

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Dated: 8th November, 2010

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

APPEAL NO. 8 OF 2008

**Binani Zinc Limited,
Binanipuram-683 502,
District Erankulam,
Kerala,
Represented by its
Whole Time Director
and Unit Head Mr. Roy Kurian K.K.**

.. Appellant(s)

Versus

- 1. The Kerala State Electricity Board
Vydhyuthi Bhavan,
Pattom,
Thiruvananthapuram-695 004
Kerala,
Represented by its Chairman**
- 2. Kerala State Electricity Regulatory Commission,
C.V. Raman Pillai Road,
Vellapaybalam,
Thiruvananthapuram-695 004
Kerala,
Represented by its Chairman**
- 3. State of Kerala,
Represented by the Principal Secretary,
Power Department,
Secretariat,
Thiruvananthapuram-695 001**

4. Kerala HT & EHT Consumer Association .. Respondent(s)

Counsel for the Appellant(s) :Mr. Kunal Verma, Mr. Sudhir Gupta,
Mr. Ashok K.Singh

Counsel for the Respondent(s):Mr. M.T. George & Mr. Sreenivasan,
Ms. Smitha M.R. for R-1
Mr. Amarjit Singh Bedi & Mr. Dinesh Kumar
for R.2
Mr. Ramesh Babu for KSERC

JUDGEMENT

**PER HON'BLE JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

Binani Zinc Limited, Kerala is the Appellant. This Appeal has been filed by the Appellant challenging the Tariff Order in respect of the Kerala State Electricity Board for the year 2007-08, passed on 26.11.2007 by the Kerala State Commission. The short facts are as follows:

2. The Appellant is an Extra High Tension Consumer of electricity. It owns and manages a factory at Binanipuram in Ernakulam District, Kerala. It is engaged in the manufacture of Zinc

metal. The Appellant is a 110 KV EHT consumer. It is one of the major industrial consumers in Kerala with a contract demand of 18,000 KVA and annual energy consumption of around 140 million units. The Appellant commenced operation in the year 1967 with a capacity of 12,000 Tonnes Per Year of Zinc metal.

3. The Electricity Regulatory Commission Act, 1998 came into force on 25.4.1998. Earlier, the Tariff Order used to be passed by the Kerala State Electricity Board, the Respondent No. 1, herein. After coming into force of the Regulatory Commission Act, 1998, the State Commission had to issue the Tariff Order. However, the Board continued to issue Tariff Orders despite the Act of 1998.

4. In October, 2002, the tariff applicable to EHT consumers like the Appellant was enhanced by 50 paise per unit by the Board. This was challenged by the Appellant questioning the jurisdiction of the Electricity Board to issue the Tariff Order. The said issue is still pending in the Hon'ble Supreme Court.

5. On 11.12.2006, the Electricity Board, the Respondent herein filed an application before the State Commission for the approval of ARR and ERC for the year 2007-08. Various HT and EHT Electricity Consumer Associations filed their objections. The State Commission heard the matter on 20th January, 2007. Thereafter, the State Commission issued a draft Schedule of Tariff and Terms & Conditions of Retail Supply in

May, 2007. The Appellant submitted its objections. The other consumer associations also filed their objections. Thereupon, on 26.11.2007, the State Commission, the Respondent No. 2 herein issued Tariff Order in respect of the year 2007-08 for the Electricity Board which came into effect from 1.11.2007. At that stage, the Government of Kerala issued an order dated 16.12.2007 whereby instructions were issued to the State Commission in respect of the cross subsidy for the tariff determination. Challenging the Tariff Order dated 26.11.2007, the appellant has filed this Appeal.

6. Though the Appellant has raised several grounds in the Memorandum of Appeal, the

Appellant had confined itself to three issues, namely,

- (i) Cross Subsidy;
- (ii) Government Subsidy; and
- (iii) Surplus of Rs. 184 crores arrived at by the State Commission during 2006-07.

7. In regard to the above grounds, the learned Counsel for the Appellant made the following submissions:

- (i) There has been an increase in the Cross Subsidy levels for EHT consumers like the Appellant from 2003-04 to 2007-08. As per the Electricity Act and National Tariff Policy, the State Commission should gradually reduce the Cross Subsidy but in this case, the State Commission instead of

reducing the Cross Subsidy has increased the Cross Subsidy. Increase in Cross Subsidy levels is against the principles of the Electricity Act and National Tariff Policy.

- (ii) Section 65 of the Electricity Act requires the State Government to grant subsidy in advance to the person affected by its policy decision to grant subsidy to any consumer category, to compensate the person so affected. But on the contrary, in Kerala, the socio-economic support is completely borne by the subsidizing consumers like the Appellant without a rupee being paid by the Government of Kerala. In Kerala, the State Commission is fixing the

subsidized tariff even without a request from the State Government to subsidize domestic and agricultural consumers. Hence, a direction be issued to the State Commission to re-work tariff for 2007-08 and get a direction from the Government of Kerala on the amount of tariff that they would like to subsidize for 2007-08. Further, the State Commission has not assessed the impact of the non-payment of the Government subsidy of Rs.30 crores for 2005-06 and Rs.120 crores for 2006-07 on the Board finances, especially the Working Capital and Interest Cost. Therefore, State Commission should analyze the impact of this cost and pass specific direction to the State Government

to make payment to the Board along with the carrying cost.

- (iii) The order passed by the State Commission on 30th March, 2006 in relation to the ARR and ERC for the year 2006-07 was passed in such a manner that there is a surplus of Rs.184 crores. The State Commission further directed the Board to file a detail Tariff Petition by 30th April, 2006 rationalizing the historical tariff. Despite the objection raised by the Associations, the State Commission has not factored the surplus of Rs.184 crores in 2006-07 while determining the revenue requirement of 2007-08. This is not in the interest of the consumers.

The Kerala HT & EHT Consumer Association which made its appearance pursuant to issue of public notices filed written submissions supporting the case of the Appellant.

8. In reply to the above contentions, the learned Counsel for the Respondent Nos. 1 & 2 have made the following contentions:

- (i) In regard to the cross subsidy, the Appellant has argued that the cross subsidy has been increasing over the years. This is not factually correct. The actual fact is that the percentage of cross subsidy is decreasing. In any case, it is within the limit of +/- 20%. The Appellant's stand is that the cross subsidy is increasing because the average cost of

supply is decreasing. This is wrong. If average cost of supply is decreasing and the tariff applicable to subsidizing consumers and the subsidized consumers have not changed, the quantum of cross subsidy paid by the subsidizing consumers and received by the subsidized consumers would remain constant. As per Section 61 of the Electricity Act, 2003, cross subsidy has to be progressively reduced. As per the Tariff Policy, cross subsidy is to reach the level of +/- 20% of the average cost by the year 2011. Since the years 2003-04 to 2007-08, the cross subsidy level has always remained below 20%. Taking into consideration of this fact, the State Commission has weighed

various factors such as balancing among different categories of consumers, minimum tariff increase for a majority of consumers, reduction in cross subsidy among highly skewed category of consumers, etc., and has then fixed the tariff. Thus, it is evident that the State Commission has considered the requirement to bring down the cross subsidy while fixing the tariff. In view of the above, the Appellant's arguments regarding cross subsidy is devoid of any merit and the same is liable to be rejected.

- (ii) The next issue is relating to Government subsidy. The ground urged by the learned Counsel for the Appellant in this regard is

contrary to facts. The State Commission allowed reduction of tariff by 20 paise strictly in accordance with Section 65 of the Act on the condition that the Government will give direct subsidy. This order has been passed on 5.1.2006. This also further clarifies that in case the Government fails to provide subsidy, the same would be borne by the Electricity Board unless the rebate is withdrawn on account of non-payment of direct subsidy by the Government. The impact of non-payment of subsidy for 2005-06 and 2006-07 will be considered while truing up, once the accounts of the Electricity Board is audited by the Comptroller & Auditor

General (CAG). Therefore, this point also is not valid.

(iii) The next issue is regarding the surplus of Rs. 184 crores in 2006-07. The argument of the Appellant is that the State Commission has not factored a surplus of Rs.184 crores in the year, 2006-07 while determining revenue requirement for 2007-08, as it would reduce the tariff of subsidizing consumers. It has to be stated that the Appellant is not a subsidizing consumer and as such, he is not an aggrieved party. That apart, the State Commission has decided that while considering the truing up of the accounts for the year 2006-07, the actual position of

the revenue surplus will be available and, at that stage the appropriate adjustment will be done taking into account the truing up of accumulated revenue gap for the previous years 2003-04 and 2004-05.

Therefore, this contention would fail.

9. In the light of the above submissions made by both the parties, the following questions would arise:

- I) Is the State Commission right in increasing the Cross Subsidy levels to the subsidizing consumers?
- II) Is the State Commission right in loading the entire burden of the subsidized customers on the subsidizing consumers?

III) Is the State Commission right in not passing the surplus of Rs. 184 crores identified for 2006-07 to the consumers?

10. We have heard the learned Counsel for the parties at length. Before dealing with the questions, it would be appropriate to deal with the Preliminary Objection raised by the learned Counsel for the Respondent stating that the Appeal is not maintainable inasmuch as the Appellant cannot be treated as a person aggrieved and hence the Appellant has no locus standi to challenge the impugned order.

11. According to the Respondents, by the Tariff Order under challenge, the State Commission has not brought out any change in the tariff of EHT category of consumers to which category the

Appellant's electricity connection falls and that from October, 2002 onwards till 26.11.2007, i.e. date of the impugned order, the tariff of the Appellant remained as such without any addition or modification.

12. Refuting this Preliminary Objection, it is contended by the Appellant that in the present case the Appellant who is a consumer of electricity is aggrieved by the failure of the State Commission to consider the factors mentioned by the Appellant in the Appeal which, if considered, would have resulted in the reduction of the tariff and hence the Appellant is clearly an 'Aggrieved Person' and, therefore, the Appeal is maintainable.

13. We have considered this issue. In this context, it would be appropriate to refer to the observations

made by this Tribunal in BSES Rajdhani Power Vs. Delhi Electricity Regulatory Commission reports in 2010 ELR (APTEL) 404 on the basis of the decisions of the Hon'ble Supreme Court in Banarasi & Ors. Vs. Rampal (AIR 2003 SC 1989) and Northern Plastics Ltd. Vs. Hindustan Photo Films (AIR 1997 SC 3236). The same is quoted as below:

“The ratio decided by the Supreme Court as mentioned above is that a person aggrieved does not mean a man who is merely disappointed of a benefit which he might have received. On the other hand, it is to be established that the order impugned has caused a legal grievance to him, order impugned is prejudicially or adversely affecting him or the order impugned has wrongfully

deprived him or wrongfully refused him something.”

14. The above observation would make it clear that a person who claims that he is aggrieved shall establish that the order impugned has caused legal grievance to him and it has wrongfully deprived him or wrongfully refused him of something. In the present case, as pointed out by the Counsel for the Respondents, the tariff of the Appellant remains constant from the year 2002 and there is no change in the tariff applicable to the Appellant. In the light of the fact situation it cannot be said that the Appellant is a ‘Person Aggrieved’. As pointed out earlier, the term “Person Aggrieved” does not mean the person who is merely disappointed of a benefit which he might

have received. In the absence of any material placed by the Appellant that because of the impugned order it has caused a legal grievance, it cannot be construed that the Appellant is an Aggrieved Person. However, on this ground, we are not inclined to reject this Appeal particularly when we have allowed the learned Counsel for the Appellant to argue the matter on merits. Therefore, it is proper to deal with the merits also. Let us now consider the merits of each of the issue.

15. The first issue is regarding the Cross Subsidy. According to the Appellant, the Cross Subsidy has been increasing over the years rather than reducing as per Section 61(g) of the Electricity Act, 2003. But on noticing the data submitted by the

Respondents, as referred to in the impugned order, it would be seen that the percentage of Cross Subsidy is decreasing and it is within the limit of +/- 20%. As per Section 61 of the Electricity Act, the Cross Subsidy has to be progressively reduced. As per the Tariff Policy, the Cross Subsidy is to reach the level of +/- 20% of average cost by the year 2011. It is further noticed from the data which are not disputed that from the years 2003-04 to 2007-08, the Cross Subsidy level always remained below 20%. The chart given below would show the actual state of affairs.

Year	Avg. Cost Of Supply (Rs/kWh)	Avg. Tariff Of the Appellant (Rs/kWh)	Cross Subsidy (Rs/kWh) %		Remarks
2004-05	3.51	3.23	(-)0.28	(-)8.0%	
2005-06	3.15	3.32	0.17	5.4%	No
2006-07	2.99	3.29	0.30	10.1%	Revision
2007-08	2.94	3.22	0.28	9.5%	Of
2008-09	3.29	3.31	0.03	0.9%	Tariff
2009-10	3.49	3.30	(-)0.19	(-)5.3%	

It is evident that the Appellant is bearing cross subsidy within 20% as envisaged in the Tariff Policy. It may be seen that the average cost of supply has reduced in the same years. According to the Respondent, the Average cost of supply in Kerala is dependent on the hydro generation. In years of good monsoon the average cost of supply comes down appreciably and when there is deficit in monsoon, the same goes up again. This would also be evident from the above table. According to the Appellant, the non-payment of subsidy by the Government is deemed indirectly passed on to subsidizing consumers while the Electricity Act demands elimination of Cross Subsidy. Neither the Electricity Act, 2003 nor the National Tariff Policy or the National Electricity Policy has so far contemplated total elimination of Cross Subsidy in

the tariff. They only envisage a gradual reduction of subsidy in a phased manner.

16. As per Section 8.3(2) of the Tariff Policy, notified by the Central Government, the tariff of each category shall be brought within the range of +/- 20% of the average cost of supply for the year 2010-11 only. The tariff of the Appellant is within the limit envisaged in the policy.

17. In other words, in the present Tariff Order, as a step towards reducing the Cross Subsidy, the State Commission has reduced the tariff for the LT commercial category (subsidizing consumers) by 20 paise per unit. There was large variation in the tariff between LT and HT commercial category and hence the rate for HT consumers was increased. The average cost of supply for the years 2007-08 is

Rs.3.01/kWh. The average tariff for the EHT 66 KV consumers and 110 KV consumers are Rs.3.58/KWh and Rs.3.55/KWh respectively. This is only about 19% and 18% above the average cost of supply. The learned counsel for the Respondents has cited an example. According to the Respondents, for example, if the average cost of supply is Rs.3/- per unit at the end of the year 2010-11, the tariff for the Cross Subsidized category should not be lower than Rs.2.40 per unit and that the Cross Subsidy for the Subsidizing category should not go beyond Rs.3.60 per unit. Hence the submission of the Appellant that additional burden on account of non-payment of subsidy by the Government should have been recovered from the subsidized category cannot be accepted. As a matter of fact, the tariff of the

Appellant was not enhanced from October, 2002 onwards.

18. In this context, the learned State Commission's observations in the impugned order is relevant which is reproduced here:

“In the present order the Commission has weighed the factors such as balancing among different categories of consumers, minimum tariff increase for majority of consumers, reduction in cross subsidy among highly skewed category of consumers etc. This is apparent in the case of LT and HT commercial category and the commission wishes to reduce the disparity between HT and LT commercial rates. Hence Commission seeks to reduce

20 paise per unit for LTVII-A and VII-B in the existing tariff and to enhance 50 paise for HT-IV category to overcome the revenue deficit.”

19. The above observations contained in the impugned order would reveal that the State Commission has considered the requirements to bring down the Cross Subsidy while fixing the tariff.

20. As long as the Cross Subsidy is not increased and there is a road map for its gradual reduction in consonance with the Electricity Act and the Tariff Policy, the determination of tariff by the State Commission on account of existence of Cross Subsidy in the tariff cannot be said to be wrong. The gradual reduction of Cross Subsidy every year

will go a long way in achieving the balance as envisaged by the Act and the policies. In the present case, the State Commission has fixed the tariff after taking into account all the above principles. The Tariff Order passed by the State Commission is in accordance with law. In view of the above, the submission made by the Appellant regarding Cross Subsidy is devoid of any merit and the same is rejected.

21. The next issue is with reference to the surplus of Rs. 184 crores in the year, 2006-07. According to the Appellant, the State Commission has not factored the surplus of Rs. 184 crores in the year 2006-07 while determining the revenue requirement for the year 2007-08, as it would reduce the tariff of the subsidizing consumers. It

is to be noted that the present Appeal is on the ARR and ERC of the Kerala State Electricity Board for the year 2007-08 and the Tariff Order. The order on ARR and ARC for 2007-08 was issued on 26.11.2007 after completion of the year 2006-07. The surplus would definitely be different from what was approved at the time of issuing the order of the year 2006-07.

22. According to the learned Counsel for the State Commission, since the actual status on the surplus was not available while issuing the impugned order, the State Commission did not factor the impact of the estimated surplus. In the impugned order the impact of true up of the years 2003-04 and 2004-05 has been taken into account while determining the tariff. However, the true up

of the years 2006-07 has not been carried out. It is further stated that the actual position of the revenue surplus will be made available only when exercise of truing up of the accounts for the year 2006-07 is done and appropriate adjustment will be done taking account of the truing up of the accumulated revenue gap of the previous years, i.e. 2003-04 and 2004-05. In view of the above statement, this contention raised by the Appellant also would fail.

23. The last issue is relating to the Government Subsidy. According to the Appellant, the Government Subsidy has to be directly paid to the consumers notwithstanding any direction which may be given under Section 108 of the Electricity Act. Through the G.O. dated 16.12.2006 the

Government of Kerala issued a direction under Section 108 of the Electricity Act to the State Commission regarding the power reforms in the State. Para 4 of the said order deals with the Subsidy and Cross Subsidy, which is reproduced below:

“In order to ensure social justice, it is essential to continue the cross subsidy in the State without causing any burden to the State Government. Considering the decreased purchasing power of the down trodden section in the society and the need to provide electricity by subsidized rates to the productive sector in the State making any change in the existing cross subsidy will create adverse consequences.

Considering the public interest the existing subsidy and cross subsidy among the various tariff rates should continue in the State.”

It is pointed out by the learned Counsel for the State Commission that in the Order dated 5.1.2006, the State Commission allowed reduction of tariff by 20 paise strictly in line with Section 65 of the Act on the condition that the Government will give direct subsidy. In case the Government fails to provide Subsidy, the same would be borne by the Board unless the rebate is withdrawn on account of non-payment of direct subsidy by the Government. It is further stated that the impact of non-payment of Subsidy for the years 2005-06 and 2006-07 will be considered while truing up after

the accounts of the Board are audited by the Comptroller & Auditor General (CAG). In view of the above statement made by the learned Counsel for the Respondents, there is no merit in this issue also raised by the Appellant.

24. In view of the above discussions and conclusions, we do not find any flaw in the finding rendered by the State Commission in the impugned order. Consequently, the Appeal is liable to be dismissed and accordingly the same is dismissed. However, there is no order as to cost.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Reportable/Non-Reportable

Dated: 8th November, 2010