

**KERALA STATE ELECTRICITY REGULATORY COMMISSION
THIRUVANANTHAPURAM**

PRESENT: Shri. K.J. Mathew, Chairman
 Shri. C. Abdulla Member
 Shri. M.P.Aiyappan, Member

Date : March 8, 2010

Petition DP No.4	M/s Binani Zinc Limited Vs Kerala State Electricity Board	Appellant Respondent
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ORDER

Background:

1. This Order arises from the Judgment of the Hon. Supreme Court dated 21-4-2009 in Civil Appeal 3492/2006 filed by M/s Binani Zinc Limited. In order to facilitate proper understanding of the matter, brief facts and circumstances of the case are given below: The Kerala State Electricity Board (*hereafter referred to as Board or KSEB*) issued a tariff revision order on October 24, 2002 in exercise of the powers vested under the Electricity (Supply) Act, 1948. On March 24, 2003 the appellant, M/s Binani Zinc Limited, challenged the tariff revision effected by KSEB by way of a writ petition before the Hon. High Court of Kerala. In the mean time Govt. of Kerala constituted the Kerala State Electricity Regulatory Commission on 14-11-2002 as per Section 17 of the Electricity Regulatory Commissions Act 1998. Hon. High Court of Kerala disposed of the matter on 28-5-2003 permitting the appellant to approach the Kerala State Electricity Regulatory Commission (*the Commission for short*) and also observed that the Commission will be entitled to examine as to whether or not the revision of tariff conforms to the parameters laid down by Section 29 of the ERC Act, 1998. Pursuant to the Order of the Kerala High Court the appellant approached the Commission through a petition (DP 4 of 2003). Two other petitions by M/s TCM Ltd. and Kerala High Tension/Extra High Tension Industrial Electricity Consumers Association (DP 7 and DP 8 respectively) were also filed against the tariff revision order of KSEB dated 24-2-2002. The Commission in its order dated

30-4-2004 disposed of all the petitions in a common order. The Commission held that on the day of the notification, the Board was empowered to determine tariff as per the provisions of the Electricity (Supply) Act, 1948 and there was no valid ground for re-determining the tariff for HT and EHT consumers. Further the Commission observed that the cross subsidy in tariff for HT-EHT categories was around 43%. Aggrieved by the Order of the Commission, the appellant M/s Binani Zinc Limited preferred an appeal before the Hon. High Court of Kerala, as per Section 27 of the ERC Act 1998, along with an application for interim relief. The Hon. High Court stayed the disconnection proceedings of the Board against the appellant for non-payment of disputed electricity charges resulting from the tariff hike. Hon. High Court disposed of the matter on 2-7-2004, and held that the Board was empowered to issue tariff order since the Regulatory Commission was not constituted at that time. Regarding the issue of cross subsidy, the same was remanded to the Commission for fresh determination. The Commission, pursuant to the Order of the High Court, reiterated that the cross subsidy provided by the EHT and HT consumers was 43% vide its order dated 11-8-2004. The appellant further filed a Special Leave Petition before the Hon Supreme Court against the Order dated 2-7-2004 of the Kerala High Court. Hon. Supreme Court in its interim order dated 13-9-2004 directed the Board not to disconnect electricity to the appellant subject to the condition that appellant continues to pay the demand raised in accordance with the tariff before it was revised with effect from 24-10-2002. The appellant was also directed to remit Rs.1 crore with KSEB. Hon. Supreme Court in its order dated 8-9-2005 held that questions raised by the appellant can be effectively considered by the Appellate Tribunal for Electricity (*APTEL for short*) and in the interest of justice, allowed the appellant to prefer an appeal against the Order of the Commission before the APTEL. Hon. Supreme Court also directed the appellant to file the memo of appeal filed by the appellant in the Hon. High Court of Kerala against the Order of the Commission dated 30-4-2004 be filed before the APTEL..And till the disposal of the matter the interim order passed on 13-9-2004 would continue. APTEL in its order dated 24-7-2006 held that no interference is required in the Order of Commission dated 30-4-2004. The appellant filed appeal No. 3492 of 2006 before the Hon. Supreme Court against the Order dated 24-7-2006 of the APTEL. During the proceedings before the apex Court, the question whether KSEB is empowered to determine

tariff was referred to a larger bench, and in its order dated 19-3-2009 it was held that the State Electricity Board had the requisite jurisdiction to revise the tariff till such time the Commission was constituted. The other contentions and questions of law were referred back to the appropriate two bench. The matter was finally disposed of by the Hon. Supreme Court by its judgment dated 21-4-2009. Hon. Supreme Court in the Order held that :

“In the facts and circumstances of the case, we set aside the impugned judgment passed by the Appellate Tribunal and Order dated 30-4-2004 passed by the Commission and remand the matter to the Commission for deciding the representation of the appellant afresh in accordance with the law after hearing both parties. Since the material which was not supplied by the Board to the appellant earlier was admittedly supplied to the appellant at the appellate stage, the appellant will be at liberty to file any material, if so desired, in rebuttal. The Board and the appellant will be at liberty to file documents/evidence in support of their case. Further, if the Commission wishes to carry out a separate exercise to assess the cost of service to the customers, it can only do so by giving an opportunity to the appellant. The Commission is directed to dispose of the matter as expeditiously as possible and in any event within six months of date of receipt of certified copy of this order after giving an opportunity of hearing to the parties through their representatives. Mean while during the pendency of the representation before the Commission, the interim order passed on 13-9-2004 shall continue.”

2. Pursuant to the above order, the Board in its letter dated 14-9-2009 furnished a copy of the judgment of the Hon. Supreme Court and requested to dispose of the matter after hearing the appellant M/s Binani Zinc Limited and KSEB. The Commission issued notices to the parties on 30-9-2009 and scheduled a hearing on 22-10-2009. Since 3 appeals (DP No. 4/7/8) were disposed off by the Commission vide its order dated 30-4-2004, notices were issued to all the parties in the original proceedings. The Commission also directed KSEB to provide a copy of the letter dated 15-4-2004 to the parties before the hearing. However, the hearing was postponed to 11-12-2009 on the request of M/s Binani Zinc

Limited and M/s TCM limited. However, appellants other than M/s Binani Zinc limited were not present in the subsequent proceedings. Meantime, M/s Binani Zinc Limited vide its letter dated 1-12-2009 requested the Commission to provide a copy of the details of the study conducted by the Commission to assess the cost of service which was referred to in the Order dated 30-4-2009, and the details and supporting calculations submitted by KSEB vide letter dated 15-4-2009 to arrive at the cost of service of various category of consumers. Since the Commission decided that it was not necessary to rely on the documents of the Commission mentioned in the impugned order and as the Commission would be taking a fresh view of the matter in line with the judgment of Hon. Supreme Court, documents requested from the Commission were not relevant in the matter. Regarding the documents from the Board, direction was issued by the Commission to the Board to provide the necessary documents, which was communicated to the appellant vide letter dated 2-10-2009.

Hearing on the matter

3. In the hearing held on 22-12-2009, Shri. Subir Gupta, the learned counsel for the appellant pressed for the information sought from KSEB and the Commission. After hearing the arguments of the appellant and KSEB, the Commission issued an interim order directing KSEB to provide to the appellant information which are available to KSEB and are relevant in the matter. The matter was further heard on 11-1-2010. On that day, the appellant produced a document on 'cost of service' which called for the response of KSEB. KSEB was directed to file response if any on the document before the next hearing scheduled on 30-1-2009. Meanwhile, Shri. Arul Chandra, Shri. P.T Joy, and Shri. V.M Rajan representing Cominco Binani Zinc employees Association, Binani Zinc employees organization, and Cominco Binani Zinc employees Union respectively moved a petition for impleading them in the matter since their survival would be affected if any adverse decision is passed by the Commission in the matter. Since KSEB and the appellant did not raise any objection during the hearing, Commission allowed the representatives of the Unions as a party in the matter.

4. The matter was finally heard on 30-1-2009. Representatives of M/s Binani Zinc Limited, KSEB and Workers Unions were present. Representing the appellant, Adv. Shri Subir Gupta informed that though the Commission had directed KSEB to file objections and rejoinders by the appellant before 30-1-2010, appellant had not received any objection and hence, KSEB cannot make any arguments on the materials filed before the Commission. In reply, KSEB stated that, KSEB's reply was forwarded to the Commission on 28-1-2010 and also faxed to the appellant.

5. The appellant pointed out that there was no dispute that the tariff order dated 24-10-2002 of the Board as per the provisions of Electricity (Supply) Act, 1948, was not valid till the date on which the Commission came into existence. The issue is that, as soon as the Commission came into existence, the tariff should have been re-determined in terms of Section 29 of the ERC Act, 1998. By drawing attention to the preamble of the ERC Act, the appellant argued that the Parliament was concerned about the unsustainable levels of cross subsidy and inefficient operation of the electricity supply industry and the need for corrective measures to be taken accordingly. Section 22(1)(a),(b) & (c) of the ERC Act confers powers on the State Commissions to determine tariff in the manner provided in Section 29. Hon. Supreme Court expressed the view that tariff revision should be in conformity with the provisions of Section 29 of the Act. According to the appellant, the matter has been remanded to the Commission by the Hon. Supreme Court for deciding the representation afresh in accordance with section 29 and other provisions of law after providing suitable opportunity of being heard. The appellant also pointed to the Section 29 of the ERC Act and the principles governing the determination of Tariff. Section 29(1) provides that tariff for supply of electricity, grid, wholesale, bulk or retail within a State shall be determined by the State Commission. As per Section 29(2), the State Commission shall determine by regulations the terms and conditions for fixation of tariff and while doing so among other things shall be guided by the principles and their applications of Section 46, 57 and 57A of the Electricity (Supply) Act 1948, and in the case of the Board and successor entities Section 59 of Electricity (Supply) Act. Further, tariff shall progressively reflect cost of supply of electricity and interests of consumers shall be safeguarded and at the same time consumers shall pay for the use of electricity in a reasonable manner based on the average

cost of supply of energy. While determining the tariff under the Act State Commission shall not show undue preference to any consumers except according to consumers load factor, power factor, total consumption of energy during any period of time, etc., Section 29(5) provides that if the State Government requires to provide subsidy to any consumer or class of consumers in the tariff determined by the State Commission, the State government shall pay the subsidy in the manner the State Commission may direct. According to the appellant, as per this section, subsidy and cross subsidy have to be treated separately and the burden of providing subsidy should not be loaded solely on to other consumer categories and the cross subsidy absolutely cannot be increased. The appellant further stated that the act of the Board by increasing the tariff by 50 paise is a clear instance of increasing cross subsidy level, which is against the letter and spirit of section 29 of ERC Act. The appellant has also made a presentation on their estimation of cost of supply based on embedded cost from the information received from KSEB. According to the appellant, the cost of supply is Rs.1.71/kWh for EHT categories. Hence, tariff should be redetermined on this basis. Further, the 50paise increase effected by KSEB in 2002 was completely arbitrary as it is evident from the fact that there was no other tariff revision for the HT-EHT category till now. Appellant requested the tariff be based on cost of service from the date on which the Commission came into existence.

6. The respondents representing the Workers Unions stated that more than 1000 people are directly employed in the company, which is the only source of their livelihood. Any decision against the company would lead to huge arrear of electricity bill, which may lead even to the closure of the Company. According to them, the Company had challenged the tariff increase of 50 paise/kwh effected by KSEB in October 2002. Considering the judgment of Hon. Supreme Court, the Commission should re-determine the tariff in accordance with section 29 of the ERC Act so as to ensure fairness. Further, they requested that by considering the repayment ability of the Company the arrear of electricity charges if any shall be adjusted in liberal installments with necessary moratorium on payment so that closure of the company is avoided.

7. The views of the Board with reference to the document submitted by M/s Binani Zinc Limited on 'determination of cost of supply for EHT category of consumers' was forwarded vide their letter dated 28-1-2009. According to the Board, on the question whether Hon. Supreme Court had directed to determine the cost of supply for the appellant as per ERC Act 1998, the apex Court has set aside the order of the Commission dated 30-4-2004 on account of the violation of natural justice in not providing opportunity to the Appellant for rebuttal of the documents supplied by the Board vide its letter dated 15-4-2004. Representing the Board the Chief Engineer (commercial & Tariff) stated that the Board had revised the tariff vide its notification dated 24-10-2002 based on section 49 and 59 of the Electricity (Supply) Act, 1948. Cost of supply was not a criterion for tariff determination under the provisions in that Act and KSEB has not made any cost of service study nor has relied on such materials for determination of tariff. Further he stated that the letter dated 15-4-2004 given to the Commission as per its direction provided the average cost of supply at generation, transmission and distribution end for the year 2002-03 was not relied on by the KSEB for revising the tariff during October 2002, since the Electricity (Supply) Act did not mandate determination of tariff based on cost of supply. With the support of the Apex Court judgment dated 19-3-2009, he argued that KSEB was not bound by the provisions of ERC Act, 1998 while determining tariff. He further argued that the apex court has not directed to re-determine the tariff or decide the matter as per letter dated 15-4-2004 of the Board. Since the Commission did not rely on that material, even if the appellant has any objections, it is of no significance. He even stated, SERC has no authority to re-determine the tariff which was framed by the Board under the statutory and plenary powers confirmed on it by the statute. With the help of para 15 of the apex Court order dated 21-4-2009, KSEB argued that the matter was remanded to the Commission for deciding afresh and the appellant and the Board would be at liberty to file any document in support of their case.
8. KSEB also raised objection during the hearing on 30-1-2009 that other than the appellant M/s Binani Zinc Limited and respondent KSEB, no one should be allowed to be heard at this stage. KSEB further requested that the document

submitted by the appellant on cost of service shall not be considered, and direction to be issued to the appellant to pay the outstanding dues since 1-10-2002 to 30-11-2007 based on the tariff determined by the Board.

Analysis of the Commission

9. The Commission heard the argument of the appellant M/s Binani Zinc and the respondents. The Appellant argued that upto the date of the constitution of the Commission there is no dispute on the authority on the determination of tariff. However, after it came into existence, the Commission should have redetermined the tariff as per section 29 of the ERC Act. The appellant also pointed out the observation in the Apex court order on 21-4-2009. According to the appellant the tariff as per the provisions of the ERC Act should be based on the cost of service and as per their calculations it is Rs.1.71/kWh. The respondent Board however, maintained that it had the necessary jurisdiction to determine the tariff before the Commission came into existence as had been held by the Hon. Supreme Court. Hence, the Board argued that retrospective re-determination of tariff by the Commission as per the ERC Act is not required at all. This view, however, was not challenged by the Appellant in any manner. The appellant rather raised the contention that the Commission should have re-determined the tariff as per the principles laid down under Section 29 of ERC Act. However, the respondent Board did not address this issue specifically, but maintained that tariff revision was in accordance with law and no redetermination was required. According to the appellant cross subsidy is to be reduced as per ERC Act and cross subsidy is to be measured in relation to the cost imposed on the system ie., based on Cost of service. Thus, the tariff determined by the Board is arbitrary and not based on efficient costs. The other respondent, the Workers Union also pleaded to determine the tariff as per section 29 of the ERC Act and requested that in the event of adverse order, it shall not lead to a situation of closure of the company since, more than 1000 people are working in the company. Regarding the objection raised by KSEB making the unions a party in the matter, the Commission took the view that the objection was raised too late and cannot be accepted. KSEB and the appellant did not raise any objection when the Commission sought the opinion of the Board and the appellant during the hearing held on 11-1-2010 before making them a party. Based on the submissions of the

parties in the matter, the Commission is of the view that following issues are to be addressed in the matter.

- a. Whether the Commission should re-determine the tariff as per section 29 of the Act as soon as it came into existence ?
- b. Whether tariff should have been determined based on cost of service for EHT categories as per ERC Act 1998.

10. Regarding first issue, the order dated 30-4-2004 of the Commission which was remanded back to the Commission by the Hon. Supreme Court, emanates from the Order of the Hon. High Court of Kerala since the appellants had approached the Kerala High Court. Hon. High Court while allowing the appellants to approach the Commission also observed that the Commission will be entitled to examine as to whether or not revision of tariff conforms to the parameters laid down by Section 29 of the ERC Act, 1998. Further Hon. Supreme Court in its order dated 24-4-2009, para 6 also held the view that the representation had to be disposed of by considering whether the tariff revision was in conformity with section 29 and other provisions of the Act. In this premise, it is essential to examine the provisions of ERC Act 1998 regarding determination of tariff. The provisions are reproduced below:

Section 22. Functions of State Commission (1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely: -

- (a) to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in section 29;*
- (b) to determine the tariff payable for the use of transmission facilities in the manner provided in section 29;*
- (c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;*
- (d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act.*

11. As per Section 22, the Commission is vested with the powers of determination of tariff for electricity in accordance with provisions of Section 29. Section 29 is as follows:

- Section 29. Determination of tariff by State Commission: (1) Notwithstanding anything contained in any other law, the tariff for intra-State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the "tariff"), shall be subject to the provisions of this Act and the tariff shall be determined by the State Commission of the State in accordance with the provisions of this Act.*
- (2) The State Commission shall determine by regulations the terms and conditions for the fixation of tariff, and in doing so, shall be guided by the following, namely:-*
- (a) the principles and their applications provided in section 46, 57 and 57A of the Electricity (Supply) Act, 1948 (54 of 1948) and the Sixth Schedule thereto:*
 - (b) In the case of the Board or its successor entities, the principles under section 59 of the Electricity (Supply) Act, 1948(54 of 1948)*
 - (c) that the tariff progressively reflects the cost of supply of electricity at an adequate and improving level of efficiency.*
 - (d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments, and other matters which the State Commission considers appropriate for the purposes of this Act;*
 - (e) the interests of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy.*
 - (f) the electricity generation, transmission, distribution and supply are conducted on commercial principles.*
 - (g) national power plans formulated by the Central Government.*
- (3) The State Commission, while determining the tariff under this Act, shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, total consumption of energy during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.*
- (4) The holder of each licence and other persons including the Board or its successor body authorised to transmit, sell, distribute or supply electricity wholesale, bulk or retail, in the State shall observe the methodologies and procedures specified by the State Commission from time to time in calculating the expected revenue from charges which he is permitted to recover and in determining tariffs to collect those revenues*
- (5) If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under this section, the State Government shall pay the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the license or any other person concerned to implement the subsidy provided for by the State Government.*
- (6) Notwithstanding anything contained in section 57A and 57B of the Electricity (Supply) Act, 1948(54 of 1948) no rating committee shall be constituted after the*

date of commencement of this Act and the Commission shall secure that the licensees comply with the provisions of their licence regarding the charges for the sale of electricity both wholesale and retail and for connections and use of their assets of systems in accordance with the provisions of this Act.

12. As per section 29(2), the Commission shall determine the terms and conditions for determination of tariff considering the principles under section 59 of the Electricity (Supply) Act, 1948. Further, it provides that tariff shall progressively reflect the cost of supply of electricity at an adequate and improving levels of efficiency. Further, section 29(2)(e) provides that consumers' interest has to be protected at the same time the consumers should pay for the use of electricity based on the average cost of supply. The appellant could not point out any provision which stipulated that the Commission should take up re-determination of tariff as soon as it came into existence. Further, the provision of the Act says that tariff shall progressively reflect cost of supply, but it does not provide that there shall be no cross subsidy in the tariff. On the other hand, as per Section 29(2)(e), the consumers' shall pay for the use of electricity in a reasonable manner based on average cost of supply. Thus, though the tariff is required to reflect progressive reduction in cross subsidy, the consumers have to pay based on average cost of supply.

13. It is pertinent to examine the argument of the petitioner that tariff revision effected in 2002 was enormous such that there was no change in tariff till 2007. However, the facts are on the contrary. The Commission which came into existence in November 2002 initiated the proceedings for determination of ARR&ERC of the Board. KSEB filed the first ARR &ERC in the year 2003. The Commission after following the due procedure, issued an order on 31-12-2003 fixing the revenue gap as Rs.556 crore. On the request of KSEB, the Government of Kerala vide letter No. 9714/A1/03/PD dated 11.12.2003 concurred with the proposal of KSEB for payment of subsidy of Rs.375 crore and adjustment of duty as requested by KSEB totalling about Rs.556 crore to avoid an immediate tariff revision. Hence the tariff was not revised because of payment of subsidy by the Government. Further in 2004-05 also, the Commission fixed the revenue gap as Rs.296 Crore, which was to be filled up through adjustment of duty to the tune of Rs.200 Crore

and Rs.96 crore was suggested to be filled up through subsidy from the Government to avoid an immediate tariff revision.

14. As per the observation of the Hon. Supreme Court in the Order dated 19-3-2009 (para 30) the Commission cannot determine tariff with retrospective effect so as to cover a period before its constitution. Hence, as the appellant argued, Commission is not in a position to revise the tariff considering the accounts for the period 2002-03. It is not binding that Commission should evaluate the costs before the period of its constitution.

15. As pointed out in the para above, after the Commission came into existence in November 2002, the KSEB submitted the ARR&ERC for 2003-04 in August 2003 being the first in the State. After following the due procedures and considering various materials filed before the Commission, the order on ARR & ERC for the year 2003-04 was issued on December 31, 2003. As per the provisions of ERC Act, the Commission shall determine tariff in line with section 59 of the Electricity (Supply) Act, 1948. Section 59 of the Electricity (Supply) Act, 1948 is as follows:

Section 59: General principles of Board's Finance. (1) The Board shall after taking credit for any subvention from the State Government under Section 63, carry on its operations under this Act and adjust its tariff so as to ensure that total revenue in any year of account shall, after meeting all expenses properly chargeable to revenues, including operating, maintenance and management expenses, taxes (if any) on income and profits, depreciation and interest payable on all debentures, bonds and loans, leave such surplus as is not less than three percent or such higher percentage, as the State Government may by notification in the Official gazette, specify in this behalf of the value of fixed assets of the Board in service at the beginning of such year. "

16. The Commission after having considered these provisions, approved an ARR of Rs.3697.83 crore and a total Expected Revenue from Charges of Rs.3141.37 crore for the year 2003-04 as against Rs.3850.31 crore and Rs.2924.23 crore projected respectively by the KSEB. The revenue gap of Rs.556.46 crore arising out of the above estimates was proposed to be met from the concessions and subsidy from the Government of Kerala. The Commission also directed to adjust

the duty Rs.182.56 crore, budget provision for subsidy Rs.175 crore and additional cash subsidy from the Government of Rs.200 Crore. Thus, the Commission allowed 3% return on Net Fixed Assets as provided under Section 59 of ESA, 1948 after considering the subvention from the Government of Kerala. Based on this, the Commission approved the continuance of the existing tariffs decided in 2002-03.

17. The provisions of Electricity (Supply) Act, 1948 and ERC Act 1998, do not prescribe that tariff determination has to be based on cost of service. On the contrary, it provides that the consumers should pay for the use of electricity on average cost of supply. Further it does not also provide that cross subsidy is to be determined based on cost of service. Regarding presence of cross subsidy, full bench of Hon. APTEL has taken a considered view in a group of appeals M/s. Siel Ltd. Vs. Punjab State Electricity Regulatory Commission & Ors. (Appeal No. 4 of 2005), PHD Chamber of Commerce & Industry vs. State of Punjab through Secretary-Power, Punjab Civil Secretariat & Ors. (Appeal No. 13 of 2005, Punjab State Electricity Board vs. Punjab State Electricity Regulatory Commission & Ors. (Appeal No. 55 of 2005) etc., that cross-subsidy between the consumers has to be tolerated for some time and it has to be reduced step by step and by degrees. In this regard, APTEL held as follows:

“While keeping in view, this perspective, the poor of the country cannot be forgotten. Poorer sections of society have to be pulled up from life of deprivation and they shall not be denied access to electricity on the ground that they cannot afford the same. For some time in our democratic set up, some sections need socio-economic support and the support wholly and solely cannot come from the Government alone in the form of subsidy. The well to do sections of the society need to contribute for making electricity available to the poor and certain other weak sectors. This can be achieved either by the method of cross subsidization or by imposition of electricity duty by the State.

The cross subsidies have to be brought down by degrees without giving tariff shock to the consumers. Though it is desirable that cross subsidies are reduced through every tariff order but in a given situation, it may not be possible. As long as cross subsidy is not increased and there is a roadmap for its gradual reduction in consonance with Section 61(g) of the Act of 2003 and the National Tariff Policy, the determination of tariff by the Commission on account of existence of cross subsidy in the tariff can not be flawed”.

18. Further to this, Tariff Policy issued by Government of India, recognized the difficulties in total elimination of cross subsidy and the resultant tariff shock to the consumers. As per the Tariff Policy, tariff has to be adjusted in such a way that it should be +/- 20% of the average cost of supply. Hence, for determining the tariff average cost of supply is benchmarked. It is also pertinent to note that the Parliament amended the Electricity Act, 2003 to exclude the provision of elimination of cross subsidy by realizing the need for existence of cross subsidy. All the above, clearly provides for existence of cross subsidy in the tariff.

19. Based on the above observations, it is useful to compare the average tariff paid by the EHT category (110 kV) to which the appellant belongs and the average cost of supply during past years based on the approved ARR&ERC of the Board. Average cost of supply is used since as per the provision of ERC Act 1998 tariff of consumers is to be based on average cost of supply.

Order Years	Gross ARR (Rs.Crore)	Non-Tariff Income (Rs.Crore)	Net ARR (Rs.Crore)	Sales* (MU)	Average Cost of supply (Rs./kWh)	Average Realisation of EHT(110kV) (Rs./kWh)	Cross subsidy levels % (Rs.Crore)
1	2	3	4	5	6=4/(5*10)	7	8=(7-6)/6*100
2003-04	3697.8	240.37	3457.5	9080	3.81	3.53	-7%
2004-05	3492.5	231.18	3261.3	9300	3.51	3.52	0%

*Internal sales ie., sales within Kerala

The above table shows that in 2003-04, EHT category in fact was subsidized (to the tune of 7%) based on the average cost of supply. Further the cross subsidy levels based on average cost of supply cannot be said to be excessive. The appellant argued that cost of service of EHT category is Rs.1.71/kWh based on the accounts of the Board for the year 2002-03. However, Board did not respond to the estimation of the appellant. Further, the appellant also did not make any comment on the letter dated 15-4-2004 of the Board, but produced a separate estimate based on Cost of Service. According to the Commission, as per ERC Act, consumers have to be charged based on average cost of supply; hence comparison based on average cost of supply is more pertinent than cost of service, which is presented in the above table. Hence even by the provisions of Section 29 of the ERC Act, the tariff allowed by the Commission in 2003-04 and in 2004-05 is perfectly in order and thus the arguments of the appellant cannot be sustained.

20. The Board in its objections has argued that the appellant should be directed to pay the dues from October 2002 to November 2007. As per the decision of the Hon. Supreme Court, the order dated 13-4-2006 shall continue till the Regulatory Commission disposes of the matter. Hence, the appellant has to pay the dues of electricity charges as above. The appellant informed that dues payable was the difference between tariff which existed prior to October 2002 revision and the revised tariff as per October 2002 order. The Board shall raise the additional bill based on the tariff applicable to the appellant. Considering the pleadings of the Workers Union and the well being of an old industrial unit, as per the provisions of clause 22(8) of Kerala Electricity Supply Code, Board shall offer necessary instalment facility to the appellant if they make a request in this regard. The Board may decide the number of instalments so as to reduce the difficulty in payment of arrears as provided in the Kerala Electricity Supply Code.

Orders of the Commission

21. After considering the matter which was remanded to the Commission by the Hon. Supreme Court for fresh determination, subsequent oral and written submissions of the appellant, written and oral responses of the respondents, the provisions of Section 29 of the ERC Act 1998 and the observations made above, the Commission is of the considered view that the petition filed by M/s Binani Zinc Limited is devoid of merits and is to be dismissed. The appellant shall pay the dues as per the tariff effective from October 2002. Upon the request of the appellant, the Board shall provide necessary instalments as per the provisions of the Kerala Electricity Supply Code, 2005 to enable the appellant to remit the dues without hardship. The petition is disposed of. Ordered accordingly.

Sd/-

M.P.Aiyappan
Member

Sd/-

C. Abdulla
Member

Sd/-

K.J. Mathew
Chairman

Approved for Issue

Sd/-

Secretary