

**BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA**

Case No. HERC/PRO – 76 of 2017

DATE OF HEARING : 23.10.2019

DATE OF ORDER : 17.12.2019

IN THE MATTER OF:

Appeal under Reg. 53 of the HERC (Terms and Conditions for grant of connectivity and open access for intra state transmission and distribution) Regulation, 2012 against the order dated 27th September, 2017 passed by the Coordination Committee, HVPNL, Panchkula.

Petitioner M/s. HIL Limited

Respondents 1. Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL)
2. HVPNL
3. SE/STU, The Coordination Committee for Open Access

Present On behalf of the Petitioner

1. Shri Gaurav Behl, Advocate

Present on behalf of the Respondents

1. Sh. Samir Malik, Advocate for DHBVNL
2. Shri Pushpendra Singh, XEN., HVPNL, Open Access & Commercial
3. Shri Pankaj Singhal, XEN., HVPNL, Open Access & Commercial
4. Shri Arun Kumar, Sr. A.O., DHBVNL, Open Access

QUORUM

Shri Pravindra Singh Chauhan, Member
Shri Naresh Sardana, Member

ORDER

1. This Petition has been filed by M/s. HIL Ltd (formerly known as HYDERABAD INDUSTRIES LIMITED), challenging the order, dated 27.09.2017, passed the Coordination Committee for Open Access, set up under the provisions of HERC (Terms & Conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 as amended from time to time (hereinafter referred to as “HERC OA Regulations”), holding that DHBVNL was right in rejecting the refund of Rs. 1,22,04,410/- to the Petitioner, on account of power drawn through open access, since the Petitioner had not complied with the conditions specified in Regulation

no. 42 & 45 of HERC OA Regulations and that it was mandatory for the consumer to submit to the distribution licensee a schedule of power required through open access to the licensee by 10.00 AM of the day preceding the day of transaction.

Brief Background of the Case

Succinctly the facts leading to the filing of present petition are that the petitioner had challenged the decision of DHBVNL, denying the refund of Rs. 1,22,04,410/- in respect of the electricity drawn through Open Access for certain dates in January, February, March, April, May and June, 2015 citing that the procedure of Open Access prescribed under Regulation 42 and 45 of HERC OA Regulations, 2012, laying down the condition of the prior intimation to DHBVNL of the power he intended to bring through Open Access, was not followed.

The Petitioner filed an appeal before the Coordination Committee for open access, HVPNL. The Coordination Committee, vide its order, dated 27.09.2017, decided as under:-

“The Committee after taking into consideration of the written submissions made by both the parties and arguments made by the ld. Counsels of the parties, the Committee finds that the following issues are to be decided:-

1. *Is it mandatory that the consumer shall submit to the distribution licensee a schedule of power required through open access to the Licensee by 10.00 AM of the day preceding the day of transaction?*

The Committee decides that reply to this issue is in affirmative in terms of the State Electricity Regulator (HERC) Regulation No 42 and 45 of the Haryana Electricity Regulatory Commission (Terms and Conditions for grant of connectivity and open access for intra-state transmission and distribution system) Regulations, 2012 (Regulation No. 25/HERC/2012 of dated 11th January, 2012. The HERC Regulations (1st Amendment) Regulations, 2013 under Para 2.4 additional conditions for Open Access for day ahead transactions stipulates this to be essential for the planning and managing the drawl of the licensee from the grid as also in the load control in a cost effective manner unless a confirmed schedule of power through open access tied up for the next day by the open access consumers is made available to them (Distribution Licensee) sufficiently in

advance. The total quantum of open access power for the next day i.e. for 00.00 hrs to 24.00 hrs of the following day, against day ahead transactions is known by the distribution licensee only between 5.00 PM to 6.00 PM of the previous day. Thereafter the Licensee has no time and is not in a position to take any corrective measures to affect alternations in its own schedule for surrendering any surplus power or for arranging more power in case of any shortfall as by that time distribution licensee on bids/schedules for energy drawl would have been approved by the power exchange/RLDC. The result is that they invariably are forced to under draw/overdraw or impose avoidable power cuts leading to financial losses and consequent additional burden for other consumers of the State due to actions of the open access consumers. That it would not be fair and justifiable if any losses of the licensee on account of energy transaction by open access consumer get passed on directly or indirectly to other consumer of the State. The Commission, after careful consideration of these aspects, has prescribed certain additional conditions for grant of open access and the foremost among these additional conditions is that for day ahead transactions, the open access consumers shall submit a confirmed slot wise schedule of power through open access and from the licensee for the next day at 10.00 hrs of the previous day to the licensee and SLDC. In case there are any reductions in consumers open access schedule when it is finally accepted/cleared by the power exchange the consumer would be required to manage his drawl from the licensee as also his total drawl accordingly. In case he exceeds his admissible drawl in any time slot, penalty will be leviable. The Principle that has been based upon to arrive at these conclusions is simple i.e. in case a consumer wants to avail the benefit of cheaper power, he should also be ready to face the associated risks thereon if any.

This is also substantiated from the fact that in case of under drawl of power by an open access consumer due to reasons attributable to him and within his control shall be compensated only to the extent of 10% of the entitled drawl in a time slot or up to 5% of the entitled drawl on aggregate basis for all the 96 time slots in a day and no compensation shall be payable by the distribution licensee for under drawl beyond these limits.

This speaks of the importance of the discipline on the part of the open access consumers with an overall aim to maintain the grid security, discipline and also to save the distribution licensee from the losses on account of un-planned purchase of power, sale of surplus power at UI rates thereby burdening the consumers of the State as the power purchase expenses of the distribution licensee is a pass-through expense in the ARR as per HERC MYT Regulations, 2012.

2. Has the consumer done the same?

The committee decides the reply to this issue in negative. The consumer has not complied with the condition of the prior intimation to the distribution licensee (DHBVN) of the power he intended to bring through open access as also admitted by the consumer in his petition and mentioned in the aforementioned paragraphs at the relevant places.

3. If a schedule was not informed by the consumer what loss has been caused to the licensee or what gain has been made by the consumer

This aspect has been dealt with in detail under issue no. 1 above. The committee also agrees with the contention of the distribution licensee that the exact calculation of the losses attributable to non-intimation of open access power by a particular consumer and resultant Profit and Loss for sale of equivalent power through the exchange/UI cannot be worked out owing to complexities and pooling of power in the grid.

4. Whether the mandatory conditions of prior intimation by the consumer has been waived off by the respondent Nigam.

After considering all the facts on the record the opinion of this Committee is negative on this issue.

5. Whether the respondent Nigam has the authority to point out the recovery at a later stage.

The Committee is of the opinion that the respondent Nigam in terms of section 56 of the Electricity Act, 2003, is within its rights to overhaul the consumer accounts for a period of two years after pointing out the short assessment by its internal audit wing or otherwise. However, the respondent Nigam (DHBVNL) needs to ensure that only the amount that was refunded/adjusted to the open access consumer in the first instance, be charged from them without any surcharge/interest thereon from the

date of refund/adjustment to the date when the amount was again charged to the consumer.

In view of the above, the Committee disallows the petition of the consumer on the ground aforementioned. No costs on either side.”

2. Aggrieved with the order of the Coordination Committee, the Appellant has filed by the present appeal before this Commission challenging the impugned order on the following grounds:-
 - a) That the ABT meter readings had also been provided from time to time. Only after reconciliation of the readings through ABT meter the bills were to be generated for the total Electricity consumed by the Petitioner. However, the Petitioner has been prejudiced by being forced to pay twice over for the same electricity consumed, one payment to the DHBVN and another to PTC (open access), which was never the intent of the legislature or of the Commission before amending the Regulations. DHBVN being a government agency cannot draw the benefit of unjust enrichment by taking benefit of monopolistic situation.
 - b) That the Petitioner has meticulously observed and followed the schedule prescribed as per the regulations of the HERC and has intimated the Respondent through emails well before time about the schedule for availing Open Access for each day.
 - c) That the Coordination Committee failed to appreciate that the provision of Regulation 42, are only directory and not mandatory in nature. It is respectfully stated that neither the Act nor the Regulation provide for any consequences or for any penalty in case the amended Regulation 42 with respect to day ahead transaction is not followed. Although Regulation 42 uses the word “shall”, but, the same is to be read as “May” since the direction in absence of any consequences or any penalty shall tantamount to being considered as directory in nature and not mandatory. Hence, the Respondents have no right to withhold the money of the Petitioner for not serving them with an email by 10 am and is arbitrary in nature.
 - d) That the Petitioner filed the Complaint before the Coordination committee, vide case no. 2/STU/CC/2017 with the similar prayers.

- e) However, the Coordination committee dismissed the Complaint of the complainant without assigning any just and proper reasons and passed the order in a mechanical manner and only reiterated the objects and reasons which lead to the amendment of Regulation 42. However, the legal arguments have not been even considered or adjudicated by the Coordination Committee and have passed the Impugned Order.
- f) That the Respondent is the distribution licensee providing electricity through open access to the Southern region of Haryana. It is further submitted that Power Trading Corporation, (hereinafter mentioned as PTC) is providing electricity through open access.
- g) That the Petitioner has got electricity connection bearing K No. F33-HYHT, A/C No. 7102301000, for a contracted power of 2800 KVA with a sanctioned load of 7296 KW under S/U Balbagarh sub division, Faridabad.
- h) That the Petitioner is consumer of the Respondent with the following particulars:-

Name of the Consumer	K. NO.	A/C NUMBER
Hydrabad AsbetsLtd	F33- HYHT	7102301000

- i) That the Petitioner is duly permitted by M/s. Haryana Vidyut Prasaran Nigam Ltd (HVPNL), issuing “no – objection” to seek and avail open access through PTC in accordance with the applicable regulations of HERC.
- j) That in terms of the HERC in order to avail electricity through Open Access the Consumer is required to place their bids for the supply of Electricity by 10 am of the day preceding the day of the transaction and this will be considered as confirmed schedule for working out the admissible drawl of the Consumer for the next day.
- k) That the Petitioner has meticulously observed and followed the schedule prescribed as per the regulations of the HERC and has intimated the Respondent through emails well before time about the schedule for availing Open Access for each day.
- l) That none of the emails sent by the Petitioner to the Respondents ever bounced back or failed due to delivery failure notice through any of the email service providers. The information to PTC had been sent through

the PTC portal during the said period also. The Petitioner had been issuing appropriate intimation both to PTC and DHBVN. The Petitioner had received the refund order in March 2016 when the Bill dated 23rd March, 2016 was generated and reflected an amount Rs. 1,58,02,574/- as refundable for the period April 2015 to November 2015. However, for certain dates of January, February, March, April, May and June, 2015 no amount was refunded. It is submitted that for the dates in January, February, March, April, May and June, 2015 an amount Rs. 1,22,04,410/- is to be refunded towards the electricity drawn through Open Access. The dates when the Electricity had been purchased, due intimation was provided to PTC portal and bills were accordingly generated by reading through the ABT meter. The dates for which the amount to be refunded is as under:

Date	Units Bid
01.01.2015	26400
02.01.2015	26400
19.01.2015	16800
11.02.2015	26400
16.02.2015	26400
02.03.2015	26400
07.03.2015	9800
13.03.2015	26400
16.03.2015	26400
17.03.2015	26400
18.03.2015	26400
20.03.2015	26400
21.03.2015	26400
22.03.2015	8800
23.03.2015	8800
26.03.2015	26400
28.03.2015	26400
08.04.2015	26400
09.04.2015	26400
10.04.2015	26400
11.04.2015	26400
12.04.2015	26400
13.04.2015	26400
14.04.2015	26400
15.04.2015	26400
16.04.2015	26400
17.04.2015	26400
18.04.2015	26400
19.04.2015	26400
20.04.2015	26400

21.04.2015	26400
22.04.2015	26400
26.04.2015	26400
27.04.2015	26400
28.04.2015	26400
29.04.2015	26400
30.04.2015	26400
01.05.2015	26400
02.05.2015	26400
03.05.2015	26400
04.05.2015	26400
05.05.2015	26400
06.05.2015	26400
07.05.2015	20400
08.05.2015	26400
09.05.2015	20400
10.05.2015	26400
11.05.2015	26400
12.05.2015	26400
13.05.2015	26400
14.05.2015	26400
15.05.2015	26400
16.05.2015	26400
17.05.2015	26400
18.05.2015	26400
19.05.2015	26400
21.05.2015	26400
23.05.2015	26400
24.05.2015	26400
25.05.2015	26400
26.05.2015	0
27.05.2015	0
28.05.2015	0
29.05.2015	26400
30.05.2015	26400
31.05.2015	26400
01.06.2015	26400
02.06.2015	26400
03.06.2015	26400
04.06.2015	26400
05.06.2015	19200
06.06.2015	26400
TOTAL	1741000

	Particulars	Rate	Amount
	Energy Charges	6.15	1,07,07,150
Add:-	Fuel Surcharge	1.64	28,55,240
Add:-	Electricity Duty	0.1	1,74,100
Add:-	Municipal Taxes	0.05	87,050
Less:-	Cross Subsidy	0.93	16,19,130

		G TOTAL	1,22,04,410
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- m) That PTC receives its money in advance for the supply of Electricity. Further it is stated that readings from the ABT meter installed at the Factory are taken and bills are issued from PTC and the Haryana Government. It is submitted further that copy of the ABT meter recorded readings are sent to the DHBVN for the refund of the amount.
- n) That DHBVN has failed to refund/ reimburse the amount of the bills submitted. A letter dated 03rd February, 2017 was also sent to Chief Engineer Commercial, DHBVN Ltd. seeking the reasons for the non refund of Rs. 1,22,04,410/-. However, the Respondent in an arbitrary manner has failed to even respond to the Petitioner and thereby forcing the Petitioner to approach the Coordination Committee.
- o) That Coordination Committee has erroneously and for no justifiable reason denied the Petitioner the refund of Rs. 1,22,04,410/-.
- p) That the Respondents cannot be allowed to gain on the ground of unjust enrichment. It is stated that the DHBVN has charged the Appellant twice over for the consumption of same amount of Electricity. It is stated that the consumption of electricity drawn from open access and from the distribution licensee had been the same and there was no increase in the same. The Petitioner has already paid the amount for the consumption of the electricity consumed through open access.
- q) That any act of the DHBVN which prejudices the right of the Appellant is not only arbitrary but also misuse of the statutory authority. DHBVN being an instrumentality of state is under an obligation to perform its duties as per the provisions of the statute. In absence of any power under the Act or regulation, the act of DHBVN to not refund is wrong, arbitrary and without authority/power.
3. On the basis of above grounds, the appellant has prayed as under:-
- Allow the appeal;
 - Set aside the order dated 27th September, 2017;
 - Direct the Respondent to refund the amount of Rs. 1,22,04,410 (Rupees One Crore Twenty Two Lacs Four Thousand Four Hundred and Ten Only) along with applicable interest @18%p.a. from the date

- the amount became due and payable by the Respondent to the Appellant;
- d) Direct the Respondent to pay administrative cost of Rs. 1,00,000/- to the Appellant;
 - e) Direct the Respondent to pay legal fees of Rs. 1,00,000/- to the Compliant;
 - f) Any other relief which Forum deems fit and proper in the facts and circumstances of this case.

Proceedings in the Case

4. The case was first heard on 13th December, 2018. However, the case was adjourned and next hearing was held on 02.04.2019 wherein Shri Gaurav Behl appearing for the Petitioner argued at length against the order passed by the Coordination Committee. The Petitioner argued vehemently that the information regarding the drawl of energy by the Petitioner through open access was given as per the provisions of Regulations in vogue, however, the same was not received by the Respondents. The learned counsel argued that it is arbitrary action on the part of the Respondent to force a consumer to pay an amount twice on account for mere procedural irregularity, which has been duly waived by the Respondent by its inaction and even otherwise has not caused any loss to the Respondent. The Petitioner further argued that in absence of enabling provisions in the HERC Open Access Regulations, the requirement imposed upon the Open Access Consumer to intimate day ahead schedule, should be read as “May” instead of “Shall”, being directive in nature and not mandatory.
5. After hearing the Id. Counsel for the appellant, this Commission enquired about the possibility of ascertaining the loss incurred by the Respondent on account of non intimation of schedule by the petitioner as per the prescribed procedure. The Id. counsel for the respondent pointed out that this issue was also examined by the Coordination Committee and in its order, and the Committee has observed that *“the exact calculation of the losses attributable to non-intimation of open access by a particular consumer and resultant profit and loss for sale of equivalent*

power through exchange / UI cannot be worked out owing to the complexities and pooling of power in the grid”

6. In response to the Interim Orders of the Commission, DHBVN filed its reply pleading therein as under:-
- a) That the appeal filed by M/s HIL Ltd (“Appellant”) is devoid of merits.
 - b) That the Ld. Coordination Committee has rightly rejected, the Appellant’s prayer regarding refund of Rs. 1,22,04,410/- towards electricity drawn through open access for the months of January, 2015 to June, 2015.
 - c) The Petitioner, during the disputed period, had failed to provide the information to the Respondent as required under Regulation 42 of HERC OA Regulations. The information regarding submission/non-submission of bids sought by the Commission in the prescribed format is annexed.
 - d) Since the petitioner did not submit the morning schedule, its schedule become invalid and no refund for the electricity sourced through open access was given for the days on which such day ahead schedule was not given.
 - e) With respect to the consequences of non-submission of the aforesaid day ahead schedule, the Respondent had no other option but to take into account the contract demand of the Petitioner while planning its power procurement, without deducting the unplanned Open Access Energy scheduled by the Petitioner. Resultantly, the unplanned energy brought by the petitioner was wasted. On most of the dates there is under drawl by the respondent *inter alia* due to the reasons attributable to the unplanned energy brought by the petitioner in to the system causing grid indiscipline. Although underdrawl/overdrawl on account of a specific individual embedded open access consumer is not possible.
- A. When was the mandatory information specified in Regulation 42 of the OA Regulations provided by the Appellant to the Respondent?**
- f) That the Appellant has admitted during the arguments as well as in the pleadings filed before this Commission that the Appellant has not provided the information as required under Regulation 42 of the OA Regulations, on the dates for which no adjustment of open access electricity has been given by the answering Respondent. This factum is

evident from the emails placed on record by the Appellant along with its appeal. This case is unique because the Appellant knowing fully well the requirement of submission of day ahead schedule did not submit the same for some of the dates. As for the dates, the Appellant submitted day ahead schedule, the answering Respondent has already given appropriate adjustment.

B. Whether the procurement of power by the Appellant through Open Access was considered in its power procurement planning by the Respondent.

- g) In order to respond to this query, it is imperative to set out the relevant regulatory background by which the condition as mandated under Regulation 42 was prescribed. It is submitted that the OA Regulations was amended on 03.12.2013. By way of the said amendment, Regulation 42 was amended and a mandatory obligation was casted on the embedded consumer (who were willing to avail short term open access) to submit to the distribution licensee (the Respondent herein) a schedule of power through open access for all 96 slots by 10:00 AM of the day preceding the day of transaction, as under:-

“42. Eligibility criteria, procedure and conditions to be satisfied for grant of long term open access, medium term open access and short term open access to embedded consumers shall be same as applicable to other short-term open access consumers. However, the day-ahead transactions, bilateral as well as collective through power exchange or through NRLDC, by embedded open access consumers under short term open access shall be subject to the following additional terms and conditions:

i) The Consumer shall submit to the distribution licensee a schedule of power through open access for all the 96 slots by 10:00 AM of the day preceding the day of transaction and this will be considered as confirmed schedule for working out the slot-wise admissible drawl of the consumer from the licensee with reference to his sanctioned contract demand. For example, if an embedded consumer with a contract demand of 10 MW has scheduled 4 MW power through open access in any time slot of the succeeding day as per the schedule submitted by him at 10 AM, then his admissible drawl from the licensee in that time slot will be 6 MW.

The total admissible drawl in different time – slots shall, however, be worked out based on slot-wise admissible drawl from the licensee as above and the slot-wise schedule of power through open access accepted / cleared by the power exchange and intimated to the SLDC and distribution licensee by the consumer in compliance of regulation 45. For example if, as per the schedule for drawl of power through open access submitted by the consumer at 10 AM of the day preceding the day of transaction, 4 MW power was scheduled through open access in a time slot and as per the accepted schedule this gets reduced to 3 MW, then his admissible total drawl in that time slot shall be 9 MW. i.e. 6 MW from the licensee and 3 MW through open access.

In case recorded drawl of the consumer in any time slot exceeds his total admissible drawl but is within 105 % of his contract demand, he will be liable to pay charges for the excess drawl (beyond admissible drawl) at twice the applicable tariff including FSA. In case the recorded drawl exceeds the sanctioned contract demand by more than 5% at any time during the month as per his energy meter, demand surcharge as per relevant schedule of tariff approved by the Commission shall also be leviable. For the purpose of calculating demand surcharge in such cases, the total energy drawl during the month including the energy drawl through open access shall be considered. The consumption charges for the energy drawl through open access, for the purpose of levy of demand surcharge, will be worked out at the applicable tariff for the category to which the consumer belongs...”

The reason behind such an amendment has been provided by this Commission in the above said Regulations itself, as under:-

“The Commission feels that it would not be fair and justifiable if any losses of the distribution licensee on account of energy transactions by open access consumers get passed on, directly or indirectly, to other consumers. The Commission, to address these problems /difficulties, after a careful consideration of all these aspects, has prescribed certain additional conditions for grant of open access in case of day ahead transactions by open access

consumers. The foremost among these additional conditions is that for day ahead transactions, the open access consumers shall submit a confirmed slot wise schedule of power through open access and from the licensee for the next day at 10:00 hours of the previous day to the distribution licensee and SLDC. In case there are any reductions in his open access schedule when it is finally accepted / cleared by the power exchange, he would be required to manage his drawl from the licensee as also his total drawl accordingly. In case he exceeds his admissible drawl in any time-slot, penalty will be leviable. Amendments have been made in the relevant regulations accordingly. The principle that has been based upon to arrive at these conclusions is simple i.e. in case a consumer wants to avail the benefit of cheaper power, he should be ready to face the associated risks also if any.”

[Emphasis Supplied]

As evident from the aforesaid, the Commission acknowledged the difficulties faced by the distribution licensee if the schedule is not intimated by the consumers and has accordingly amended the OA Regulations to include the above mandatory condition. The primary reasons behind introducing such condition were to introduce systematic planning and scheduling of the load by the distribution licensees.

The Petitioner admittedly not submitted the day ahead schedule as per the manner specified under Regulation 42 of the HERC OA Regulations. It is further submitted that:-

- i) The contract demand of the Appellant was considered by the Respondent in its power procurement as the Respondent is under a universal service obligation to provide power to consumers within its licensed area. In the absence of prior intimation to the Respondent, the Respondent is bound to schedule the entire contract demand for its consumers;
- ii) The Appellant cannot be allowed to take advantage of its own wrong; and

iii) There was no waiver of the conditions prescribed under Regulation 42 of the OA Regulation as the adjustments have been claimed well within the time limits prescribed under the Electricity Act. It has been further submitted that it is a settled principle of law that where the statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. The condition of intimating day-ahead scheduling to the Respondent was introduced by way of an amendment as the Commission acknowledged the difficulties being faced by the Respondent when the consumers were not intimating the schedule. Therefore, the Appellant by no means can contend that necessary compliance of Regulation 42 was done as information was received by the Respondent through power exchange/SLDC at a later time. The said contention, if accepted, would defeat the entire purpose of introducing such condition. In this regard, reliance is placed on Hon'ble Supreme Court's judgment in *Dipak Babaria & Ors. v. State of Gujarat & Ors.*, (2014) 3 SCC 502:-

“53. It is well settled that where the statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. This proposition of law laid down in *Taylor v. Taylor* (1875) 1 Ch D 426, 431 was first adopted by the Judicial Committee in *Nazir Ahmed v. King Emperor* reported in MANU/PR/0020/1936 : AIR 1936 PC 253 and then followed by a bench of three Judges of this Court in *Rao Shiv Bahadur Singh v. State of Vindhya Pradesh* reported in MANU/SC/0053/1954 : AIR 1954 SC 322. This proposition was further explained in paragraph 8 of *State of U.P. v. Singhara Singh* by a bench of three Judges reported in MANU/SC/0082/1963 : AIR 1964 SC 358 in the following words:

8. The rule adopted in *Taylor v. Taylor* is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle

behind the rule is that if this were not so, the statutory provision might as well not have been enacted....

This proposition has been later on reiterated in Chandra Kishore Jha v. Mahavir Prasad reported in MANU/SC/0594/1999: 1999 (8) SCC 266, Dhananjaya Reddy v. State of Karnataka reported in MANU/SC/0168/2001 : 2001 (4) SCC 9 and Gujarat Urja Vikas Nigam Limited v. Essar Power Limited reported in MANU/SC/1055/2008 : 2008 (4) SCC 755.”

[Emphasis supplied]

- h) The Petitioner has argued that the Respondent cannot penalize the Appellant for not complying with the Regulation 42 as there is no such penalty prescribed under the Regulation. The said contention is liable to be rejected as misconceived. It is reiterated that the Respondent has not penalized the Appellant for non-compliance of Regulation 42, it has just rejected the adjustment provided under Regulation 43. The adjustment can only be availed by a consumer if such consumer is entitled to draw power through open access in terms of Regulation 42. As detailed above, if the Petitioner could not intimate the Respondent of the day ahead schedule then the Respondent has to bear the charges for un-availed power.
- i) That this case pertains to January, 2015 to June, 2015. The Appellant was allowed adjustment of Open Access electricity for each of the dates day ahead schedule was submitted. This process was followed for each of the month and each of the invoice raised during the disputed period. There is no lapse on part of any officers of the answering Respondent in this particular case on any account.
7. The SLDC, vide memo no. Ch-31/ISB-512 dated 23.10.2019, also submitted that the Petitioner has not provided day ahead schedule by 10 AM, during the disputed period, as prescribed under Regulation 42 of HERC OA Regulations.
8. The Petitioner in its reply sought in the prescribed format, submitted that no information is available. The Petitioner submitted that the concerned person who used to coordinate with respect to electricity

matters with the Respondent and other entities, has left the services of the Petitioner in May, 2015. Therefore, the emails containing the entire correspondence with the Respondents could not be retrieved.

9. The case was subsequently heard on 25.07.2019, 13.09.2019 and finally on 23.10.2019.

The findings recorded by the Commission.:

10. The Commission has heard the arguments of the ld. counsel for the appellant and the Respondents and has also gone through the entire records of the appeal. The following issues arise for consideration and decision:-

- a) **Whether Regulation 42 of HERC (Terms & Conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 (HERC OA Regulation), is a mandatory provision?**
- b) **Whether the Petitioner has complied with the Statutory provision?**
- c) **Whether the Respondent Nigam can waive of the condition of intimation of day ahead schedule?**
- d) **Whether the Respondent Nigam suffered any financial loss and was constrained in planning its power procurement on day to day basis?**

After hearing the learned counsel for the parties and going through the records of the appeal, the findings of the Commission on the issues are as under:-

Issue (a):

Whether Regulation 42 of HERC (Terms & Conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 (HERC OA Regulation), is a mandatory provision?

The Commission has closely examined the said Regulation as well as the rival contention on the same. The Commission observes that all the provisions of the Regulations notified by the Commission in its legislative

capacity, have the force of law behind it. Hence a statute has to be construed according to the intent of the legislation, as the same, as reflected in the 'objectives' is to make the dispensation effective and workable. A reading of the said provision i.e. Regulation clause no. 42 & 45 of HERC OA Regulations, establishes the fact that meaning/interpretation of the said provision is plain & simple and the same by no stretch of imagination is open to more than one interpretation, which may require interference of the Commission or any court of competent jurisdiction to choose the interpretation which represents the true intent of the said Regulation. Hence, the effect of the same has to be necessarily given to it irrespective of the consequences.

In view of the above discussion and the case laws cited by the Respondent, the Commission answers this issue in affirmative i.e. the requirement under Regulation 42 of the HERC OA Regulations is mandatory and binding.

Issue (b)

Whether the Petitioner has complied with the Statutory provision?

The Commission observes that the Petitioner has claimed that it has provided day ahead schedule by 10 AM, during the disputed period, as prescribed under Regulation 42 of HERC OA Regulations. However, the proof in respect of the same is not available with it, since the concerned person who used to coordinate with respect to electricity matters with the Respondent and other entities, has left the services of the Petitioner in May, 2015. Therefore, the emails containing the entire correspondence with the Respondents could not be retrieved. However, the Petitioner could produce emails in respect of some of the dates of the period of demand and the Respondent Nigam has duly allowed adjustment of Open Access energy bought by the Petitioner on those dates.

In view of the above, the Commission answers the issue framed above in negative i.e. the information was not provided by the Petitioner as per the provisions of Regulation 42 of the HERC OA Regulations in vogue.

Issue (c)

Whether the Respondent Nigam can waive of the condition of intimation of day ahead schedule?

The Commission has examined the aforesaid issue at length. The Commission has taken note of the letter dated 27.12.2013 addressed by Haryana Vidyut Prasaran Nigam Limited (HVPNL) to all the embedded open access consumers, intimating the revised eligibility criteria for grant of open access, as per the revised OA Regulations notified on 03rd Dec., 2013. Upon Notification, the Regulations achieves the status of subordinate legislation. The Commission, therefore, holds that there was a mandatory set of procedure to be followed by embedded open access consumers and an important part of which is an obligation cast upon the embedded open access consumers to submit to the distribution licensee a schedule of power through open access for all the 96 slots by 10:00 AM of the day preceding the day of transaction. **This being in nature of subordinate legislation, the Distribution licensee had no power to waive off or modify the statutory conditions set out in the Regulations in any manner, whether explicit or implicit. If Act or Regulations mandate to follow a particular procedure, the same shall have to be adhered to by the person who desires to avail the benefit under the said Regulations. If consumer does not adhere to the conditions of Open Access Regulations/Procedure, it has to face the consequences.**

In view of the above, the Commission answers the issue framed above in negative i.e. the Respondent Nigam can not waive of the condition of intimation of day ahead schedule.

Issue (d)

Whether the Respondent Nigam suffered any financial loss and was constrained in planning its power procurement on day to day basis?

The aforesaid query was put forth to the Respondent Nigam. In reply to the same it has been submitted that *“the exact calculation of the losses attributable to non-intimation of open access by a particular consumer and*

resultant profit and loss for sale of equivalent power through exchange / UI cannot be worked out owing to the complexities and pooling of power in the grid”

The Commission observes that the Respondent Nigam failed to quantify the loss in individual case, as well as at an aggregate level. However, the Commission has taken note of the submission of the Respondent Nigam that the un-planned energy has gone wasted as on most of the dates there was under drawl.

In view of the above factual matrix, the Commission answers the issue in affirmative i.e. the Nigam did suffer some financial loss, which is difficult to quantify.

Conclusion-

Having answered the above issues, the Commission is of the considered view that Regulations 42 & 45 of HERC OA Regulations, 2012 being mandatory in nature has not been followed and complied with the Petitioner.

In conclusion the Commission is of the considered view that the Petitioner herein did not strictly complied with the Regulations occupying the field. The non-compliance by the Petitioner of the important eligibility criteria for grant of open access overrides the fact that DHBVNL could not calculate the loss because of pooling of power in the grid. Accordingly, the Commission upholds the decision of the Coordination Committee and rejects the appeal filed by the Petitioner.

11. Before parting with the Order, the Commission further directs DHBVNL to develop a portal within 3 months from the date of receipt of this Order, where the open access consumer can submit the schedule of power to be drawn through open access for all the 96 slots by 10:00 AM of the day preceding the day of transaction. Submission of the schedule on portal before 10 AM of the preceding day will be deemed to be information duly supplied in compliance of the HERC Open Access Regulations, 2012, as amended from time to time.

12. The present appeal is accordingly disposed of.

(Pravindra Singh Chauhan)
Member

(Naresh Sardana)
Member

Dated: 17.12.2019
Place: Panchkula

HEERC