

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

Case No. HERC/PRO-40 of 2019
Case No. HERC/PRO-1 of 2020

Date of Hearing : 24.01.2020
Date of Order : 06.03.2020

IN THE MATTER OF:

Petition under section 42 of the Electricity Act 2003 read with Regulations 22 of Haryana Electricity Regulatory Commission (Terms and conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 for approval of Additional Surcharge to the Discoms – UHBVN and DHBVN in reference to the Open Access for Second half of FY 2018-19. (HERC/PRO-40 of 2019)

AND

Petition under section 42 of the Electricity Act 2003 read with Regulations 22 of Haryana Electricity Regulatory Commission (Terms and conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 for approval of Additional Surcharge to the Discoms – UHBVN and DHBVN for 2nd half of FY 2019-20 and onwards. (HERC/PRO-1 of 2020)

Petitioners

Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL), Panchkula
& Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL), Hisar

Respondents

General Public

Present On behalf of the Petitioners

1. Shri Samir Malik, Advocate
2. Shri Amit Diwan, Controller of Finance, UHBVNL
3. Shri S.S. Walia, Consultant, UHBVNL
4. Shri Shashank Singh, Consultant, UHBVNL

Present On behalf of the Respondent(s)/General Public

1. Shri R.K. Jain, M/s. Jindal Stainless (Hissar) Limited
2. Shri Saurabh Srivastav, Manager, Regulatory Affairs, IEX
3. Shri Amal Nair, Advocate for M/s. Faridabad Industries Association

QUORUM

| | |
|--------------------------------------|-----------------|
| Shri D.S. Dhesi, | Chairman |
| Shri Pravindra Singh Chauhan, | Member |
| Shri Naresh Sardana, | Member |

ORDER

1. The Petition has been filed by Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL), Panchkula & Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL), Hisar (collectively referred to as “DISCOMs) for

determination of Additional Surcharge for the 1st half of the FY 2019-20 on the basis of calculated amount of additional surcharge of second half of FY 2018-19 i.e. from October, 2018 to March, 2019 (HERC/PRO-40 of 2019). UHBVNL has submitted as under:-

- a) That the calculation of additional surcharge based on 100% data of all days in second half of FY 2018-19 i.e. October-18 to March-19 is submitted.
- b) That in order to ensure that only the surrendered power stranded due to open access consumer, be considered for calculating additional surcharge, the lower of open access and surrendered power quantum is taken in each slot, to determine the quantum of stranded power.
- c) That based on the slot wise stranded power as determined above, the total quantum of backing down eligible for computation of Additional Surcharge is determined by the Discoms. The eligible backing down quantum is further, multiplied with the per unit Fixed Charge approved for the relevant financial year, for determination of total amount of Additional Surcharge.
- d) That total Additional Surcharge for second half of FY 2018-19 (in Rs. Millions) is calculated by multiplying the Units of Power (in MUs) evaluated above and the per unit effective fixed charge excl. PGCIL charges approved by the Commission for FY 2018-19, i.e. Rs. 1.22/kwh.
- e) That the per unit Additional Surcharge is determined by dividing the total amount of additional surcharge with the estimated Open Access units for Second half of FY 2018-19.
- f) That the details of the backing down owing to Open Access in MW and MU for calculation of additional surcharges and Open Access availed is given in the table below:

| Months | Min of OA & Back down in MW | Min of OA & Back down in MU | Open Access in MW | Open Access in MU |
|--------------------------|-----------------------------|-----------------------------|-------------------|-------------------|
| Oct | 0.93 | 0.70 | 0.93 | 0.70 |
| Nov | 41.62 | 29.97 | 45.75 | 32.94 |
| Dec | 102.31 | 76.12 | 102.70 | 76.41 |
| Jan | 107.65 | 80.09 | 108.78 | 80.93 |
| Feb | 129.95 | 87.33 | 138.97 | 93.39 |
| March | 146.36 | 108.89 | 149.65 | 111.34 |
| Total H2 FY 18-19 | | 383.09 | | 395.70 |

g) That summary of total additional surcharge that may be allowed is summarized below:-

| | | |
|--|-----------------|-------------|
| Total Eligible Quantum (Min of Baking down and OA) to be considered for Additional Surcharge | in MU | 383.09 |
| Average Fixed Cost approved for FY 2018-19 | Rs/ Unit | 1.22 |
| Total Additional Surcharge for H2 of FY 2018-19 | Rs Million | 468.99 |
| Estimated Open Access Units for H1 of FY 2019-20 (considering same as in H2 of FY 2018-19) | MU | 395.70 |
| Additional Surcharge to be applicable on OA Consumers in H1 of FY 2019-20 | Rs/ Unit | 1.19 |

h) In view of the above, UHBVNL has requested to allow an additional surcharge of Rs 1.19 per unit to be levied for 1st half of FY 2019-20 on open access consumers which has been calculated based on details of slot wise surrendered power and slot wise open access power considering data of all days.

2. Subsequently, another Petition has been filed by Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL), Panchkula & Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL), Hisar (collectively referred to as "DISCOMs) for determination of Additional Surcharge for the 2nd half of the FY 2019-20 on the basis of calculated amount of additional surcharge of first half of FY 2019-20 i.e. from April, 2019 to September, 2019 (HERC/PRO-1 of 2020). UHBVNL has submitted as under:-

i) Per unit fixed charges approved by the Commission in Tariff Order dated 7th March 2019, is tabulated as under: -

Fixed Charges approved for FY 2019-20

| Sr. No. | Generating Stations | Estimated Quantum (MU) | Fixed Cost (Rs. Cr.) |
|---------|---------------------|------------------------|----------------------|
| | NTPC | | |
| 1 | Singrauli STPS | 1296.00 | 97.5 |
| 2 | Rihand STPS I | 431.00 | 41.1 |
| 3 | Rihand II | 378.00 | 37.4 |
| 4 | Rihand III | 372.00 | 65.2 |
| 5 | Unchhahar TPS I | 63.00 | 9.1 |
| 6 | Unchhahar TPS II | 131.00 | 17.1 |
| 7 | Unchhahar TPS III | 68.00 | 12.0 |
| 8 | Unchhahar TPS IV | 104.00 | 11.0 |
| 9 | Anta CCPP | 14.30 | 12.8 |
| 10 | Auraiya CCPP | 16.03 | 20.5 |
| 11 | Dadri CCPP | 36.08 | 17.8 |
| 12 | Faridabad CCPP | 984.00 | 246.4 |
| 13 | Farakka STPS | 62.44 | 8.4 |

| Sr. No. | Generating Stations | Estimated Quantum (MU) | Fixed Cost (Rs. Cr.) |
|---------|-------------------------------|------------------------|----------------------|
| 14 | Kahalgaon I STPS | 150.72 | 19.7 |
| 15 | Kahalgaon II STPS | 419.97 | 57.9 |
| 16 | Kol Dam HPS | 318.94 | 79.9 |
| | NHPC | | |
| 17 | Salal I HPS | 469.00 | 83.8 |
| 18 | Bairasiul HPS | 190.00 | 23.3 |
| 19 | Tanakpur HPS | 18.54 | 5.3 |
| 20 | Chamera I HPS | 415.53 | 63.2 |
| 21 | Chamera II HPS | 79.83 | 10.0 |
| 22 | Chamera-III HPS | 139.30 | 42.1 |
| 23 | Dhauliganga HPS | 54.72 | 11.3 |
| 24 | Dulhasti HPS | 120.00 | 38.8 |
| 25 | Uri HPS | 141.66 | 18.1 |
| 26 | Sewa II HPS | 28.59 | 8.9 |
| | SJVNL (Nathpa Jhakri) | | |
| 27 | SJVNL (Nathpa Jhakri) HPS | 292.38 | 39.7 |
| 28 | Rampur HPS | 69.00 | 17.0 |
| | THDC | | |
| 29 | Tehri (THDC) HPS | 196.60 | 60.6 |
| 30 | Koteshwar HPS | 48.14 | 10.6 |
| | NPCIL | | |
| 31 | NAPP (Narora) | 180.04 | - |
| 32 | RAPP (3-4) | 545.00 | - |
| 33 | RAPP (5-6) | | - |
| 34 | HPGCL (as per HERC order) | 17288.00 | 1751.3 |
| | Shared Project | | |
| 35 | BBMB HPS | 2890.55 | 0.0 |
| | DVC | | |
| 36 | Mejia TPS | 466.00 | 91.9 |
| 37 | Koderma TPS | 336.00 | 114.5 |
| 38 | Raghunathpur TPS | 636.00 | 38.1 |
| | UMPP | | 0.0 |
| 39 | CGPL Mundra UMPP TPS | 2561.43 | 252.5 |
| 40 | Sasan UMPP TPS | 3000.00 | 54.5 |
| | Others | | 0.0 |
| 41 | Tala, HPS | 45.07 | 0.0 |
| 42 | PTC GMR Kamalangs TPS | 1611.00 | 316.8 |
| 43 | PTC Baglihar HPS | 263.72 | 0.0 |
| 44 | PTC Lanco Amarkantak TPS | 1857.43 | 250.7 |
| 45 | PTC Karchamwangtoo HPS | 803.72 | 229.1 |
| 46 | PTC Karchamwangtoo HPS New | 649.15 | 0.0 |
| 47 | IGSTPP, Jhajjar (Aravali) TPS | 2406.00 | 789.3 |
| 48 | Pragati Gas Bawana CCGT | 0.00 | 104.2 |
| 49 | Adani Power Ltd. TPS | 9300.00 | 1132.8 |
| 50 | Teesta III HPS | 0.00 | 0.0 |
| 51 | MGSTPS, CLP, Jhajjar TPS | 5628.00 | 870.2 |
| 52 | Bhoruka HPS | 29.14 | 0.0 |
| 53 | P&R Gogripur HPS | 9.73 | 0.0 |
| 54 | Puri Oil Mill HPS | 13.60 | 0.0 |
| 55 | Biomass Projects | 217.14 | 0.0 |
| 56 | Cogeneration Plants | 226.63 | 0.0 |
| 57 | New Plants (Hydro) | 1189.86 | 0.0 |
| 58 | Solar Projects | 209.40 | 0.0 |
| | Total | 59471.38 | 7182.13 |

| Sr. No. | Generating Stations | Estimated Quantum (MU) | Fixed Cost (Rs. Cr.) |
|---------|--|------------------------|----------------------|
| | Average Fixed Cost of Power Purchase excluding PGCIL charges | | 1.21 |

ii) Per Unit Additional Surcharge is determined by dividing the total additional surcharge with the estimated Open Access Units in MUs for the First half of FY 2019-20.

iii) The details of the backing down owing to Open Access in MW and MU for calculation of additional surcharges and Open Access availed is given in the table below:-

Month-wise Stranded Power & Open Access Power

| Month | Stranded Power Min. of OA & backdown (MW) | Stranded Power Min. of OA & backdown (MU) | OA Purchase (MW) | OA Purchase (MU) |
|------------------------------------|---|---|------------------|------------------|
| April' 19 | 125.66 | 90.47 | 141.09 | 101.59 |
| May'19 | 123.04 | 91.54 | 133.81 | 99.56 |
| June'19 | 149.31 | 107.50 | 158.50 | 114.12 |
| July'19 | 163.19 | 121.42 | 140.94 | 101.48 |
| August'19 | 151.10 | 112.42 | 172.34 | 128.22 |
| September'19 | 188.35 | 135.61 | 200.16 | 144.12 |
| Average of H1 of FY 2019-20 | 150.11 | 109.83 | 157.81 | 114.85 |

iv) A summary of calculation of total additional surcharge for First half of FY 2019-20 and per unit additional surcharge to be applicable on the Open Access consumers in Second half of FY 2019-20 is summarized below:

Calculation of Additional Surcharge

| Sr. N | Particulars | Units | Value |
|-------|---|---------|-------------|
| 1 | Total Eligible Quantum (Min of Backing down and OA) to be considered for Additional Surcharge | MU | 658.97 |
| 2 | Approved Fixed cost per unit | Rs/kWh | 1.21 |
| 3 | Total Additional Surcharge for H1 of FY 2019-20 | Rs. Cr. | 79.58 |
| 4 | Estimated Open Access Units for H2 of FY 2019-20 (considered same as in H1 of FY 2019-20) | MU | 689.09 |
| 5 | Additional Surcharge to be applicable on OA Consumers | Rs/kWh | 1.15 |

v) Accordingly, the Commission has been requested to allow an additional surcharge of Rs 1.15 per unit to be levied on open access consumers which has been calculated based on details of slot wise surrendered power and slot wise open access power considering data of all days.

Proceedings in the Case

3. The case no HERC/PRO-40 of 2019 was first heard on 25th September, 2019. Upon hearing the parties, the Commission, vide its Interim Order

dated 25.09.2019, directed DISCOMs to file detailed calculation of revenue, projected to be forgone due to change in the rate of additional surcharge. DISCOMs were further directed to study the methodology and calculation of additional surcharge done by the Gujarat Electricity Regulatory Commission and submit their calculations accordingly. They were also directed to state the quantum of revenue losses due to reduction in additional surcharge that was passed on to other consumers in the true-up of Power Purchase Cost/FSA. The case was next heard on 05.11.2019. Consequently, the Commission, vide its Interim Order dated 05.11.2019, directed DISCOMs to submit their detailed reply in compliance to the Interim Order of the Commission dated 25.09.2019 with copy to M/s. FIA. The case was subsequently heard on 18.12.2019, wherein the Commission decided that the present petition shall be put up for public hearing on 15th January, 2020, in order to elicit comments/objections of various stakeholders. Meanwhile, the DISCOMs filed another petition for determining additional surcharge for 2nd half of FY 2019-20 and onwards. Accordingly, the date of public hearing, for both the petitions, was scheduled for 24th January, 2020.

4. The public hearing was held on 24.01.2020 as scheduled. During the hearing, Shri Samir Malik, Ld. Advocate for the Petitioners argued that the Additional Surcharge needs to be calculated in accordance with the methodology adopted by the Commission, consistently, in its earlier Orders prior to the Order dated 07.03.2019 (HERC/PRO-52 & 53 of 2018). Further, Shri Walia, Consultant, UHBVNL pointed out that there are certain discrepancies/calculation error in the methodology adopted by the Commission in its Order dated 07.03.2019 and after correcting the same, the additional surcharge works out to be @ Rs. 0.90/kWh (approximately). Per-contra, Shri R.K. Jain, counsel for M/s. Jindal Stainless (Hissar) Ltd., Shri Saurabh Srivastav, Advocate Manager, Regulatory Affairs, IEX and Shri Amal Nair, Advocate for M/s. Faridabad Industries Association, vehemently argued the case & asserted that the data in support of the fact that the power continued to remain stranded was not provided to them. However, the

objections raised by the Respondents were countered by the representatives of the Petitioners by submitting that all the data is available on their website under tab 'Regulatory/HERC Petition'. After hearing the parties at length, the Commission directed UHBVNL to supply the copy of calculation of Additional Surcharge pointing out & substantiating the discrepancies contained in the Order dated 07.03.2019 to the Commission as well as to the Respondents within 7 days. The Respondents were directed to file, with the Commission as well as with the UHBVNL, their written objections including on the discrepancies/calculation error in the calculation of Additional Surcharge pointed out by UHBVNL. UHBVNL is directed to file the reply on the objections raised by the Respondents within 5 days thereafter.

5. Objections filed by M/s. Jindal Stainless (Hisar) Ltd.:

The written objections filed by M/s. Jindal Stainless (Hisar) Ltd., are summarized as under:-

I. ABOUT THE PETITION:

UHBVN & DHBVN have filed this Petition seeking approval of Additional Surcharge to be recovered from Open Access consumers in 1st half of FY 2019-20. The supporting data has been appended for 2nd half of FY 2018-19. The Commission had already determined the Addl. Surcharge to be recovered in the 1st half of FY 2019-20 vide its order dated 07.03.2019. This issue was again reviewed by the Commission through Petition No. HERC/RA-18 of 2019. Hence the present Petition filed by the Petitioners is infructuous and needs to be rejected straightaway. The Petitioners should have submitted data pertaining to the 1st half of FY 2019-20 and approach the Commission for determination of Additional Surcharge to be recovered from Open Access consumers during 2nd half of FY 2019-20.

II. REVIEW/ REVISION OF ADDITIONAL SURCHARGE FOR THE 1ST HALF OF FY 2019-20:

Section 42 (4) of the Electricity Act, 2003, provides as under:-

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

Clause 8.5.4 of National Tariff Policy, 2016 provides as under:-

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

Thus, the Tariff Policy makes it mandatory to conclusively demonstrate the following factors,

- (i) The obligation of the licensee, in terms of existing power purchase commitments,
- (ii) Such obligation has been and continues to be stranded,
- (iii) There is unavoidable obligation and incidence to bear fixed cost.

The Policy speaks of the existing power purchase commitments and not the obligations, which are being added irrespective of the demand. The Utilities are entering into power purchase contracts for capacities far more than required and these unmindful purchases contracted add to the power remaining stranded besides the impact of purchase of power by open access consumers.

Second important factor is the continuity of such stranding. When the utility feels that due to the existing contracts there is stranded power then it can take curative steps to avoid such continuity in future at least. Adding new obligations while there is already stranded obligation, needs to be curbed, instead of unnecessarily burdening the consumers with such heavy charges so that they are forced to become captive consumers of the Licensees.

Reg. 22 (2) & (3) of HERC Open Access Regulations provides as under:-

- “(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.*
- (3) The distribution licensee shall submit to the Commission, on six monthly basis the details regarding the quantum of such stranded costs and the period over which these remained stranded and would be stranded. The Commission shall scrutinize the statement of calculation of such stranded fixed costs submitted by the distribution licensee and determine the amount of additional surcharge.*

Provided that any additional surcharge so determined shall be applicable to all the consumers availing open access from the date of determination of same by the Commission.”

From these Regulations also the pre-requisites as mentioned under the Tariff Policy are evident. Hence the Licensee has to establish the stranding of obligation, not only as it exists at present but in future as well.

III. PAST CONSIDERATIONS OF COMMISSION ON THE SUBJECT:

The issue of method of calculation of Addl. Surcharge has been under consideration of the Commission for quite a long time and on behalf of Open Access consumers various objections have been raised. Some of the major objections are given hereunder,

A) Indiscriminate purchase of power:

The extent of power purchased through Open Access is very well known to the Discoms as it is being done for the last over a decade and the Discoms give advance approval to such power purchase. Once this fact is known to the Discoms, they should be wise enough to take effective steps to check the stranding of power and be very prudent in adding new power purchase obligations. Indiscriminate purchase of power is bound to end up in power being surplus and resultant stranding of power.

B) Stranding of power because of Open Access consumers – Is it a truth or myth?

It is a fallacy that the power remains stranded because of the purchase of power by the consumers through Open Access. Even if there is no purchase through open access, the power will remain surplus and the resultant obligation of fixed cost to the Licensees. It is not the impact of the Open Access purchases but the unplanned procurement of power by the Licensees.

C) Multiple charging of the Fixed Cost of power purchase from the consumers:

It needs to be appreciated that the obligation to pay Fixed Charges, which is the base for determination of Additional Surcharge, is being recovered from the Open Access consumers through many ways, such as:-

- a) This cost is already a part of the cost of power purchase allowed to the Licensees through every successive ARR order;
- b) The Fixed Demand Charges recovered from the consumers, as a part of tariff include substantial part of the fixed cost borne by the Licensee;
- c) While allowing True up at the end of the year any part of the unrecovered fixed cost is allowed to the Licensee;

- d) While computing the FSA, any unrecovered gap in the cost of power purchase allowed/actually incurred is fully figured in.
- D) Other important contributory factors:
 - a) In addition to the power purchased by consumers over IEX and PXIL platforms, there is sizeable quantum of power purchased by the Licensee also.
 - b) The power claimed to have been surrendered/backed down depends on what was the PLF of the specific generating stations at the time of backing down and full rated generation capacity could not be taken as backed down.
 - c) The Petitioner needs to certify that the backing down was as per their instructions and not a fait accompli.
 - d) It has to be certified that the backing down was done on merit order basis and not by pick and choose method.
- E) Reference to past considerations by the Commission:
 - a) The Commission's ARR order for FY 2014-15 dated 29.05.2014, recognized the fact that Licensee was already recovering substantial part of the fixed cost of power purchase through the tariff. The order read as under:-

"The Commission, therefore, after careful consideration of the submissions made in the petition by UHBVNL, replies / comments furnished by various stakeholders in reply to the petition, the comments / submissions by the petitioners and other stakeholders made during the hearing held on 27.05.2014 and the relevant statutory provisions is of the considered view that the additional surcharge cannot be attributed to the entire energy drawn through Open Access as the Discoms are expected to take into consideration some quantum of power that would be drawn by the Open Access Consumers based on the past trend while undertaking demand assessment and load management. The Commission therefore considers it appropriate to pass on 50% of the stranded cost worked out by the Discoms on account of power drawn through Open Access. Such reduction is necessary in view of the fact that the Discoms charges from most of the Open Access consumer a part of the cost of distribution system and cost of 6% losses as wheeling charges. Further the Discoms also collect, from most Open Access consumers, demand charges on the basis of the connected load / contract demand. Hence in the considered view of the Commission some adjustment of the demand charges paid by the Open Access consumers in the stranded fixed cost of the Discoms has to be made.

In view of the above disposition the Commission has now decided to levy additional surcharge on the energy drawn by open access consumers through open access @ 50 Paisa/kWh with effect from the date of this Tariff Order. The additional surcharge shall be levied / recovered by the distribution licensees from open access consumers as provided in regulation 22 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.”

- b) The Commission’s ARR order for FY 2019-20 dated 07.03.2019, also took note of the objections raised by the consumers and recognized the fact that Licensee was already recovering substantial part of the fixed cost of power purchase through the tariff. The order read as under:-

“The crux of the Regulations cited by the Discoms as well as the issues raised by the Intervener has been examined by the Commission at length. As per the Regulation occupying the filed additional surcharge becomes applicable if the obligation of the distribution licensee in terms of power purchase commitment has been and continues to be stranded (emphasis added) and / or there is an un-avoidable obligation and incidence to bear fixed cost consequent to such contract (emphasis added). Hence, the issue germane to levy of additional surcharge is that the fixed cost of power, contracted under long – term power purchase agreement, due to drawl of power under Open Access mechanism from the sources other than the distribution licensee(s) of the area should remain un-recovered.

The Commission has examined the aforesaid issue at length and observes that the monthly average of power brought under Open Access mechanism during the six months (April to September, 2018) as reported by the Discom is only about 30.79 million units i.e. 187.74 million units. As against this, in case just one source of long-term power is taken for the purpose of illustration i.e. HPGCL, it is observed that the Commission had approved purchase of 17,234 million units at a fixed cost of Rs. 1727.95 Crore in the FY 2018-19 (cf. from the table filed by the Discoms reproduced earlier in the present Order). As against this the Discoms actually purchased 12,291 million units i.e. 4,943 million units lower than the approved quantum wherein the generator was available for dispatch. Whereas, on an annual basis only about 378 million units may have come in under Open Access

mechanism. Going forward, in line with the MYT Regulations in vogue, the fixed cost stranded will also get recovered through the Fuel Price Adjustment (FPA) mechanism from the embedded Open Access consumers as well. This illustration holds good for all other approved sources of long-term power purchase where the PPA provides for two-part tariff i.e. energy charges based on actual energy drawn and fixed cost irrespective of the fact whether power was drawn or not as determined by the appropriate Commission.

In addition to the above, the Commission observes that the Discoms, on the basis of anticipated power deficit, have tied up thermal power of for eight months and round the clock hydro power of more than 500 MW. This is in addition to a lot of power tied up from Solar and Wind. Hence, about 6000 to 9000 kWh of surplus power is upfront available to the Discoms even if the banked power to be drawn during peak season is not considered. Hence, it is observed that a large quantum of power is stranded because of the mismatch in demand – supply including the large variation in the peak load and off-peak load hours / season. In conclusion it is observed that during the period under consideration only a miniscule quantum of power is backed down and attributable to the open access consumers which can be said to be unavoidable obligation under the contract as per the statute. Hence, to this extent additional surcharge is leviable. The Commission has examined at length the contention of the intervener that there is multiple charging as the embedded open access consumers who are also consumers of the distribution licensee, are paying transmission / wheeling charges as well through the applicable tariff (s). The Commission, after due deliberations, observes that in the true-up as well as FSA the embedded consumers including open access embedded consumers do bear the fixed cost by way of demand charges based on contract demand in the respective tariff. However, incidence of FSA in terms of Rs. / kWh or kVAh is levied on the quantum of energy actually drawn by such consumers from the Discoms. Hence, in case of reduced quantum drawn from the Discoms, the amount of FSA recovered by the Discoms also reduces.

In view of the above discussions, the Commission is of the considered view, as also observed in the previous order(s), that the multiplicity of recovering the same cost from the same set of consumers ought to be avoided. The Commission has

accordingly proceeded to estimate the additional surcharge to be recovered from the Open Access embedded consumers.”

The Commission had agreed to the fact of multiple recovery of fixed cost from the consumers and gone to the extent of calculation of the Fixed Cost of power to have been recovered through Fixed Demand Charges from HT/LT Industrial consumers to the extent of 73.62% and as such the balance 26.38% was only to be recovered by way of Addl. Surcharge.

- c) The Commission's order dated 22.10.2019 on the review petition filed by the Discoms suffered on many accounts, such as:-
- (i) The review Petition had been filed on 17.07.2019 i.e. after 4 1/2 months against the allowed period of 45 days. This delay in submission of Review Petition was not specifically condoned by the Commission.
 - (ii) A reference was made by the Commission to the judgment of Hon'ble Delhi High Court in Aziz Alam Vs Union of India & others (2006 (130) AD (Delhi) 297. Some of the relevant extracts from the order of Hon'ble Supreme Court of India in Meera Bhanja Vs Nirmal Kumari Choudhary and emphasis laid on following parts of the judgment,
 - (a) The review petition has to be entertained on the ground of error apparent on the face of record and not on any other ground;
 - (b) Review of the Order passed by this Court cannot be sought on the basis of what was never urged or argued before the Court;
 - (c) Review can be used to correct a mistake but not to substitute one view for another.
 - (iii) The order dated 22.10.19 suffered from all these limitations. The calculations of Additional Surcharge were substituted even when there was no mistake in the calculations.

IV. REFERENCE TO THE ORDER OF HPERC DATED 30.10.17:

The HP State Electricity Regulatory Commission, passed order dated 30.10.2017 in Petition No. 28/2017 – 'Determination of Additional Surcharge on Short Term Open Access consumers', wherein Hon'ble State Commission gave due weightage to the charges already recovered by the Licensee through Fixed Charges. The Commission agreed that against the total Fixed Charges payable to the Generators by the licensee (Rs.118.83 Crore), the Licensee had already recovered Rs.67.96 Crore as Fixed Demand Charges and as such only Rs. 50.87 Crore

could be recovered as Additional Surcharge from Open Access consumers.

V. ADDITIONAL SURCHARGE AS DETERMINED BY OTHER STATE COMMISSIONS IN THE COUNTRY:

An attempt has been made to know the extent of Additional Surcharge being recovered in other States in the Country. It is interesting to note that in majority of States no Additional Surcharge is being levied. A statement showing the rates of Additional Surcharge being levied in different States is enclosed for ready reference. Main observations made from this statement are,

- (a) In majority of States no Additional Surcharge is being recovered, The States include, Uttar Pradesh, J&K, Jharkhand, Orissa, Gujarat, Chhattisgarh, and Andhra Pradesh.
- (b) In many States the rate of Additional Surcharge is varying from 50 Ps to 83 Ps/kWh. These States include, Telengana, Karnataka, Himachal Pradesh, Madhya Pradesh, Rajasthan, and Punjab.
- (c) Haryana is amongst the 3 States where Additional Surcharge is above Rs.1/kWh. These States are Uttarakhand, Haryana and Maharashtra.

Thus, there is no merit in recovery of Additional Surcharge from the Open Access consumers.

6. Objections filed by M/s. Indian Energy Exchange (IEX):

No written objections were filed by M/s. Indian Energy Exchange (IEX).

7. Objections filed by M/s. Faridabad Industries Association (FIA):

Comments of M/s FIA on Petition No. HERC/PRO-40 of 2019

- a) The present Petition has been filed by the petitioners for seeking approval of additional surcharge to be charged by the Discoms in reference to open access for second half of FY 2018-19.
- b) That the Intervenor is a company duly registered under the Companies Act, 2013. The members of the petitioner Association are industrial units based in and around Faridabad, Haryana.
- c) The Intervenor being an Open Access consumer, is directly affected by any decision on the levy of Additional Surcharge on open access. In this regard, the Intervenor craves leave to place the following submissions:

RE: MAINTAINABILITY OF PRESENT PETITION

- d) At the outset, it is submitted that the present Petition is not maintainable, and is a gross abuse of process. It is submitted that the period for which Additional Surcharge has been calculated by the Petitioners i.e. second half of FY 2018-19 is already over. Further, the said additional surcharge as calculated by the Petitioners has been sought to be levied in the first half of FY 2019-20. Therefore, even the period for levying this additional surcharge is now over. In the circumstances, there cannot be any retrospective levy of Additional Surcharge on the open access consumers.
- e) While the period for levy of additional surcharge is over, and the consumers have already paid the tariff in terms of the orders of the Commission, it is submitted that such retrospective levy of Additional Surcharge cannot be allowed at any cost.
- In this background, it is also relevant to note that the Commission had already determined Additional Surcharge for 1st half of the FY 2019-20 at Rs. 0.44 per unit, vide its Order dated 07.03.2019 (HERC/PRO-52 of 2018 & HERC/PRO-53 of 2018). The said order was subsequently reviewed by the Hon'ble Commission vide its Order dated 22.10.2019 (HERC/RA-18 of 2019), and the Additional Surcharge was re-determined at Rs. 1.16 per unit.
- f) Aggrieved by the Commission's Order dated 22.10.2019, a writ petition was filed by the Petitioners in the Hon'ble Punjab & Haryana High Court. The Hon'ble Punjab & Haryana High Court, vide its Order dated 20.12.2019 (CWP 34623-2019) has stayed the implementation of the order dated 22.10.2019.
- g) Therefore, in view of the above, while Additional Surcharge has already been determined by the Commission for H-1 of FY 2019-20, and while the revised levy of Additional Surcharge for the first half of FY 2019-20 has also been stayed by the Hon'ble High Court, the present Petition filed by the Petitioner is in fact infructuous in so far as it seeks to re-determine additional surcharge for the same period.

- h) Further, it is respectfully submitted, that in view of the stay order of the Hon'ble High Court, the Petitioners are seeking to achieve something indirectly, what has been expressly prohibited.
- i) In the circumstances, it is submitted that the present Petition is not maintainable and is liable to be rejected at the outset.

RE: RESPONSE TO SUBMISSIONS DATED 24.01.2020 FILED BY THE PETITIONERS:

- j) When the matter was heard on 25.09.2019, the Petitioners were directed by the Commission to file additional detailed calculations as under:

“Upon hearing the parties, the Commission directs DISCOMs to file detailed calculation of revenue, projected to be forgone due to change in the rate of additional surcharge. DISCOMs are further directed to study the methodology and calculation of additional surcharge done by the Gujarat Electricity Regulatory Commission and submit their calculations accordingly. They may also state the quantum of revenue losses due to reduction in additional surcharge that was passed on to other consumers in the true-up of Power Purchase Cost/FSA.”

- k) Thereafter, on 05.11.2019, the Petitioners pleaded for some more time to submit the details required by the Commission, and the Commission held as under:

“Upon hearing the parties, the Commission directs DISCOMs to submit their detailed reply in compliance to the Interim Order of the Commission dated 25.09.2019 with copy to M/s. FIA.”

- l) Thereafter, the matter was heard again with another Petition No. PRO 1 of 2020 (Additional Surcharge claim for H2- FY 2019-20) on 24.1.2020 where the Petitioners were again asked by the Commission and the Intervenor to furnish the desired dataset.

- m) In this regard, it is submitted that though the Petitioners have belatedly, after the public hearing on 24.01.2020, provided some details, the same suffers from various discrepancies as under:

A. Projected revenue to be forgone due to change in the rate of additional surcharge:

The Petitioners were asked to submit the ‘revenue foregone’ data for FY 2019-20 due to change in Additional Surcharge from Rs. 1.13/kWh to Rs. 0.44/kWh. However, the Discoms have submitted the figures of some ‘notional losses’ accrued to them on account of open access consumption during FY 2018-19 and 1st half of FY 2019-20. Such losses have been worked out by them as the difference between the Tariff payable by HT-33 kV consumers and the Open Access Charges i.e. Rs. (HT Tariff- OA Charges) * OA consumption

For eg: loss in FY 2018-19 = Rs. 76 Cr.

worked out based on HT Tariff = Rs. 6.89/kWh, OA charges= Rs. 2.77/kWh, OA in FY 2019-20 = 185 MUs
 $(6.89-2.77) * 185/10 = \text{Rs. } 76 \text{ Cr.}$

Similarly: loss in H1 FY 2019-20 = Rs. 334 Cr.

worked out based on HT Tariff = Rs. 6.89/kWh, OA charges= Rs. 2.05/kWh, OA in FY 2019-20 = 689 MUs
 $(6.89-2.05) * 689/10 = \text{Rs. } 334 \text{ Cr.}$

Thus, this ‘notional loss’ essentially is the revenue foregone due to open access in the state. It may be noted that HERC did not seek this data from the Petitioners and thus the data furnished by the Discoms is irrelevant to the instant Petitions.

Further, on examining the sale of surplus power by the Petitioners, it is understood that around 691 MUs were sold at around Rs. 2.78/kWh fetching Rs. 192 cr. of revenue. Thus, a quantum almost equivalent to open access consumption during H1- FY 2019-20 was sold by the Petitioners, resulting in no stranded quantum with the Petitioners. Thus, by their own data and submissions, there appears no case for claiming additional surcharge by the Petitioners, as also depicted below:

| | Unit | FY 2019-20 |
|---|---------|------------|
| OA consumption in H1- FY 2019-20 | MU | 689 |
| Revenue from Sale of Surplus Power @ 2.78 Rs/kWh for FY 2019-20 | Rs. Cr. | 192 |
| Surplus quantum sold in H1- FY 2019-20 | MU | 691 |

Since the quantum sold by the Discoms during H1- FY 2019-20 was almost the same as the open access availed, there is no case for stranded capacity during the period.

B. Calculation of additional surcharge as per Gujarat Electricity Regulatory Commission methodology for H1 of FY 2019-20:

The Petitioners have submitted the computations of Additional Surcharge based on the methodology adopted by Hon'ble GERC. However, there are several errors in the computations furnished by the Petitioners-

| Sr. No. | Particulars | Unit | Gujarat | Haryana | Our Remarks |
|-----------|---|------------------|--------------|--------------|--|
| 1 | Contracted Capacity | MW | 18,070 | | |
| 2 | Maximum Availability | MW | 17,769 | 11,242 | Petitioners need to clearly furnish the break-up details of 'availability' and the corresponding 'total fixed charge' considered, since these are only supposed to cover the long term thermal PPAs and should not include the RE or other must run contracts. The apprehension of the Intervenor herein is that the Petitioners have included the Fixed cost of the entire PPAs they have entered into instead of only the long term thermal PPAs. |
| 3 | Minimum Availability | MW | 11,616 | 5,186 | |
| 4 | Average Availability | MW | 14,478 | 8,485 | |
| 5 | Maximum Scheduled | MW | 15,011 | | |
| 6 | Minimum Scheduled | MW | 7,128 | | |
| 7 | Average Scheduled | MW | 11,195 | | |
| 8 | Capacity not availed (Max) | MW | 8,323 | | The data considered by the Gujarat Discoms in their computations is on 15 minutes block basis where the 'unavailed capacity' by Gujarat Discoms excludes any capacity not availed due to reasons not attributable to open access i.e. outages, congestions, fuel scarcity etc. The Petitioners in their workings have simply worked out the stranded capacity as the average open access availed by consumers without depicting the 'average unavailed capacity' by them. It goes without saying that the minimum of average unavailed capacity and the OA allowed is to be considered as capacity stranded due to OA. |
| 9 | Capacity not availed (Min) | MW | -51 | | |
| 10 | Capacity not availed (Avg.) | MW | 3,282 | | |
| 11 | OA Allowed (Max) | MW | 547 | | |
| 12 | OA Allowed (Min) | MW | 19 | | |
| 13 | OA Allowed (Avg.) | MW | 56 | 158 | |
| 14 | Capacity stranded due to OA | MW | 56 | 150 | |
| 15 | Total Fixed Charge (PPA) | Rs. Crore | 4,621 | 3,603.20 | |
| 16 | Fixed charges per MW available (15÷4) | Rs. Crore | 0.32 | 0.42 | |
| 17 | Fixed charges of stranded capacity (16×14) | Rs. Crore | 18.03 | 63.75 | |
| 18 | Interstate Transmission Charges Paid | Rs. Crore | 2,543.10 | 1,171 | |
| 19 | Energy Scheduled | MU | 49,170 | 32,663 | |
| 20 | Interstate Transmission Charges per unit (18÷19) | Rs./kWh | 0.5172 | 0.3585 | The Petitioners have considered the inter-state transmission charges while netting off from the demand charges to adjust the same in 'stranded charges recoverable' (S.N 27). However, the Gujarat Discoms have rightly |
| 21 | Intra State Transmission & Distribution Charges (As approved in Tariff Order) | Rs./kWh | 0.1401 | 1.30 | |
| 22 | Total T & D Charges per kWh (20+21) | Rs./kWh | 0.6573 | 1.6585 | |

| Sr. No. | Particulars | Unit | Gujarat | Haryana | Our Remarks |
|---------|--|------------------|---------------|---------------|--|
| | | | | | considered only the intra-state transmission and distribution charges since Discom is paying only such charges for conveyance of electricity within the state based on the network laid down by STU. It's only the intra-state charges which are part of demand charges and not the inter-state charges. Total transmission and distribution charges considered for netting-off from the demand charges are considered by the Petitioners at Rs. 1.30/kWh. The Petitioners seem to have considered distribution charges as Rs. 0.88/kWh, which however includes losses as well and is therefore incorrect. Distribution charge is Rs 0.55/kWh as per the Tariff Order for FY 2019-20. |
| 23 | Energy Consumed by OA Consumer from Discoms | MU | 1,608 | 619 | |
| 24 | T & D charges payable to Discoms by OA consumers (22×23) | Rs. Crore | 105.69 | 102.66 | |
| 25 | Demand Charges Recovered by Discoms from OA | Rs. Crore | 138.90 | 61.88 | |
| 26 | Demand Charges to be adjusted /recoverable (25-24) | Rs. Crore | 33.21 | -40.78 | |
| 27 | Net stranded charges recoverable (17- 26) | Rs. Crore | -15.18 | 104.53 | |
| 28 | OA scheduled energy | MU | 248 | 689 | |
| 29 | Additional Surcharge applicable for the period from 1st April, 2019 to 30th September, 2019 | Rs./kWh | -0.61 | 1.52 | Inaccurate and not based on the relevant data |

For the above stated reasons, the computations shown by Haryana Discoms based on Hon'ble GERC's methodology are incomplete and not correct reflection of the additional surcharge.

C. Quantum of revenue losses due to reduction in additional surcharge that was passed on to the other consumers in the true-up of Power Purchase Cost:

The Petitioners have depicted the following chart under this head of response-

| Month | Stranded Power Min. of OA & backdown (MW) | Stranded Power Min. of OA & backdown (MU) | OA Purchase (MW) | OA Purchase (MU) |
|-------------|---|---|------------------|------------------|
| Apr | 125.66 | 90.47 | 141.09 | 101.59 |
| May | 123.04 | 91.54 | 133.81 | 99.56 |
| Jun | 149.31 | 107.50 | 158.50 | 114.12 |
| Jul | 163.19 | 121.42 | 140.94 | 101.48 |
| Aug | 151.10 | 112.42 | 172.34 | 128.22 |
| Sep | 188.35 | 135.61 | 200.16 | 144.12 |
| Grand Total | 150.11 | 109.83 | 157.81 | 114.85 |

For the month of July, the stranded power considered by the Petitioners is 163.19 MW, while OA purchase during the same month is listed as 140.94 MW. This dataset appears flawed since

stranded capacity attributed to OA consumers in July is more than the capacity availed by them, an interpretation which doesn't make sense.

- n) Further, while the data submitted on 24.01.2020 as stated above, is clearly flawed, and suffers from various discrepancies, it is pertinent to note that the distribution licensees have still not provided the following details:
- (i) The distribution licensees have not correlated the stranded capacity on block wise basis as against the open access demand in the State.
 - (ii) The distribution licensees have not provided the details of short-term and medium-term purchases as against the stranded capacity claimed. If there is capacity claimed to be stranded, there cannot be any justification of short-term purchases or medium-term purchases.
 - (iii) The distribution licensees have not provided the reasons for the alleged backing down of the generators. The backing down need not be only on account of open access demand, whereas the additional surcharge is to be determined only due to backing down due to open access capacity.
 - (iv) The distribution licensees have not provided authenticated data, the data on stranded capacity, backing down etc. need to be certified by the SLDC in addition to the same being placed on record vide an affidavit by the distribution licensees.
 - (v) The distribution licensees have not provided any justification for the change in the methodology for the computation of the additional surcharge. The order of the Hon'ble Commission dated 07.03.2019 providing for the methodology was not challenged by the distribution licensees and there is no justification for the distribution licensees to seek any deviation from the said methodology adopted by the Hon'ble Commission.
- o) In the circumstances, it is respectfully submitted that the Petitioner has miserably failed to place on record documents/data conclusively proving its case for redetermination of additional surcharge. All

contentions and averments to the contrary are stated to be wrong and are denied.

RE: CONCEPT OF OPEN ACCESS AND APPLICABILITY OF ADDITIONAL SURCHARGE

- p) Without prejudice to the fact that the present Petition is not maintainable, it is submitted that even on merits the Petitioners have miserably failed to establish a case for levy of additional surcharge. The Petitioners have miserably failed to conclusively prove the existence of any stranded capacity on account of open access, and has certainly not met the conditions precedent to levy of additional surcharge. This particularly includes the decision of the distribution licensees to enter into new PPAs for procurement of capacity of 400 MW on medium term basis, the substantial procurement of power on short-term bilateral basis and also the procurement of power on the energy exchange to meet the demand in the State, contrary to the requirement of surplus capacity to be stranded for the levy of additional surcharge.
- q) One of the primary features and provisions of the Electricity Act, 2003 is the concept of open access. Open access is the right available to the consumer to source electricity from third parties, apart from the distribution licensee which operates in the area of supply, only using the transmission and distribution system of the licensees.
- r) Open access under the Electricity Act is governed under Sections 38, 39 and Section 42 which mandates open access to be introduced in a progressive manner. Section 42 provides that *the State Commission shall introduce open access for consumers in such phases and subject to such conditions as may be specified.*
- s) The primary intention behind the concept of open access evolved under the provisions of the Electricity Act is to promote competition. When the consumers have the option and freedom of taking electricity from third parties and not from the distribution licensee in the area of supply, there arises competition between the multiple sources of supply including that of the distribution licensee which ultimately benefits the consumers at large.

- t) Once open access is permitted, the use of the transmission and distribution lines are to be on non-discriminatory basis, namely, that the open access sources are to be placed on the same pedestal with regard to the use of the lines as that of the transmission licensee / distribution licensee, with neither getting any preference over the other.
- u) In this regard, the Statement of Objects and Reasons to the Electricity Act and also the Preamble captures the intention of the Union Parliament to promote competition and open access.
- v) Section 42 (4) of the Electricity Act provides for the levy of additional surcharge, which reads as under:

"42. Duties of distribution licensee and open access -

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

- w) On a plain reading of the above provision, the surcharge under Section 42 (4) of the Electricity Act is only for the purpose of meeting the fixed cost of the distribution licensee on account of its obligation to supply. The obligation to supply is provided under Section 43 of the Electricity Act.
- x) The Central Government has also, in exercise of its statutory powers under Section 3 of the Electricity Act has framed and notified the National Electricity Policy and the National Tariff Policy. The above Policies of the Government of India also lay great emphasis on competition to be promoted and towards that end to ensure that Open Access is provided to the consumers in the matter of right.
- y) Open access, apart from providing the freedom of choice to the consumers for supply of electricity, also helped the development of States and their economies by providing for an alternate mechanism to meet the electricity demand in the State. The distribution licensees have been in substantial deficit of capacity and have been unable to

meet the demand in the States. The open access has helped to bridge this gap in demand and supply to some extent.

- z) The Electricity Act provides for only the following charges to be levied by the distribution licensee on open access consumers and which are towards particular purposes:
 - (a) **Wheeling charges:** The wheeling charges are payable only if the electricity lines of the distribution licensee are used. In case of dedicated transmission lines etc where no part of the distribution system is used, no wheeling charges are payable;
 - (b) **Cross-subsidy surcharge:** This is to compensate for the existing level of cross-subsidy in the system.
 - (c) **Additional surcharge (Section 42(4)):** This is payable to compensate for any stranded capacity of the distribution licensee on account of consumers taking supply through open access.
- aa) The National Electricity Policy and the National Tariff Policy lays great emphasis on open access to be provided and competition to be promoted in the electricity sector.
- bb) The National Tariff Policy, 2016 reiterates the objective of promoting open access and ensure that charges and conditions are not imposed to make open access un-competitive. The National Tariff Policy notification dated 28/01/2016, inter-alia, reads as under:

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

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

*A consumer who is permitted open access will have to make payment to the generator, the transmission licensee whose transmission systems are used, distribution utility for the wheeling charges and, in addition, the cross subsidy surcharge. **The computation of cross subsidy surcharge, therefore, needs to be done in a manner***

that while it compensates the distribution licensee, it does not constrain introduction of competition through open access. A consumer would avail of open access only if the payment of all the charges leads to a benefit to him. While the interest of distribution licensee needs to be protected it would be essential that this provision of the Act, which requires the open access to be introduced in a time-bound manner, is used to bring about competition in the larger interest of consumers.

SERCs may calculate the cost of supply of electricity by the distribution licensee to consumers of the applicable class as aggregate of (a) per unit weighted average cost of power purchase including meeting the Renewable Purchase Obligation; (b) transmission and distribution losses applicable to the relevant voltage level and commercial losses allowed by the SERC; (c) transmission, distribution and wheeling charges up to the relevant voltage level; and (d) per unit cost of carrying regulatory assets, if applicable.

.....

The National Tariff Policy of 2016, continues the same provision with regard to the additional surcharge as in the earlier Policy as under:

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

- cc) The implication of the above is the following:
 - (a) The onus of proof is on the licensee. The degree of proof required is very high – to conclusively demonstrate.

- (b) The existing power purchase agreements have been and continues to be stranded. This refers to the actual data, which has been stranded and also continues to be so in future. It cannot be based on assumptions.
 - (c) There is surplus electricity tied up on long term basis which has been rendered stranded.
 - (d) There is an unavoidable obligation to bear fixed cost on account of open access consumers.
- dd) The Hon'ble Tribunal and the Hon'ble Supreme Court have reiterated that open access is essential to promote competition and the charges which are imposed on the open access consumers ought not to be onerous which has the effect of throttling open access and competition.

The Hon'ble Tribunal has in the full bench decision in the case of RVK Energy Private Limited v. Central Power Distribution Co of AP Ltd &Ors, Appeals No. 169 of 2006 and batch dated 05/07/2007 has held that the object and purpose of the act is to promote competition and considering the above the charges for open access need to be determined in a reasonable manner and not to make open access illusory.

In the case of SESA Sterlite v. OERC, (2014) 8 SCC 444, the Hon'ble Supreme Court has reiterated the importance of open access for promoting competition. The Hon'ble Supreme Court has also held that the cross-subsidy surcharge and additional surcharge are compensatory in nature. (Para 23 to 30)

- ee) The very concept of additional surcharge applies in a situation wherein the distribution licensee has entered into long term power purchase agreements and is under an obligation to pay fixed charges, but a part of the capacity tied up under the Power Purchase Agreements are left stranded on account of open access consumers purchasing electricity from third party sources. Such capacity has to be continuously stranded, and not merely for part of the day or month.
- ff) For determination and levy of additional surcharge, the following needs to be fulfilled in relation to stranded capacity:

- (a) The consideration is only of long term power purchase commitments which are in excess of the demand in the State;
 - (b) The stranded capacity is to be considered only on the drawl by the open access consumers and not back-down for any other purpose;
 - (c) The fixed cost to be considered is out of such stranded capacity on account of open access consumers, which otherwise gets passed on to the retail supply consumers.
 - (d) There has to be continuous stranding of capacity, not for individual time blocks or for particular seasons for levy of additional surcharge.
- gg) The regulations framed by the Commission are also in line with the above object and purpose of the Electricity Act, the provisions of the Electricity Act and also the national tariff policy. Regulation 22 of the Open Access Regulations, 2012 of the Commission reads as under:

"Additional Surcharge – (1) An open access consumer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge in addition to wheeling charges and cross-subsidy surcharge, to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under subsection (4) of Section 42 of the Act.

Provided that such additional surcharge shall not be levied in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use.

(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.

(3)The distribution licensee shall submit to the Commission, on six monthly basis the details regarding the quantum of such stranded costs and the period over which these remained stranded and would be stranded. The Commission shall scrutinize the statement of calculation of such stranded fixed costs submitted by the distribution licensee and determine the amount of additional surcharge.

Provided that any additional surcharge so determined shall be applicable to all the consumers availing open access from the date of determination of same by the Commission.

(4) The consumers located in the area of supply of a distribution licensee but availing open access exclusively on inter-State transmission system shall also pay the additional surcharge.

(5) Additional surcharge determined on per unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access".

- hh) In the above background, the distribution licensees are mandated to provide the details of the stranded capacity and stranded costs on six monthly basis. Additional surcharge as a concept cannot be fixed for a longer period of time as it is based on the present, existing and also continuing stranded capacity and stranded cost of the distribution licensees on account of the open access supply being taken by the consumers.
- ii) The stranded capacity on account of open access consumers presumes surplus capacity available with the distribution licensee, namely, capacity which would have been scheduled if the open access consumers had taken supply from the distribution licensee. Therefore, the presumption is that the distribution licensees are in surplus.
- jj) As a direct natural corollary, the existence of any of the following circumstances would disentitle the distribution licensees from claiming any stranded capacity:
 - (a) any load shedding carried out or load restrictions imposed on consumers in the State;

- (b) short term power purchases made by the distribution licensees;
- kk) In addition, the renewable energy purchase made by the distribution licensees also need to be examined. The distribution licensees are obligated to procure renewable power and any backing down of capacity under long term PPAs on account of renewable power purchase is not accountable to the open access consumers, but the renewable obligation of the licensees. This cannot be loaded on in the determination of additional surcharge.
- ll) Each of the above needs to be co-related on every 15 minutes time block basis as against the un-requisitioned capacity from power stations from which distribution licensees are procuring electricity under long-term PPAs to ascertain the existence of stranded capacity.
- mm) The above is essential because the additional surcharge under Section 42(4) can be levied only to the extent the capacity remained stranded on account of the open access consumers. Therefore the following would be relevant:
 - (a) When the distribution licensees are imposing load restrictions or load shedding on consumers, to such extent the distribution licensees are unable to supply electricity to the consumers. If during the same time block there is any un-requisitioned capacity from power stations under long term PPAs, the said capacity remains un-requisitioned not due to the open access consumers but due to the inability of the distribution licensees to supply electricity to its consumers and imposition of load shedding;
 - (b) When the distribution licensees are procuring power on short-term basis, either on bilateral basis or from the power exchange, to such extent any capacity un-requisitioned from power stations under long-term PPAs cannot be attributed to open access consumers. The distribution licensees in such cases are only, for reasons best known to them, substituting the power available under the long-term PPAs with short-term purchases and the same has nothing to do with open access consumers;

- (c) As stated above, to the extent of renewable energy purchases by the distribution licensees under new PPAs being entered into, such capacity being purchased from renewable sources are to fulfil the renewable purchase obligation of the distribution licensee and are consciously intended to substitute the power available under long-term PPAs. In other words, despite there being claimed surplus capacity with the distribution licensees, further capacity from renewable energy sources are being tied up to fulfil the renewable purchase obligation. To such extent the capacity under long-term PPAs being stranded are not on account of the open access consumers, but are due to procurement of renewable energy to fulfil the renewable purchase obligation.
- nn) The Regulations of the Commission in any event require the distribution licensees to file the necessary details on a six monthly basis. Therefore the Commission has also envisaged periodic determination of additional surcharge, which is required to ensure that during periods when there is higher stranded capacity, the distribution licensees are adequately compensated by way of additional surcharge, but when there is no stranded capacity on account of open access consumers, the same additional surcharge previously determined assuming stranded capacity is not continued to be levied.
- oo) In such an event, the additional surcharge should be calculated based on actual parameters for the comparable past period and assuming that conditions would remain same for corresponding period next year. For example, the period of April to June for the FY 2016-17 is comparable with April to June of FY 2017-18.
- pp) As is the settled position now, additional surcharge is compensatory in nature and has to correlate to the costs and expenses of the distribution licensees on account of stranded capacity due to the open access consumers. The additional surcharge cannot be a means for the distribution licensees to earn additional profit or subsidization of the other consumers for reasons other than stranded capacity.

- qq) In the above background, on 07.03.2019, the State Commission had passed an order in Petitions No. HERC/PRO-52 of 2018 and HERC/PRO-53 of 2018 filed by the Discoms, together with the tariff order for the year 2019-20, had determined the additional surcharge applicable at Rs. 0.44/- kWh on the open access consumption, based on the data then available. In terms of the above, the State Commission had adopted the correct methodology of applying the fixed charges towards all the consumers in the State including the open access consumers for the purposes of additional surcharge as no co-relation can be established between a particular generation capacity tied up by distribution licensee and a Consumer. It is due to the fact that the power purchase tie up is for all the consumers and any backing down is due to the surplus capacity available after meeting the demand of all the consumers. The State Commission had determined Additional Surcharge of 0.44 Rs./ Unit addressing the issues raised by stakeholders in the prevailing methodology of determination of Additional Surcharge.
- rr) It is relevant to mention that the above determination of additional surcharge at 44 paise per unit was itself a substantial benefit granted by the State Commission to Distribution licensees. This was under the circumstances when the distribution licensees were in fact under deficit and have tied up substantial power from generators and other sources.
- ss) In the present facts and circumstances, to the knowledge of the Petitioner that is available from public sources, the distribution licensees are in fact not in a surplus, but are procuring substantial quantum of power on short-term basis, on bilateral basis as well as from the power exchanges.
- tt) In fact, the distribution licensees are procuring 400 MW on medium term basis under new PPAs entered into pursuant to the Scheme of the Government of India to operationalize stressed power assets. This includes 250 MW from SKS Power Generation Chhattisgarh Limited and 150 MW from MB Power. The procurement is not under long term agreement and is further with the full knowledge of the present demand-supply position.

- uu) The above by itself is sufficient to conclusively demonstrate that there is no stranded capacity in the State and on the contrary the distribution licensees are under deficit for which they are entering into new agreements for purchase of power.
- vv) Further, for the period from April, 2018 to March, 2019 the distribution licensees have procured a total of 5519 MUs of power on bilateral basis. This is for throughout the year, except for the month of March, 2019 which itself establishes that there are purchases being made by the distribution licensees throughout the year on short-term basis.
- ww) In addition, the distribution licensees have also procured a quantum of 139 MUs from the energy exchange. Therefore, the aggregate quantum of energy procured by the distribution licensees on short-term basis is in excess of 5650 MUs for the year 2018-19, as under:

| Month | Total Volume purchased from exchanges (MUS) | Discoms Bilateral Purchase (MU) | Discoms Exchange Purchase (MU) | Open Access Purchases (MU) |
|--------------|--|--|---------------------------------------|-----------------------------------|
| Apr-18 | 19 | 69 | 12 | 7 |
| May-18 | 107 | 178 | 98 | 9 |
| Jun-18 | 40 | 664 | 4 | 36 |
| Jul-18 | 69 | 1361 | 13 | 56 |
| Aug-18 | 54 | 1493 | 0 | 54 |
| Sep-18 | 26 | 1093 | 0 | 26 |
| Oct-18 | 1 | 443 | 0 | 1 |
| Nov-18 | 33 | 86 | 1 | 32 |
| Dec-18 | 80 | 56 | 2 | 78 |
| Jan-19 | 88 | 43 | 5 | 84 |
| Feb-19 | 98 | 33 | 3 | 95 |
| Mar-19 | 114 | 0 | 1 | 113 |
| Total | 730 | 5519 | 139 | 591 |

- xx) Thus, while the distribution licensees have procured 5658 MUs of power on short-term basis during the year 2018-19, only 591 MUs have been procured by consumers through open access from the exchange, which is the primary source of open access procurement.
- yy) In other words, less than 11% of the total procurement of the distribution licensees on short-term basis is the procurement by the open access consumers. This by itself would establish that there is no stranded capacity whatsoever in the State of Haryana on account of the open access consumers as the distribution licensees are themselves

procuring about 10 times the quantum of power on short-term basis as is being procured by the open access consumers. There obviously cannot be any backing down of generating stations on account of open access consumers, when the distribution licensees themselves are procuring so much of electricity on short-term basis to meet the demand in the State of Haryana.

- zz) In addition to the above, the distribution licensees are required to produce details of the load shedding in the State of Haryana, the quantum of drawal under the UI mechanism, the renewable energy purchases being tied up to substitute the power available under long-term PPAs, any new PPAs executed or being proposed to be executed on long term basis etc. The details are essential for the correct and proper determination and levy of additional surcharge.
- aaa) In the circumstances, the present Petition is devoid of any merit and is liable to be rejected.

Comments of M/s FIA on Petition No. HERC/PRO-1 of 2020

- a) In terms of the daily order dated 24.01.2020 of this Commission in the present matter, the Petitioners were directed to file certain computation/submissions within 7 days, after which the Respondents were given time to respond. The Commission had held as under:
 - “4. After hearing the parties at length, the Commission directs UHBVNL to supply the copy of calculation of Additional Surcharge pointing out & substantiating the discrepancies contained in the Order dated 07.03.2019 to the Commission as well as to the Respondents within 7 days. The Respondents are directed to file, with the Commission as well as with the UHBVNL, their written objections including on the discrepancies/calculation error in the calculation of Additional Surcharge pointed out by UHBVNL within 5 days thereafter. UHBVNL is directed to file the reply on the objections raised by the Respondents within 5 days thereafter.”*
- b) However, the Petitioner has till date not filed any submissions in this regard, and the intervenor/respondent has not received the same. It is

respectfully submitted that the present Petition at the outset is liable to be dismissed on this ground alone.

Other submissions of M/s. FIA are the same as submitted in the case of HERC/PRO-40 of 2019. Hence, for the sake of brevity, the same is not reproduced again.

8. Additional submissions of UHBVNL & DHBVNL including reply on the objections filed by M/s. Jindal Stainless (Hisar) Ltd.:
 - a) The Petitioners had filed these petitions under Section 42 (4) of the Electricity Act, 2003 read with regulation 22 of the HERC terms and conditions for grant of connectivity and open access for intra State transmission and distribution system Regulations, 2012 (“OA Regulations”).

Scope of the Present Proceedings.

- b) It emanates from the above that the scope of the present proceedings is limited to scrutiny of data submitted by UHBVNL and DHBVNL on six monthly basis for determination of determination of Additional Surcharge for first and second half of the 2019-20 applying the methodology already in place since 29.05.2014. No proceedings for the purposes of revising this methodology have been initiated by the Commission, as yet.
- c) Thus, during the course of the hearing in the present proceedings, UHBVNL and DHBVNL specifically submitted that in case the Commission is intending to revise the methodology, then a public hearing specifically on proposed revised methodology may kindly be scheduled and opportunity of being heard on pros and cons of such proposed revised methodology may be granted to all stakeholders including UHBVNL and DHBVNL. The Commission indicated that such opportunity shall be granted if such revision in methodology would be done.
- d) In view of this matter, UHBVNL and DHBVNL have restricted their arguments on the existing methodology and submitted that any methodology that shall be proposed must be in synchronization with

the principles/formula laid down in Regulation 22 of the HERC OA Regulations (supra) and any revision which is not synchronization with the said regulation would require amendment in the provisions of the said regulation itself. In this context, it was submitted that the present proceedings are in quasi-judicial jurisdiction of the Commission and that revision of methodology and/or amendment to the said regulation 22 of OA Regulations for revision in such methodology falls within legislative jurisdiction (and outside quasi-judicial jurisdiction) of the Commission. Thus, any revision in methodology and/or amendment in said regulation 22 of OA Regulations cannot be done in the present proceedings, which were initiated by UHBVNL and DHBVNL for the purposes of scrutinizing the data submitted and determination of Additional Surcharge on the basis of existing methodology.

- e) Accordingly, both oral submissions made during the course of the hearing based on which these written submissions are being filed addressed on the following issues:-
- i) Revision of additional surcharge from 44 paisa/unit determined by the Hon'ble Commission in Tariff Order for FY 2019-20 to Rs 1.16 paisa/unit vide Order dated 22.10.2019, passed on the review Petition (HERC/RA-18 of 2019) filed by the Discoms against ARR/Tariff Order dated 07.03.2019 for FY 2019-20,
 - ii) Determination of additional surcharge for 2nd half of FY 2019-20 based on date for first half of FY 2019-20.

Regulatory framework governing determination of Additional Surcharge

- f) Section 42 of the Electricity Act, 2003 which stipulates levy of Additional Surcharge on open access consumers is extracted and reproduced herein below for ready reference:-

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

- g) Regulation 22 of the OA Regulations provides for the principles and methodology for determination of Additional Surcharge, This regulation 22 reads as under:-

“22. Additional Surcharge. –

(1) An open access consumer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge in addition to wheeling charges and cross-subsidy surcharge, to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under sub-section (4) of Section 42 of the Act.

Provided that such additional surcharge shall not be levied in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use.

(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.

(3) The distribution licensee shall submit to the Commission, on six monthly basis the details regarding the quantum of such stranded costs and the period over which these remained stranded and would be stranded. The Commission shall scrutinize the statement of calculation of such stranded fixed costs submitted by the distribution licensee and determine the amount of additional surcharge. Provided that any additional surcharge so determined shall be applicable to all the consumers availing open access from the date of determination of same by the Commission.

(4) The consumers located in the area of supply of a distribution licensee but availing open access exclusively on inter-State transmission system shall also pay the additional surcharge.

(5) Additional surcharge determined on per unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access:”

- h) Thus, Additional Surcharge is determined in accordance with the principles and methodology provided in the aforesaid regulation 22. Sub regulations (2) and (3) of regulation 22 of OA Regulations, lay down the applicability and methodology of working out Additional Surcharge. Sub regulation (2) provides that ‘the additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract.’ It means that Additional Surcharge is to compensate the Discoms for the fixed cost borne by the Discoms for the Power Purchase Commitments stranded on account of drawl by Open Access consumers from sources other than Discoms. Sub regulation (2) further provides that fixed cost related to network assets would be recovered through wheeling charges i.e. stranding of network costs, if any, is to be treated/addressed differently.
- i) Sub regulation (3) of the Regulation 22 of OA Regulations provides that distribution licensee shall submit to the Commission, on six monthly basis, details of such stranded costs and the period over which these remained stranded. It is noteworthy that the said sub-regulation provides that data is to be submitted on six monthly basis and does not mandate that each petition for determination of Additional Surcharge is to be filed immediately upon expiry of six months every year. It is submitted that this six months data is provided to the Discoms by HVPNL in the seventh month and it takes about a month or two to process this data, make calculations, verify the calculations, draft a petition and file the same before the Commission.
- j) Accordingly, UHBVNL and DHBVNL submitted before the Commission slot wise details of Power backed down/ surrendered, power drawn by OA consumers, power backed down/surrendered exclusively due to drawl by Open Access Consumers for the complete six months period in each these petitions.
- k) In this view of the matter, the Commission is required to scrutinize the data, determine the power backed down / surrendered exclusively on

account of drawl by Open Access Consumers during the period of 6 months and then work on the fixed cost of power so stranded.

- 1) Further, assuming that, the drawl by OA consumers would be same during the next half of the year as in the six months for which data is submitted by the Discoms, the Commission is required to determine the Additional Surcharge per unit of the Open Access drawl to be applicable during the next half of the year.

Methodology for Determination of Additional Surcharge

- m) In this regard, it is submitted that the Commission by its Order dated 29.05.2014 passed in HERC/PRO-41, 42 & 43/2013 had already determined methodology for fixing Additional Surcharge payable by Open Access consumers in synchronization with the formula provided in regulation 22 of the OA Regulations. The relevant paragraphs of the Order dated 29.05.2014 are extracted and reproduced herein below for ready reference:-

“5.3 Additional Surcharge

Regulation 22 of “Haryana Electricity Regulatory Commission (Terms and conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 provides as under:

...

The Commission notes that the additional surcharge has to be determined under section 42 of the Electricity Act, 2003. Since the Discoms has an universal obligation to supply power, it has to enter into long term agreements for purchase of power from various generating stations for meeting the entire demand of the state. As such, when these embedded consumers draw power from any other person under Open Access, the fixed cost of the supply taken by these consumers from elsewhere is still payable by the licensee, making it a stranded capacity for the Discoms’. The additional surcharge payable by open access consumers was worked out by the Discoms in the petition at Rs. 1.00/kWh as under:

..

The Commission heard this petition during the public hearing on MYT ARR petition of UHBVNL for the control period FY 2014-15 to FY 2016-17. During the hearing UHBVNL requested the Commission to grant some more time to the licensee for calculating the amount of additional surcharge with respect to stranded power on account of open access consumers procuring power from sources other than the licensee. The UHBVNL thereafter filed the detailed calculations for additional surcharge along with other relevant data for FY 2013-14 vide their Memo no. Ch-73/GM/RA/NIF-25/Vol-51 dated 15.05.2014. The basis for calculation of month-wise additional surcharge for FY 2013-14 has been given as under by UHBVNL:

- i. The amount of power surrendered from individual power plants on a daily basis for every month starting from April 2013 to March 2014, has been considered.*
- ii. The number of units of power that have been drawn via Open Access by the consumers on daily basis, have been considered.*
- iii. Since, the quantum of power surrendered every day are not from a specific power plant, and fixed cost associated with every power plant is different, the appellant has calculated an effective per unit fixed cost for every month that may be considered for calculating the amount of total fixed charges (Additional surcharge) that the appellant has paid because of the total stranded power in that particular month owing to corresponding open access for that month. In other words, the proportion in which individual power plant units have contributed to the surrendering of power for the entire month, in the same proportion; the fixed costs for the individual power plant units have been taken to give a total effective per unit fixed cost for that month.*
- iv. The effective per unit fixed cost obtained above is multiplied to the stranded power (in MUs) of that month that has been taken to be surrendered because of consumers opting open access and not scheduling power from the Discoms.*

- v. *In order to ensure that only such power surrendered is taken for calculating additional surcharge, which corresponds to power stranded because of open access consumers only, the lower amount of the open access power in “Round the clock” and surrendered power of every day is taken as the amount for the stranded power for the day due to open access.”*
- n) The aforesaid order including the methodology followed by the Commission was challenged before the Hon'ble Appellate Tribunal for Electricity in Appeal Nos. 269/2014, 204/2014 and 216/2015 titled as Open Access Users Association v. Haryana Electricity Regulatory Commission. The Hon'ble APTEL upheld the methodology adopted by the Commission in its final judgment and Order dated 28.04.2016. It is noteworthy that arguments similar to those raised during the course of hearing by M/S JSL were raised and the same were rejected by the Hon'ble APTEL after considering the same. The relevant paragraphs of the said final judgment and order dated 28.04.2016 are extracted and reproduced below:-
- “39) Issue No.(k) - relating to additional surcharge: On this issue, the appellants have contended as under:*
- 39.1) That the State Commission has approved additional surcharge of 50 paise/kWh for the open access consumers for FY 2014-15. Such high rate of additional surcharge is detrimental to the spirit of competition intended to be brought about by the Electricity Act 2003 and the Tariff Policy.*
- 39.2) Paragraph 8.5.1 of the National Electricity Policy lays down that the amount of cross subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition. The Tariff Policy mandates safeguarding of the interest of the open access consumers in the broader interest of creating competition in the electricity market through open access. Since the amount of additional surcharge approved in the Impugned Order is detrimental to the spirit of competition in the electricity*

sector by means of open access, approval of such additional surcharge is against the spirit of Tariff Policy.

39.3) That Regulation 22 of the HERC Open Access Regulations provides that additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.

39.4) That the consumers have been denied the rightful opportunity to study the method of computation or to assess the impact of the proposed additional surcharge during hearing before the State Commission. The State Commission has issued the Impugned Order just on the very next day after the detailed submission made by the licensees, which submissions were never made public. Hence, the determination of additional surcharge violates the principles of natural justice.

39.5) That while the State Commission has allowed 41,086 Mu as the net energy available for intra-State sale for FY 2013-14, the power surrendered has been shown as nearly 10,327 MU, which is more than 25% of the net available energy for sale. The total surplus quantum for FY 2014-15 has been estimated as 5452 MU by the State Commission in the Impugned Order after considering all the sources of power supply and projected demand. It is not possible to understand how the DISCOMs could have surrendered almost double the quantum at 10327 MU in FY 2013-14, when the sources of power were lesser than those considered in FY 2014-15.

39.6) That the Impugned Order does not contain the data regarding the fixed cost of power purchase from various sources of power purchase, as the power purchase expenses have been approved on the basis of the composite per unit rate, rather than considering the share of fixed charges in Rs. Cr. and the energy charges in Rs./kWh. Hence, there is no way to verify whether the rate of around Rs.1.00/kWh considered by the DISCOMs and accepted by the DISCOMs is appropriate. Since this is the

most critical figure in the computation of additional surcharge, the absence of such information in the Impugned Order vitiates the determination of additional surcharge.

39.7) That open access energy has been shown as 1884 Mu i.e. around 4.6% of the total purchase allowed. Open access phenomenon was not new to the licensee and the likely trend of purchase of power through open access should have been taken into consideration. If the licensees had taken into consideration the likely trend of the open access in the State, it would have been possible for the licensee not to be bound by the long term PPAs for the excess amount of power on account of consumers opting for open access as the energy sales forgone by the licensees on account of open access is a small fraction of the total energy available for sales for the licensees. Indiscriminate signing of the agreements indicates nothing but poor planning on the part of the licensees. For the failure of the licensee, the consumers cannot be loaded for the contractual liabilities which are of no benefit to the consumers.

39.8) That in a separate order dated 14.07.2014, in the matter of review of tariff order dated 30.03.2013 (for FY 2013-14), the State Commission in paragraph 4, dealing with trading loss has noted that the DISCOMs need to appreciate that peak and base load ought to be met with power sourced from different fuels i.e. requirement of base load power ought not to be met from peaking station as the consumer would have to bear the avoidable cost of peak load station during off peak hours. The DISCOMs have not demonstrated whether the DISCOMs explored the economies of different options to serve the peak load or whether the financial implications of the idle load were quantified and then the conscious decision was taken. Further the State Commission observed in its Review Order dated 14.07.2014 that on the one hand licensee talks of surplus power and on the other hand it resorts to load shedding and power regulatory measures. It is unable to strengthen its distribution system to release the long pending connection for new consumers who are in need of power and on the other hand it seeks compensation for under-drawing power at a fraction of the cost of which could have been sold to these consumers at a

compensatory tariff. The Commission in the Review Order further notes its concern that DISCOMs have already tied up for power which is in excess of its requirement for at least 5 to 7 years without having a system of power procurement planning and load forecasting and for open access of power purchase cost. Considering all this in Review Order, the State Commission has taken a view that the relief sought by the DISCOMs for recovering its trading loss from the consumers is not admirable hence, the same is not admitted.”

....

41) *Our consideration and conclusion on Issue No.(k)- relating to additional surcharge:*

41.1) *We have given our thoughtful consideration to the rival contentions made by the parties on this issue of additional surcharge. The State Commission dealing with issue of additional surcharge has observed as under in the Impugned Order:*

“The Commission observes that the distribution licenses, based on the data provided by them for the period April 2013 to March 2014, have been able to conclusively prove, backed with calculations, that their long term power purchase commitments do get stranded most of the times when power is drawn by embedded open access consumers from other sources and the Discoms have to bear the fixed cost of such stranded power which ultimately get passed on to other consumers. They have worked out the cost of such stranded power and based on that has worked out the additional surcharge as 97 paise/unit for FY 2013-14. The Commission further observes that it would not be fair if the cost incurred by distribution licensees for the power purchase commitments stranded on account of power drawn by open access consumers from other sources is passed on to other consumers as that would amount to cross subsidising of the open access consumers by other consumers. It would also be fair to assume that, as the number of open access consumers and power drawn through open access is increasing every year, the additional surcharge worked on similar basis for FY 2014-15 would not work out less than as has been worked out by UHBVNL for FY 2013-14.

41.2) *We have considered the reasoning's recorded in the Impugned Order on this issue of additional surcharge. We find ourselves in agreement with the same findings and observations. The conditions for levy of additional surcharge are provided in the relevant regulations and the repetition of the same is not needed.*

41.3) *We are happy to note that the State Commission in a separate review order dated 14.07.2014, seeking review of an earlier tariff order dated 30.03.2013, has expressed its concern that the DISCOMs have already tied up with power which is in excess of requirement for at least 5 to 7 years without having a system of power procurement planning and for load optimum power cost and accordingly the State Commission has rejected the relief sought by the DISCOMs for recovering its trading loss from the consumers.*

41.4) *Thus there is no perversity in the Impugned Order on this issue and it is decided against the appellants”*

- o) Accordingly, the Commission has been following the aforesaid methodology for the purposes of determination of Additional Surcharge. In this context, it would be relevant to refer to the Order dated 01.08.2016 passed by the Commission in HERC/PRO-14/2016. Relevant part of the said order is extracted and reproduced herein below:-

“At the outset it needs to be stated that this Commission, for the first time, had determined Additional Surcharge vide its Order dated 29.05.2014 on ARR & Tariff of UHBVN & DHBVN for Distribution and Retail Supply Business for the control period from the FY 2014-15 to the FY 2016-17. The calculation of Additional Surcharge, in the said Order, was largely based on the lower of the quantum of power surrendered by the Discoms from April 2013 to March 2014 and the quantum of power drawn by the Open Access consumers under Open Access mechanism; effective per unit fixed cost of power purchase as estimated by the Commission and the same was multiplied by lower of the quantum of power surrendered by the Discoms and the power drawn by Open Access consumers under Open Access mechanism ;

Accordingly, fifty percent of the stranded cost so worked out was passed on as Additional Surcharge. Aggrieved by the aforesaid Order, Open

Access Users Association, Faridabad Industries Association and Hisar Industries Association, preferred statutory appeal in the Hon'ble APTEL (Appeal No. 269 of 2014, Appeal No. 204 of 2014, IA Nos 320 of 2014, 309 of 2014, 188 of 2015 and Appeal No. 216 of 2015 and IA No. 356 of 2015). These appeals were disposed of by the Hon'ble APTEL vide judgment dated 28th April, 2016. The operative part of the ibid judgment is reproduced below:-

....

It is evident from the judgment (Supra) that the Hon'ble APTEL is in agreement with the reasoning, findings and observations of the Commission on the issue of determination of Additional Surcharge. In the present case the Discoms have filed data regarding power surrendered / backed down from various power plants from where they are drawing power under long term Power Purchase Agreements for each day in 15 minutes time block from 1.04.2015 to 30.09.2015 (six months as per the relevant Regulations). Thus, the data, which was also put in the public domain, for inviting objections, in the considered view of the Commission is adequate to estimate the quantum and cost of stranded power that can be attributed to the Open Access consumers.

.....

The Additional Surcharge of Rs. 0.87 / kWh as determined above shall be applicable from 1st August, 2016. The Discoms are advised to take timely action for submission of supporting data / details for the next six months and also host the same on its website. The additional surcharge shall continue to be effective till the same is revised / amended by the Commission. The Additional Surcharge of Rs. 0.87/kWh shall be applicable to the consumers of Uttar Haryana Bijli Vitran Nigam (UHBVN) and Dakshin Haryana Bijli Vitran Nigam (DHBVN) who avail power under the Open Access mechanism in terms of Haryana Electricity Regulatory Commission (Terms and Conditions for Grant of Connectivity and Open Access for Intra-State Transmission and Distribution System) Regulations, 2012, from any source other than the distribution licensees.”

- p) It is submitted that the Commission has been following the above methodology since FY 2014-15. In FY 2018-19 also, the Commission had determined the Additional surcharge following the same methodology as under:-

| Months | MW | MU | OA (MW) | OA (MU) | |
|---|--|----------------------|----------------|------------------------|-------|
| | A= Lower of Open Access and Backing down | B= converted into MU | C= Open Access | D= C converted into MU | |
| Oct-17 | 16.38 | 12.19 | 16.99 | 12.64 | |
| Nov-17 | 38.21 | 27.51 | 42.01 | 30.25 | |
| Dec-17 | 78.58 | 58.46 | 84.36 | 62.76 | |
| Jan-18 | 85.47 | 63.59 | 89.52 | 66.60 | |
| Feb-18 | 69.44 | 46.66 | 74.32 | 49.94 | |
| Mar-18 | 8.54 | 6.35 | 14.5 | 10.79 | |
| Total | 296.62 | 214.77 | 321.70 | 232.99 | |
| Monthly Average | 49.44 | 35.79 | 53.62 | 38.83 | |
| Quantum considered for Addl. Surcharge (lower of the power backed down/surrendered and open access power) | | | | MU | 35.79 |
| Per Unit Fixed Cost of Power Purchase for the FY 2018-19 | | | | Rs/kWh | 1.22 |
| Avg. Additional Surcharge for the FY 2018-19 | | | | Rs. Millions | 43.82 |
| Monthly Open Access Power | | | | MU | 38.83 |
| Additional Surcharge (rounded off) | | | | Rs/kWh | 1.13 |

- q) In the ARR/Tariff Order for FY 2019-20, the Commission sought to change the methodology for working out Additional surcharge without affecting any amendment in the Regulations and without sharing the methodology with various stakeholders and seeking comments thereon.
- r) It is submitted that the methodology as given in regulation 22 of the OA Regulations is the most appropriate methodology for working out the Additional surcharge and the same is exactly in line with the clause 8.5.4 of the National Tariff Policy. Both regulation 22 of OA Regulations as well as National Tariff Policy provides that the Additional Surcharge shall correspond only to the fixed cost of the power stranded on account of drawl by OA consumers. This has also been made very clear by APTEL in its a judgement dated 26.11.2014 in Appeal Nos. 294, 299, 331 and 33 of 2013 titled as Indian Hotel and Restaurant Association v. Maharashtra State Electricity Regulatory Commission & Ors., which is reproduced hereunder:-

“42. Having prescribed the formula in the said manner, the tariff policy in order to avoid double recovery of fixed costs has restricted additional surcharge only to recovery of stranded power purchase costs. The relevant extract is as follows:

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

43. Fixed costs of the Distribution Licensees other than power purchase are generally included in the Wheeling Charges. The Cross Subsidy Surcharge then computed using the Tariff Policy formulae would not thus include such fixed costs. However, in case, the Wheeling Charges do not contain certain fixed cost of the distribution licensee then the same gets recovered by way of Cross Subsidy Surcharge as in the Tariff Policy Formula. The wheeling charges are to be subtracted from the tariff payable by various categories of consumers which include such fixed costs. The State Commission, in fact adopted the Cross Subsidy Surcharge formula specified in the tariff policy. Therefore, such fixed cost is recovered through Cross Subsidy Surcharges instead of wheeling charges. Since the fixed cost of distribution licensee other than power purchase cost would be recovered by the Distribution Licensee either by way of wheeling charges or Cross Subsidy Surcharges, therefore, as per the tariff policy, the additional surcharge is limited to stranded cost of power purchase only otherwise it would amount to double recovery of fixed cost from the migrating consumers.”

- s) It is submitted that the Commission is bound to determine Additional Surcharge as per the methodology given in OA Regulations, 2012 until these regulations are amended. In this regard, the Hon'ble Supreme court in PTC India vs CERC (2010) has held that State Commission exercises legislative powers while framing the regulations including their amendments under Section 181 of the EA that power to frame/amend regulations is to be distinguished from other powers of the Commission for tariff determination and adjudication.
- t) It was further submitted that the proceedings to amend the Regulations are entirely different than the proceedings for determination of Tariff or

Additional Surcharge etc. The Commission frames new Regulations and carries out amendment in Regulations under Powers vested with the Commission under Section 181 of the Electricity Act 2003. So any amendment in the Regulations can be carried out only in the proceedings to be held by the Commission under Section 181 of EA and not in the present proceedings. Further it was submitted that any amendment in Regulations is subject to the condition of previous publication.

- u) In case the Commission intend to amendment regulation 22 of OA Regulations, it may issue consultative paper, frame draft Regulations, seek comments, hold public hearing and then finalises and notify the Regulations.
- v) Additionally, it is submitted that even for the sake of argument, it is assumed that amendment in Regulation was not required for the Commission to switch over the altogether different methodology for working out the Additional surcharge, it is submitted that the Commission was following a certain methodology for determination of Additional surcharge from FY 2014-15 to FY 2018-19 and the same was upheld by the APTEL also. There was no apparent reason to affect any change in the methodology. The various objections received on the Petition filed by the Discom were by and large the same as have been made by the various stakeholders in the past. So there was no basis for affecting any change in the methodology. In case, the Commission consider it prudent to change the methodology, the Commission should bring a consultation paper clearly bringing out the methodology to be followed, basis for the same along with detailed reasons etc. The comments of various stakeholders should be sought on the consultation paper, public hearing could also be held and only thereafter the Commission should approve any new methodology. The Discoms, however, again strongly emphasise that the methodology for determination of Additional Surcharge being followed by the Commission in the past is the most appropriate methodology which is in line with the National Tariff Policy.

Calculation mistake in determination of Additional Surcharge even as per the new methodology:-

w) It is further submitted that even with the methodology followed by the Commission for FY 2019-20, the calculation of Additional Surcharge, worked out at Rs 0.44 per unit, is wrong. The various discrepancies are pointed as under:-

a) At Sr. No. 2 of the table Approved Power Purchase Quantum has been taken as 59471.22 MUs whereas if the Commission refers to the table at page 255 of the Order, it may kindly be seen that Power Purchase Cost (as at Sr. No. 21 of the table) which has been built into the approved ARR of UHBVN and DHBVN (Sr. No. 1.1 of the table at page 269, Sr. No. 1.1 at page 270) correspond to 50462.36 MUs purchased by Discoms for sale to consumers. So, for working out the per unit cost at Sr. No. 3 of the table, the approved Power Purchased Volume should have been taken as 50462.36MUs instead of 59471.22MUs and the corresponding rate works out to 1.42 per unit.

b) The rate worked out as above is the Ex-bus rate i.e. at the generator bus and therefore, for working out the fixed cost attributable to HT/LT industrial consumers, either the approved sale i.e. 14386 MUs should have been grossed up for approved losses or the per unit fixed cost worked out at Sr. No. 3 should have been converted to the corresponding per unit cost at consumer end.

c) The ratio of 73.62% worked out at Sr. No. 7 is also wrong. As the requirement is to work out what part of the fixed cost of power attributable to HT/LT Consumers is recovered through recovery of fixed charges, the ratio to be considered at Sr. No. 7 of the table should be the ratio of fixed cost of power to the total fixed cost of the ARR of the two Discoms. The total fixed cost of Discoms as per the approved ARR is as under:-

Total ARR for FY 2019-20 : Rs. 28805 Cr.

Variable cost of power purchase by

Discoms for sale to consumers (50463.26x2.78): Rs. 14025 Cr.

Total Fixed cost of Discoms : Rs. 14780 Cr.

Therefore, the fixed cost of power being 7182.13 Cr, the ratio of fixed cost of power to total fixed cost works out to 48.6%. The short

recovery of fixed cost for calculation of Additional Surcharge would have to be worked out accordingly.

The revised calculation with this methodology, wherein the Additional Surcharge works out to Rs 1.18/kWh, are enclosed herewith.

Calculations for Additional Surcharge for Second Half of FY 2019-20 with the methodology being already followed by Commission as per Regulation 22 of the HERC OA Regulations:-

- x) The Additional Surcharge for Second half of FY 2019-20 based on the data of first half of FY 2019-20 as per the methodology already been followed by the Commission works out at Rs 1.15 per kWh. The relevant calculations as given in the Petition No. 40 of 2019 filed by UHBVN and DHBVN are reproduced as under:-

| Month | Stranded Power Min. of OA & backdown (MW) | Stranded Power Min. of OA & backdown (MU) | OA Purchase (MW) | OA Purchase (MU) |
|-----------------------------|---|---|------------------|------------------|
| April' 19 | 125.66 | 90.47 | 141.09 | 101.59 |
| May'19 | 123.04 | 91.54 | 133.81 | 99.56 |
| June'19 | 149.31 | 107.50 | 158.50 | 114.12 |
| July'19 | 163.19 | 121.42 | 140.94 | 101.48 |
| August'19 | 151.10 | 112.42 | 172.34 | 128.22 |
| September'19 | 188.35 | 135.61 | 200.16 | 144.12 |
| Average of H1 of FY 2019-20 | 150.11 | 109.83 | 157.81 | 114.85 |

| Sr. No. | Particulars | Units | Value |
|---------|---|---------|--------|
| 1 | Total Eligible Quantum (Min of Backing down and OA) to be considered for Additional Surcharge | MU | 658.97 |
| 2 | Approved Fixed cost per unit | Rs/kWh | 1.21 |
| 3 | Total Additional Surcharge for H1 of FY 2019-20 | Rs. Cr. | 79.58 |
| 4 | Estimated Open Access Units for H2 of FY 2019-20 (considered same as in H1 of FY 2019-20) | MU | 689.09 |
| 5 | Additional Surcharge to be applicable on OA Consumers in H2 of FY 2019-20 | Rs /kWh | 1.15 |

Reply on the objections raised by M/s. Jindal Stainless (Hisar):-

- y) It is submitted that the objections raised by M/S JSL etc. are stereotyped objections, which have already been considered by this Commission in its previous orders on determination of Additional Surcharge. In this regard, internal page number 9 to 35 of the Order dated 01.08.2016 passed by this Commission in HERC/PRO-14/2016 (supra) records similar submissions raised in those proceedings as well by objectors including Jindal Stainless Steel, Hisar. The views of Hon'ble Commission on such objections are extracted and reproduced below:-

“Commission’s View on the Objections

The Commission has considered the objections filed by the stakeholders as well as the reply dated 4.08.2016 filed by the petitioner(s) and observes that while passing Order dated 16.11.2015 (Case No. HERC/PRO-5 of 2015) approving the Additional Surcharge to be recovered in the FY 2015-16, had dealt at length almost all the legal issues raised by the Interveners in the present matter. The relevant part of the said Order which has not been set aside / stayed by any Court/Tribunal of competent jurisdiction is reproduced below:-

“The Commission is of the view that the Discoms, as per the statute, are entitled to recover from the Open Access Consumers, additional surcharge estimated on the basis of fixed cost of its stranded power, arising out of its universal supply obligation. The above was also elucidated by the Hon’ble Supreme Court in its judgment dated 25th April, 2014 in Civil Appeal No. 5479 of 2013. The relevant extract is as under:-

“25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge – one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts –one, on its ability to cross-subsidize the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded

costs).The mechanism of surcharge is meant to compensate the licensee for both these aspects.”.

It is evident from the above judgment that additional surcharge is also in the nature of ‘compensatory charge’ payable to the Distribution Licensee of the area towards the cost of stranded power attributable to the Open Access consumers.

Hence, it is a settled law that Additional Surcharge is leviable. Thus the Additional Surcharge (AS) becomes leviable if power being drawn by the Consumers under Open Access mechanism is leading to backing down of generation and even after backing down intra-State generation capacity the Discoms are under drawing/ power is being surrendered as the generation cannot be backed down further”.

The issue of embedded Open Access Consumers already paying full fixed cost determined by the Commission despite the fact that such consumers are meeting a part of their contracted demand/sanctioned load by drawing power from sources other than the Discoms through Open Access has been considered. At this stage, the Commission would like to reiterate its findings on this issue in its Order dated 16.11.2015 as under:-

“The Commission has also considered the submission of the Objectors that Open Access Consumers who are also the Consumers of the Discoms are paying fixed cost / Demand Charges as per the tariff in vogue on their entire sanctioned contract demand besides paying transmission and wheeling charges on the Open Access power. The Commission is of the view that in the present case, the limited issue is to determine Additional Surcharge based on stranded PPAs due to Open Access Consumers. Hence, in the next ARR/Tariff proceedings the Objectors may raise the issue of wheeling charges to be paid by the embedded Open Access Consumers on the power brought from sources other than the Discoms as they are

already paying partly or wholly the transmission / wheeling charges as per the tariff Order and the wheeling charges are to be paid by the non- embedded Open Access Consumers. The Commission shall examine the submissions on merit and relief, if any, shall be considered accordingly.

Thus the issue raised by the Objector is not germane in the context of determination of additional surcharge. Hence, as far as the present Order is concerned, the Commission finds no merit in the contention of the Intervener and rejects the same.

The Commission has considered the objections regarding the fact that the power surrendered / under drawn by the Discoms cannot solely be attributed to the Open Access Consumers. This issue was also dealt at length in the Commission's Order dated 16.11.2015. The Commission reiterates that the stranded PPAs could be due to mismatch in demand and supply of power from time to time in Haryana. Given the long gestation period in setting up a power plant including the power evacuation lines it is incumbent upon the Discoms to tie-up power on a long term basis so as to avoid uncertainties of short-term drawl of power including under UI mechanisms which at times i.e. during peak periods may not be available or available at very high rates. Consequently, the Commission is of the considered view that the proportionate share, even if it is miniscule, as pointed out by the Respondents, of the stranded PPAs attributable to the short-term open access consumers has to be recovered from such consumers only through additional surcharge.

A few Interveners, based on NRLDC data from September to December, 2015, pointed out that the Discoms were overdrawing from the Grid and hence the Additional Surcharge estimated on the basis of stranded / surrendered power is not tenable. The Commission has considered the said objection and is of the views that in certain time blocks,

in order to match the power demand and supply on a real time basis, such possibilities cannot be ruled out. However, such exceptions cannot form the basis to conclude that on a month to month basis the tied-up power is not being surrendered / backed down. Thus, in order to take care of such aberrations and normalize the power drawl pattern of the Discoms the Commission, in line with its previous Orders, has considered it appropriate to consider the six monthly averages (based on monthly averages) of power surrendered / backed down as well as the six monthly averages (based on monthly averages) of power drawn by the Open Access consumers and has considered the lower of the two for the purpose of working out the Additional Surcharge.

The Commission has taken note of the issue raised regarding sale of unrequisioned surplus power by the Central Generating Stations and sharing of revenue thereto. The Commission is of the view that this is a recent phenomena and the impact / benefit of the same is yet to flow to the Discoms. The Commission shall keep this in mind while determining Additional Surcharge for the subsequent period(s).

In view of the above it is evident that 100% data for six months (each day in 15 minutes time block) for all the Generating Stations has been provided by the Petitioner. The same is adequate for estimating surrendered / backed down power with fair degree of accuracy. Hence, there is no ad-hoc determination of Additional Surcharge as perceived by the Interveners. Further, given the power demand and supply scenario in the State, the Commission has every reason to believe that the power will continue to be stranded during the FY 2016-17 as well.”

Similarly, this Commission in its Order dated 16.11.2015 passed in Petition No. HERC/PRO-05/2015 petition filed by UHBVNL and

DHBVNL for determination of Additional Surcharge for FY 2015-16 framed the following issue for consideration:-

“Issue No.2: Whether the Discoms are already recovering the Fixed Cost through Tariff i.e. through demand charges and FSA mechanism.

This Commission after due consideration concluded on the aforesaid issue that *“In view of the above discussions the Commission, subject to the observations on the FSA answers the Issue No. 2 in negative.”* Thus, the contention of some of the stakeholders that they are also paying fixed cost of the power by way of demand charges/FSA has already been considered and rejected by the Commission.

With regard to the objections raised by M/s JSL on Petition No. HERC/PRO-40 of 2019 filed by UHBVN and DHBVN for approval of Additional Surcharge for second half of FY 2019-20, it is submitted that same objections have been raised by M/s JSL time and again which have been duly considered and overruled by the Commission. In this context, a copy of Chapter 6, Additional Surcharge (Pg 256 to Pg 286) of the ARR/ Tariff Order for FY 2018-19 is enclosed. Various objections raised by M/s Jindal during the course of determination of Additional Surcharge for FY 2018-19 has been listed at para 3 of Chapter 6 from Sr. No. 1 to 34 at page 263 to 276 which may kindly be perused. As may kindly be seen, all the objection which the intervener has raised now were also raised during the determination of Additional Surcharge for FY 2018-19 and even earlier also, as is brought out below:-

- (a) Objections at Sr. No. II is the same as in paras 8 and 9 of the Order at page 267 of the Order. Same objection were raised earlier also during the course of determination of Additional Surcharge for FY 2016-17 vide Order dated 1.08.2016 (supra).
- (b) Objection at Sr. No. III (A) is the same as at Sr. No. 12. at page 268 Of the Tariff Order for FY 2018-19.
- (c) The objection at Sr. No III (C) is the same as at Sr. No. 18 to 24 at page 270 to 272 of the Tariff Order for FY 2018-19. Same objection was raised during the determination of Additional Surcharge for FY 2017-18 which is listed at page 34 of the Tariff Order for FY 2017-18.

- (d) Objection at Sr. No. III (D) is the same as at para 25 (d) at page 273 of the Tariff Order for FY 2018-19. Same objection was raised earlier also during the course of determination of Additional Surcharge for FY 2015-16 vide HERC Order dated 01.08.2016 which is listed at page 22 of the Order.
- (e) Objection at Sr. No. III (E) i.e. 'Reference to past consideration of the Commission, is same as at para 30 at page 275 of Tariff Order for FY 2018-19. Same objection is also listed at page 24 of the Order dated 1.08.2016.

All the objections raised by the intervener were replied by UHBVNL. The reply of UHBVN is recorded at page 276 to 285 of the Order for FY 2018-19. Based on the reply furnished by UHBVNL, the Commission, after due consideration, overruled all these objection and determined the Additional Surcharge with the same methodology as was followed earlier.

Same objections were raised by JSL on the ARR/Tariff Petition for FY 2019-20 also. Besides, Similar Objections were raised by some other interveners also. The Commission, however, as recorded at page 150 of the ARR/Tariff Order for FY 2019-20, have overruled all these objection and decided to continue with the same methodology. The observation of the Commission as recorded at page 150 of the Order dated 07.03.2019 for FY 2019-20 are reproduced below:

"Commission's View

The Commission has taken note of the ibid objections / comments and observes that the Commission in the past Orders has been working out the additional surcharge based on the fixed cost of power that has to surrendered by the Discoms on account of energy drawl by the consumers through open access. This is in line with the provision as in section 42 of Electricity Act, 2003 as also in line with clause 8.5.4 of the National Tariff Policy. The same methodology has been followed while calculating additional surcharge in the present Order."

The observation of Hon'ble Commission as at page 342 and 343 of the Order and as also reproduced by the intervener in para E) (b), as also

the methodology followed for determination of Additional Surcharge, is in total contradiction of the view of the Commission as recorded at page 150.

The intervener has stated in the Objections that Discoms are making indiscriminate purchase of Power and that is the sole reason for stranding of power and that the same is not on account of drawl by OA consumers. In this context, it is submitted as under:-

- (a) All Power purchases are made with the prior approval of the Commission. All PPAs which has been entered into have the approval of Commission. The Commission while approving the sources asked for the details of demand/availability projections for the next 5 to 10 years and only after satisfying itself that the additional power needs to be tied up, approves the source.
- (b) As on date total tied up installed capacity is 11,971 MW which translates to an availability of 9910 MW only.
- (c) The peak demand recorded in FY 2019-20 has already touched 11030 MW on 3.07.2019. The gap was met by the power received through banking.
- (d) So, the objection that Discoms are making indiscriminate power purchase is without any basis/merit.

Further, it is submitted that Discoms are committed to provide 24X7 electricity supply to all consumers as per the National Tariff Policy as also as per the vision of the Central Government. Therefore, it is obligatory on the part of Discoms to tie up power from long terms sources to meet the peak demand after taking into account the power which could be made available through banking.

- (a) The stranding of power is, therefore, is unavoidable in view of the fact that the peak demand which is 11030 MW in summer, decreases to 6000 MW in winter. Further there are variation during the day also. The stranding of power is not on account of any indiscriminate power purchase or mismanagement but this is due to seasonal/daily variations in the demand.

- (b) Some power will always be stranded because of seasonal or daily variations, as already stated, and fixed cost of such power has to be borne by the consumers if they are to be given 24X7 power supply.
- (c) However, fixed cost of power which is stranded exclusively on account of energy drawl by OA consumers should obviously be borne by OA Consumers in form of Additional Surcharge and not by other consumers.

Regarding the objection raised by intervener of Multiplicity of charging the fixed cost of Power, it is submitted as under:-

- (a) It correct that fixed cost of power purchase is recovered multiple time but no part of the fixed cost is recovered twice.
- (b) Discoms recover approved power purchase cost through tariff. The quarterly variation over approved power purchase cost is recovered through FSA as per HERC MYT Regulations.
- (c) Because of cap (10% of APPC) on the recovery of quarterly FSA, some portion of the increase in the fixed cost remain unrecovered which is ultimately recovered during truing up of power purchase cost.
- (d) Fixed cost recovered as additional surcharge from OA Consumers becomes non tariff income and is thus reduced from approved ARR. Corresponding relief is thus passed on to the other consumers.

Regarding the Objection at III. B) Stranding of power because of Open Access consumers – Is it a truth or myth? , wherein it has been submitted that power will still be stranded even if there is no drawl by Open Access consumers, it is submitted that, yes, power will still be stranded but it will be lesser to the extent they would have drawn through Open Access. For an example, if any given slot, the total quantum of power surrendered/ backed down is say 250MW and the drawl by Open Access consumers in the same slot was 50MW, then 50MW power out of 250MW is stranded on account of drawl by OA consumers. Had the OA consumers not drawn this 50MW in the said slot, the stranded power would have been 200MW and not 250MW. The fixed cost of 50MW power which has been stranded on account of Open Access drawl has to be borne by the OA consumers only by way of Additional Surcharge. In the absence of which other consumers would be required to subsidize the OA consumers.

In view of above, it is humbly submitted that the Commission may kindly continue with the revised Additional Surcharge as worked out at Rs 1.16 per unit vide Order dated 22.10.2019, passed by the Commission on the review Petition HERC/RA-18 of 2019, until the Additional Surcharge for second half of FY 2019-20 is determined by the Commission based on data of first half of FY 2019-20 and further the Additional Surcharge at this rate should be applicable w.e.f. date of Order on RA-18 of 2019 i.e. w.e.f. 22.10.2019. The Additional Surcharge for second half of FY 2019-20 based on methodology already being followed works out at Rs 1.15 per kWh as given in para 24 above and the same may kindly be approved by the Commission.

The findings recorded by the Commission.:

9. The Commission has heard the arguments of the Id. Counsel for the Petitioners and the Respondents and has also gone through the entire record of the case. The following issues arise for consideration and decision:-

- a) **Whether the methodology of calculation of additional surcharge earlier adopted by the Commission was changed in the Order dated 07.03.2019.?**
- b) **Whether there was discrepancy/calculation error in the calculation of Additional Surcharge in the Order dated 07.03.2019.?**

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

Issue (a):

Whether the methodology of calculation of additional surcharge earlier adopted by the Commission was changed in Order dated 07.03.2019.?

The Commission has examined the aforesaid issue at length. A perusal of the Order dated 07.03.2019 passed by the Commission reveals that the Commission has made some observations while dealing with the comments filed by interveners before analyzing the matter in detail in Chapter 6 of the Order dated 07.03.2019.

The observations made by the Commission, while dealing with the objections on the matter filed by M/s. Jindal Stainless (Hissar) Ltd., on page 145, 150 of the Order dated 07.03.2019 are reproduced below:-

“The aforesaid objection has been taken note of. It is reiterated that consumer category wise sales projections are done by the Commission on its own, independent of the sales projection by the Discoms, based on the CAGR of time series data for the last 3-5 years to smoothen out the year to year aberrations. The working out of additional surcharge is not dependent on the sales projections and the cross subsidy surcharge has been worked out in this Order in line with the formula given in the National Tariff Policy taking the sales projections as determined by the Commission.” (pg. 145 of the Order dated 07.03.2019).

“The Commission has taken note of the ibid objections / comments and observes that the Commission in the past Orders has been working out the additional surcharge based on the fixed cost of power that has to surrendered by the Discoms on account of energy drawl by the consumers through open access. This is in line with the provision as in section 42 of Electricity Act, 2003 as also in line with clause 8.5.4 of the National Tariff Policy. The same methodology has been followed while calculating additional surcharge in the present Order.” (pg. 150 of the Order dated 07.03.2019).

Thereafter, the Commission has proceeded to deal with the issue of levy of Additional Surcharge, in detail, in Chapter 6 of the Order dated 07.03.2019 and made the following observations in page 343:-

“In view of the above discussions, the Commission is of the considered view, as also observed in the previous order(s), that the multiplicity of recovering the same cost from the same set of consumers ought to be avoided. The Commission has accordingly proceeded to estimate the additional surcharge to be recovered from the Open Access embedded consumers.

The Commission, while approving Additional Surcharge, has considered fixed cost approved for the FY 2019-20 i.e. Rs. 7182.13 Crore and divided the same by approved volume from all approved sources i.e. 59,471.22 Million. Resultantly, the per unit fixed cost works out to Rs. 1.21 / kWh that shall form

the basis of estimating additional surcharge as per the computational details provided below: -

| | | | |
|----|---|----------------------|----------|
| 1 | Fixed Cost for Power Procurement | Rs. Million | 71821.30 |
| 2 | Approved Power Purchase Quantum | Million Units | 59471.22 |
| 3 | Per Units Fixed Cost | Rs / Unit (1/2) | 1.21 |
| 4 | Approved Sale (HT & LT Industry) | Million Units | 14386.00 |
| 5 | FC attributable to HT/LT Indust. | Rs. Million (3X4) | 17373.47 |
| 6 | Ratio of Power Purchase Cost to FC | | |
| | ARR approved 2019-20 (a) | Rs. Crore | 28805.08 |
| | Power Purchase Cost out of above (b) | Rs. Crore | 21206.96 |
| 7 | Ratio of b to a | % | 73.62 |
| 8 | Fixed Cost Recovered from HT/LT Indust. | Rs. Million | 15054.64 |
| 9 | Recovery of FC from HT/LT Indust. | Rs. Million (8 X 7%) | 11083.57 |
| 10 | Short Recovery of FC | Rs. Million (5-9) | 6289.90 |
| 11 | Additional Surcharge | Rs. / Unit (10/4) | 0.44 |

In the calculations, the Commission had reduced the part of fixed cost, in view of the demand charges recovered from HT/LT consumers under two part tariff, which is levied upon embedded open access consumers also. Accordingly, the Commission recalculated the average fixed cost per unit for the purpose of levy of additional surcharge as Rs. 0.44/kWh. In the earlier methodology, the entire fixed cost per unit was used for calculating additional surcharge proportionate to the energy drawn by open access consumers.

The Commission has in its initial order on the levy of Additional Surcharge dated 29.05.2014, has expressed views that adjustment of the demand charges paid by the Open Access consumers in the stranded fixed cost of the Discoms has to be made. The relevant part of the Order dated 29.05.2014 from page 141 is reproduced hereunder:-

“The Commission, therefore, after careful consideration of the submissions made in the petition by UHBVNL, replies / comments furnished by various stakeholders in reply to the petition, the comments / submissions by the petitioners and other stakeholders made during the hearing held on 27.05.2014 and the relevant statutory provisions is of the considered view that the additional surcharge cannot be attributed to the entire energy drawn through Open Access as the Discoms are expected to take into consideration some quantum of power that would be drawn by the Open Access Consumers based on the past trend while undertaking demand assessment and load management. The Commission therefore considers it appropriate to pass on

50% of the stranded cost worked out by the Discoms on account of power drawn through Open Access. Such reduction is necessary in view of the fact that the Discoms charges from most of the Open Access consumer a part of the cost of distribution system and cost of 6% losses as wheeling charges. Further the Discoms also collect, from most Open Access consumers, demand charges on the basis of the connected load / contract demand. Hence in the considered view of the Commission some adjustment of the demand charges paid by the Open Access consumers in the stranded fixed cost of the Discoms has to be made.”

The Commission has also carefully examined the provisions of Regulation Clause No. 22 of Haryana Electricity Regulatory Commission (Terms and conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 (hereinafter referred to as “OA Regulations, 2012”) which provides as under:

“Additional Surcharge – (1) An open access consumer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge in addition to wheeling charges and cross-subsidy surcharge, to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under subsection (4) of Section 42 of the Act.

Provided that such additional surcharge shall not be levied in case open access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use.

(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.

(3) The distribution licensee shall submit to the Commission, on six monthly basis the details regarding the quantum of such stranded costs and the period over which these remained stranded and would be stranded. The Commission shall scrutinize the statement of calculation of

such stranded fixed costs submitted by the distribution licensee and determine the amount of additional surcharge. Provided that any additional surcharge so determined shall be applicable to all the consumers availing open access from the date of determination of same by the Commission.

(4) The consumers located in the area of supply of a distribution licensee but availing open access exclusively on inter-State transmission system shall also pay the additional surcharge.

(5) Additional surcharge determined on per unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access".

The Commission has also perused the provisions of Section 42 (4) of the Electricity Act 2003 provides as under:

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

The Commission observes that Regulation clause no. 22 of HERC OA Regulations, 2012 provides for the levy of Additional Surcharge only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. Similarly, Section 42 (4) of the Electricity Act, 2003 provides for levy of Additional surcharge, to meet the fixed cost of such distribution licensee arising out of his obligation to supply. However, the methodology of levy of additional surcharge has not been specified neither in HERC OA Regulations, 2012 nor in the Electricity Act, 2003. The underlying principle is that obligation of the licensee in terms of power purchase commitments should continue to be stranded and there is unavoidable obligation on the DISCOMs to bear fixed costs component of power purchase, consequent to such a contract.

In view of the fact that under two part tariff, recovery of some part of fixed cost of stranded contracts, in form of demand charges levied on the basis of the connected load / contract demand, cannot be ruled out, therefore, accepting the persistent demand of Open Access Consumers that some adjustment of the demand charges paid by the Open Access consumers in the stranded fixed cost of the Discoms has to be made, the Commission changed the methodology of calculation of Additional Surcharge in its Order dated 07.03.2019. However, in absence of relevant data, the calculation of recovery of such portion of stranded fixed cost from demand charges paid by the Open Access consumer, was made on the basis of certain assumptions. Thus, the underlying principle adopted in the Order dated 07.03.2019 while calculating additional surcharge was correct. The only thing missing in the Order dated 07.03.2019, was further adjustment of re-calculated fixed cost, vis-à-vis the power remained stranded due to power drawn through Open Access. Therefore, the Commission answers the issue framed in affirmative i.e. the methodology of calculation of additional surcharge earlier adopted by the Commission was changed in Order dated 07.03.2019. However, the same needs to be tested on the basis of actual data supplied by the DISCOMs and further needs to be adjusted on the basis of power remained stranded due to open access.

Issue (b)

Whether there was discrepancy/calculation error in the calculation of Additional Surcharge in the Order dated 07.03.2019?

The Commission has examined the calculation of additional surcharge provided by the DISCOMs, as given below:-

| SN | Particulars | Units | Calculation of Additional Surcharge |
|-----|---|-----------------|-------------------------------------|
| 1 | Fixed Cost for Power Procurement | Rs Crs | 7,182 |
| 2 | Approved Power Purchase Quantum for sale to consumers (Sr No. 25 of Table at Pg 255) | Mus | 50,462 |
| 3 | Per Units Fixed Cost (EX Bus) | Rs / Unit (1/2) | 1.42 |
| (a) | Inter State Losses | % | 3.82% |
| (b) | Intra State Losses | % | 2.42% |
| (c) | Distribution Losses at HT Level (Sr. No. 10(a) of the table at Pg. 334 | % | 10.39% |
| 4 | Approved Sale (HT & LT Industry) | Mus | 14,386 |
| 5 | Grossed up Sales (HT & LT Industry) | Mus | 17,106 |
| 6 | FC attributable to HT/LT Industry | Rs. Crs. (3X5) | 2,435 |
| 7 | Approved FC as per approved ARR of FY 2019-20 (Approved ARR-Variable cost for Power Purchase for sale to consumers) -(Sr. No. 20 of the Table at Pg. 255) | Rs Crs | 14,780 |

| | | | |
|----|--|----------------------|--------------|
| 8 | Ratio of Power Purchase Cost to FC | % | 48.59% |
| 9 | Fixed Cost Recovered from HT/LT Indust. | Rs. Crs | 1,505 |
| 10 | Recovery of FC from HT/LT Indust. | Rs. Crs (8 X 7%) | 732 |
| 11 | Short Recovery of FC | Rs. Crs (6-9) | 1,703 |
| 12 | Additional Surcharge | Rs./Unit (11/4) | 1.18 |

The main contention of DISCOMs is that in case the recovery of fixed cost in the demand charges is to be taken into consideration, then fixed cost of power purchase is also to be taken on the basis of its recoverability i.e. the fixed cost of power purchase is to be divided by the units sold taking into consideration of HT level losses.

The Commission after carefully examining the details provided by the DISCOMs, agrees with their contention. In order to ensure Apple-to-Apple comparison, in the methodology involving recovery of fixed cost as demand charges from Open Access consumers, fixed cost of power purchase is to be taken on recoverable basis. In order to calculate fixed cost of power purchase recoverable from HT consumers, the fixed cost of power purchase is to be divided by the units available for sale by DISCOMs.

Accordingly, the Commission has calculated the fixed cost of power purchase recoverable from HT consumers, for second half of the FY 2018-19 and first half of the FY 2019-20, on the basis of ARR orders of the respective years, as detailed below:-

| Particulars | Formulae | Units | FY 2019-20 | FY 2018-19 |
|--|-----------------|--------------|-------------------|-------------------|
| Fixed cost | 1 | Rs. Millions | 71821.30 | 67653.27 |
| Calculation of Units available for sale by Discoms | | | | |
| Power available for sale to Discoms | 2 | MUs | 48668.12 | 43835.24 |
| Less: Distribution loss at HT level | 3 | MUs | 5056.62 | 5457.49 |
| Units available for sale by Discoms | 4=2-3 | MUs | 43611.50 | 38377.75 |
| Recoverable Fixed cost | 5=4/1 | Rs./Unit | 1.65 | 1.76 |

Further, the Commission in its Order dated 07.03.2019, had taken the average of projected demand charges recoverable from HT/LT consumers, during the FY 2019-20 considering all of them as open access consumers. Now, since the actual data of recovery of demand charges from open access consumers is available, the Commission sought the requisite details from DISCOMs for the second half of the FY 2018-19 as well as for the first half of the FY 2019-20, on affidavit.

DISCOMs has provided the requisite data regarding recovery of fixed charges from open access consumers, on affidavit, as given hereunder:-

FY 2019-20 (1st half)

| Month | No. of OA consumers | | | OA energy drawl by Consumers (MUs) | | | Energy drawl from Discoms by OA consumers (MUs) | | | Fixed charges recovered from OA consumers (Rs. Cr.) | | |
|--------------|---------------------|----|----|------------------------------------|------------|------------|---|------------|------------|---|-----------|-----------|
| | UH | DH | HR | UH | DH | HR | UH | DH | HR | UH | DH | HR |
| April 19 | 9 | 28 | 37 | 10 | 87 | 97 | 53 | 0.12 | 53 | 3 | 5 | 8 |
| May, 19 | 12 | 26 | 38 | 12 | 81 | 93 | 46 | 158 | 203 | 3 | 10 | 13 |
| June 19 | 14 | 29 | 43 | 18 | 86 | 105 | 38 | 76 | 115 | 3 | 7 | 10 |
| Jul., 19 | 23 | 37 | 60 | 21 | 74 | 95 | 45 | 84 | 129 | 3 | 8 | 11 |
| Aug., 19 | 26 | 44 | 70 | 21 | 90 | 112 | 41 | 52 | 93 | 3 | 7 | 10 |
| Sep., 19 | 35 | 56 | 91 | 27 | 107 | 134 | 33 | 47 | 80 | 3 | 7 | 10 |
| Total | | | | 109 | 526 | 635 | 256 | 416 | 672 | 18 | 44 | 62 |

FY 2018-19 (2nd half)

| Month | No. of OA consumers | | | OA energy drawl by Consumers (MUs) | | | Energy drawl from Discoms by OA consumers (MUs) | | | Fixed charges recovered from OA consumers (Rs. Cr.) | | |
|--------------|---------------------|----|----|------------------------------------|------------|------------|---|------------|------------|---|--------------|--------------|
| | UH | DH | HR | UH | DH | HR | UH | DH | HR | UH | DH | HR |
| April 19 | 2 | 7 | 9 | 0.13 | 1.06 | 1.06 | 31 | 149 | 180 | 1.61 | 6.21 | 7.82 |
| May, 19 | 4 | 15 | 19 | 2 | 28 | 30 | 28 | 109 | 137 | 1.58 | 6.31 | 7.89 |
| June 19 | 9 | 27 | 36 | 9 | 64 | 73 | 15 | 69 | 83 | 1.40 | 6.02 | 7.43 |
| Jul., 19 | 9 | 32 | 41 | 9 | 69 | 78 | 22 | 74 | 96 | 1.52 | 6.38 | 7.90 |
| Aug., 19 | 9 | 32 | 41 | 10 | 79 | 89 | 20 | 58 | 78 | 1.69 | 6.20 | 7.89 |
| Sep., 19 | 10 | 31 | 41 | 12 | 92 | 105 | 15 | 51 | 65 | 1.49 | 5.89 | 7.38 |
| Total | | | | 43 | 333 | 375 | 130 | 509 | 639 | 9.29 | 37.02 | 46.30 |

On the basis of the above data provided by the DISCOMs, per unit of demand charges actually recovered from Open Access consumers is calculated as hereunder:-

| Particulars | Formulae | Units | FY 2019-20 | FY 2018-19 |
|---|----------|--------------|------------|------------|
| Demand charges recovered from open access consumers | 1 | Rs. Crore | 62.00 | 46.30 |
| Open Access energy drawn by consumers | 2 | MUs | 672 | 639 |
| Energy drawn from Discoms by Open Access consumers | 3 | MUs | 635 | 375 |
| Total energy drawn by OA consumers, on which recovery of fixed charges per unit is to be calculated | 4 = 2+3 | MUs | 1307 | 1014 |
| Recovery of fixed charges per unit | 5=1/4 | Rs. per unit | 0.47 | 0.46 |

The fixed cost recovered by the Discoms from consumers, in form of demand charges, include all the fixed components of ARR, out of which fixed cost of power purchase is one component. Accordingly, the ratio of fixed cost of power purchase to fixed cost portion of total ARR is calculated as under:-

| Particulars | Formulae | Units | FY 2019-20 | FY 2018-19 |
|--|-----------------|--------------|-------------------|-------------------|
| Total ARR approved in the ARR Orders | 1 | Rs. Million | 288050.8 | 279607.2 |
| Less: Variable cost of power purchase approved in the ARR Orders | 2 | Rs. Million | 165286.3 | 138895 |
| Fixed cost of approved ARR which has been factored in the demand charges | 3=1-2 | Rs. Million | 122764.5 | 140712.2 |
| Fixed cost of power purchase approved in ARR Orders | 4 | Rs. Million | 71821.30 | 67653.27 |
| Ratio of fixed cost of power purchase to total fixed cost of approved ARR | 5 = 4/3*100 | % | 59 | 48 |
| Recovery of fixed charges per unit (from the above table) | 6 | Rs. per unit | 0.47 | 0.46 |
| Fixed cost of power purchase included in the demand charges | 7=6*5 | Rs. per unit | 0.28 | 0.22 |
| Recoverable Fixed cost (from the table given above) | 8 | Rs. per unit | 1.65 | 1.76 |
| Fixed cost per unit to be considered for levy of Additional surcharge (in case fixed cost recovery method is followed) | 9=8-7 | Rs. per unit | 1.37 | 1.54 |

After analyzing the fixed cost per unit to be considered for levy of Additional Surcharge under both the methods i.e. fixed cost of power purchase recovery method (Rs. 1.37/unit & Rs. 1.53/unit, for FY 2019-20 & FY 2018-19, respectively) and fixed cost of power purchase (Rs. 1.21/unit and Rs. 1.22/unit for FY 2019-20 & FY 2018-19, respectively), the Commission finds force in the arguments of the DISCOMs that the demand charges determined to be recovered from HT/LT consumers, are not rationalized enough to recover all the fixed cost of power purchase. The DISCOMs have amply demonstrated that power purchase cost component in the demand charges recovered from embedded open access consumers is Rs. 0.22/kWh & 0.28/kWh for the second half of FY 2018-19 and first half of FY 2019-20, respectively. The Commission, in its Order dated 07.03.2019 has taken the same as Rs. 0.77/kWh (Rs. 1.21/kWh minus Rs. 0.44/kWh), on the basis of

certain assumptions, which was not found correct on the receipt of actual data.

In view of the above factual matrix, the Commission answers the issue in affirmative i.e. there was discrepancy/calculation error in the calculation of Additional Surcharge in the Order dated 07.03.2019.

Commission's View on the Objections:

The Commission issued public notices in Dainik Bhaskar and The Tribune on 21.12.2019 & 10.01.2020, inviting the objections of the interest parties on or before 10.01.2020/20.01.2020. In response, M/s. JSL filed written objections on 16.01.2020. However, the representatives of M/s. FIA and M/s. IEX present in the hearing, raised certain oral objections on the petition filed by DISCOMs. The Commission despite the fact that no written objections were filed by M/s. FIA and M/s. IEX, considered it appropriate to hear them at length and even allowed them to file written objections within 5 days. However, in response written objections were filed by M/s. Faridabad Industries Association (FIA) only, albeit late i.e. on 13.02.2020.

The Commission has considered the objections filed by the stakeholders as well as the reply dated 31.01.2020 filed by the petitioner(s) and observes that while passing Orders dated 16.11.2015 (Case No. HERC/PRO-5 of 2015) and 01.08.2016 (Case No. HERC/PRO-14 of 2016) approving the Additional Surcharge to be recovered in the FY 2015-16 & FY 2016-17, had dealt at length almost all the legal issues raised by the Interveners in the present matter. The relevant part of the Order of the Commission dated 16.11.2015, which has not been set aside / stayed by any Court/Tribunal of competent jurisdiction is reproduced below:-*"The Commission is of the view that the Discoms, as per the statute, are entitled to recover from the Open Access Consumers, additional surcharge estimated on the basis of fixed cost of its stranded power, arising out of its universal supply obligation. The above was also elucidated by the Hon'ble Supreme Court in its judgment dated 25th April, 2014 in Civil Appeal No. 5479 of 2013. The relevant extract is as under:-*

“25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge – one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts –one, on its ability to cross-subsidize the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand(stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects.”

It is evident from the above judgment that additional surcharge is also in the nature of ‘compensatory charge’ payable to the Distribution Licensee of the area towards the cost of stranded power attributable to the Open Access consumers. Hence, it is a settled law that Additional Surcharge is leviable. Thus the Additional Surcharge (AS) becomes leviable if power being drawn by the Consumers under Open Access mechanism is leading to backing down of generation and even after backing down intra-State generation capacity the Discoms are under drawing/ power is being surrendered as the generation cannot be backed down further”.

It is evident from the judgment (Supra) that Hon’ble APTEL is in agreement with the reasoning, findings and observations of the Commission on the issue of determination of Additional Surcharge. In the present case the Discoms have filed data regarding power surrendered / backed down from various power plants from where they are drawing power under long term Power Purchase Agreements for each day in 15 minutes time block from 1.10.2018 to 31.03.2019 & 01.04.2019 to 30.09.2019 (six months as per the relevant Regulations). Thus, the data, which was also put in the public domain, for inviting objections, in the considered view of the Commission is adequate to estimate the quantum and cost of stranded power that can be attributed to the Open Access consumers.

Conclusion:-

Having answered the above issues, the Commission is of the considered view that apprehension of the open access consumers that fixed cost of power purchase is being recovered from them twice i.e. in form of demand charges as part of tariff and in form of Additional Surcharge, is unfounded. In case the recovery of fixed cost of power purchase methodology is applied, then the Additional Surcharge to be levied on open access consumers will be more. In order to reduce the burden on the open access consumers, the DISCOMs have proposed to continue with the methodology of calculation of Additional Surcharge, as was adopted in the earlier Orders of the Commission.

Accordingly, acceding to the request of the DISCOMs and after analysing the impact of recovery method of calculation of Additional Surcharge, the Commission decides to apply the old methodology of calculation of Additional change, hitherto adopted by the Commission in its earlier orders and time tested.

The Commission observes that the additional surcharge has to be determined under Section 42 of the Electricity Act, 2003. Since the Discoms has an universal obligation to supply power, it has to enter into long term agreements for purchase of power from various generating stations for meeting the entire demand of the state. As such, when these embedded consumers draw power from any other person under Open Access, the fixed cost of the supply taken by these consumers from elsewhere is still payable by the licensee, making it a stranded capacity for the Discoms. However, as per the situation currently obtaining in Haryana only a part of the stranded generation capacity to the extent of the quantum of Open Access power scheduled by such consumers out of the total quantum of power surrendered by the Discoms can be attributed to the Open Access consumers. The Commission further observes that the distribution licensees have been able to conclusively prove, backed with calculations, that their long term power purchase commitments do get stranded most of the times when power is drawn by embedded open access consumers from other sources and the Discoms have to bear the fixed cost of such stranded power which ultimately get passed on to other consumers. It would not be fair if the cost incurred by

distribution licensees for the power purchase commitments stranded on account of power drawn by open access consumers from other sources is passed on to other consumers as that would amount to cross-subsidising of the open access consumers by other consumers.

The Commission has scrutinised the figures submitted by the Petitioner on oath, for determining the Additional Surcharge and examined as under:-

- a) That the Petitioner has worked out backing down quantum day-wise, slot-wise for the corresponding six months of FY 2018-19 (HERC/PRO-40 of 2019) & FY 2019-20 (HERC/PRO-1 of 2020), from the implemented schedule and the entitlements as per their last revision, for the particular day.
- b) That due to the change in the declared capacity of the inter-State generator during the day, the change in entitlement of the State from that particular Generator, is automatically accounted for.
- c) It has been further observed that the generating units which are not on bar due to less demand have not been considered and only the running units backing down has been considered for arriving at the stranded cost of power for determination of additional surcharge.
- d) The Commission, while approving Additional Surcharge, has considered fixed cost approved for the FY 2018-19 & FY 2019-20, in the respective ARR Orders at Rs. 1.21/unit. Accordingly, the Additional Surcharge had been determined as per the details below:-

(A) Additional Surcharge calculated on the basis of data for 2nd half of the FY 2018-19 – HERC/PRO-40 of 2019:-

| Months | MW | MU | OA (MW) | OA (MU) | |
|---|--|------------------------|----------------|------------------------|-------|
| | A= Lower of Open Access and Backing down | B= A converted into MU | C= Open Access | D= C converted into MU | |
| Oct-18 | 0.93 | 0.70 | 0.93 | 0.69 | |
| Nov-18 | 41.62 | 29.97 | 45.75 | 32.94 | |
| Dec-18 | 102.31 | 76.12 | 102.70 | 76.41 | |
| Jan-19 | 107.65 | 80.09 | 108.78 | 80.93 | |
| Feb-19 | 129.95 | 87.33 | 138.97 | 93.39 | |
| Mar-19 | 146.36 | 108.89 | 149.65 | 111.34 | |
| Total | 528.82 | 383.09 | 547.78 | 395.70 | |
| Monthly Average | 88.14 | 63.85 | 91.13 | 65.95 | |
| Quantum considered for Addl. Surcharge (lower of the power backed down/surrendered and open access power) | | | | MU | 63.85 |
| Per Unit Fixed Cost of Power Purchase for the FY 2018-19 | | | | Rs/kWh | 1.21 |
| Avg. Additional Surcharge | | | | Rs. Millions | 77.26 |

| Months | MW | MU | OA (MW) | OA (MU) | |
|------------------------------------|--|------------------------|----------------|------------------------|-------|
| | A= Lower of Open Access and Backing down | B= A converted into MU | C= Open Access | D= C converted into MU | |
| Monthly Open Access Power | | | | MU | 65.95 |
| Additional Surcharge (rounded off) | | | | Rs/kWh | 1.17 |

(B) Additional Surcharge calculated on the basis of data for the 1st half of the FY 2019-20 – HERC/PRO-1 of 2020:-

| Months | MW | MU | OA (MW) | OA (MU) | |
|---|--|------------------------|----------------|------------------------|--------|
| | A= Lower of Open Access and Backing down | B= A converted into MU | C= Open Access | D= C converted into MU | |
| April, 2019 | 125.66 | 90.48 | 141.09 | 101.58 | |
| May, 2019 | 123.04 | 88.59 | 133.81 | 96.34 | |
| June, 2019 | 149.31 | 107.50 | 158.50 | 114.12 | |
| July, 2019 | 163.19 | 117.50 | 140.94 | 101.48 | |
| August, 2019 | 151.10 | 108.79 | 172.34 | 124.08 | |
| September, 2019 | 188.35 | 135.61 | 200.16 | 144.12 | |
| Total | 900.65 | 648.47 | 946.84 | 681.72 | |
| Monthly Average | 150.11 | 108.08 | 157.81 | 113.62 | |
| Quantum considered for Addl. Surcharge (lower of the power backed down/surrendered and open access power) | | | | MU | 108.08 |
| Per Unit Fixed Cost of Power Purchase for the FY 2019-20 | | | | Rs/kWh | 1.21 |
| Avg. Additional Surcharge | | | | Rs. Millions | 130.77 |
| Monthly Open Access Power | | | | MU | 113.62 |
| Additional Surcharge (rounded off) | | | | Rs/kWh | 1.15 |

The Commission observes that it has already determined Additional Surcharge for the FY 2019-20 vide its Order dated 07.03.2019, the Review for which was sought by DISCOMs. The Commission vide its Order dated 22.10.2019, as an interim measure till disposal of petition filed by DISCOMs for determination of Additional Surcharge, had allowed Additional Surcharge of Rs 1.16/kWh.

The Commission in its Order dated 22.10.2019, while disposing of the Review Petition filed by DISCOMS (HERC/RA-18 of 2019) has decided as under: -

“The Commission is also of the considered view that it will be difficult to recover the Additional Surcharge with retrospective effect after the determination of same upon the decision of Petition No. HERC/PRO-40 of 2019, after holding detailed discussions with various stakeholders. Therefore, in order to restore the original position, the Commission decides that the

Additional Surcharge shall be applicable as determined according to the methodology adopted by the Commission in its earlier orders i.e. at Rs. 1.16/Kwh, from the date of this Order, which shall be applicable till the Petition No. HERC/PRO-40 of 2019 filed by DISCOMs for determination of Additional Surcharge is decided.”

Having decided the methodology for determination of Additional Surcharge and in view of discrepancies in calculation of Additional Surcharge in the HERC Order dated 7.3.2019, the Commission observes that Additional Surcharge calculated on the basis of data of 2nd half of FY 2018-19 i.e. Rs. 1.17/kWh ought to be applicable for 2nd half of FY 2019-20, whereas petitioners have requested for determination of Additional Surcharge on the basis of data of 1st half of 2019-20 which works out to Rs. 1.15/Kwh.

In view of the above, the Commission decides that Rs. 1.15/kWh shall be the Additional Surcharge (i.e. lowest of rates calculated above viz. Rs. 1.17/kWh & Rs. 1.15/kWh) applicable w.e.f. 22.10.2019 i.e. the date w.e.f. which the Additional Surcharge was made applicable, as an Interim measure. DISCOMs are directed to refund the excess Additional Surcharge, over and above Rs. 1.15/kWh, levied on open access consumers since 22.10.2019. The Additional Surcharge @ Rs. 1.15/kWh, to be levied with effect from 22.10.2019 shall remain effective until these are revised / amended by the Commission and shall be applicable to the consumers of Uttar Haryana Bijli Vitran Nigam (UHBVN) and Dakshin Haryana Bijli Vitran Nigam (DHBVN) who avail power under the Open Access mechanism in terms of Haryana Electricity Regulatory Commission (Terms and Conditions for Grant of Connectivity and Open Access for Intra-State Transmission and Distribution System) Regulations, 2012, from any source other than the distribution licensees. The Commission shall review the calculation of Additional Surcharge upon the receipt of detailed information for the second half of the FY 2019-20.

10. In terms of the above Order, the present petitions are disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 06.03.2020.

| | | | |
|------------------|------------------|---------------------------|--------------|
| Date: 06.03.2020 | (Naresh Sardana) | (Pravindra Singh Chauhan) | (D.S. Dhesi) |
| Place: Panchkula | Member | Member | Chairman |

HEERC