

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

Case No. HERC/PRO – 72 of 2017

DATE OF HEARING : 23.10.2019
DATE OF ORDER : 17.12.2019

IN THE MATTER OF:

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

Petitioner

M/s. Alchem International Private Limited (M/s. Alchem)

Respondents

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

Present On behalf of the Petitioner

1. Shri D.P. Singh, Advocate
2. Ms. Ishita Jain, Advocate
3. Shri Sandeep Malik, Authorised Representative

Present On behalf of the Respondents

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

QUORUM

**Shri Pravindra Singh Chauhan, Member
Shri Naresh Sardana, Member**

ORDER

1. This Petition has been filed by M/s. Alchem International Private Limited, Ballabgarh, challenging the order, dated 27.09.2017, passed the Coordination Committee for Open Access, set up under the provisions of HERC (Terms & Conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 as amended from time to time (hereinafter referred to

as “HERC OA Regulations”), holding that DHBVNL was right in recovering the amount refunded/adjusted to the open access consumer for a period of two years, because the Petitioner had failed to comply with the conditions specified in Regulation no. 42 & 45 of HERC (Terms & Conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 and its subsequent amendment, as it was mandatory for the consumer to submit to the distribution licensee a schedule of power required through open access to the licensee by 10.00 AM of the day preceding the day of transaction.

Brief Background of the Case

Succinctly stating the facts leading to the filing of present petition are that the petitioner had challenged the demand raised by the DHBVNL, in the month of Dec., 2015, for the units purchased during the period from Dec 2013 to Dec 2014, through Open Access, after being pointed out by its Audit Wing about the fact that the procedure of Open Access prescribed under Regulation 42 and 45 of HERC OA Regulations, 2012, laying down the condition of the prior intimation to DHBVNL of the power he intended to bring through Open Access, was not followed.

The Petitioner challenged the above order on the ground that it had approached the following forum/authorities, prior to filing of this petition. However, the CGRF, Hisar, in its Order, dated 29.12.2016, disallowed the petition of the consumer, while directing the Respondent Nigam (DHBVNL) to ensure that only the amount that was refunded/adjusted to the open access consumer, in the first instance, be charged from them without any surcharge/interest thereon from the date of refund/adjustment to the date when the amount was again charged to the consumer.

The appellant herein filed an appeal before the Electricity Ombudsman, on 24.01.2017, against the Order of CGRF Order dated 29.12.2016. Electricity Ombudsman, in its Interim Order, dated 25.01.2017, directed the DHBVNL to restore the supply of the appellant immediately and to raise a fresh demand/bill as per the CGRF Orders within three working days. The

Interim Order was issued without prejudice to the rights of the appellant in the appeal filed by the Appellant.

The appeal was finally heard by Electricity Ombudsman on 15.02.2017, and the appeal filed by the Appellant was disposed off as not maintainable. However, while disposing off the appeal it was held by the Electricity Ombudsman that the CGRF has acted beyond its jurisdiction while entertaining the complaint and rendering the decision. Further, the Petitioner was apprised about the Regulation 53 of the HERC Open Access Regulations 2012 which specifies that all disputes and complaints arising under these regulations shall be decided by the Coordination Committee.

The appellant also filed a writ petition in the Hon'ble Punjab & Haryana High Court. The Hon'ble High Court, while issuing notice of motion, also issued an Interim Order, dated 03.02.2017, directing that the supply of electricity will not be disconnected on account of the disputed amount of Rs. 2,32,80,043/-.

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

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

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

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

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

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

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

2. Has the consumer done the same?

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

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

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

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

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

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

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

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

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

2. Aggrieved with the order of the Coordination Committee, the Appellant has filed by the present appeal before this Commission challenging the impugned order on the following grounds:-
 - a) That the Respondent has no legal right to claim refund of the adjustment, which it has already, given to the Appellant during the disputed Period i.e. December 2013 to December 2014.
 - b) That the Coordination Committee has failed to appreciate the fact that the demand in the above mentioned Memo no. 896 dated 02.03.2016 is for a Period, i.e. December 2013 to December 2014; is for the units purchased from Open Access by the Appellant. The Appellant has already paid for the units so purchased by the Appellant from Open Access. Furthermore, the Respondent was duly aware about details of the units that were purchased by the Appellant Company as the same is evident from the fact that the Respondent had provided the necessary deductions/adjustments in the bills of the relevant months for the units so purchased by the Appellant from Open Access.
 - c) That the Coordination Committee has failed to consider the fact that Respondent was being duly intimated of the energy units that were being purchased by the Appellant by the Indian Energy Exchange (IEX) as IEX has a policy of intimating to the Licensee (Respondent) as well as the consumer (Appellant) about the total units purchased by the consumer from Open Access on a daily basis. Thus, no adverse effect has been or could be caused upon Respondent due to the alleged failure of the appellant in intimating Respondent about the units purchased from Open Access.
 - d) That the Coordination Committee has caused grave error in ignoring the fact that Respondent itself has waived the requirement of the intimation of bids by the consumer of open access to Respondent. It is submitted that during the disputed Period of 13 months, Respondent has not issued even a single letter/show cause notice to the Appellant regarding

the alleged failure of the Appellant to intimate the bids to Respondent or intimating the losses/difficulties, if any, which it had incurred due to the alleged failure of Appellant to comply with the procedural requirements. It is humbly submitted that the conduct of Respondent; raising no objection/failure to serve show cause notice against the alleged violation and providing adjustments/deductions in the bills to the Appellant, for a long Period of 13 months, clearly implies that Respondent has impliedly waived the said condition as mentioned in clause 42 of the Regulations.

- e) That the Coordination Committee has ignored the holding of the Hon'ble Supreme Court of India wherein it has been observed in catena of judgments that waiver is conscious abandonment of an existing statutory provision, right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. Waiver is an agreement not to assert a right. It is also a well-established principle that even a statutory right/condition can be waived by conduct of the Parties. The Hon'ble Supreme Court of India has observed in the case of *Dhirendra nath Gorai and Subhash Chandra Shaw and Ors. Vs. Sudhir Chandra Ghosh and Ors.*, AIR 1964 SC 1300 that the general principal is that statutory conditions which were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and no public interests are involved, such condition will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the court.
- f) That the Coordination Committee has failed to give any reasoning for observing that Respondent despite not giving any show cause notice to the Appellant for its failure to give prior intimation, and providing the adjustment in the disputed period for a continuous 13 months, have not waived the condition laid down under clause 42 of the Regulations.
- g) That the Coordination Committee has committed grave error in observing that Respondent is entitled to claim refund under clause 42 of the Regulations. Clause 42 of the Regulations states about the circumstances, failure of which will make a consumer ineligible for getting supply of electricity from Open Access, irrespective of the contractual demand with Respondent. Thus, any violation of clause 42 of

Regulations would only make the consumer ineligible to get electricity from Open Access. However, in no circumstances such violation could result in non-consideration of schedule and cancelling/ refund of the adjustments/deductions already provided to the Consumer by Licensee.

- h) That it would be arbitrary to force a Consumer to pay an amount twice on account of a mere procedural irregularity, which has been duly waived by Respondent and even otherwise has not caused any loss to Respondent. It would be against the object of the Electricity Act and the regulations made thereunder.
- i) That the DHBVN being a government authority, whose main aim is to serve its consumer, is also under an obligation/onus to intimate its consumer of any procedural irregularity that is being committed by the consumer; either intentionally or negligently. The Respondent cannot in any circumstance be allowed to take undue benefit/wrongful gain from negligent acts, if any, of its consumers, as it would lead to 'unjust enrichment', which is not allowed under the law. The Hon'ble supreme court of India has clearly held in the case of Indian Council for Environmental Action and Others Vs Union of India & Ors. (2011) 8 SCC 161 and Sahakari Khand Udyog Mandal Ltd vs Commissioner Of Central Excise and customs, (2005) 3 SCC 738, that no person can be allowed to enrich inequitably at the expense of another. Before claiming a relief of refund, it is necessary for the person to show that if such relief is not granted, he would suffer loss.
- j) That the the object of the Electricity Act is to protect the interest of the Consumer. It is a settled principle of law that any provision of a statute must be read in the light of the objects and purposes for which it was enacted. There is common object of Electricity Act and all the rules and regulations that is made under the said act; protecting the interest of the Consumer. In particular, the object of aforesaid regulations is to provide more access to the consumers in the open access. Therefore, none of the provision of the applicable act, rules and regulations, shall be read in contravention to the interest of the consumer or in a manner which lead to wrongful losses/damages to the Consumer.

- k) That the Coordination Committee has failed to appreciate the fact that Respondent has failed to provide the accounts showing any loss/damage to it due to the alleged failure of the present appellant to give prior intimation. It is further submitted that the Coordination Committee has completely ignored the fact that as per the accounts of the present Appellant, the Appellant has actually paid in excess to Respondent and thereby an amount of Rs. 21.78 lacs is due from the Respondent to present Appellant.
- l) That the Coordination Committee has failed to appreciate the fact that the failure of the Respondent to calculate the exact loss caused to it due to the alleged failure of prior intimation, does not give any right to Respondent to claim the entire amount, which was earlier, adjusted by Respondent itself. Respondent is under an obligation to give its accounts clearly showing the losses incurred by Respondent due to the alleged failure of the present Appellant. The failure of Respondent in doing so shall not adversely affect the Consumer (present Appellant); by making claim for refund of the whole adjusted amount.
- m) That the Coordination Committee has failed to appreciate that Appellant Company was never notified of any such change in the policy, either by Respondent or by Open Access. If the Appellant Company would have been notified of any such change in policy, it would have abided by the same. It is pertinent to note that since the time Appellant Company had come to know about the new policy, it has been duly following the same.
- n) That the Coordination Committee has committed grave error in holding that section 56 of the Electricity Act, 2003 is applicable in the present case. Section 56 applies where any person 'neglects to pay'. However, in the present case, the appellant has always paid the due amount and as such no amount was due or no bill was pending to be paid. The Licensee, Respondent, has suddenly vide a memo dated 08.12.2015, raising refund of the adjustment which Respondent has given earlier, at the time of raising bills. Thus, the present issue does not fall with the terms of Section 56 of the Electricity Act, 2003.
3. On the basis of above grounds, the appellant has prayed as under:-

- a) Pass an interim order to deter Respondent from disconnecting the electricity supply of the Applicant Company;
- b) Direct Respondent to withdraw their notice of payment of Rs. 2.32 crore;
- c) Direct Respondent to pay appropriate damages to the Complainant;
- d) Pass an interim order to deter Respondent from adding the disputed amount in the current bills of the Applicant Company until the final disposal of this Application;
- e) Direct Respondent to refund the amount of Rs. 21.78 lacs, paid in excess by the Applicant Company to the Respondent; and
- f) To pass any such other or further order(s) as this Commission may deem fit and proper in the facts and circumstances of the present case.

Proceedings in the Case

4. The case was heard on 29th November, 2017. The learned counsel for the Petitioner argued at length against the order passed by Coordination Committee. The learned counsel for the appellant, while admitting that the procedure of intimating the schedule of power through open access to the licensee by 10.00 AM of the preceding day was not followed, argued vehemently that the same process continued for a considerable period of time and the Respondent did not issued even a single letter/show cause notice pointing out the alleged failure of the Petitioner and it tantamount to implied waiver of the said condition by the Respondent. The learned counsel further argued that it is arbitrary action on the part of the Respondent to disconnect the power and force a consumer pay an amount twice on account for mere procedural irregularity, which has been duly waived by the Respondent by its inaction and even otherwise has not caused any loss to the Respondent. In the interim, the Petitioner sought a stay on the disconnection of power supply by the Respondent DISCOM.
5. After hearing the Id. Counsel for the appellant, this Commission enquired about the possibility of ascertaining the loss incurred by the Respondent on account of non intimation of schedule by the petitioner as

per the prescribed procedure. The ld. counsel for the respondent pointed out that this issue was also examined by the Coordination Committee and in its order, and the Committee has observed that *“the exact calculation of the losses attributable to non-intimation of open access by a particular consumer and resultant profit and loss for sale of equivalent power through exchange / UI cannot be worked out owing to the complexities and pooling of power in the grid”*

6. Accordingly, the Commission vide its Interim Order dated 19.03.2018, directed the Respondent to file its reply within a month to the appeal, alongwith the estimation of loss caused to it due to the alleged failure of prior intimation. The Commission, while following the judgment dated 03.02.2017 of Hon’ble Punjab & Haryana High Court, directed that supply of electricity will not be disconnected, on account of default in payment of disputed amount of Rs.2,32,80,043/-, till the disposal of writ Petition pending before Hon’ble High Court.
 7. In response to the Interim Order of the Commission dated 19.03.2018, DHBVN filed its reply pleading therein as under:-
 - a) That the appeal filed by M/s Alchem International Private Limited (“Appellant”) is devoid of merits.
 - b) That the following issues requires adjudication by this Commission:
 - (i) Whether compliance of Regulation 42 of the OA Regulation is mandatory in nature?
 - (ii) Whether the Respondent will be subjected to any loss in case the Regulation 42 of the OA Regulation is not complied by the Appellant?
- Re: Issue (i)**
- c) That the OA Regulation was notified on 11.01.2012 by this Commission. Thereafter, 1st amendment to OA Regulation was notified on 03.12.2013 by the Commission. The said amendment to OA Regulation was made after taking into consideration comments/suggestions/objections received from various stakeholders including the Respondent. Further hearing was also held by the Commission in this regard.
 - d) That during the said hearing the Respondent apprised this Commission regarding the difficulties faced by them in the planning / managing their drawl of power from the grid as also in the load control in a cost effective

manner unless a confirmed schedule of power through open access tied up for the next day by the open access consumers is made available to them sufficiently in advance. Further, it was submitted that the total quantum of open access power for the next day i.e. for 00.00 hours to 24.00 hours of the following day, against day ahead transactions is known by the distribution licensees only between 5 PM to 6PM of the previous day. Thereafter, the Respondent have no time and are not in a position to take any corrective measures to affect alternations in their own schedule for surrendering any surplus power or for arranging more power in case of any shortfall as by that time Respondent's own bids/schedule for energy drawl would have been approved by the power exchange / RLDC. The result is that the Respondent invariably is forced to under draw / over draw or impose avoidable cuts leading to financial losses and consequent additional burden for other consumers due to actions of the open access consumers.

- e) That after taking into consideration above mentioned submission, this Commission in order to primarily protect the interest of the general public made necessary amendments in Regulation 42 of OA Regulation. For ease of reference the relevant portion of the said amended provisions are reproduced below:

Regulation 42 (After amendment)

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

*i) The Consumer **shall** submit to the distribution licensee a schedule of power through open access for all the 96 slots by 10:00 AM of the day preceding the day of transaction and this will be considered as confirmed schedule for working out the slot-wise admissible drawl of the consumer from the licensee with reference to his sanctioned contract demand. For*

example, if an embedded consumer with a contract demand of 10 MW has scheduled 4 MW power through open access in any time slot of the succeeding day as per the schedule submitted by him at 10 AM, then his admissible drawl from the licensee in that time slot will be 6 MW.

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

- f) That the above provision laid down the eligibility criteria for the embedded consumers. The fulfillment of the said criteria by the embedded consumers could only ensure their entitlement to open access power. The said provision categorically prescribes that the embedded consumer who wants to avail open access shall submit to the Respondent a schedule of power through open access for all 96 slots by 10:00 AM of the day preceding the day of transaction.
- g) That where the statute provides for a particular procedure, then the same has to be followed and no one can be permitted to act in contravention of the same. Further, it was submitted that the same view has also been adopted by the Hon'ble Supreme Court of India in Selvi J. Jayalalithaa and Ors. Vs. State of Karnatka and Ors. (2014) 2 SCC 401. For ease of reference the relevant portion of the said judgement is reproduced below:

“29. We find force in the submissions advanced by the learned Attorney General that this Court generally should not pass any order in exercise of its extraordinary power under Article 142 of the Constitution to do complete justice if such order violates any statutory provisions. We do not

intend to say that it would be illegal to extend the term of the special judge, but that it is a matter within the jurisdiction of the State in accordance with the relevant law.

There is yet an uncontroverted legal principle that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. In other words, where a statute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressiouniusestexclusioalterius", meaning thereby that if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no other manner and following any other course is not permissible." **Emphaseses Supplied**

- h) That amendment in the Regulation 42 of OA Regulation has been made by this Commission primarily for the benefit of the other consumers of the Respondent, thereby making the compliance of the said provision mandatory in nature. Moreover, Regulation 42 uses the expression "Shall Submit" which also makes the provision mandatory in nature. However, admittedly the Appellant failed to comply with the said provision and therefore was not entitled to source power from open access during the Disputed Period. It is pertinent to mention that while amending Regulation 42, the Commission categorically opined that the said amended has been based upon a simple principal that in case a consumer wants to avail the benefit of cheaper power, that consumer should be ready to face the associated risks.

Re: Issue (ii)

- i) That the Appellant had failed to provide requisite schedule to the Respondent, the Respondent in order to supply electricity with respect to the entire contract demand of the Appellant, purchased power from the concerned sources and have paid for the same. Therefore, the Respondent is entitled under law to charge the Appellant for the said power. In case the same is not recovered from the Appellant, the

Respondent will suffer substantial loss, which will ultimately be passed on to the other consumers of the Respondent.

- j) That in order to arrive at the amount which the Appellant is entitled to pay towards the power purchased by the Respondent, the account of the Appellant was overhauled for the Disputed Period i.e. the period for which the Complainant failed to submit requisite schedule to the Respondent. During overhauling it was found that excess amount of Rs. 2.32 crores with respect to open access adjustment was inadvertently made to the Appellant. According a demand in this respect was raised on the Appellant under law.
- k) That the NOCs for availing short-term open access were issued to the Appellant in which it was categorically mentioned regarding compliance of the said statutory requirement on part of the Appellant. Moreover, a communication dated 27.12.2013 was addressed to all short-term open access consumers categorically informing them to comply with the said statutory requirement. It is submitted that, as the Appellant had failed to provide requisite schedule to the Respondent, the Respondent in order to supply electricity with respect to the entire contract demand of the Appellant, purchased power from the concerned sources and have paid for the same. Therefore, the Respondent is entitled under law to charge the Appellant for the said power. Therefore, the issue of unjust enrichment doesn't arise.

DHBVNL submitted that in light of the aforesaid facts and submissions the Appellant is not entitled to any relief and therefore this Commission may be pleased to dismiss the present appeal.

- 8. The Commission, vide memo no. 821/HERC/Tariff dated 14.06.2018, 1315/HERC/Tariff dated 03.08.2018 and 1655/HERC/Tariff dated 13.09.2018, directed the Coordination Committee for Open Access, to examine and submit a fact finding report whether the officers of the distribution licensee, concerned with the scheduling of power, continued to schedule power based on the procedure followed prior to the amendment dated 03.12.2013, even after the notification of the amendment.

9. The Coordination Committee for Open Access, vide its memo no. Ch-56/ISB-521 dated 28.09.2018, in reply to the Commission's memos dated 14.06.2018, 03.08.2018 & 13.09.2018, enclosed the report received from SE/SO, DHVBNL, Hisar submitted vide letter no. Ch-277/SE/SO-50/IV dated 19.09.2018. SE/SO, DHVBNL, Hisar submitted as under:-

“In this regard, it is submitted that prior to January 2015 adjustment towards open access energy was performed on the basis of data/calculations provided by the consumers. Later on, it was discovered by the Audit team that the data/calculations provided by the consumers were not authentic, which resulted in excess adjustment thereby causing substantial financial loss to the Nigam.

In January 2015, a separate open access wing was established by the Nigam to deal with the said problem and provide adjustment towards open access energy in terms of the open access regulation and guidelines framed in this regard. Thereafter, as permitted under the Electricity Act, 2003 and regulations framed by the Hon'ble Haryana Electricity Regulatory Commission, necessary steps were taken by the Nigam (open access wing) against the said consumers.”

10. The case was subsequently heard on 13.12.2018, 02.04.2019, 25.07.2019, 13.09.2019 and finally on 23.10.2019.

The findings recorded by the Commission.:

11. The Commission has heard the arguments of the ld. counsel for the appellant and the Respondents and has also gone through the entire record of the appeal. The following issues arise for consideration and decision:-
- a) **Whether Regulation 42 of HERC (Terms & Conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012 (HERC OA Regulation), is a mandatory provision?**
 - b) **Whether the Petitioner has complied with the Statutory provision?**

- c) **Whether grant of adjustment by the Respondent Nigam, in respect of power bought by the Petitioner through Open Access, for considerable period of time, without the Petitioner following the provisions of the Statute, constitute implied waiver of the condition of intimation of day ahead schedule?.**
- d) **Whether the Respondent Nigam suffered any financial loss and was constrained in planning its power procurement on day to day basis?**
- e) **Relief?**

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

Issue (a):

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

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

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

Issue (b)

Whether the Petitioner has complied with the Statutory provision?

The Commission observes that the Petitioner has vehemently claimed that it has not provided day ahead schedule by 10 AM, during the disputed period, as prescribed under Regulation 42 of HERC OA Regulations.

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

Issue (c)

Whether grant of adjustment by the Respondent Nigam, in respect of power bought by the Petitioner through Open Access, for considerable period of time, without the Petitioner following the provisions of the Statute, constitute implied waiver of the condition of intimation of day ahead schedule?

The Commission has examined the aforesaid issue at length. The Commission has taken note of the letter dated 27.12.2013 addressed by Haryana Vidyut Prasaran Nigam Limited (HVPNL) to all the embedded open access consumers, intimating the revised eligibility criteria for grant of open access, as per the revised OA Regulations notified on 03rd Dec., 2013. Upon Notification, the Regulations achieves the status of subordinate legislation and the public is deemed to have been informed and cannot claim ignorance of the amendment. The Commission, therefore, holds that there was a mandatory set of procedure to be followed by embedded open access consumers and an important part of which is an obligation cast upon the embedded open access consumers to submit to the distribution licensee a schedule of power through open

access for all the 96 slots by 10:00 AM of the day preceding the day of transaction. **This being in nature of subordinate legislation, the Distribution licensee had no power to waive off or modify the statutory conditions set out in the Regulations in any manner, whether explicit or implicit. If Act or Regulations mandate to follow a particular procedure, the same shall have to be adhered to by the person who desires to avail the benefit under the said Regulations. If consumer does not adhere to the conditions of Open Access Regulations/Procedure, it has to face the consequences. The charges are levied as an enforcement measure and not as a penalty in the strict sense.**

In view of the above, the Commission answers the issue framed above in negative i.e. grant of adjustment by the Respondent Nigam, in respect of power bought by the Petitioner through Open Access, for considerable period of time, without the Petitioner following the provisions of the Statute, does not constitute implied waiver of the condition of intimation of day ahead schedule.

Issue (d)

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

The aforesaid query was put forth to the Respondent Nigam. In reply to the same it has been submitted that *“the exact calculation of the losses attributable to non-intimation of open access by a particular consumer and resultant profit and loss for sale of equivalent power through exchange / UI cannot be worked out owing to the complexities and pooling of power in the grid”*

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

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

Relief:-

Having answered the above issues, the Commission is of the considered view that Regulation 42 of HERC OA Regulations, 2012 being mandatory in nature has not been followed and complied with by both the parties from Dec 2013 to Dec 2014. The Petitioner has admitted that the requisite information has not been supplied by him before 10 AM of the preceding day. The Respondent without verifying the said information kept on adjusting the amount for as long as one year.

The Regulations occupying the field came into existence in 2012 and the first amendment was notified on 03.12.2013. However, the said adjustments were being made by the Respondent without taking in account the amendments which were done in the HERC OA Regulations on 03.12.2013. It is clear that the present case is basically delayed implementation of 1st Amendment of HERC OA Regulations, 2012. For this both the parties are at fault but two wrongs cannot make one right. As a matter of fact, Regulation 42 & 45 of HERC OA Regulations 2012, is the mandate of the subordinate Regulations, therefore, this cannot be waived.

Facing this peculiar situation, this Commission is of the view that a balanced approach should be taken. The Commission does not want to enrich the DISCOMS for their own fault nor wants to pass on any financial losses to the DISCOMS which ultimately have to be passed on to the consumer at large.

In order to balance the equity on both sides as a one-time measure the Commission is of the view that present situation is comparable to the one when Open Access Consumer under draws the power and unplanned power under drawn by the consumer, flows in to the system. The procedure for settlement of such power has been specified in the Regulation 24(2) of the HERC Open Access Regulations (1st Amendment) Regulations, 2013, as reproduced below:-

“Under drawl by open access consumer: In the event of underdrawl, the consumer will be paid by the licensee UI charges as notified by CERC for intra-state entities or lowest tariff as determined by the Commission for the relevant financial year for any consumer category or power purchase price/sale price contracted by the open access consumer whichever is lower.....xxx. “

However, the said Regulation has a capping of 10% of the entitled drawl in a time – slot and 5% of the entitled drawl on aggregate basis for all the 96 time-slots in a day.

Once the Commission is of the view that the present situation is similar, in the light of the above discussions, it would be equitable and just that the Petitioners are granted credit for the purchase of energy from Power Exchange during the disputed period at the rate lowest of the UI charges notified by CERC for intra-state entities or lowest tariff as determined by the Commission for the relevant financial year for any consumer category or power purchase price/sale price contracted by the open access consumer without capping of 5 %/ 10 % as a one time measure.

The Petitioner, within 15 days from the date of this Order, shall submit to DHBVNL, the documentary evidence that it had purchased the energy through Power Exchange and paid for it. In case the Petitioner fails to produce the document as evidence, within the time allowed, then no credit shall be allowed thereafter by DHBVNL. Further, DHBVNL shall grant necessary adjustment within 30 days thereafter, failing which, DHBVNL shall be liable to interest @ 12% p.a. on the adjustment amount due.

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

13. The present appeal is accordingly disposed of.

(Pravindra Singh Chauhan)
Member

(Naresh Sardana)
Member

Dated: 17.12.2019
Place: Panchkula

HEERC