

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

Case No. HERC/PRO – 58 of 2018

DATE OF HEARING : 23.10.2019
DATE OF ORDER : 17.12.2019

IN THE MATTER OF:

Petition under Reg. 53 of the HERC (Terms and Conditions for grant of connectivity and open access for intra-state transmission and distribution system) Regulations 2012.

Petitioner M/s. Shree Cement Limited

Respondents

1. Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL)
2. Haryana Vidyut Prasaran Nigam Limited (HVPNL)
3. SE/STU, The Coordination Committee for Open Access

Present On behalf of the Petitioner

1. Shri Amarjit Singh, AVP, Shree Cement Limited

Present on behalf of the Respondents

1. Ms. Aerika Singh, Advocate for UHBVNL
2. Shri B.S. Kamboj, XEN, RA, UHBVNL
3. Pushpendra Singh, XEN., HVPNL
4. Shri Pankaj Singhal, XEN., HVPNL, Open Access & Commercial

QUORUM

Shri Pravindra Singh Chauhan, Member
Shri Naresh Sardana, Member

ORDER

Brief Background of the Case

1. This Petition has been filed by M/s. Shree Cement Limited, Jaipur, having HT connection for its cement manufacturing unit at Village-Khukhrana, PO – Assan Kalan, District Panipat challenging the order, dated 31.10.2018, 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”), granting relief to the Appellant for just 4 days out of total 13 days for which unilateral

deductions of Rs. 75,87,995 (Rupees Seventy-Five Lacs Eighty-Seven Thousands and Nine Hundred Ninety-Five) was made by UHBVNL holding that UHBVNL was right in recovering the amount refunded/adjusted to the open access consumer in these 9 dates, because the Petitioner had failed to comply with the conditions specified in Regulation no. 42 & 45 of HERC (Terms & Conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 and its subsequent amendment, as 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 stating the facts leading to the filing of present petition are that the petitioner had challenged the demand raised by the UHBVNL, in the month of August, 2017, for the units purchased during the period from Oct 2015 to Feb 2017, through Open Access, on account of the fact 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 UHBVNL 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 31.10.2018, decided as under:-

“After taking into consideration of the written submissions of petitioner and respondent-1, Committee finds that-

1. *It is statutory requirement 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 which is affirmative in terms of the clause 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.*

2. *The HERC during notification of 1st Amendment, Regulations, 2013 of HERC (Terms and Conditions for grant of connectivity and open access*

for intra-state transmission and distribution system) Regulations, 2012 takes cognizance of the concern of DISCOMs that is difficult for distribution licensees plan and manage their drawl from the grid along with 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.

3. *The delay in submission of day ahead schedule of power through Open Access by petitioner results Licensee with less time and 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 consumers 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 consumer 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 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.

4. *The committee decides that the petitioner submitted the day ahead schedule after 10.00 AM except four days i.e. 09.12.2015, 19.07.2016, 18.07.2016 & 04.10.2016. The recovery for balance 9 days i.e. 25.10.2015, 06.11.2015, 07.11.2015, 14.02.2016, 10.06.2016, 12.08.2016, 10.12.2016, 28.01.2017 and 02.02.2017 is as per regulations of Haryana Electricity Regulatory Commission.*

In view of the above, the Committee disallows the petition of consumer as since it is a mandatory requirement that consumer has to send the day ahead schedule to the respondent by 10.00 AM of the preceding day. Consumer failed to do that, hence benefit can be given to the petitioners only for four days i.e. 09.12.2015, 19.07.2016, 18.07.2016 & 04.10.2016.”

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:-
 - i. That the Appellant is purchasing power from IEX under open Access since May-2015. The required formalities/steps that are required for availing open access is being religiously followed as is stipulated in the Regulations of CERC and HERC by the Appellant.

- ii. That in the month of August-17 an amount of Rs. 75,87,995 (Rupees Seventy-Five Lacs Eighty-Seven Thousands and Nine Hundred Ninety-Five) was debited by Respondent-2 in the HT bill of the Appellant. The recovery as informed by Respondent 2 was primarily because of alleged late submission of daily schedules for 13 days by the Appellant as per following table:-

SN	Month	Schedule submission date (Bidding Date)	Power Consumption Date (Delivery Date)
1.	Oct. 15	24-Oct-15	25-Oct-15
2.	Nov. 15	05-Nov-15	06-Nov-15
3.	Nov. 15	06-Nov-15	07-Nov-15
4.	Dec.15	08-Dec-15	09-Dec-15
5.	Feb.16	13-Feb-16	14-Feb-16
6.	Jun-16	09-Jun-16	10-Jun-16
7.	Jul-16	17-Jul-16	18-Jul-16
8.	Jul-16	18-Jul-16	19-Jul-16
9.	Aug. 16	11-Aug-16	12-Aug-16
10	Oct. 16	03-Oct-16	04-Oct-16
11	Dec. 16	09-Dec-16	10-Dec-16
12	Jan. 17	27-Jan-17	28-Jan-17
13	Feb. 17	1-Feb-17	2-Feb-17

- iii. That as per Regulation 42 of the HERC (Terms and Conditions for Grant of Connectivity and Open Access for Intra-State Transmission and Distribution System) Regulations, 2012 an Embedded Open Access consumer buying power under day-ahead transactions, bilateral as well as collective through power exchange, by 10:00 hours every day of the day of preceding the day of transaction, is required to prepare and submit daily schedule of power to the distribution licensee. The relevant extract of the said regulation is reproduced 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:

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.....”

- iv. That regulation 45 of the HERC (Terms and Conditions for Grant of Connectivity and Open Access for Intra-State Transmission and Distribution System) Regulations, 2012 as amended by (1st Amendment) Regulation 2013 (hereinafter referred to as “HERC OA Regulations”) further provides that by 10:00 hours every day the schedule as referred above shall also be submitted to SLDC. The relevant extract of regulation 45 is reproduced as under:

“45 Requirement of Scheduling for Embedded open access consumers - (1) *Scheduling shall be done in accordance with relevant provisions of IEGC for inter-State transactions and in accordance with relevant provisions of Haryana Grid Code for intra-State transactions.*

(2) By 10.00 hours every day, these embedded consumers shall prepare and submit daily schedule of power, in MW, separately showing schedule of power from licensee and that from another supplier through open access for the next day, i.e. from 0000 hrs to 24.00 hrs of the following day to SLDC along with copy to distribution licensee. For day-ahead transactions, bilateral as well as collective, through power exchange or through NRLDC, this schedule of drawl of power through open access submitted at 10.00 hrs shall be considered as final for the purpose of working out slot-wise admissible drawl from the licensee as per the provisions of regulation 42.”

- v. That aggrieved by unilateral deduction of Rs. 75,87,995 (Rupees Seventy-Five Lacs Eighty-Seven Thousands and Nine Hundred Ninety-Five) the Appellant represented before UHBVNL, highlighting the fact that e-mails for all the days (except 2 days), as required under Regulation 42 and Regulation 45, were sent before 10 AM. However, no relief was granted in the matter.
- vi. That deprived of relief, the Appellant approached the Coordination Committee, constituted under HERC Open Access Regulations, for resolution of dispute between the Appellant and UHBVNL.

- vii. That the Coordination Committee, vide its Order dated 31.10.2018, decided to grant relief to the Appellant for 4 days out of total 13 days for which deductions were made.
- viii. That being aggrieved by the aforesaid impugned Order dated 31.10.2018 passed by the coordination committee, giving relief for only 4 days and denying relief for remaining 9 days, this appeal is being filed.

GROUND & REGULATORY FRAMEWORK

- ix. That at the outset, it is submitted that HERC OA Regulations nowhere provides for penalization by way of non-adjustment of scheduled energy in case of delay of submission daily schedules. The main purpose of submission of daily schedule by 10:00 AM is for the purpose of working out slot-wise admissible drawl from the licensee.
- x. That it is a cardinal principle of law that penalties/punishments not prescribed under law cannot be imposed. Penalties/punishments cannot be assumed/inferred by any authority. Hon'ble Supreme Court of India in Civil Appeal No.3550 of 2012 in Vijay Singh vs State of UP and Ors at para 16 has held as under :

“Undoubtedly, in a civilized society governed by rule of law, the punishment not prescribed under the statutory rules cannot be imposed.....In S Khushboo v. Kanniammal and Anr.....this court has held that a person cannot be tried for an alleged offence unless the Legislature has made it punishable by law and falls within the offence as defined Under Sections 40,41 and 42 of the Indian Penal Code,1860,Section2(n) of the Code of Civil Procedure 1973, or section 3(38) of the General Clauses Act,1897. The same analogy can be drawn in the instant case though the matter is not criminal in nature”.

Hon'ble Supreme Court in para 8 has further held as under:

“ Admittedly, the punishment imposed upon the Appellant is not provided for under rule 4 of Rules 1991.....It is a settled proposition of law that punishment not prescribed under rules, as a result of disciplinary proceedings cannot be awarded”.

- xi. That it is further submitted that Regulation 26(1) provides for scheduling of inter-State power and states as under:

“Scheduling of inter-State open access transactions shall be done in the manner as specified by CERC from time to time.”

Thus it is abundantly clear that once the power has been scheduled by NLDC as per provisions of CERC, a Distribution licensee cannot deny the IEX schedule by virtue of Regulation 26(1) of HERC OA Regulations. Thus non – adjustment of Open Access Energy through IEX is patently unfair and prejudicial to the interest of OA consumers.

- xii. That based on information received from Open Access Nodal officer and Appellant’s e-mail data, the summarized data for 9 instances where E-mail was sent on time by the Appellant but said to be received late (after 10:00 AM) by Nodal Officer of the Respondent is as under:

Sr. No.	Schedule submission date (Bid Date)	Power Consumption Date (Delivery Date)	Submission Time as per Appellant’s E-mail	Receipt time as per Respondent’s E-mail
1.	24-Oct-15	25-Oct-15	10:11 AM	10:10 AM
2.	05-Nov-15	06-Nov-15	10:02 AM	10:02 AM
3.	06-Nov-15	07-Nov-15	09:59 AM	10:10 AM
4.	13-Feb-16	14-Feb-16	09:59 AM	10:11 AM
5.	09-Jun-16	10-Jun-16	10:00 AM	10: 01 AM
6.	11-Aug-16	12-Aug-16	09:27 AM	11:11 AM
7.	09-Dec-16	10-Dec-16	09:31 AM	10:31 AM
8.	27-Jan-17	28-Jan-17	09:47 AM	10:05 AM
9.	1-Feb-17	2-Feb-17	09:25 AM	10:13 AM

*Next Day

- xiii. That only on two instances i.e. on 24.10.2015 and 05.11.15 the schedule was submitted after the stipulated cut off time of 10:00 AM. Otherwise on all other 7 instances the E-mail was sent well before the cut off time by the Appellant. Moreover, on two instances the delay in submission of schedules was very insignificant and would not had any adverse impact on the power planning for next day by Respondents.
- xiv. That the Regulation stipulates for submission of such information which on e-mail platform implies sending of a mail. The Appellant can not exercise any control over the delivery of these e-mails once they are sent by the Appellant owing to the fact that servers are not under the control of sender. Therefore, the Appellant has discharged its duty and requirement of submission of schedule as stipulated in the regulations

and requirements put in place given by the Respondents, the moment it sent the schedules through e-mail.

- xv. That the Respondents in its submissions to Coordination Committee has confirmed the timing of receipt of Appellant's e-mails. The timings as confirmed by Respondents are as under:

Sr. No.	Schedule submission date (Bid Date)	Power Consumption Date (Delivery Date)	E-mail Time as per UHBVN	Receipt as per HVPN
1.	01-02-17	02-02-17	10:13 AM	10:21 AM
2.	27.01.17	28.01.17	10:05 AM	10:13 AM
3.	09.12.16	10.12.16	10:31 AM	10:21 AM
4.	11.08.16	12.08.16	11:11 AM	10:44 AM
5.	09.06.16	10.06.16	10:01 AM	02:41 PM
6.	13.02.16	14.02.16	10:11 AM	10:02 AM
7.	06.11.15	07.11.15	10:10 AM	10:02 AM
8.	05.11.15	06.11.15	10:02 AM	10:04 AM
9.	24.10.15	25.10.15	10:10 AM	10:14 AM

As evident from the above table there is not even a single instance out of 9, when the e-mail receipt time for both Respondent-2 and Respondent-3 is same. This clearly establishes the fact that time of Delivery of e-mail to different receipt can vary significantly depending upon various factors that are not in the control of the sender (Appellant).

- xvi. That every month, a communication is sent by the office of CE (SO & Comml), HVPNL, Panchkula to XEN (OP) Suburban Division, UHBVN, Panipat. This communication clearly states that the energy accounts has been prepared after confirming and based on advance schedules sent by the Appellant. If at all there was any concern on account of delayed receipt of the schedule, the same should have been informed to us with corrective measures that may be needed. It is submitted here that not even a single notice has been issued to us till date on the subject. Thus, the conduct of SLDC/UHBVN clearly established that they did take cognizance of our schedules and there was never any concern on their part on account of SCL submission of daily schedules.
- xvii. That it is also presumed that since all the State agencies involved and responsible for preparation of energy account and credit of IEX energy (i.e. SLDC, Energy Account Centre (HVPNL) and UHBVNL including Senior AO) had taken due cognizance of daily schedules submitted by us,

the credit once provided for IEX purchase is final and requires no further act on the part of SCL.

- xviii. That the regulatory provisions regarding submission of daily schedule were framed to facilitate UHBVN in planning its power purchase/sell and were never intended to be used as a tool to penalize legitimate consumers. The relevant extract from Statement of Objects and Reasons published with HERC OA Regulations are reproduced below:

“2.4 Additional conditions for open access for day ahead transactions:

Distribution licensees have often brought to the notice of the Commission the difficulties being faced by them in the planning / managing their drawl of power from the grid as also in the load control in cost effective manner unless a confirmed schedule of power through open access tied up for next day by open access consumers is made available to them sufficiently in advance.

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 previous day to distribution licensee and SLDC.”

That the above statement of reasons nowhere stipulates that in case of a slight delay in receipt of email, the same will be totally disregarded. Also anytime in the past no communication was received by the Appellant from Respondents intimating it the delay in receipt of e-mails or stating that Respondent’s planning / managing of drawl of power was getting disturbed because of delay in relaying of schedules by the Appellant.

- xix. Notwithstanding and without prejudice to the above, it’s a conclusively established fact that Appellant had purchased power from exchange on the above 9 days by paying the cost and same had been scheduled and had flown through state grid. However, Respondent’s only contention is

that as the power had not been purchased duly complying with HERC open access regulations, therefore no credit of purchased/scheduled energy can be given in the HT bills of the Appellant. Considering the fact that the Appellant has borne the cost of purchase of power, the same can not be used by Respondent (UHBVN) free of cost as that would lead to unfair enrichment of Respondents and would be against principles of natural justice. The above position has also been upheld by Hon'ble Rajasthan Electricity Regulatory Commission in its order dated 13th June 2017 in case number 878/16 in the matter of M/s Ultratech Cement Ltd. Vs Jodhpur Vidyut Vitran Nigam Ltd. and State Load Despatch Centre.

- xx. On the basis of above grounds, the appellant has prayed as under:-
- a) Direct the Respondent (UHBVNL) to provide credit of the energy that was scheduled for the 9 days, to the Appellant in its HT bills.
 - b) Alternatively, Direct the Respondent (UHBVNL) to credit the amount equivalent to actual amount paid by the Appellant to purchase power for above 9 days.
 - c) Direct the Respondent (UHBVNL) to Pay interest @ 18% on the amount which was held back / deducted by Respondent-2 due to reversal of energy credit/Credit of the amount equivalent to purchase cost of the energy for above 13 days from the day of deduction till the time it is adjusted back to Appellant account.
 - d) Provide an opportunity to the Appellant to present his case in person and be permitted to make additional submissions, if any, at the time of hearing.
 - e) Any other order or direction which this Hon'ble Commission deems just and proper may kindly be passed.

Proceedings in the Case

3. The case was heard by the Commission on 02.04.2019, wherein Shri Amarjit Singh, appearing for the Petitioner argued at length against the order passed by Coordination Committee. The Petitioner argued that it is arbitrary action on the part of the Respondent to force a consumer to pay an amount on account of slight delay in receipt of email by the Respondents, intimating the drawl of power through open access, which

on 7 occasions out of 9 was sent in time and on 2 occasions there was slight delay ranging from 2 to 11 minutes.

4. After hearing the Id. Counsel, the Commission enquired about the possibility of ascertaining the loss incurred by the Respondent on account of delay in 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, the Committee 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”*
5. In response to the Interim Orders of the Commission, UHBVN filed its reply pleading therein as under:-
 - a) That the drawl of open access energy is governed by HERC OA Regulations. Clause 42 & 45 of Open Access Regulations stipulates that the consumer shall submit to the distribution licensee a schedule of power required through Open Access by 10:00 A.M. of the day preceding the day of transaction. Even in consent for short term access issued by UHBVN to Appellant, the condition for submissions of confirmed schedule by 10:00 AM was specifically mentioned in following terms :-

“The consumer may avail option of open access for all 96 slots during a day provided the confirmed schedule shall be submitted to Discoms by 10:00 AM, (openaccessbid@gmail.com) of the preceding day of the transaction as per HERC regulations/ Notifications”
 - b) That the Commission during notification of 1st Amendment, Regulation 2013 of HERC OA Regulations, also took cognizance of the concern of distribution licensees to the effect that it is difficult for distribution licensees to plan and manage their drawl from the grid along with 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 sufficiently in advance.

- c) That it was observed by UHBVN that on 13 various dates, the bidding schedule provided by the consumer on email id openaccessbid@gmail.com was injected late by the consumer and was received subsequent to 10:00 AM. The details of the submission of bidding schedule on alleged 13 dates is as under –

SN	Date of purchasing open access energy	Date of submitting bidding schedule	Schedule receipt time on above mentioned mail id
1.	02-02-17	01-02-17	10:13 AM
2.	28-01-17	27-01-17	10:05 AM
3.	10-12-16	09-12-16	10:31 AM
4.	04-10-16	03-10-16	04:30 PM
5.	12-08-16	11-08-16	11:11 AM
6.	19-07-16	18-07-16	05:33 PM
7.	18-07-16	17-07-16	10:01 AM
8.	10-06-16	09-06-16	10:01 AM
9.	14-02-16	13-02-16	10:11 AM
10.	09-12-15	08-12-15	10:40 AM
11.	07-11-15	06-11-15	10:10 AM
12.	06-11-15	05-11-15	10:02 AM
13.	25-10-15	24-10-15	10:10 AM

- d) That since the appellant had acted contrary to the regulations by not submitting the bid schedule in time, the adjustment on account of purchase of power through Open Access on the above referred 13 days could not be given to the appellant.
- e) That the appellant challenged the non-adjustment of purchase of power through Open Access before the Coordination Committee as per Regulation 53 of Open Access Regulations, 2012.
- f) The Coordination Committee vide decision dated 31.10.2018 held that it is a mandatory requirement that consumer has to send the day ahead schedule to the UHBVN by 10 A.M. of the preceding day. After detailed scrutiny of the record of the case, it was decided that appellant submitted the day ahead schedule after 10:00 AM except on four days i.e. 09.12.2015, 19.07.2016, 18.07.2016 and 04.10.2016. Accordingly, benefit of 4 days out of 13 days was accorded to the Appellant by allowing adjustment of power drawl as per schedule submitted on those days. The recovery for balance 9 days i.e. 25.10.2015, 06.11.2015, 07.11.2015, 14.02.2016, 10.06.2016, 12.08.2016, 10.12.2016, 28.01.2017 and 02.02.2017 was found justifiable in terms of the Regulations of this Commission.

- g) That the decision of the Coordination Committee is based on the logical reasoning that delay in submission of day ahead schedule of Power through Open access causes inconvenience to Licensee as it provides them less time and they are not in a position to take any corrective measures to affect alternations in their own schedule for surrendering any surplus power or for arranging more power in case of any shortfall. Resultantly, Licensee is constrained to under-draw/ over-draw or impose avoidable power cuts leading to financial losses and consequent additional burden on the consumers of the State. The Coordination Committee took note of the situation where it would not be fair and justifiable if any losses of the licensee on account of energy transaction by open access consumer gets passed on directly or indirectly to other consumers of the State. It was further rightly observed by the Coordination Committee that the principle behind energy drawl in terms of Open Access Regulations, 2012 is that if the consumer wants to avail the benefit of cheaper power, he should also be ready to face the associated risks thereon, if any. The specified limits and caps provided in the regulations speaks of the importance of the discipline on the part of the open access consumers with an overall aim to maintain 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 not 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.
- h) That the decision of the Coordination Committee is valid, legal and justified. The Coordination Committee has deliberated at length the facts, legality and consequences of the delayed submission of bid schedule. The reasoning spelt out in the decision of Coordination Committee may kindly be considered by the Hon'ble Commission and the claim of the Appellant may be dismissed in the interest of justice.
6. The case was subsequently heard on 25.07.2019, 13.09.2019 and finally on 23.10.2019.

The findings recorded by the Commission.:

7. The Commission has heard the arguments of the ld. counsel for the appellant and the Respondents and has also gone through the entire record 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 grant of adjustment by the Respondent Nigam, in respect of power bought by the Petitioner through Open Access, without the Petitioner following the provisions of the Statute, constitute implied waiver 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 record 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?

In order to examine this issue, the Commission has referred the relevant provisions of Section 13 of the Information Technology Act, 2000, which provides as under:-

“13. Time and place of despatch and receipt of electronic record.–
(1) Save as otherwise agreed to between the originator and the addressee, the despatch of an electronic record occurs when it enters a computer resource outside the control of the originator.”

In view of the above, undoubtedly 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, however, the same was fulfilled upon the submission of email as per Section 13 of the Information Technology Act, 2000. The obligation of the Petitioner was duly discharged when the it entered a computer resource outside the control of the Petitioner. Therefore, the Commission decides that the Petitioner has complied with the requirement of Regulations in the seven dates out of nine dates for which open access power was disallowed by the UHBVNL/Coordination Committee for Open Access, as the intimation of drawl of open access was duly

submitted before the time specified in Regulation 42 of HERC OA Regulations. However, for two days, when there was slight delay in the submission of intimation by the Petitioners, the Commission rejects the arguments of the Petitioner and holds that Petitioner violated the requirement of the Regulations.

Issue (c)

Whether grant of adjustment by the Respondent Nigam, in respect of power bought by the Petitioner through Open Access, without the Petitioner following the provisions of the Statute, constitute implied waiver 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 and the public is deemed to have been informed and cannot claim ignorance of the amendment. 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. The charges are levied as an enforcement measure and not as a penalty in the strict sense.**

In view of the above, the Commission answers the issue framed above in negative i.e. grant of adjustment by the Respondent Nigam, in respect of power bought by the Petitioner through Open Access, without the Petitioner following the provisions of the Statute, does not constitute implied waiver 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 and the Petitioner has complied with the requirement of Regulations in the seven dates out of nine dates for which open access power was disallowed by the UHBVNL/Coordination Committee for Open Access, as the intimation of drawl of open access was duly submitted before the time specified in Regulation 42 of HERC OA Regulations. However,

for two days, when there was slight delay in the submission of intimation by the Petitioners, the Commission rejects the arguments of the Petitioner and holds that Petitioner violated the requirement of the Regulations. Hence, the Commission Orders that for the seven days, mentioned above, the Nigam shall give adjustments to the Petitioner considering the same as power bought under Open Access Mechanism.

8. Before parting with the Order, the Commission further directs UHBVNL 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.
9. The present appeal is accordingly disposed of.

(Pravindra Singh Chauhan)
Member

(Naresh Sardana)
Member

Dated: 17.12.2019
Place : Panchkula