

Introduction to Law on Electricity
Professor Uday Shankar
Rajiv Gandhi School of Intellectual Property Law
Indian Institute of Technology Kharagpur
Lecture 21
Open Access (Contd.)

Welcome to all of you again. In the last session, we have read about the different regulations, which have come into place to facilitate open access that how the heart and soul of the Electricity Act of 2003 has been translated into action with the help of those regulations.

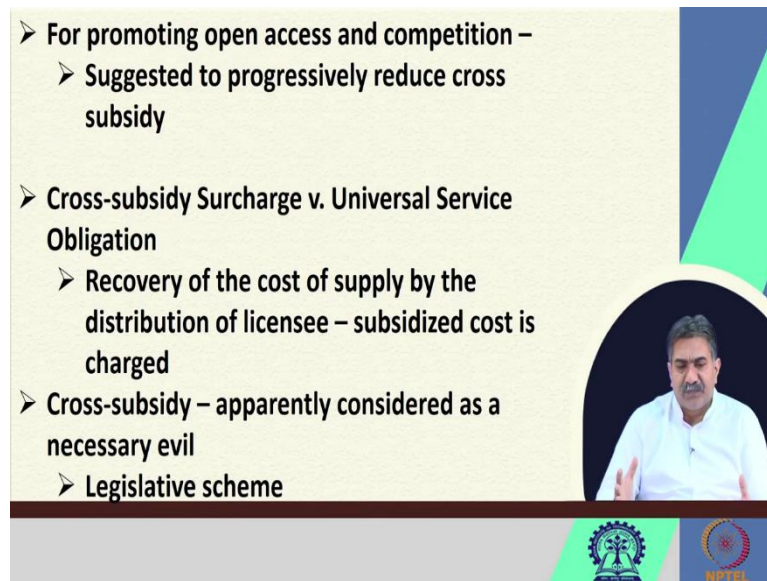
(Refer Slide Time: 00:42)



Now in today's session, we will understand how this open access will be addressing the issue of cross-subsidy. We have learned that open access, on the one hand, refers to competitiveness, it refers to freedom in procurement of the electricity, it refers to choice to the consumer and on the other hand, the price fixation, the tariff which is to be charged from the customer differs from the cost with respect to customers.

So, cross-subsidy, considering the demographic pattern of this country, considering the agrarian economy of this country, appears to be a sort of requirement, something which is not to be discounted, something which is not to be dispensed without really bringing in, without really getting into a sort of getting into concrete thought process that what shall be the effect. So, this is what we would try to understand in this session.

(Refer Slide Time: 02:22)



- For promoting open access and competition –
 - Suggested to progressively reduce cross subsidy
- Cross-subsidy Surcharge v. Universal Service Obligation
 - Recovery of the cost of supply by the distribution of licensee – subsidized cost is charged
- Cross-subsidy – apparently considered as a necessary evil
 - Legislative scheme

If you look at the scheme of the law, if you look at the overall the transformational aspect which has been brought under the Electricity Act 2003, you would find that, on the one hand, when it was suggested that let the market be open. Then it was also suggested that in order to take the optimal benefit from that open market, the cross-subsidy should be reduced progressively.

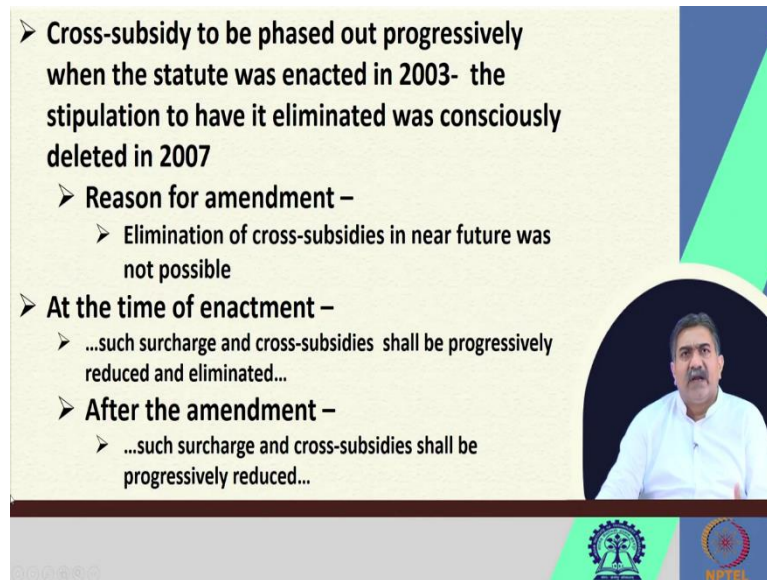
When you read the term progressive reduction, it certainly brings in the idea that the lawmaker has not thought of leaving the marginalized section of the society in lurch. They have not decided to decide on the supply of electricity based on ability to pay alone. So, that is not what is the driving factor and why this is so, because when you look at the obligation, which has been entrusted upon the distribution licensee, which we have discussed in detail that you have an obligation to supply electricity and within a stipulated time what we call it as a universal service obligation, wherein impliedly it has been stated that not only the supply of electricity shall happen within a stipulated time, but also it should be seen that it is a supply of reliable and quality electricity.

Now, with the open access, there is a possibility of the big consumers switching over to the market, and in that regard, it has been suggested that there shall be an imposition of cross subsidy surcharge from the consumers who were supposed to get the electricity from distribution licensee, but then in their own interest, they decided to switch over.

So, when you look at the arrangement, you would find that cross subsidy appears to be a necessary. It is something which has to be there, which has to be there for very purpose that

electricity is to be supplied to all needy, to all. But at the same time, undue burdening should not be there on the large consumers. Undue burdening in terms of paying the cost on behalf of others. So, then you would find that this is what is a sort of necessary will, and that is what even the law talks about it.

(Refer Slide Time: 06:01)



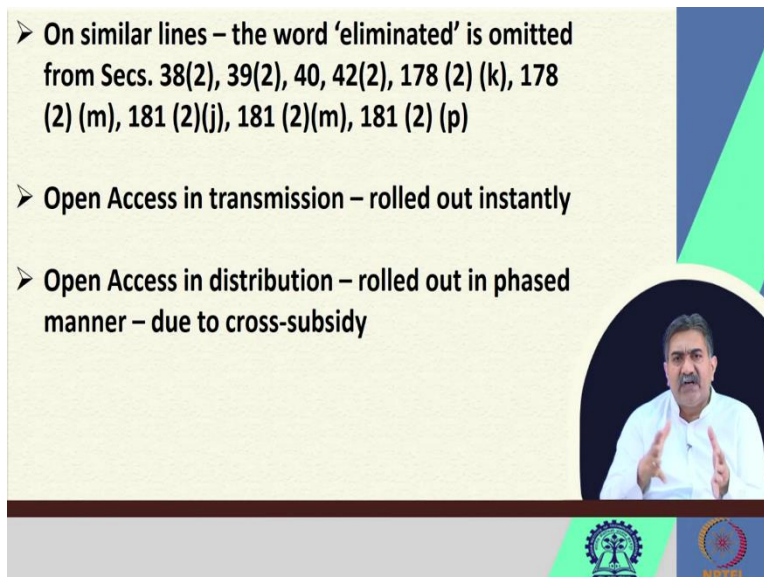
- **Cross-subsidy to be phased out progressively when the statute was enacted in 2003- the stipulation to have it eliminated was consciously deleted in 2007**
 - **Reason for amendment –**
 - Elimination of cross-subsidies in near future was not possible
 - **At the time of enactment –**
 - ...such surcharge and cross-subsidies shall be progressively reduced and eliminated...
 - **After the amendment –**
 - ...such surcharge and cross-subsidies shall be progressively reduced...

Now, when you look at the way, cross-subsidy has been discussed in the Act, you would find that initially, it was categorically suggested to eliminate cross-subsidy that there shall be no cross-subsidy as the time progresses, and it was suggested that it should be a mandate for the commission to follow.

It should be the mandate for all the players to follow, but then we have studied that electricity falls in the concurrent list and state and the center both, they have a responsibility to govern the sector. And any reference of elimination of cross-subsidy certainly would be bringing heavy cost on political premium because the large population is not in a position to pay the actual cost of the supply of electricity. And on the other hand, the distribution licensees are being asked to supply electricity under Section 43 of the Act. Because of the objections raised by the state governments because of the visible difficulty in eliminating cross-subsidy, the amendment was done, and this word “elimination” was dropped, this was removed from the 2003 Act.

(Refer Slide Time: 08:06)

- On similar lines – the word ‘eliminated’ is omitted from Secs. 38(2), 39(2), 40, 42(2), 178 (2) (k), 178 (2) (m), 181 (2)(j), 181 (2)(m), 181 (2) (p)
- Open Access in transmission – rolled out instantly
- Open Access in distribution – rolled out in phased manner – due to cross-subsidy



Therefore, you would find that the sections which deal with cross-subsidy; all those sections, you would find are now only referring to progressive reduction that over a period of time it should be reduced. And what shall be the timeline? It is all that when the electricity becomes very competitive. And only identified class of consumer need support from the government for getting the electricity, not the situation which is prevailing as on date where a large segment, a large class of consumers are looking forward for this support.

So, be it the provisions with regard to open access in the transmission segment, be it in the distribution related segment, be it the power of the commission to frame regulations. In all this, you would find that the reference of elimination was dropped. One would say that this is something where a kind of reconciliation was done.

Reconciliation was done between what ought to be achieved and what is feasible to achieve. If you make elimination as part of the legal mandate, then the commissions need to direct; commissions need to move to take the steps in that direction. Therefore, that would become a subject matter of legal scrutiny, i.e., if being done to get eliminated or not; if not, there is a violation of law.

So, this very amendment appears to be a reconciliation, reconciliation because of the need to extend the support to certain class of consumer and considering that it was decided to continue with cross-subsidy and parallelly to build a strategy to reduce it in a gradual manner. When it comes to open access, as we have studied; when it comes to transmission network, it was decided to roll out immediately.

So, that multi-buyer model can be given effect without any delay. But then, for distribution network, for distribution licensee, it was suggested to roll out in a phased manner. Thus, we have read that now with a large consumer having the requirement of more than 1 megawatt is entitled to get open access, but then the large consumer need to pay the cross-subsidy surcharge.

Now, why was this required to roll out in the phases? Because of the universal service obligation, that is what we need to understand. Because it is one set of consumer who is paying for the other set of consumer, and that is something which cannot be taken back and cannot be withdrawn instantly. Otherwise, the electricity would not be available to everyone.

(Refer Slide Time: 11:54)

➤ **Different methods to implement cross subsidy**

- **Category Wise**
 - some categories of consumers such as commercial, industrial, etc. pay more than the cost of supply to cover the shortfall in revenue from other categories of consumers such as domestic, agriculture
- **Intra Category**
 - occur within the same consumer category, where segmental tariff exists for different level of energy consumption – assumption – those who are falling in the higher level of consumption – capacity to pay
- **Geographical**
 - Different tariff for hilly or rural areas consumers – compare to urban areas

The slide features a video inset of a man in a white shirt speaking. At the bottom, there are logos for IIT Bombay and NPTEL.

Now when you look at cross-subsidy, you would find, there are different mechanisms to implement the same. One for India, you find that the category wise, cross-subsidy is very popular whereas, as I said, a particular set of consumers, they pay for other set of consumers and as we know in India, it is industrial and commercial consumers they pay for agricultural consumer and residential consumer.

The other is intra-category, where you divide the consumer on the basis of consumption pattern, and the one who has a higher consumption will be paying higher tariff, and a compensatory mechanism is to be devised to extend the support to the consumers who are consuming the electricity on a lesser scale.

So, this is another category, a third category which is the geographical one, where the consumers staying in hill areas, tough terrains, rural areas, they need to be supported by the one who is staying in urban areas. So, this is how you find that different methods of implementation of cross-subsidy is working, and for India, it is a category which plays a significant role in getting it implemented.

(Refer Slide Time: 13:45)

➤ **Effect of removal of cross subsidy –**

- May lead to food inflation – increase of household expenditure for meeting the electricity bill – especially in rural areas
- Political backlash – a considerable of number of consumers are falling in marginalised category
- Unpreparedness of the DISCOMS

Now, we are talking about the removal, and we are talking about the withdrawal, we are talking about the elimination of cross-subsidy, for the betterment of the power market and no denial that power market will flourish only when you have a situation where every customer, every consumer pays, as per the consumption and the cost of supply which is a kind of an ideal situation. But then, it is also to be taken note of that if you remove cross subsidy without planning, without strategy, then it would really make huge impact on inflation. One certainly is the prices of farm produce will go up because if the agriculturists are not getting electricity on a subsidized rate, accordingly, they will be increasing the price of farm produce.

Second is that; if a consumer has been asked to pay the cost as per the actual cost of supply then it would certainly cause dent in his pocket. Perhaps substantial earning would go in paying electricity bill. If you can recall, I have discussed this in first few classes that electricity is not to be seen as a commodity for leading a luxury life, and it has now become an important ingredient, important component of leading a meaningful life.

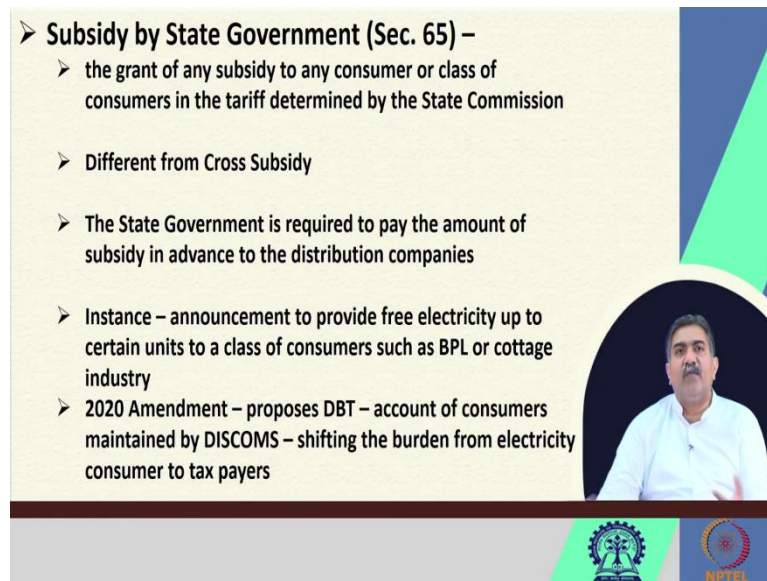
So, everyone would be going for electricity connection, and everyone would be aspiring to get 24 x 7 electricity connection. Therefore, they will have to pay, and if the very payment factor is disturbing the budget, it would certainly have an impact on the inflation. The other important one is political backlash.

A considerable number of the consumer who are getting the benefit of the subsidized rate, they belong to marginalized section, and when you look at the goal of economic development, it is not only about GDP, it is not only about industrialization, it is also about how the upgrading of living style is happening of the marginalized section and that upgrading in that; you would agree with me that electricity has a vital role to play.

So, what would happen to that and obviously, the government would not like to see, that marginalized section of the society is further pushed towards periphery. They would not like to see that, and in fact, that should be the concern for everyone because if growth is not influencing the life of everyone, if growth is not influencing the life of the last person who is standing in the queue, then there is some question to be raised with regard to the pattern of growth, some question is to be raised with regard to the policy which is driving that growth.

The other is the unpreparedness of DISCOMS. The infrastructural issues, the issue of universal service obligation that would also make an impact because cross-subsidy is helping the DISCOMS to supply the electricity to all the consumers who are there in the licensee's area of supply. So, is the distribution network equipped enough to facilitate open access? That is another important question. Is the relevant data being there to make the prices transparent and competitive? All these issues are also involved with removal.

(Refer Slide Time: 19:15)



➤ **Subsidy by State Government (Sec. 65) –**

- the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission
- Different from Cross Subsidy
- The State Government is required to pay the amount of subsidy in advance to the distribution companies
- Instance – announcement to provide free electricity up to certain units to a class of consumers such as BPL or cottage industry
- 2020 Amendment – proposes DBT – account of consumers maintained by DISCOMS – shifting the burden from electricity consumer to tax payers

The slide features a video inset of a man in a white shirt speaking. At the bottom, there are logos for IIT Bombay and NPTEL.

In this regard, when you talk about cross-subsidy, our attention goes to section 65 of the Act. This is a provision wherein a state government can extend subsidy, and this is different from the subsidy what we have been talking about under cross-subsidy, where it is one set of consumers is paying for another. Here it is not the consumer who is paying here, the state government is committing to pay, and that is what is different from cross-subsidy.

Where whatever tariff has been decided by the commission, the government decides on the grant of subsidy on that, whether it should be for person belonging to below poverty line or whether it is for promoting a particular trade. You have been listening, and you have been reading this news that the governments are promising free electricity to a certain set of consumer, free electricity or subsidized electricity to certain set of industries to promote industry. Now, this kind of announcements by the government gets necessary support from section 65. Somehow, when you look at what is being proposed in terms of bringing reform in the sector, you find that it is the direct benefit transfer which is working for other subsidies in India is being suggested for electricity sector as well, where you observe, where you find that 2020 proposed amendment suggests that; let there be instead of the cross-subsidy going to the distribution licensee and further reaching to the generating companies, it is better that let the actual cost we charge from the consumer and the subsidized rate, subsidized price should be transferred to the account of the beneficiaries.

This is what has been proposed and appears to be a good idea, but then you have to also consider that this is something which amounts to shifting of the whole responsibility. Earlier,

the responsibility or what is the system which prevails as on date, the responsibility is of the large consumers. Now this responsibility, you are shifting with this proposed amendment to the tax payers. How far it is feasible, is certainly an important question to investigate.

(Refer Slide Time: 22:24)

➤ **M/S Keshree Metalurgies Pvt. Ltd. v. Telangana Electricity Regulatory Commission (2019 – Telangana HC)**

- Petitioner using the distribution network through open access refuse to pay cross subsidy surcharge (CSS) – In the tariff order – CSS component was specifically mentioned.
- **Held:**
 - To access distribution network of a licensee the generator and consumer must pay wheeling charges and cross- subsidy surcharge until cross-subsidy surcharge is totally removed
 - By not paying CSS – there was undue enrichment to the Petitioner.

Now when you look at how the cross-subsidy component has worked, when you look at that what are the challenges on which this very legal provision has been discussed or deliberated, you find an important case which is decided by Telangana High Court. *M/S. Keshree Metalurgies Private Limited versus Telangana Electricity Regulatory Commission*, the decision of Telangana High Court in the year 2019.

Wherein what has happened is that the petitioner here, Keshree Metalurgies Private Limited was using the distribution network through open access but then refused to pay cross subsidy surcharge. On the very ground that whatever tariff determination has happened, the way, the commission has drafted the tariff determination, the cross-subsidy surcharge component is missing, and therefore, there is no need to pay. That is what was suggested.

Now when the matter has come before the court and why the high court, why matter has come before the high court, because of the very fact that legality of the order issued by the regulatory commission was challenged, that whether the regulatory commission was competent to issue such direction or not and if directions are being issued, whether it was arbitrary unlawful without having any backing of the legal provisions. That is what the high court can very well examine under Article 226 of the Constitution.

Now in this case, the high court very closely examined the rationale of cross-subsidy surcharge. The high court asked, why this very scheme of cross subsidy surcharge? why section 42 talks about it? What is the legal mandate under Section 42 subsection 2, Sec. 42 subsection 4 and it was suggested that the idea is that that when the distribution licensee is losing the customer and the customer which are high paid customers, customers who are paying the higher tariff to support others, then how the distribution licensee is going to maintain the universal service obligation?

So, the rationale of the law is very clear. That if the distribution licensee loses the consumer, loses the consumer where the consumer decides to avail open access, then the consumer is under an obligation to pay cross subsidy surcharge. And in this regard, it has been suggested that when the open access consumer is asking for facilities of distribution licensees, then that consumer has to pay cross-subsidy surcharge.

If the facilities are being availed and if cross subsidy surcharge is not being paid, then in that case, that customer is getting unduly enriched. Because he is not paying the charges to the distribution licensee because he is no more a consumer, and at the same time, he is getting also the benefit of being an open access consumer. So, the court says that this is not what the law intends, that there shall be undue enrichment to the one set of consumer, and on this premise, it was said that the consumer is under an obligation to pay cross-subsidy surcharge.

(Refer Slide Time: 27:11)

➤ **Damodar Valley Corporation v. Jharkhand Electricity Regulatory Commission (2021 – APTEL)**

- Jharkhand Government communicated to the Regulatory Commission to waive fix charges for three months to industrial consumer
- The Commission issued the order u/s 108 of the Act
- Appellant, Distribution Licensee, objected to the order that such direction be issued only in the form subsidy u/s 65
- **Held:**
 - Power to issue direction u/s 108 should be not contrary to the tariff order (fixed charges) issued by the Commission
 - In this case, the direction of the Commission was not in the interest of balancing the right of the licensee and the customer – blanket waiver with retrospective effect - harsh

The slide also features a circular inset image of a man in a white shirt speaking, and logos for NIALS and APTEL at the bottom.

Now this is another interesting case of tribunal which was decided in 2021. This case has arisen because of the relief which the state regulatory commission in the state of Jharkhand decided to extend to the industry. Industries approach the government that we need to get the necessary support because the electricity is not being sold because of shutdown, because of lockdown during COVID-19 and therefore revenue flow has stopped; the power plant is not operating as per the capacity and thus, some relief should be given.

Jharkhand government suggested the regulatory commission to come up with the plan. And regulatory commission on the basis of the petition submitted by the consumers to the government suggested under section 108 that let there be waiver of the fixed charges for 3 months. Now, the appellant here was a distribution licensee argued that the waiver is contrary to the tariff regulation determined by the commission. The licensee said that there is nothing called waiving off fixed charges.

There can be preponement or postponement, but waiving is beyond the competence because that is what is to be paid by the consumer, by the licensee to the distribution licensees, and in this case, waiver was decided.

So, the appellant argued that if the government wants to extend the support to the consumers, government can always invoke section 65 and grant the subsidy, and section 65 says that the payment of subsidy should be in advance to the licensee. It does not say that it has to be paid later on. It said it has to pay in advance. So, appellant said that let that arrangement be there and let the government bear the expense; there is no problem.

But if the commission passes an order under section 108 of the Act, which authorizes the commission to pass an order in public interest, then that order must be in compliance with the tariff regulation. It cannot be different from that. Therefore, in this case, when the tribunal examined, tribunal said that what is to be done is the balancing of interests.

You cannot only take care of the interest of the consumer; you have to also take care of the interest of the licensees and this blanket waiver for 3 months, and that, too, with the retrospective effect, was a harsh one. And in this case, it was so happened that appellant submitted this information to the tribunal that considerable number of consumers have already paid the fixed charges.

Now on the basis of this notification, on the basis of this invocation of section 108, now they will be also asking back the money, they will be asking for returning back that amount, and that would really be very harsh on the distribution licensees.

Considering this, the tribunal has said that it was wrong on the part of the commission to issue this direction under section 108 because the tariff formulation was being done, fixed charges are to be paid as per the tariff formulation, as per the fixation done by the regulatory commission and if at all section 65 could have been used by the state government for extending the support to the consumers. So, that is what is important to understand the open access cross-subsidy debate. Thank you for this session. Thank you for listening. Thank you.