

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

APPEAL Nos. 169,170,171,172 of 2005 & 248 and 249 of 2006

Dated: July 05, 2007

Present:

**Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member
Hon'ble Mr. H.L. Bajaj, Technical Member**

Appeal No. 169 of 2005

RVK Energy Pvt. Ltd.
11 & 12 Amrutha Mall,
Somajiguda,
Hyderabad-500 016

... Appellant

V/s.

1. Central Power Distribution Co.
of Andhra Pradesh Ltd.,
11-5-423/1/A, First Floor,
Singareni Collieries Bhavan,
Lakdi-ka-pul,
Hyderabad 506 001.
2. Southern Power Distribution
Co. of Andhra Pradesh Ltd.,
Upstairs, Hero Honda Showroom,
Renigunta Road,
Tirupati 517 501
3. Northern Power Distribution
Co. of Andhra Pradesh Ltd.,
11-5-423/1/A, First Floor,
1-7-668, Postal Colony,
Hanamkonda,
Warangal- 506 001.
4. Eastern Power Distribution
Co. of Andhra Pradesh Ltd.,
Sai Shakti, Opp. Saraswati Park,
Daba Gardens,
Visakhapatnam- 530 020.
5. Andhra Pradesh Electricity Regulatory Commission,
Singareni Bhavan,
Red Hills,
Hyderabad.

... Respondents

Appeal No. 170 of 2005

1. Venkataraya Power Pvt. Ltd.
101 Maruthi Grandneur,
Punjagutta, Hyderabad.

2. GMK Products Pvt. Ltd.,
B-4, Industrial Estate,
Vijayawada Appellants
V/s.
1. Central Power Distribution Co.
of Andhra Pradesh Ltd.,
11-5-423/1/A, First Floor,
Singareni Collieries Bhavan,
Lakdi-ka-pul,
Hyderabad 506 001.
2. Southern Power Distribution
Co. of Andhra Pradesh Ltd.,
Upstairs, Hero Honda Showroom,
Renigunta Road, Tirupati 517 501
3. Northern Power Distribution
Co. of Andhra Pradesh Ltd.,
11-5-423/1/A, First Floor,
1-7-668, Postal Colony,
Hanamkonda, Warangal- 506 001.
4. Eastern Power Distribution
Co. of Andhra Pradesh Ltd.,
Sai Shakti, Opp. Saraswati Park,
Daba Gardens,
Visakhapatnam- 530 020.
5. Andhra Pradesh Electricity Regulatory Commission,
Singareni Bhavan,
Red Hills, Hyderabad. ... Respondents

Appeal No. 171 of 2005

1. HCL Agro Power Ltd.,
#117, Amrutha Ville,
Somajiguda, Raj Bhavan Road,
Hyderabad.
2. Jyoti Bio-Energy Ltd.,
307, Liberty Plaza,
Basheerbagh,
Hyderabad
3. Sree Rayalseema Green Energy Ltd.,
Srinilayam, KPS Complex,
Station Road, Gooty
4. Sudha Agro Oils & Chemical Industries Ltd.,
Samalkot 533440, E.G. Distt.
5. Ind-Barath Energies Ltd.,
Plot # 30-A, Road No. 1,
Filmnagar, Jubilee Hills,
Hyderabad-500 033 Appellants
V/s.

1. Central Power Distribution Co. of Andhra Pradesh Ltd.,
11-5-423/1/A, First Floor,
Singareni Collieries Bhavan,
Lakdi-ka-pul,
Hyderabad 506 001.
 2. Southern Power Distribution Co. of Andhra Pradesh Ltd.,
Upstairs, Hero Honda Showroom,
Renigunta Road,
Tirupati 517 501
 3. Northern Power Distribution Co. of Andhra Pradesh Ltd.,
11-5-423/1/A, First Floor,
1-7-668, Postal Colony,
Hanamkonda,
Warangal- 506 001.
 4. Eastern Power Distribution Co. of Andhra Pradesh Ltd.,
Sai Shakti, Opp. Saraswati Park,
Daba Gardens,
Visakhapatnam- 530 020.
 5. Andhra Pradesh Electricity Regulatory Commission,
Singareni Bhavan,
Red Hills,
Hyderabad.
- ... Respondents

Appeal No. 172 of 2005

1. Small Hydro Power Developers Association,
6-3-347/17/5 Dwarakapuri Colony,
Punjagutta,
Hyderabad-500 082.
2. RPP Ltd., Plot No. 45,
Sai Sarana Sagar Society,
Road No. 2, Banjara Hills,
Hyderabad
3. Trident Power Systems Ltd.,
103, My Home Lakshmi Nivas,
Greenlands, Ameerpet,
Hyderabad 500 016.
4. Shivani Power Spinners Ltd.,
6-3-347/17/5, Dwarakapuri Colony,
Punjagutta,
Hyderabad- 500 082.
5. Espar Pak Ltd.,
6-3-347/17/5, Dwarakapuri Colony,
Punjagutta,
Hyderabad.

6. Sri Dhanalakshmi Cotton & Rice Mills Pvt. Ltd.,
Ganapavaram, via Chilakaluripet,
Guntur District.
7. Shree Jayalakshmi Powercorp Ltd.,
Tobacco Colony,
Mangalagiri Road,
Guntur 522 001.
8. Akshay Profiles Pvt. Ltd.,
6-179, G.T. Road,
Ganapavaram-522 619.
9. Thirumala Hydel Power Projects Ltd.,
Subbaiah Thota,
Chilakaluripet 522 616.
10. SKJ Power Projects Ltd.,
473, Sagar Society, Road No. 2,
Banjara Hills, Hyderabad-500 034.
11. NATL Power Ltd.,
Plot # 30-A, Road No. 1,
Filmnagar, Jubilee Hills,
HYDERABAD-500 033. Appellants
V/s.
1. Central Power Distribution Co.
of Andhra Pradesh Ltd.,
11-5-423/1/A, First Floor,
Singareni Collieries Bhavan,
Lakdi-ka-pul,
Hyderabad 506 001.
2. Southern Power Distribution
Co. of Andhra Pradesh Ltd.,
Upstairs, Hero Honda Showroom,
Renigunta Road,
Tirupati 517 501
3. Northern Power Distribution
Co. of Andhra Pradesh Ltd.,
11-5-423/1/A, First Floor,
1-7-668, Postal Colony,
Hanamkonda,
Warangal- 506 001.
4. Eastern Power Distribution
Co. of Andhra Pradesh Ltd.,
Sai Shakti, Opp. Saraswati Park,
Daba Gardens,
Visakhapatnam- 530 020.

5. Andhra Pradesh Electricity Regulatory Commission,
Singareni Bhavan,
Red Hills,
Hyderabad. ... Respondents

Appeal No. 248 of 2006

1. Small Hydro Power Developers Association,
6-3-347/17/5 Dwarakapuri Colony,
Punjagutta,
Hyderabad.
2. RPP Ltd., H.No. 1-B, (New No. 618),
Arora Colony,
Road No. 3, Banjara Hills,
Hyderabad
3. Trident Power Systems Ltd.,
103, My Home Lakshmi Nivas,
Greenlands, Ameerpet,
Hyderabad 500 016.
4. Shivani Power Spinners Ltd.,
6-3-347/17/5, Dwarakapuri Colony,
Punjagutta,
Hyderabad- 500 082.
5. Espar Pak Ltd.,
6-3-347/17/5, Dwarakapuri Colony,
Punjagutta,
Hyderabad.
6. Sri Dhanalakshmi Cotton & Rice Mills Pvt. Ltd.,
Ganapavaram, via Chilakaluripet,
Guntur District.
7. Shree Jayalakshmi Powercorp Ltd.,
Tobacco Colony,
Mangalagiri Road,
Guntur 522 001.
8. Akshay Profiles Pvt. Ltd.,
6-179, G.T. Road,
Ganapavaram-522 619.
9. Thirumala Hydel Power Projects Ltd.,
26-141, Subbaiah Thota,
Chilakaluripet 522 616. Appellants
V/s.
1. Central Power Distribution Co.
of Andhra Pradesh Ltd.,
Singareni Bhavan, Red Hills,
Hyderabad 500 004.

2. Southern Power Distribution
Co. of Andhra Pradesh Ltd.,
19-3-13 (M) Upstairs,
Renigunta Road, Tirupati 517 501
3. Northern Power Distribution
Co. of Andhra Pradesh Ltd.,
1-1-503, NIT Main Road,
Chaitanyapuri Kazipet,
Warangal- 506 004.
4. Eastern Power Distribution
Co. of Andhra Pradesh Ltd.,
Sai Shakti, Opp. Saraswati Park,
Daba Gardens,
Visakhapatnam- 530 020.
5. Andhra Pradesh Electricity Regulatory Commission,
Singareni Bhavan,
Red Hills,
Hyderabad. ... Respondents

Appeal No. 249 of 2006

1. Jyoti Bio-Energy Ltd.,
307, Liberty Plaza,
Basheerbagh,
Hyderabad
2. Sree Rayalseema Green Energy Ltd.,
Srinilayam, KPS Complex,
Station Road, Gooty
3. Sudha Agro Oils & Chemical Industries Ltd.,
Samalkot 533440, E.G. Distt. Appellants

V/s.

1. Central Power Distribution Co.
of Andhra Pradesh Ltd.,
Singareni Bhavan, Red Hills,
Hyderabad 500 004.
2. Southern Power Distribution
Co. of Andhra Pradesh Ltd.,
19-3-13 (M) Upstairs,
Renigunta Road, Tirupati 517 501
3. Northern Power Distribution
Co. of Andhra Pradesh Ltd.,
1-1-503, NIT Main Road,
Chaitanyapuri Kazipet,
Warangal- 506 004.

4. Eastern Power Distribution
Co. of Andhra Pradesh Ltd.,
Sai Shakti, Opp. Saraswati Park,
Daba Gardens,
Visakhapatnam- 530 020.
5. Andhra Pradesh Electricity Regulatory Commission,
Singareni Bhavan,
Red Hills,
Hyderabad. ... Respondents

Counsel for the Appellant(s) : Mr.Gopal Choudary

Counsel for the Respondent(s) : Mr. Sanjay Sen & Mr. Vishal Anand
for Distribution Companies

Mr. M.G. Ramachandran,
Mr. K.V. Mohan & Mr. Anand K.
Ganesan for APERC

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

By this Judgment, we propose to dispose of two sets of appeals arising out of the following two orders of the Andhra Pradesh Electricity Regulatory Commission (for short 'APERC'):

- (i) dated September 21, 2005 in O.P. No. 16 of 2005, whereby method for determination of cross subsidy surcharge and additional surcharge payable by consumers of various categories was laid down in respect of the year 2005-06; and
- (ii) Order dated August 29, 2006 in O.P. no. 13/2006, whereby basis for determination of cross subsidy surcharge for

open access consumers of various categories was laid down for the year 2006-07.

The facts relating to the first set of Appeals, being appeal Nos. 169 to 172 of 2005 are as follows:-

2. The Andhra Pradesh Electricity Regulatory Commission sometime in May,2004 issued a public notice, whereby objections and suggestions were invited in respect of its proposal set out in a note purporting to be its preliminary views in regard to levy of cross-subsidy surcharge for open access consumers with effect from June 10, 2003. Objections/suggestions were filed by the affected parties including the appellants. A hearing was also held on July 9, 2004. During the hearing the APERC clarified that the hearing was in the nature of consultative discussion and was not a proceeding which will lead to an order. It was suggested by number of interested parties that the levy of surcharge be deferred until the Regulations specifying the terms and conditions of open access are formulated. During the

pendency of the proceedings, the following three events took place:-

- (i) National Electricity Policy was notified on February 12, 2005;
- (ii) Draft Tariff Policy was issued by the Government of India on March 16, 2005; and
- (iii) The Commission framed Regulations specifying the terms and conditions of open access on July 1, 2005.

3. In view of the fresh developments, the APERC seems to have abandoned the earlier proceedings and issued a fresh public notice, in consonance with the requirements of the first proviso to sub-section (2) of Section 42 of the Electricity Act, 2003 (for short 'the Act') read with Section 86(1)(a) thereof, with a view to elicit objections/suggestions of the stakeholders and interested persons to its fresh proposal to levy the surcharge payable by the users of open access for supply of electricity to the consumers with reference to consultative paper prepared by it. After receipt of the comments and

suggestions it held a public hearing on July 11, 2005 to discuss the different nuances of the matter.

4. On September 21, 2005, the APERC laid down the basis for determining the cross subsidy surcharge and additional surcharge for use of open access for supply of electricity to the consumers in respect of the years 2005-06 in the following manner:-

- “(1) The embedded cost methodology shall be the basis for determining cross-subsidy surcharge;*
- (2) The surcharge for the year 2005-06 shall be equivalent to the cross-subsidy estimated in the Tariff Order for FY 2005-06 for the respective consumer categories. The rates for cross-subsidy for FY 2005-06 as applicable to consumers availing open access at different voltage in the areas of supply of respective distribution licensee shall be as detailed in Annexure-II.*
- (3) To encourage renewable energy sources, a relief of 50 per cent on surcharge shall be provided to consumers availing use of open access for drawing electricity from non-conventional energy projects located within the State of Andhra Pradesh.*
- (4) Additional surcharge shall be payable by the consumer allowed open access for a period of three months only*

from the date on which the open access has commenced at the rate of the demand charge for H.T. Category – 1(A) Industry-General applicable in the Tariff Order of the relevant year”.

5. Being aggrieved by the order passed by the APERC, the appellants have filed appeal nos. 169-172 of 2005.

The facts of the second set of appeals, being appeal nos. 248-249 of 2006, briefly stated are as follows:-

6. On January 12, 2006, the APERC issued a public notice stating that it intends to determine surcharge for open access consumers of different categories for the year 2006-2007 based on the filings made by the distribution licensees for that year and the Tariff Policy framed by the Government of India. The notice called upon public, interested persons and stakeholders to file suggestions/objections, if any, for determination of cross subsidy surcharge and additional surcharge payable by open access consumers under Sections 39, 40 and 42 of the Act on the basis of the methodology specified in the Tariff Policy. The objections were filed by various persons, entities and generators using renewable sources of energy for generating electricity including the

appellants, who are generating electricity from bio-mass. The APERC after receipt of the comments and suggestions held a public hearing, which was scheduled alongwith the public hearing fixed for the tariff application of the licensees.

7. Thereafter, on August 29, 2006, the APERC laid down the method for computing the surcharge and the additional surcharge payable by the consumers. While determining the same, the APERC directed as follows:-

“(1) The embedded cost methodology shall be the basis for estimating the quantum of cross-subsidy as done in the Tariff Order dated 23.03.2006 for Distribution Tariffs (2006-07 to 2008-09) and Retail Supply Tariffs (for FY 2006-07) for the respective consumer categories. The rates for Cross-subsidy Surcharge for FY 2006-07 as applicable to consumers availing open access at different voltages in the areas of supply of respective distribution licensees are given in Annexure;

(2) To encourage renewable sources of energy, a relief of 50 per cent on surcharge shall be provided to consumers availing of open access from non-conventional energy projects located within the State of Andhra Pradesh.

(3) Additional surcharge for licensees’ obligation to supply as per section 42(4) of the Act shall be payable by the

consumer allowed open access only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such commitments.

(4) The Cross-subsidy Surcharge and Additional Surcharge as specified in this Order shall be subject to adjustment against any Cross-Subsidy Surcharge/Additional surcharge already paid by the Open Access consumer concerned against the Commission's interim order on the subject dated 01.04.2006".

8. As is clear from above, the basis of both the orders is the same and the embedded cost methodology is required to be applied for estimating the quantum of cross-subsidy. The question which arises for determination is whether the APERC has adopted the correct principle for determining the cross-subsidy surcharge.

9. Before we determine the question, it needs to be noted that for the present the impugned orders of the APERC do not directly affect the appellants. It was pointed out by the APERC in the impugned order dated September 21, 2005 that on

June 8, 2005 the Ministry of Power, Government of India, in exercise of its powers conferred by Section 183 of the Act, had issued the Electricity (Removal of Difficulties) second Order 2005, effective from June 10, 2003. The order reads as follows:-

“Exemption from payment of surcharge on the sale or supply of electricity: -

No surcharge would be required to be paid, in terms of sub-section (2) of section 42 of the Act on the electricity being sold by the generating companies with consent of the competent government under clause (c) of sub-section (1) of section 43A of the Electricity (Supply) Act, 1948 (now repealed by the Act), and on the electricity being supplied by the distribution licensee on the authorization by the State Government under section 27 of the Indian Electricity Act, 1910 (now repealed by the Act), till the current validity of such consent or authorization”.

10. In view of the above, it appears that the APERC is not competent to levy the cross-subsidy surcharge on those covered by the aforementioned order. The APERC in its order dated September 21, 2005 also took the same position. It however, clarified that consumers shall be liable to pay the applicable surcharge on their ceasing to be covered by the aforementioned order.

11. The learned counsel for the appellants, however, submitted that the impugned orders affect their business and future expansion plans in as much as the consumers will not buy electricity from the generating companies, once they cease to be covered by the Government order, and their plants other than the ones covered by the Electricity (Removal of Difficulties) second Order 2005 as they will not be able to pay cross subsidy surcharge calculated on the basis of Embedded Cost Methodology. This, according to the learned counsel will obviously deter the appellants and others from setting up new generating stations and therefore, the appellants and others will not be able to add to the existing generation capacity, notwithstanding the dire need of the country for more power.

12. In view of the position explained by the appellants, the question whether or not the Commission has adopted the correct principle for determining the cross subsidy surcharge needs to be examined. It appears to us that for proper answer to the question, the provisions of the Act relating to open access must receive purposive interpretation. It is necessary

to appreciate why the concept of open access was brought on the Statute Book and armed with that knowledge the statutory provisions need to be construed.

13. The importance of a statute being given purposive interpretation was highlighted by the Supreme Court in K.L. Gupta vs. Bombay Municipal Corporation AIR 1968 SC 303, where it was held as follows:

“ Before examining the contentions on the points of law raised in this case, it is necessary to appreciate what the Act sought to achieve and why it was brought on the statute-book. In order to do this, it is necessary to take stock of the position at the time of its enactment so that attention may be focused on the situation calling for a remedy and how the legislature sought to tackle it”.

Again in Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. & Ors. (1987) 1 SCC 424, the Supreme Court laid down as follows:-

“ If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections,

clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act.

In *Maruti Udyog Ltd. vs. Ram Lal & Ors.*, (2005) 2 SCC 638 rule of purposive construction was followed.

In *Nathi Devi vs. Radha Devi Gupta*, (2005) 2 SCC 271, the Supreme Court held that the interpretation of a statute which serves the object and purpose of the Act must be given effect to.

14. Thus, it is absolutely necessary to look at the object of the Act and the context of its enactment before construing the relevant provisions thereof. The object and purpose of the Act lies in its preamble, which is for unshackling the electricity industry. This it seeks to achieve by adopting, *inter alia*, measures conducive to the development of the electricity industry and promoting competition. Competition is a

significant factor for unleashing the electricity sector. Competition in the sector depends upon various factors. One of the most important factors is the availability of open access to the consumer, generator and distributor, as the case may be. Open access is the back bone of competition. It is the corner stone of the Act.

15. Under the Act, it is no longer necessary that the supplier of energy should be the owner of delivery system. In theoretical terms, it means that a consumer should be able to buy electricity from any one and not just the distribution licensee located within its area of supply.

16. The provisions of the Act relating to open access need to be noticed for understanding the statutory principles on the basis of which the consumer is required to pay the charges.

Open access

“1 (47): ‘Open Access’ means the non-discriminatory provision for use of transmission line or distribution system or associated facilities with such line or system by any licensee or consumer or a person engaged in generation in accordance with the regulation specified by the Appropriate Commission”.

“Section 10 Duties of generating companies:

(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of Section 42, supply electricity to any consumer.

“ 38(2) The functions of Central Transmission Utility shall be –

(a)

(b)

(c)

(d) To provide non-discriminatory open access to its transmission system for use by –

(i) any licensee or generating company on payment of transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of Section 42, on payment of transmission charges and a surcharge thereon as may be specified by the Central Commission:

Provided that such surcharge shall be utilized for the purpose of meeting the requirement of current level of cross-subsidy:

Provided further that such surcharge and cross subsidy shall be progressively reduced in the manner as may be specified by the Central Commission:

Provided also that the manner of payment and utilization of surcharge shall be specified by the Central Commission:

Provided also that 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 of his own use”.

“ 39(2) The functions of State Transmission Utility shall be –

(a).....

(b).....

(c)

(d) To provide non-discriminatory open access to its transmission system for use by –

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under subsection (2) of Section 42, on payment of transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilized for the purpose of meeting the requirement of current level of cross-subsidy:

Provided further that such surcharge and cross subsidy shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that the manner of payment and utilization of surcharge shall be specified by the State Commission:

Provided also that 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 of his own use”.

*“ 40. **Duties of transmission licensees** - It shall be the duty of a transmission licensee-*

(a).....

(b).....

(c) To provide non-discriminatory open access to its transmission system for use by –

(i) any licensee or generating company on payment of transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of Section 42, on payment of

*transmission charges and a surcharge thereon,
as may be specified by the State Commission:*

*Provided that such surcharge shall be utilized for the purpose of
meeting the requirement of current level of cross-subsidy:*

*Provided further that such surcharge and cross subsidy shall be
progressively reduced in the manner as may be specified by the
Appropriate Commission:*

*Provided also that the manner of payment and utilization of
surcharge shall be specified by the Appropriate Commission:*

*Provided also that 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 of
his own use”.*

Part VI
Distribution of Electricity
Provisions with respect to distribution licensees

“42. Duties of distribution licensees and open access-

*(2) The State Commission shall introduce open access in such
phases and subject to such conditions, (including the cross
subsidies, and other 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 surcharge in addition to the charges for wheeling as may be determined by the State Commission.

Provided further that such surcharge shall be utilized to meet the requirements of current level of cross 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 of his own use”.

“42(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply”.

17. As already noted the context in which the provisions were enacted must be kept in view to give meaning to the language of the provisions.

18. Sub-section (47) of Section 1 of the Act defines 'open access'. It means providing for non discriminatory open access to any licensee or consumer or a person engaged in generation or to the use of transmission line or distribution system in accordance with the Regulations of the appropriate Commission. In other words, it means providing equal opportunity to any consumer, licensee or generator, as the case may be, to use open access. It is the duty of the Regulatory Authority to keep the definition in view and work towards elimination of discrimination and to promote equality of opportunity in the matter of open access.

19. Sub-section (2) of Section 38 of the Act deals with the 'functions of the Central Transmission Utility' (for short 'CTU'). Sub-clause (d) of sub-section (2) of Section 38 lays down that CTU is required to give non-discriminatory open access to its

transmission system for use by any licensee or generating company on payment of transmission charges or any consumer, after open access is provided by the State Commission under sub-section (2) of Section 42 of the Act on payment of transmission charges and surcharge thereon to be specified by the Central Commission. The first proviso to clause (d) of sub-section (2) of Section 38 of the Act requires the surcharge to be utilized for the purpose of meeting the requirement of current level of cross-subsidy. As per the second and third provisos to clause (d) of sub-section (2) of Section 38 of the Act, surcharge and cross-subsidy over a period of time are required to be progressively reduced, paid and utilized in accordance with the manner as may be specified by the Central Commission.

20. Clause (d) of sub-section (2) of Section 39 of the Act, while dealing with the functions of State Transmission Utility (for short 'STU') requires it to give non-discriminatory open access for use by any licensee or generating company on payment of the transmission charges or any consumer, after

open access is provided by the State Commission under sub-section (2) of Section 42 of the Act on payment of transmission charges and surcharge thereon as may be specified by the State Commission. The first proviso to clause (d) of sub-section (2) of Section 39 of the Act requires the surcharge to be utilized for the purpose of meeting the requirement of current level of cross-subsidy. According to the second and third provisos to clause (d) of sub-section (2) of Section 39 of the Act surcharge and cross subsidies over a period of time are required to be reduced, paid and utilized in the manner as may be specified by the State Commission.

21. Section 40 of the Act casts a duty on the transmission licensee to provide non-discriminatory open access to its transmission system for use by any licensee or generating company on payment of transmission charges but in case of consumer requiring open access, it shall be made available to him after open access is provided by the State Commission u/s 42(2) on payment of transmission charges and a

surcharge thereon as may be specified by the State Commission.

22. A conjoint reading of Sections 38(2), 39(2) and 40 show that the CTU, STU and Transmission licensee, as the case may be, can provide open access to the transmission system for use by: (a) any licensee or generating company on payment of transmission charges only; and (b) any consumer on payment of transmission charges and surcharge thereon.

23. Thus in case open access is required by any licensee or a generating company from the CTU, STU or Transmission Licensee, it has to pay transmission charges and no surcharge thereon but where open access is required for conveying electricity to a consumer, it (consumer) has not only to pay wheeling charges but is also liable to pay cross subsidy surcharge.

24. Sub-Section (2) of Section 42 of the Act authorizes the State Regulatory Commissions to introduce open access in the area of distribution of electricity. It requires the State

Commission to introduce open access in such phases and subject to such conditions including the cross subsidies and other operational constraints that may be specified within one year of the appointed date by it. While determining the charges for wheeling, the Commission is required to have due regard to all relevant factors including surcharge and other operational constraints. According to the first proviso to Section 42(2), open access can be allowed by the Commission on payment of surcharge in addition to wheeling charges. The State Commission under first proviso is also required to determine the surcharge. In terms of second proviso to Section 42(2), the surcharge determined by the Commission is required to be utilized to meet the requirements of current level of cross-subsidies within the area of supply of distribution licensee. It needs to be noted that neither the first proviso nor the second proviso provides that the cross subsidy must be so computed that it is equal to or more than the current level of cross subsidy. All that the second proviso requires is that after the surcharge is determined by the Commission under the first proviso, the surcharge collected

for providing open access must be utilized towards meeting the current level of cross subsidy. The dictionary meaning of the word 'utilised' is "to put to use". The appearance of the word 'utilised' in the second proviso to Sub-Section (2) of Section 42 before the words "to meet the requirements of current level of cross subsidy" is not without significance. It is a pointer as to how the surcharge will be used. In case the surcharge was always required to be equal to or more than the current level of cross subsidy, the second proviso would have stated as follows:-

Provided further that such surcharge shall be equal to or may be more than the requirements of current level of cross subsidy within the area of supply of the distribution licensee.

25. In fact the second proviso only deals with mode of utilization of surcharge. It does not lay down that surcharge should measure up to or be equal to the current level of cross subsidy.

26. It must not be forgotten that wheeling charges and the surcharge are not the only charges which a consumer is

required to pay for using open access. It may also be required to pay additional surcharge on the charges of wheeling to meet the fixed cost of the distribution licensee under sub-section (4) of Section 42 of the Act. The Regulatory Commissions are required to keep in view the fact that the concept of equal opportunity is essential element of open access woven into the fabric of the aforesaid provisions. In case use of open access by a consumer is made onerous by imposing excessive levies, it will amount to barring open access to him. This will result in discrimination of the consumer qua the licensee and generator. Therefore, the above provisions must be looked at, keeping in view the object and reasons of the Act. The provisions must be worked out to promote open access as it will boost competition. Competition benefits the consumer. It pulls down the prices. It improves the quality of service to the consumers. In case open access is inhibited by making it uneconomical for the consumer to choose its source of power, it will have deleterious effect on competition resulting in scarcity of electricity and high tariff. Open access must be utilized to mop up every bit of power available with the generators to

surmount shortages and outages of electricity. This is possible in case the surcharge and additional surcharge is reasonable.

27. Though the legislative intent is to give impetus to competition, the APERC by its impugned orders, by taking recourse to the Embedded Cost Methodology to work out the surcharge, has acted contrary thereto. The initiative of the consumers to seek open access must be sustained and kept alive. If the Regulatory Commission goes for an overkill by imposing burdensome cross subsidy surcharge and additional surcharge for open access, it will hit generation for generators will not increase capacity, as it will be hard to find consumers willing to buy expensive power. The Commission in its consultative paper had referred to Residual Generation Rate method but in the impugned order it failed to utilize the same to compute the effect of surcharge determined through various methodologies. It should have adopted such level of cross subsidy surcharge as would have maintained the right equilibrium between promotion of competition and financial

security of the utility (distributor). Unless the consumers can avail of the open access at a reasonable cost not exceeding the rate at which electricity is available within the area of supply of the distribution licensee, it will be difficult for the private entrepreneurs to set up generating stations. The Regulatory Authorities must face the reality. There is no denying the fact that there are crippling shortages of electricity in the country. The economic growth which is about 9% of the GDP, cannot be sustained and further accelerated unless substantial capacity addition takes place. The Regulatory Commissions need to encourage the entrepreneurs to set up generating stations by their visionary orders.

28. The National Tariff Policy issued by the Central Government had come into force by the time the impugned order dated August 29, 2006 was passed. The impugned order dated August 29, 2006 ought to have been in consonance with the National Tariff Policy. The relevant part of the National Tariff Policy reads as follows:-

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

8.5.1. National Electricity Policy lays down that the amount of cross-subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access.

A consumer who is permitted open access will have to make payment to the generator, the transmission licensee whose transmission systems are used, distribution utility for the wheeling charges and, in addition, the cross subsidy surcharge. The computation of cross subsidy surcharge, therefore, needs to be done in a manner that while it compensates the distribution licensee, it does not constrain introduction of competition through open access. A consumer would avail of open access only if the payment of all the charges leads to a benefit to him. While the interest of distribution licensee needs to be protected it would be essential that this provision of the Act, which requires the open access to be introduced in a time-bound manner, is used to bring about competition in the larger interest of consumers.

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 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 intra-state 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.

8.5.2. *No surcharge would be required to be paid in terms of sub-section (2) of Section 42 of the Act on the electricity being sold by the generating companies with consent of the competent government under Section 43(A)(1)(c) of the Electricity Act, 1948 (now repealed) and on the electricity being supplied by the distribution licensee on the authorization by the State Government under Section 27 of the Indian Electricity Act, 1910 (now repealed), till the current validity of such consent or authorizations.*

8.5.3 *The surcharge may be collected either by the distribution licensee, the transmission licensee, the STU or the CTU, depending on whose facilities are used by the consumer for availing electricity supplies. In all cases the amounts collected from a particular consumer should be given to the distribution licensee in whose area the consumer is located. In case of two licensees supplying in the same area the licensee from whom the consumer was availing supply shall be paid the amounts collected.*

8.5.4 *The additional surcharge for obligation to supply as per section 42(4) of the Act should become applicable only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract.*

The fixed costs related to network assets would be recovered through wheeling charges.

8.5.5 Wheeling charges should be determined on the basis of same principles as laid down for intra-state transmission charges and in addition would include average loss compensation of the relevant voltage level.

8.5.6. In case of outages of generator supplying to a consumer on open access, standby arrangements should be provided by the licensee on the payment of tariff for temporary connection to that consumer category as specified by the Appropriate Commission”.

29. The formula detailed in the policy shows the path for calculating cross subsidy surcharge from the consumers, who are permitted open access. The idea is that it should not be so hefty that consumers are discouraged from utilizing the source of power of their choice otherwise competition will be eliminated, which will go against the very grain of the Electricity Act.

30. The Policy has been issued under Section 3 of the Act. It has a statutory flavor. The Regulatory Commission is required

to abide by the National Electricity Policy and Tariff Policy issued by the Central Government as long as they are in consonance with the Act. The National Electricity Policy and Tariff Policy are prepared by the Central Government in consultation with the Authority for development of the power system based on optimal utilization of its resources such as coal, natural gas, nuclear substances and hydro and renewal resources of energy. Optimal utilization of resources will take place only when generator is assured of the use of the wires for transmitting electricity to the licensees and consumers. In this context open access assumes importance. In case open access is made available for transmitting electricity to the end-user at a cost which is higher than the cost at which the distribution licensee of the area supplies energy to the consumers, the concept of open access becomes meaningless. In case, cost to use open access is high, there cannot be optimal use of capacities and resources. The optimal use of capacities and resources is the mandate of Section 3 of the Act. Besides the emphasis placed on competition in electricity sector by the preamble to the Act would be reduced to a

platitude. Such a situation would be contrary to the preamble of the Act and the very spirit of Section 3. The submission of the learned counsel for the distribution companies that the Central Government did not have jurisdiction to lay down the method and manner for calculating the surcharge cannot be countenanced in law. The submission is accordingly rejected.

31. It is the prime need of the hour to set up new generating stations. Last year China added one lakh megawatt of electricity to its already large built up capacity. Its industrial sector is thriving because of availability of infrastructure including electricity without which industry cannot be sustained. There must be no impediment for consumer, generator or a utility to utilize wires for moving the electricity to the desired destinations, without which generation would be wasted. This can be possible in case wheeling charges, cross subsidy surcharge or additional surcharge are not excessive. Every unit of electricity must be allowed to be evacuated. Country cannot afford to waste energy by restricting open

access through a price mechanism which is not in consonance with the provisions of the Act.

32. In the meeting of the Chief Secretaries/Power Secretaries of the States in April, 2007, it was suggested that cross subsidy surcharge and wheeling charges should be abolished. It seems that these suggestions were given to send positive signals to the investors to set up new plants and to ensure accelerated growth of the sector so that our industry and entire economy grows from strength to strength. It also appears that the objective behind the suggestion was also to give boost to the use of open access so that competition increases and more and more generation takes place.

33. Though the suggestions cannot be implemented, it is for the Regulatory Commissions to translate the spirit of the Act into reality by imposing realistic charges for wheeling, cross subsidy surcharge and/or additional surcharge. Once the Appropriate Regulatory Commission has introduced open access within one year of the appointed date, a right vests in the consumer to ask for open access for securing electricity

from a source of its choice so that it is able to access quality power. This vested right cannot and ought not to be defeated by imposing excessive charges on the consumers requiring open access. We do not agree with the learned counsel for the distribution licensees that neither the consumers nor the generators have a vested right to seek open access. This contention falls foul of the object of the Act, its context and the above provisions.

34. The order of the Regulatory authorities should incentivise generation. Factors which deter private investment for generation, transmission and distribution must be removed. The levy of wheeling charge, cross subsidy surcharge and additional surcharge ought not to be rapacious. The Regulatory Commissions have a statutory duty to levy reasonable charges so that entrepreneurs come forward to set up generation plants and distribution and transmission systems. In case the Tariff Policy relating to open access, which is in consonance with the Act, is ignored by the

Regulatory Commissions, it will have injurious effect on the life of the people.

35. Many of the households in the villages are still not lighted. There is hardly any industrial activity in the villages on account of shortage of electricity. People cannot be made to wait endlessly to secure electricity for their homes and industry. Lack of electricity which is one of the causes of rural unemployment leads to exodus of people from villages to urban areas. Influx results in creation of urban slums and puts pressure on the existing infrastructure. At the same time migrants are rendered rootless and removed from their social and cultural moorings and links. They find themselves strangers in the cities, where they face deprivation and most horrible and harsh living conditions. In some this gives rise to brooding sense of injustice. Since they have no societal and social ties in the cities, they take to crime as their response to the treatment received by them. It is necessary that work should be available to the people in the villages. This is not possible without electricity. Electricity is needed for

mechanized agricultural operations, irrigation and for setting up of industry.

36. Electricity creates means and opportunities to earn one's livelihood. Electricity is one of the necessities of life. It is one of the components, which can act as a catalyst for making life wholesome. It has been held by the Supreme Court in the State of Maharashtra vs. Chander Bhan, (1983) 3 SCC 387, that the right to life enshrined in Article 21 encompasses something more than survival or animal existence. Right to life includes all which goes to make a man's life meaningful and complete. Right to life under Article 21 of the Constitution is a compendium of rights, which contributes towards making life worth living.

37. Right to life also includes right to live with dignity. In M. Nagraj and Ors. vs. Union of India and Ors., (2006) 8 SCC 212, the Supreme Court held that it is the duty of the State not only to protect human dignity but facilitate it by taking positive steps in that direction. Article 21 requires the State and its agencies to create and facilitate means whereby the

individual can live with dignity. Without creation of means to earn one's livelihood, it is difficult to live a life of dignity. In *State of H.P. vs. Raja Mahendra Pal & Ors.* (1999) 4 SCC 43, it was held that the right to life includes right to livelihood by means that are not illegal or opposed to public policy.

38. In *Secretary, State of Karnataka & Ors. vs. Uma Devi and Ors.* (2006) 4 SCC 1, it was held that obligation is cast on the State under Article 39(a) of the Constitution to ensure that all citizens equally have the right to adequate means of livelihood.

39. Since electricity is not available to many because of paucity of generation and various other reasons, it cannot be said that all citizens are enjoying the right to adequate means of livelihood. Regulatory Authorities must not throw a spanner in the generation of Electricity by imposing unrealistic levies on account of wheeling charge, cross subsidy surcharge and additional surcharge. In case the Tariff Policy for working out the cross-subsidy surcharge is adhered to, it will be in tune with the desired goal of Article 21 of the Constitution and would also sub-serve the objective of

competition in the electricity sector as laid down in the preamble of the Act.

40. Section 10 confers right on the generating company to supply electricity to any licensee in accordance with the provisions of the Act, Rules & Regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of Section 42. The right conferred on the generator to supply electricity to any consumer cannot be rendered illusory by making regulations in such a manner that the right is fettered. Once the Commission decides to provide open access under section 42(2), it has to take care that excessive charges are not imposed that make the right to seek open access nugatory.

41. The whole idea is that the customer should be able to select a producer of power instead of being forced to buy electricity from distribution licensee of the area. Competitive market place can certainly reduce the tariff and save consumers from paying more. In fact the Act envisages the possibility of more than one Distribution Company within the

area of supply so that there is competition amongst the distribution companies for providing open access to the consumers. The wires of a utility should be treated as pathways where a generator or licensee could use the same to move electricity to its consumers without the consumers having to pay exorbitant charges on account of open access provided for reaching the electricity to them otherwise the right to seek open access will be of no use. It will annihilate the very concept of competition, which is the soul of the Act. It is not the intention of the legislature to render the provisions relating to open access otiose.

42. It appears to us that the Embedded Cost Method as adopted by the Commission shackles open access since the consumer will not be able to buy power from sources other than the distribution licensee of their area of supply. In case surcharge is worked out in the manner computed by the Commission, the consumer will have to pay more in case it wishes to utilize open access from sources other than the distribution licensee. On the other hand in case the

Surcharge Formula as prescribed by the Tariff Policy is employed, the consumer is not burdened with unreasonable cross subsidy surcharge and at the same time the interest of the distribution licensee are taken care of. Therefore, we are of the view that the APERC has not applied the appropriate principle for determining cross subsidy surcharge. We find that the formula for calculating surcharge given in the Tariff Policy is in tune with the spirit of the Electricity Act and must be adopted and followed by the APERC and all the Regulatory Commissions. Even de hors the Tariff Policy, the Surcharge Formula needs to be adopted as we find that it is more in tune with the object of the Act than the Embedded Cost Method as adopted by the APERC.

43. It was argued by the learned counsel for the distribution companies that the distribution companies have universal supply obligation but the generators are outside the licensed regime. According to the learned counsel, the distribution licensee has to recover the current level of cross subsidy and in the event of a consumer opting out of the system to receive

power from a generator directly, he cannot be allowed to move away without paying cross subsidy surcharge, which must be equivalent to the current level of cross subsidy, otherwise it will result in raising the general tariff. The argument in the first blush appears to be attractive but on a closer scrutiny, it has no substance. It is well-known that there is a shortage of electricity and in case a consumer finds another source of power for its needs, it reduces the burden of the distribution licensee due to the avoided additional purchase of power at marginal cost. In case the distribution licensee can meet the demand of electricity and provide quality service at a reasonable price, there can be no dearth of consumers and in that event there is hardly any question of loss to the distribution licensee when a consumer moves away from it.

44. In the circumstances, therefore, we direct the APERC to compute the cross subsidy surcharge, which consumers are required to pay for use of open access in accordance with the Surcharge Formula given in para 8.5 of the Tariff Policy, for the year 2006-07 and for subsequent years.

45. In future all the Regulatory Commissions while fixing wheeling charges, cross subsidy surcharge and additional surcharge, if any, shall have regard to the spirit of the Act as manifested by its Preamble. The charges shall be reasonable as would result in promoting competition. They shall be worked out in the light of the above observations made by us. This direction shall also apply to the APERC for computing the cross subsidy surcharge for the year 2005-06 as well.

46. Accordingly, the Appeals are allowed to the extent indicated above.

47. No costs.

(Justice Anil Dev Singh)
Chairperson

(A.A. Khan)
Technical Member

(H.L. Bajaj)
Technical Member

Dated : July 05, 2007