongful calculation of Cross Subsidy Surcharge by the Respondent Commission which it arrived while determining the Aggregate Revenue Requirement and Retail Supply Tariff Order for Financial Year 2015 - 16 filed by the Respondent Nos. 2 to 5 collectively being Petition No. 30 of 2014, as per the requirement of Madhya Pradesh Regulatory Commission (Terms and Conditions for Determination of Tariff for Supply and Wheeling of Electricity and Methods and Principles for Fixation of Charges) Regulations, 2012 (herein after referred to as the "Tariff Regulations").



## LIST OF DATES

B

DATE	EVENT
04.08.2012	The Open Access User Association (the Appellant) was registered as a society on 04.08.2012.
19.12.2014	Madhya Pradesh Poorv Kshetra Vidyut Vitaran Co. Ltd. (Respondent No. 2), Madhya Pradesh Madhya Kshetra Vidyut Vitaran Co. Ltd. (Respondent No. 3), Madhya Pradesh Paschim Kshetra Vidyut Vitaran Co. Ltd. (Respondent No. 4) and Madhya Pradesh Power Management Co. Ltd. (Respondent No. 5) collectively filed Petition No. 30 of 2014 as per the requirements of the tariff regulations for determination of ARR and Retail Supply Tariff for the FY 2015-16.
11.02.2015	The Madhya Pradesh Electricity Regulatory Commission (Respondent No. 1/Respondent Commission) issued a public notice inviting views, suggestions and objections from the public and interested stakeholders on the aforementioned joint petition.
17.03.2015	The Respondent Commission held public hearings on
20.03.2015	the ARR/Tariff Petition at Indore, Bhopal and Jabalpur,
24.03.2015	respectively.
25.02.2015	The Member Stakeholders of the Appellant had filed their objection before the Respondent Commission

17.04.2015

e

The Respondent Commission passed the impugned order in Case No. 30 of 2014 in violation of the Tariff Policy and the Electricity Act, 2003, without paying heed to the objection raised by the Stakeholders and other participants before the Respondent Commission.

Aggrieved by the aforementioned impugned order, the Appellant is preferring the present appeal.



D

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,  
AT NEW DELHI  
[APPELLATE JURISDICTION]**

**APPEAL NO. OF 2015**

**IN THE MATTER OF:**

Appeal under section 111 of the Electricity Act, 2003 challenging the order dated 17.04.2015 passed in Case No. 30 of 2014 by the Hon'ble Madhya Pradesh Electricity Regulatory Commission regarding Determination of Aggregate Revenue Requirement and Retail Supply Tariff Order for Financial Year 2015 - 16.

**AND IN THE MATTER OF:**

Open Access Users Association,  
2<sup>nd</sup> Floor, D-21 Corporate Park,  
DMRC Building, Sector 21,  
Dwarka, New Delhi - 110075

**...APPELLANT**

**VERSUS**

**MEMO OF PARTIES**

1. Madhya Pradesh Electricity Regulatory Commission,  
5<sup>th</sup> Floor, Metro Plaza, Bittan Market  
Bhopal - 462016, Madhya Pradesh
2. Madhya Pradesh Poorv Kshetra Vidyut Vitaran Co. Ltd.  
Shakti Bhawan, PO: Vidyut Nagar, Rampur,  
Jabalpur - 482008, Madhya Pradesh
3. Madhya Pradesh Madhya Kshetra Vidyut Vitaran Co. Ltd.  
Bijli Nagar Colony, Nishtha Parisar, Govindpura,  
Bhopal-462023, Madhya Pradesh
4. Madhya Pradesh Paschim Kshetra Vidyut Vitaran Co. Ltd.  
G.P.H Compound, Pologround  
Indore - 452001, Madhya Pradesh

E

5. Madhya Pradesh Power Management Co. Ltd.  
Shakti Bhawan, PO: Vidyut Nagar, Rampur,  
Jabalpur- 482008 , Madhya Pradesh

...RESPONDENTS

THOUGH

**MATRUGUPTA MISHRA/HEMANT SINGH/ SHIKHA OHRI  
TABREZ MALAWAT/MEGHANA AGGARWAL  
ADVOCATES FOR THE APPELLANT**

**M/S PRAXIS COUNSEL,  
ADVOCATES AND SOLICITORS,  
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**NEW DELHI**

**DATE: 17-01-2015**

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY,  
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Jabalpur- 482008, Madhya Pradesh
3. Madhya Pradesh Madhya KshetraVidyutVitaran Co. Ltd.  
Bijli Nagar Colony, Nishtha Parisar, Govindpura,  
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4. Madhya Pradesh PaschimKshetraVidyutVitaran Co. Ltd.  
G.P.H Compound, Pologround  
Indore - 452001, Madhya Pradesh
5. Madhya Pradesh Power Management Co. Ltd.  
Shakti Bhawan, PO: Vidyut Nagar, Rampur,  
Jabalpur- 482008, Madhya Pradesh



**APPEAL UNDER SECTION 111 OF THE ELECTRICITY ACT,  
2003 AGAINST THE IMPUGNED ORDER DATED 17.04.2015  
PASSED IN CASE 30 of 2014 BY THE HON'BLE MADHYA  
PRADESH ELECTRICITY REGULATORY COMMISSION**

**MOST RESPECTFULLY SHOWETH:**

**1. DETAILS OF APPEAL:**

- (a) The present Appeal has been preferred by Open Access Users Association against the order dated 17.04.2015 (herein "impugned order") passed by the Hon'ble Madhya Pradesh Electricity Regulatory Commission (herein "Respondent Commission") in Case No. 30 of 2014.
- (b) The Appellant is a registered Society formed under the Societies Registration Act, 1860. The Appellant was registered as Society on 04.08.2012. The main objective of the Appellant is to safeguard the interests of the open access consumers all over India. The Appellant aims to create a responsible forum to highlight consumer awareness on various types of Open Access Charges levied by different States and their implications. The Appellant also aims at adhering to safety, security & commercial issues to all Open Access consumers in the Power Market. Though before the Respondent Commission the Appellant did not file its representation in its own name, however, the representation of its Members Stakeholders was made by another society in the name and style of Electricity Consumer Society, having its registered office at M. P. State

- (c) The Appellant has filed the present Appeal to challenge findings and wrongful calculation of Cross Subsidy Surcharge by the Respondent Commission which it arrived while determining the Aggregate Revenue Requirement and Retail Supply Tariff Order for Financial Year 2015 – 16 filed by the Respondent Nos. 2 to 5 collectively being Petition No. 30 of 2014, as per the requirement of Madhya Pradesh Regulatory Commission (Terms and Conditions for Determination of Tariff for Supply and Wheeling of Electricity and Methods and Principles for Fixation of Charges) Regulations, 2012 (herein after referred to as the "Tariff Regulations").

A copy of the impugned order dated 17.04.2015 passed by the Respondent Commission in Case No. 30 of 2014 is annexed hereto and marked as **ANNEXURE A-1**.

A copy of the Petition No. 30 of 2014 filed by the Respondent Nos. 2 to 5 collectively before the Respondent Commission dated 19.12.2014 is annexed herewith and marked as **ANNEXURE A-2**.

**2. DATE ON WHICH THE ORDER APPEALED AGAINST IS COMMUNICATED AND PROOF THEREOF, IF ANY**

The Impugned Order was published in the Respondent Commission's website on 17.04.2015 and the same is not yet communicated to the Appellant.

**3. THE ADDRESS OF THE APPELLANT FOR SERVICE IS THAT**

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Jungpura Extension,  
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**4. THE ADDRESS OF THE RESPONDENTS FOR SERVICE OF  
ALL NOTICES IN THE APPEAL ARE SET OUT HEREUNDER:**

1. Madhya Pradesh Electricity Regulatory Commission,  
5<sup>th</sup> Floor, Metro Plaza, Bittan Market  
Bhopal – 462016, Madhya Pradesh
2. Madhya Pradesh PoorvKshetraVidyutVitaran Co. Ltd.  
Shakti Bhawan, PO: Vidyut Nagar, Rampur,  
Jabalpur– 482008, Madhya Pradesh
3. Madhya Pradesh Madhya KshetraVidyutVitaran Co. Ltd.  
Bijli Nagar Colony, Nishtha Parisar, Govindpura,  
Bhopal-462023, Madhya Pradesh
4. Madhya Pradesh PaschimKshetraVidyutVitaran Co. Ltd.  
G.P.H Compound, Pologround  
Indore - 452001, Madhya Pradesh
5. Madhya Pradesh Power Management Co. Ltd.  
Shakti Bhawan, PO: Vidyut Nagar, Rampur,  
Jabalpur– 482008, Madhya Pradesh

**5. JURISDICTION OF THE APPELLATE TRIBUNAL**

The Appellant declares that the subject matter of the appeal is within the jurisdiction of this Hon'ble Tribunal.

**6. LIMITATION**

The Appellant submits that there is no delay in filing the present



**7. FACTS OF THE CASE:**

1. The Appellant is a registered Society formed under Societies Registration Act, 1860. The Appellant was registered as Society on 04.08.2012. The main objective of the Appellant is to safeguard the interests of the open access consumers all over India. The Appellant aims to create a responsible forum to highlight consumer awareness on various types of Open Access charges levied by different States and their implications. The Appellant also aims at adhering to safety, security & commercial issues to all Open Access consumers in the Power Market. Though before the Respondent Commission the Appellant did not file its representation in its own name, however, the representation of its Members Stakeholders was made by another society in the name and style of Electricity Consumer Society, having its registered office at M. P. State Board, Industrial Estate, Polo Ground, Indore, Madhya Pradesh.
2. Respondent No. 1 is the Madhya Pradesh Electricity Regulatory Commission constituted under section 82 of the Electricity Act, 2003.

Respondents Nos. 2, 3 and 4 are the three distribution licensees viz. East Discom, Central Discom and West Discom in the State of Madhya Pradesh (hereinafter to be referred as "Distribution Licensees/Discoms") and they were the applicants for Determination of Aggregate Revenue Requirement and Retail Supply Tariff Order for Financial Year, 2015-16 before the Respondent Commission along with Respondent No. 5 which the

prevalent in the State of Madhya Pradesh, all Discoms are buying power from Respondent No. 5 including short term power purchase.

3. That the Respondent Nos. 2 to 5 had jointly/ collectively filed the Petition No. 30 of 2014 on 19.12.2014 as per the requirements of the Tariff Regulations for the determination of Aggregate Revenue Requirement (ARR) and Retail Supply Tariff for the FY 2015-2016.
4. On 11.02.2015, the Respondent Commission issued a public notice inviting views/ suggestions/ objections from the public and interested stakeholders on the joint petition of the Distributing Licensees for Determination of ARR and Retail Supply Tariff Order for FY 2015-16. The Respondent Commission held public hearings on the ARR/ Tariff Petition at Indore on 17.03.2015, Bhopal on 20.03.2015 and Jabalpur on 24.03.2015 respectively.
5. On 25.02.2015, the Member Stakeholders of the Appellant had filed their objection before the Respondent Commission through Electricity Consumer Society in Case No. 30 of 2014, wherein various issues substantiated with technical details were brought before the Respondent Commission.

A copy of the objection dated 25.02.2015 filed by the Electricity Consumer Society in Case No. 30 of 2014 is annexed hereto and marked as **ANNEXURE A-3**.

6. On 17.04.2015, the Respondent Commission has passed the

of Aggregate Revenue Requirement and Retail Supply Tariff Order for Financial Year 2015-16 in violation of the provisions of Tariff Policy and the Electricity Act, 2003, without paying any heed to the objection raised by the Stakeholders and other participants before the Respondent Commission. It may be clarified that the Appellant is not challenging the entire order, the Appeal is limited to various observations, calculation and conclusion drawn by the Respondent Commission pertaining to determination of Cross Subsidy Surcharge (CSS).

7. Being aggrieved by the impugned order, the Appellant is constrained to file the present Appeal.

**8. (a) FACTS IN ISSUE**

- i. The Appellant is aggrieved by the impugned order, since the Respondent Commission while calculating the Cross Subsidy Surcharge as per the formula prescribed under the Tariff Policy, has actually acted contrary to the same and wrongly calculated the component 'C' pertaining to the Weighted Average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power.
- ii. The Appellant is further aggrieved by the impugned order, since the Respondent Commission has wrongly calculated the component 'T' pertaining to the Tariff at 50% Load Factor payable by the Industrial consumer while determining the Cross Subsidy Surcharge payable by Industrial consumer using the formula prescribed under the Tariff Policy.



- iii. It is further submitted that the Respondent Commission while calculating the cross subsidy surcharge as the difference between (1) the tariff applicable to relevant category consumers and (2) the cost of the distribution licensee to supply electricity to the consumers of the applicable class has actually and wrongly calculated the cost of the distribution licensee to supply electricity to the consumers of the applicable class.
- iv. In view of the above, it is submitted that the Respondent Commission, while calculating the cross subsidy surcharge has acted contrary to paragraph 8.5.1 of the National Tariff Policy, 2006 ("Tariff Policy").

**(b) QUESTIONS OF LAW:**

The Appellant submits that the grounds of appeal by itself elaborate the questions of law, which requires determination. In any event, and without prejudice to the grounds of appeal, the questions of law, which are raised by the Appellant, can be summarized as follows:

- A. Whether the Respondent Commission has erred in calculating the component 'C' and 'T' of the cross subsidy surcharge formula?
- B. Whether the Respondent Commission while calculating component 'C' of the cross subsidy surcharge formula has wrongly calculated the Weighted Average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power in violation to the surcharge

computation formula prescribed in the Tariff Policy in paragraph 8.5.1?

- C. Whether the Respondent Commission has wrongly calculated the component 'T' i.e. Tariff at 50% load factor payable by the Industrial consumer while determining the cross subsidy surcharge payable by Industrial consumer using prescribed formula in Tariff Policy?
- D. Whether the Respondent Commission has violated provisions stipulated in sections 61(i) and 86(4) by not adhering to the principle enunciated in the Tariff Policy for computation of cross subsidy surcharge?
- E. Whether the Respondent Commission has wrongfully acted in violation of the provisions of the Electricity Act, 2003, and the relevant regulations framed thereunder by not following the principles laid down in the Tariff Policy while calculating the cross subsidy surcharge?
- F. Whether the Respondent Commission by passing the impugned order has created a deterrent for the consumers to avail and exercise their statutory right to open access guaranteed under the Electricity Act, 2003?
- G. Whether the impugned order suffers from gross irregularity by violating the objective and spirit with which the Electricity Act, 2003 has come into existence and the same being passed in violation of the provisions of section 42 of the Electricity Act, 2003?

- H. Whether the Respondent Commission erred by increasing the Tariff and calculating the Cross Subsidy Surcharge on the basis and to recover past true up costs?
- I. Whether the Respondent Commission has acted erroneously by including fixed charges to off-set the cross-subsidy?

### 9. GROUNDS OF APPEAL:

Being aggrieved by the impugned order dated 17.04.2015, the Appellant craves leave to file the present appeal, *inter alia*, on the following grounds amongst other:

- A. The Respondent Commission while determining the Cross Subsidy Surcharge has extracted para 8.5.1 of the Tariff Policy, which enumerates the formula on the basis of which Cross Subsidy Surcharge shall be calculated. The surcharge calculation has various components and factors, to be taken into consideration by the Respondent Commission. However, the Respondent Commission has erred in calculating component 'C' of the formula. For the ready reference of this Hon'ble Tribunal, the relevant portion of the impugned order is extracted herein below:

"4.18 The Cost of marginal power purchase of top 5 % power works out as below:-

**Total Energy required in FY 2015-16 = 64.261 MU**

**Table 83: Cost of marginal power purchase of top 5 % power i.e. 3213.07 MU**

Station	Units (MU)	Cost/unit	Total Cost
---------	------------	-----------	------------



SGTPS	4.09	3.75	1.53
Total	3213.07	3.88	1,245.24

**4.19** *The weighted average cost of power purchase of top 5 % at the margin works out as 1245.24 Crore / 3213.07 MU = Rs. 3.88 per unit.*

The Respondent Commission in the impugned order dated 17.04.2015 while quoting the Tariff Policy has not fully adopted the principles and methodology of determination of Cross Subsidy Surcharge. The formula adopted by the Respondent Commission to calculate cross subsidy surcharge in the impugned order is wrong. In this connection, the formula for computation of surcharge prescribed in the Tariff Policy in paragraph 8.5.1 is quoted as under:

“Accordingly, when open access is allowed the surcharge for the purpose of sections 38, 39, 40 and sub-section 2 of section 42 would be computed as 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 the applicable class. In case of a consumer opting for open access, the distribution licensee could be in a position to discontinue purchase of power at the margin in the merit order. Accordingly, the cost of supply to the consumer for this purpose may be computed as the aggregate of (a) the weighted average of power purchase costs (inclusive of fixed and variable charges) of top 5% power at the margin, excluding liquid fuel based generation, in the merit order approved by the SERC adjusted for average loss compensation of the relevant voltage level and (b) the distribution

charges determined on the principles as laid down for intrastate transmission charges.

Surcharge 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 the margin excluding liquid fuel based generation and renewable power

D is the Wheeling charge

L is the system Losses for the applicable voltage level, expressed as a percentage

The cross-subsidy surcharge should be brought down progressively and, as far as possible, at a linear rate to a maximum of 20% of its opening level by the year 2010-11."

(Underline supplied)

As per clause 8.5.1 of the Tariff Policy notified by the Government of India, component "C" of the formula denotes "the weighted average cost of power purchase of top 5% at the margin excluding liquid based generation and renewable power". The reasoning behind 'C' being the weighted average cost of the top 5% is that, cross subsidy surcharge seeks to compensate the distribution company for the loss in cross subsidy on account of an open access consumer availing supply from third party source. Thus, in order to compensate



that shall be offset once the HT/EHT open access consumer avails power from third party source through open access. The same is significant since the change from top 5% at the margin, with considering the costliest value of power purchase results in a complete change of principle behind the intent with which surcharge has been introduced under the Electricity Act, 2003 and the regulatory framework.

The Respondent Commission while passing the impugned order dated 17.04.2015 has not considered the costliest power given to the Respondent No. 5. Further, the Respondent Commission has also erred while determining the weighted average cost of power purchase of Top 5% at the margin. The Respondent Commission in Table No. 83 at Page 87 of the impugned order has taken into consideration the generators which are selling power to the Respondent No. 5 at a cost which is less than the other private generators from whom the Respondent No. 5 procures power.

- B. It is a matter of fact and record that the Respondent No. 5 has procured power from Torrent, Jaypee Bina etc. at a cost much higher than the cost of power procured from SGTPS ext and SGTPS Stations. As already stated above in the absence of any specific procedure or formula provided or mandated by the Respondent Commission, it is mandatory on the part of Respondent commission to follow the formula provided under para 8.5.1 in both letter and spirit. Only by referring to the said para of NTP thereby subsequently making a departure



scenario, is violative of NTP as well as the provisions of Electricity Act, 2003. In the present case it is mandatory on the Respondent Commission to first of all exhaust the costliest power at the margin while computing weighted average cost of power purchase of top 5% at the margin. The Impugned Order suffers from error apparent on the face of record, since instead of taking into consideration the cost of power procured from Torrent, JAYPEE Bina-1 and JAYPEE Bina-2, the Respondent Commission had taken into consideration the power procured from SGTPS Ext and SGTPS which are cheaper than the power procured from the aforementioned stations.

- C. The Respondent Commission has failed to consider the costliest generation stations. The Respondent Commission should have considered power generation stations such as Jaypee Bina and Torrent in Top 5 % as they were the costliest generation stations.

As per above referred table -83 of the impugned order the component "C" is Rs. 3.88 per unit. However, if the costliest generation stations such as Jaypee Bina and Torrent had been considered then the Component "C" would have increased to Rs. 4.76 per unit. Further, because of the increase in the "C" would have reduced the difference between "C" and "T" which resultantly would have reduced the CSS.

Reference can be made of Table no. 30 and 31 read with

suffice that when the cost of the costliest power procured are passed on to the Discoms, at the same time non-consideration of such costliest power procured, while determining the component "C" is a clear cut violation and categorical departure from the principle enunciated under Para. 8.5.1 of the NTP.

The following table would demonstrate that the CSS would have reduced, if the costliest generation stations were taken into account as stipulated and mandated by the National Tariff Policy:-

#### Power Procured by MPPMCL

Plant Name	MU	FC(in Cr)	FC/unit	VC	Total
Torrent	256	42.49	1.66	6.62	8.28
Jaypee Bina-1	1319	246.61	1.87	2.65	4.52
Jaypee Bina-2	1319	246.61	1.87	2.65	4.52
NTFC Mauda-1	Backed down	99.85			-
NTFC Mauda-2	Backed down	99.85			-

Plant Name	MU	FC(in Cr)	FC/unit	VC	Total
SGTPS ext	3209	360.64	1.12	2.75	3.88
SGTPS	4128	308.38	0.75	3	3.75

Total Energy Required (MUs)	64261
Top 5%	3213.07

MPERC Calculation of "C" with Fixed Charges			
Station	Units (MU)	Cost/unit	Total Cost
SGTPS ext	3208.98	3.88	1,243.71



Total	3213.07	3.88	1,245.24
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Calculation as per the Statutory Scheme - :

Station	Units (MU)	Cost/unit	Total Cost
Torrent	256	8.28	211.96
Jaypee Bina-1	1319	4.52	596.15
Jaypee Bina-2	1319	4.52	596.15
SGTPS ext	319.07	3.88	123.80
<b>Total</b>	<b>3213.07</b>	<b>4.76</b>	<b>1,528.05</b>

The above-referred tables clearly highlights that the component of "C" would have increased to Rs. 4.76, if the costliest power generation stations would have been considered by the Respondent Commission as required under the NTP. Only by following the above calculation correctly there would have been a difference of 88 paise in the component of "C" in the formula.

Therefore, the impugned order suffers from illegality and the same deserves to be set aside being violative of the formula prescribed under the Tariff Policy, which has been adopted by the Respondent Commission and hence, the same is mandatory and binding on the Respondent Commission. The Respondent Commission has relied upon the formula prescribed under the Tariff Policy, however, while implementing such formula the Respondent Commission has transgressed the principles laid down under the Tariff Policy. It is settled principle of law that whenever a judicial forum is



formula or calculation shall have to be implemented in entirety and unless otherwise expressly mentioned in the statute, such forum is restrained from taking any departure or carving out any exception from the formula. As it seems from the impugned order the Respondent Commission had only extracted the body of the formula in its impugned order as a mere formality without actually implementing the components of the formula as contemplated under the NTP.

- D. It is submitted that the cross subsidy surcharge for an EHT consumer taking power through an open access source can only be less than or equal to the cross subsidy amount. The principle for determination of surcharge is to compensate the DISCOM the loss of cross subsidy from the consumers who opt for open access, and not to allow the DISCOMs to claim a profit in the garb of imposing cross subsidy surcharge. Clearly, the said principle implies that in no event the cross subsidy surcharge can be greater than actual cross subsidy required. If the said discrepancy is allowed to continue the same will also be a detriment to the smooth implementation of open access as guaranteed by section 42 of the Electricity Act, 2003. A provision of a statute have to be interpreted in a manner so as to give effect to the objective with which the statute has come into existence. Therefore, the computation of 'C' component has to be in line with the principle of surcharge.

However, the Respondent Commission has acted contrary to above mentioned principle and settled position. The Respondent Commission while determining the Tariff and ARR in the petition no. 30 of 2014, has considered the past defaults and arrears as well and the same has been consolidated into the Tariff. It submitted that the arrears and shortfalls in the year 2009 to 2013 to the tune of Rs 1730 Crore has been accumulated and mounted up together in the Tariff Order 2015 -16 due to which the Tariff has increased substantially. Though for the sustainable development of the electricity Sector in the state of Madhya Pradesh, it is also important to safeguard the interest and viability of the discoms, however such safeguard of interest cannot be done at the cost of the interest of the consumers be it industrial or retail. The Respondent Commission in the impugned order while approving ARR of the discoms has loaded the entire gamut of Rs. 1730 crores of arrears of the last 5 years to be recovered from the FY 2015-16. It is arbitrary on the part of the Respondent Commission to load the entire arrears in one financial year, which has manifold effect on the tariff component since ultimately such arrears are recovered from the consumers over the period of 12 months in the form of tariff. Apart from the above the Respondent Commission has also failed to enquire the reason behind creation of such huge back log in the form of arrears. To the extent such arrears are contributed by the inefficient management of the discoms, such burden should not be transferred to the consumers to



the objective of ensuring a competitive electricity scenario in a country which presupposes cost effective and efficient functioning of the stakeholders of the industry including the distribution licenses. Unless the State Commissions in the country keep a guard on the functioning and financials of the discoms thereby rationalizing their claim and arrears, the objective with which the Electricity Act has contemplated a migration from State Electricity Boards to individual discoms would be frustrated.

Therefore, in the view of above, it is submitted that the conclusion drawn by the Respondent Commission in the impugned order so far as the determination of CSS is concerned, deserves to be ignored for the same offends the provisions of Electricity Act, 2003, the statutory Tariff Policy and the judgments of this Hon'ble Tribunal passed from time to time.

- E. The Respondent Commission while determining the cross subsidy surcharge has extracted paragraph 8.5 of the Tariff Policy, which enumerates the formula on the basis of which cross subsidy surcharge shall be calculated. The surcharge calculation has various components and factors, to be taken into consideration by the Respondent Commission. However, the Respondent Commission has in addition to above referred component has also erred in calculating component 'T' of the formula.



The tariff payable by the relevant category of consumer "T" has been calculated considering a load factor of 50% which increases its value. In practice open access consumers have a load factor of 75% and tariff "T" will be lower than that considered by the Respondent 1. In fact by considering a load factor of 75%, the value of "T" comes out as below:

Scenario	"T" as per MPERC Order @ 50% load factor (Industry Consumer)	"T" consider @ 75% load factor	
		33 KV	132 KV
1	6.75	5.51	5.52
2	6.75	5.51	5.52
3	6.75	5.51	5.52
4	6.75	5.51	5.52

It can be observed from the above table that "T" reduces by nearly Rs. 1.24/Kwhr.

Therefore, the computation of component 'T' by the Respondent Commission is arbitrary and without any basis. Hence, it is submitted that the calculation of cross subsidy surcharge which has been done while considering the Load Factor 50 % and without considering the Load Factor at 75% is contrary to ground reality. The Respondent Commission has failed to substantiate as to the basis on which 50% load factor has been taken into consideration while calculating the component "T".

It is submitted that the Respondent Commission has not elaborated the detailed calculation while computing the Open Access Charges as mentioned in Table-86 of the Impugned

It is submitted that the calculation of cross subsidy surcharge which has been done while considering the Load Factor 50 % and without considering the Load Factor at 75% is contrary to practical reality and an attempt to artificially inflate the Cross Subsidy Surcharge. Further, if the Load Factor at 75% is considered then there would be substantial reduction in the Cross Subsidy Surcharge.

- F. It is submitted that considering the value of "T" as provided above and value of "C" as Rs. 4.76/Kwhr as stated above, the CSS comes out as follows:

Scenario	Cost of Power at 5% Margin	Cost of Power Grossed up for distribution losses (4.5%)	Cost of Power Grossed up for transmission losses (3.97%)	Transmission Charges	Wheeling Charges	Total cost [C(1+L/100)+D]	"T" consider @ 75% load factor	Cross Subsidy Surcharge Rs/Kwhr
							33KV/132KV	
1	4.76	4.98	5.19	0.5	0.23	5.92	5.51	0.41
2	4.76		4.96	0.5		5.46	5.51	-0.05
3	4.76		4.96	0.5		5.46	5.51	-0.05
4	4.76	4.98	5.19	0	0.23	5.42	5.51	-0.09

- G. A comparison between the above table and the tables provided by the Respondent Commission in page No. 89 of the impugned order would suffice the discrepancy created by the Respondent Commission while calculating the components of CSS. The impugned order goes to the root of the right to avail open access vested in the consumers under Section 42 of the Electricity Act. By creating such artificial and inflated CSS, the Respondent Commission instead of incentivising and



actually created impediment in the way of availing their right to open access. That it submitted that the cross subsidy surcharge calculated by the Respondent Commission in the impugned order is without any explanation as to the figures which have been applied to the surcharge formula. As such, the impugned order suffers from gross irregularity as it is a settled principle of law that a judicial order has to be a speaking order. It is mandatory on the part the judicial or quasi judicial bodies to give sufficient reasoning through which the findings have been drawn. However, in the present case, the Respondent Commission has failed to substantiate with reasoning and calculation on the basis of which it has arrived at the cross subsidy surcharge figure. It further becomes onerous on the part of the Respondent Commission to categorically provide the basis of the conclusion drawn since the same has a substantial impact on the financials of the Appellant.

H. From the above it is evident that the Respondent Commission while calculating cross subsidy surcharge has computed the components 'T' and 'C' in an arbitrary and unreasonable manner. It is submitted that cross subsidy surcharge has to be computed by the licensee as the difference between the tariff applicable to the relevant category of consumers and the cost of the distribution licensee to supply electricity to the consumers of the applicable class.



The Respondent Commission while calculating the Cross Subsidy Surcharge has also included the Demand charges / Fixed Charges alongwith the energy charges which are variable in nature. It is submitted that the objective of the Cross Subsidy Surcharge is to compensate the distribution company for the loss in cross subsidy of a consumer availing open access power. As such open access consumers in Madhya Pradesh are already paying the fixed cost to the respective discoms as calculated and billed on the basis of the contract demand, notwithstanding the quantity of energy tied up through open access. Therefore, the open access consumers are subjected to payment of fixed charges of the discoms and in addition to that taking into consideration such fixed charges while computing the component "T" amounting to imposing the same cost twice on the open access consumers. Therefore, it is humbly submitted that while calculating the component "T" the fixed charges component shall have to be deducted. In order to compute the cross subsidy only variable cost/energy charges should be considered. Following the above submission the component "T" in the cross subsidy calculation formula becomes as below:

Scenario	"T" as per MPERC Order @ 50% load factor (Industrial Consumer)	"T" considered @ 75% load factor & excluding Fixed Charges	
		33 KV	132 KV
1	6.75	4.70	4.55
2	6.75	4.70	4.55

Now therefore it is pertinent to bring to the specific knowledge of this Hon'ble Tribunal the exact CSS after calculating component "T" at 75% load factor and after excluding the fixed charges. A Perusal of the table below would substantiate as to how erroneously and arbitrarily the respondent commission has arrived at CSS without getting into the various aspects as enumerated in paras above.

Scenario	Total cost [C(1+L/100)+D]; Considering C = 4.76 Rs/Kwhr	Avg. "T" considered @ 75% load factor Rs/Kwhr	"T" considered w/o fixed charge @ 75% load factor (Rs/Kwhr)		CSS including fixed charges in T (Rs/Kwhr)	CSS w/o including fixed charges in T (Rs/Kwhr)	
			33 KV	132 KV		33 KV	132 KV
		33KV/132KV	33 KV	132 KV		33 KV	132 KV
1	5.92	5.51	4.70	4.55	-0.41	-1.22	-1.37
2	5.46	5.51	4.70	4.55	0.05	-0.76	-0.91
3	5.46	5.51	4.70	4.55	0.05	-0.76	-0.91
4	5.42	5.51	4.70	4.55	0.09	-0.72	-0.87

F. It is submitted that section 42(2) of Electricity Act, 2003 provides that, there should have been a constant endeavour on the part of the Respondent Commission to reduce the cross subsidy surcharge on a progressive basis. In this context relevant portion of the Electricity Act, 2003 is furnished hereunder.

"42. Duties of distribution licensee and open access

.....

(2) The State Commission shall introduce open access in such phases and subject to such



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 surcharges shall be utilized 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



Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 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"

It is submitted that the Respondent Commission was required to present the future road map for eliminating cross subsidy and also to compute the cost of supply at the supplied voltage. However, the Respondent Commission rather than making the progressive reduction has increased the Tariff substantially which resulted in significant increase in the cross subsidy surcharge. There has been a rise of approximately 350% in the CSS for industrial consumers in comparison to the CSS made applicable in financial year 2014-15. A perusal of the impugned order would suffice that no analysis or reasoning ever adduced by the Respondent Commission to substantiate such geometrical increase in the CSS. The Respondent Commission has also failed to brought any statistics or peculiar circumstances said to have been occurred in the industry which resulted in such abnormal increase in the value of CSS.

The National Tariff Policy casts obligations on the State

surcharge in a manner which eliminates the competition and the Open Access User is discouraged from opting other distribution Company. The Relevant portion of the National Tariff Policy is produced below for ready reference - :

*" 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 17 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".*

It is submitted that the Respondent Commission has also referred the above-mentioned part of the National Tariff Policy in the impugned order at para. 4.16. The Respondent Commission despite being aware of the mandates of the National Tariff Policy has increased the Cross Subsidy Surcharge substantially which is contrary to the objectives of

Further, the Open Access Users would be discouraged and dis-incentivized from moving to the other distribution licensees which would defeat the whole purpose of Open Access, since the Respondent Commission by increasing the CSS amount has in reality nullified the option of the consumers to opt for open access. If a consumer finds the power procured from open access sources costlier than the cost at which energy is available from the discoms, it automatically creates a restraint in the open access market and dis-incentivizes the consumers from availing open access.

- G. That it is the duty of the Respondent Commission to pass necessary regulation so as to reduce surcharge and cross subsidies as per section 181 of Electricity Act, 2003. The relevant portion of the Electricity Act, 2003 is reproduced below:

"181. (1) The State Commissions may, by notification, make regulations Consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely: -



part and parcel of the ARR or Tariff order. If CSS will be determined in a separate proceeding, then the industry stakeholders would be in a better position to give their comments and suggestions which would further aid and assist the Respondent Commission in determining the CSS after taking into consideration the ground realities in a detailed manner prevalent in the State of Madhya Pradesh. The present appeal is not catering to any issues to be adjudicated inter-vivos, rather the appeal is challenging the very modus and the approach of the Respondent Commission towards CSS, since the outcome of the impugned findings in the impugned order has a far reaching impact on the industry as a whole and the open access consumers in particular.

- H. It is submitted that the Respondent Commission has adopted the formula for calculation of cross subsidy surcharge as prescribed in the Tariff Policy, therefore, the Respondent Commission was bound to follow the said formula and the said computation strictly in line with the Tariff Policy. The same has also been held by this Hon'ble Tribunal in RVK Energy Pvt. Limited Vs. Central Power Distribution Co. of Andhra Pradesh Ltd & Anr. The principle laid down by this Hon'ble Tribunal has been followed on subsequent judgments passed from time to time including Sarover Energy Private Limited Vs. Karnataka Electricity Regulatory Commission and Anr., decided on 03.09.2013. This Hon'ble Tribunal has observed that the Tariff Policy is laid down by the Central

Electricity Act, 2003. Further, as per section 61(i) of the Electricity Act, 2003 the Respondent Commission shall be guided by the National Electricity Policy and Tariff Policy. The Tariff Policy is a guideline prepared after due consultation with the authorities and stakeholders. Therefore, it has statutory flavour. The Policies are made in consonance with the spirit and the objective of the Electricity Act, 2003, in order to ensure optimum utilization of the resources and to establish a robust electricity market driven by competition and efficiency. Therefore, the computation of cross subsidy surcharge formula prescribed under the Tariff Policy is binding since the Respondent Commission has itself adopted the Tariff Policy formula in the impugned order. The Respondent Commission on the contrary, even after extracting the relevant paragraphs of the Tariff Policy dealing with the computation of cross subsidy surcharge formula, made categorical deviation from the same while implementing the formula.

- I. For that the impugned order is passed in violation of the spirit and objective of the Electricity Act, 2003. By not following the Tariff Policy, despite adopting the formula prescribed in the said Policy, the Respondent Commission precludes the generators and consumers in the State of Madhya Pradesh from availing the vested right of open access, which is one of the glaring features of the Electricity Act, 2003 since as per the impugned order the cross subsidy surcharge which has



consumer so far as availing the right to open access is concerned. Apart from providing an incentive to the private generators, the provision of open access ensures fair competition in the electricity market, in absence of which the objective enshrined under the preamble would be reduced to platitude.

J. The Respondent Commission is under the statutory duty to levy reasonable charges by following the principles laid down under the Act so that entrepreneurs come forward to set up generation plants, distribution and transmission system.

K. The Electricity Act, 2003 makes provisions for achieving the objectives with which the Act has come in to force, however the Respondent Commissions are vested with power to implement such provisions of the Electricity Act, 2003, in its true letter and spirit for the implementation of such policy mandates. However with the impugned order the Respondent Commission has acted in a manner contrary to the objectives, the Electricity Act, 2003 contemplates to achieve. Instead of making ways for progressively reducing the cross subsidy surcharge, the Respondent Commission by passing the impugned order has put excessive burden on the open access users, thereby denying the rights and benefits vested in them under the Electricity Act, 2003. The formula as prescribed under the Tariff Policy and as adopted by the Respondent Commission is made in a manner, so that upon implementation the consumer is not burdened with



the interest of the distribution licensee are taken care of. Therefore the impugned order deserves to be set aside since the Respondent Commission has not implemented the cross subsidy surcharge formula in its true letter and spirit.

**10. MATTERS NOT PREVIOUSLY FILED OR PENDING WITH ANY OTHER COURT**

The Appellant submits that no proceedings are pending before any court of law between the Appellant and the Respondents with regard to the subject matter of the present appeal.

**11. SPECIFY BELOW EXPLAINING THE GROUNDS FOR SUCH RELIEF (S) AND THE LEGAL PROVISIONS, IF ANY, RELIED UPON**

As mentioned in Para 9 of the present appeal.

**12. DETAILS OF INTERIM APPLICATION, IF ANY, PREFERRED ALONG WITH APPEAL**

Application for exemption from filing certified copy of the impugned order and Application seeking Leave to file an Appeal

**13. DETAILS OF APPEAL/S, PREFERRED BEFORE THIS APPELLATE TRIBUNAL AGAINST THE SAME IMPUGNED ORDER/DIRECTION, BY RESPONDENTS WITH NUMBERS, DATES, AND INTERIM ORDER, IF ANY PASSED IN THAT APPEAL**

N. A.

**14. DETAILS OF INDEX**

An index containing the details of the documents in chronological order relied upon is enclosed.

**15. PARTICULARS OF FEE PAYABLE AND DETAILS OF BANK DRAFT IN FAVOUR OF PAY AND ACCOUNTS OFFICER, MINISTRY OF POWER, NEW DELHI, IN RESPECT OF THE FEE FOR APPEAL**

Demand Draft No. 347225, Dated:15.06.2015, Bank: State Bank of India, for an amount of Rs.1,14,000/-

**16. LIST OF ENCLOSURES****1. ANNEXURE A-1.**

A copy of the impugned order dated 17.04.2015 passed in Case No. 30 of 2014 by the Respondent Commission

**2. ANNEXURE A-2.**

A copy of the joint petition dated 19.12.2014

**3. ANNEXURE A-3.**

A copy of the objection dated 25.02.2015 as filed by Appellant

**17. THE ORDER APPEALED AS COMMUNICATED IN ORIGINAL IS FILED? IF NOT, EXPLAIN THE REASON FOR NOT FILING THE SAME**

An application for exemption from filing certified copy of the impugned order is filed along with this Appeal.

**18. APPELLANT/S IS READY TO FILE WRITTEN**

**HEARING AFTER SERVING THE COPY OF THE SAME  
ON RESPONDENTS**

The Appellant undertakes to file written submissions, if so directed by the Hon'ble Tribunal.

- 19. COPY OF MEMORANDUM OF APPEAL WITH ALL ENCLOSURES HAS BEEN FORWARDED TO ALL RESPONDENTS AND ALL INTERESTED PARTIES, IF SO, ENCLOSE POSTAL RECEIPT/COURIER RECEIPT IN ADDITION TO PAYMENT OF PRESCRIBED PROCESS FEE**

No copy of the Appeal is being sent to the Respondent in advance.

- 20. MATERIAL PARTICULARS/DETAILS WHICH THE APPELLANT(S) DEEMS NECESSARY:**

The material particulars are those, which are filed along with the appeal. Should it be necessary, the Hon'ble Tribunal may call for the record of the proceedings before the Commission in the present matter.

- 21. RELIEF SOUGHT:**

In view of the facts mentioned in Para 7 and 8 above, questions of law and grounds set out in Para 9, the Appellant most humbly prays for the following reliefs:



- a. To set aside the impugned order dated 17.04.2015 passed in Case No. 30 of 2014 by the Hon'ble Madhya Pradesh Electricity Regulatory Commission; and
- b. pass such other and further Orders as the Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

Dated 17.06.2015 at New Delhi on this the 17<sup>th</sup> day of June, 2015.

COUNSEL FOR APPELLANT(S)

Place: *NEW DELHI*

Date: *17-06-2015*

**DECLARATION BY APPELLANT**

The Appellant above named hereby solemnly declares that nothing material has been concealed or suppressed and further declares that the enclosures and typed set of material papers relied upon and filed herewith are true copies of the originals/fair reproduction of the originals/true translation thereof.

Verified at New Delhi on this 17<sup>th</sup> day of June, 2015.



**COUNSEL FOR APPELLANTS**

**VERIFICATION**

I, Mr. Anirban Mondal, S/o Mr. Jayanta Kumar Mondal, aged 25 years, working as Law Officer of Appellant, do hereby verify that the contents of paragraph 1 to 8 (a) and 10 to 20 are true to my personal knowledge / derived from official record and paragraphs 8 (b) to 9 are believed to be true on legal advice and that I have not suppressed any material facts.

**Date: 17.06.2015**

**Place: NEW DELHI**

*Anirban Mondal*  
**SIGNATURE OF THE APPELLANT OR  
AUTHORIZED OFFICER**



BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY,  
AT NEW DELHI  
[APPELLATE JURISDICTION]  
APPEAL NO. OF 2015

IN THE MATTER OF:

Open Access Users Association

... APPELLANT

VERSUS

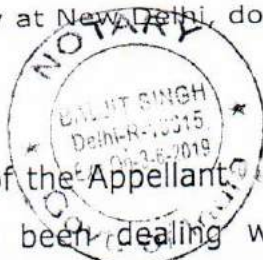
Madhya Pradesh Electricity  
Regulatory Commission & Ors.

... RESPONDENTS

AFFIDAVIT

I, Anirban Mondal, S/o Jayanta Kumar Mondal, aged about 25 years,  
working as Law Officer of the Appellant R/o D-36, 2<sup>nd</sup> Floor,  
Sector 8, Dwarka, New Delhi - 110075, presently at New Delhi, do hereby  
solemnly affirm and state as follows:

1. That I am the authorized representative of the Appellant in the abovementioned matter, I have been dealing with the matters relating to the above mentioned case and I am conversant with the facts of the case.
2. I have read the accompanying Appeal and I say that its contents are true to my knowledge and belief and based on records which are believed to be true and correct.
3. The annexures filed along with Appeal are true copies of their respective originals.



Anirban Mondal  
... DEPONENT

Identified By: *Meghana D/1227/14*

VERIFICATION:

I, the Deponent above named do hereby verify that the contents of the above affidavit are true to my knowledge, no part of it is false and nothing material has been concealed therefrom.

17 JUN 2015

Verified at New Delhi on this 17<sup>th</sup> day of June, 2015.