

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

CASE NO: HERC / Petition No. - 1 of 2022

**DATE OF HEARING : 27.04.2022
DATE OF ORDER : 13.05.2022**

IN THE MATTER OF:

Petition for reading set aside / quash the impugned rejection letter dated 11.11.2021 and to direct the respondents to refund/adjust the energy banked for the period 23.01.2019 to 24.01.2020 and up to 01.07.2020 and to direct the respondents to continue to extend the power supply to petitioner no. 2 and not to disrupt the same on account of the non-payment of the above said energy dues for the period w.e.f February 2020 till October, 2021, during the pendency of the instant petition.

Petitioners

1. M/s. Piccadily Agro Industries Ltd.
2. M/s. Piccadily Hotels Pvt. Ltd

Respondents

1. Haryana Vidyut Prasaran Nigam Ltd (HVPNL), Panchkula
2. Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL), Panchkula
3. Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL), Panchkula

Present on behalf of the Petitioners

1. Shri Naveen S. Bhardwaj, Advocate

Present On behalf of the Respondents

1. Shri Samir Malik, Advocate, for Respondent Nos. 2 & 3

Quorum

**Shri R.K. Pachnanda
Shri Naresh Sardana**

**Chairman
Member**

ORDER

Brief Background of the case

1. The present petition has been filed primarily for seeking refund/adjustment of the energy banked by the petitioner under banking arrangement, for the period from 23.01.2019 to 24.01.2020 and up to 01.07.2020. It has been further prayed that the surcharge levied in the electricity bills issued to respondent No. 2 for the period w.e.f. February 2020 till October 2021, due to non-payment of bills, be removed.
2. The petitioner has submitted as under:-
 - a) That the petitioner no.1, Piccadily Agro Industries Ltd. (hereinafter also referred to as 'PAIL'), is Sugar Mill with 17 MW bagasse based co-generation captive power plant at Village Bhadson, Karnal.

- b) That the petitioner no. 2 is an equity share holder of petitioner no. 1 and is also a beneficiary under the banking agreement under reference, being captive user and is availing banking of power from the 17 MW bagasse based captive power plant.
- c) The petitioner has submitted that the 'Policy for promoting generation of electricity through renewable energy sources', notified on 23.11.2005, by Govt. of Haryana, provides as under:-
- "11. Banking**
HVPNL/DHBVN/UHBVN/Licensee is to permit electricity generated by eligible producers to be banked. The banking facility shall be allowed for a period of one year by the Licensee/utility free of cost. However, withdrawal of banked power should be allowed only during non-peak hours. If the banked energy is not utilized within a period of twelve months from the date of power banked with the concerned power utilities/licensee, it will automatically lapse and no charges shall be paid in lieu of such power."
- d) That the petitioner opted to avail the banking facility in respect of its excess power to the extent of 5 MW generated through its bagasse/biomass based co-generation plant, in terms of the aforesaid policy. Agreement for banking of power was entered between the petitioner and HPPC on 23.01.2015. Thereafter, the banking agreement continued to be renewed through similar banking of power agreements on year to year basis, as per the prevailing Regulations till January, 2019.
- e) That when the Agreement for Energy Banking dated 19.01.2018 was due to expire on 22.01.2019, the petitioner sent a request for renewal of the Agreement for Energy Banking for a further term vide its letter dated 19.11.2018 issued to the Chief Engineer Haryana Power Purchase Center. However, the request for renewal of the Agreement for Energy Banking was declined. Accordingly, the petitioner filed petition vide Case No. HERC/PRO-13 of 2019 before the Commission, praying for a direction that the facility of energy banking be extended to the petitioner herein for a further term beyond 22.01.2019. The Commission allowed the aforesaid petition vide its order dated 04.04.2019.
- f) That eventually a Tripartite Banking Agreement was entered into and executed between the Petitioner, Respondent No.1 and Respondent No.2 herein for banking facility in respect of power up to 3MW beyond 22.01.2019. The said Tripartite Banking Agreement was executed on 24.01.2020 having retrospective effect from 23.01.2019 i.e. for a term of five years starting from 23.01.2019 to 22.01.2024 (Clause 7.1).

- g) That the requirement to provide the schedule of power as a condition for energy banking was introduced for the first time in the Tripartite Banking Agreement dated 24.01.2020, and none of the previous Agreements for Energy Banking had the requirement of scheduling of power.
- h) That since the Tripartite Banking Agreement (for a period of 5 years) came to be executed only on 24.01.2020, *albeit* retrospectively from 23.01.2019. Hence, in effect, from 23.01.2019 to 24.01.2020 the formal schedule of drawl of power pursuant to open access permission was absent/could not have been prepared and submitted by the Petitioner, for want of notice of any such requirement due to pendency of renewal process for the energy banking arrangement/agreement. However, the respondents continued to accept injection and drawl of power during the intervening period i.e. from 23.01.2019 to 24.01.2020 and the petitioner injected approximately 63 Lakhs Unit in 132 KV Sub-Station Bhadson.
- i) That the aforesaid aspect remains undisputed and even the respondent no. 2 admitted that power was injected and drawn by the petitioner during the period the energy banking arrangement/agreement was under renewal process. In this regard the inter-departmental letter dated 06.05.2020 shows the energy account for the period 01.01.2019 to 31.07.2019 and 01.08.2019 to 31.01.2020 giving a summary of power injection and power drawl by the petitioner's power plant during such periods. Similarly, letter dated 08.05.2020 shows the energy account for the period 01.02.2020 to 29.02.2020 and 01.03.2020 to 31.03.2020 giving a summary of power injection and power drawl by the petitioner's power plant during such periods. Similarly, letter dated 09.06.2020 shows the energy account for the period 01.04.2020 to 30.04.2020 giving a summary of power injection and power drawl by the Petitioner's power plant during such periods.
- j) That further, in order to claim adjustment/refund in respect of the aforesaid disputed period i.e. w.e.f. 23.01.2019 till 24.01.2020 period during which power was injected and drawn, the petitioner submitted a representation dated 03.7.2020 to the Respondents/DHBVN.
- k) That the Superintending Engineer, DHBVN (Respondent No.3) issued Memo No. Ch-13/SE/SO-Sr.A.o-81 dated 31.08.2020 to the Chief Engineer, HVPNL (Respondent No.1) capturing the above grievance of the Petitioner in the following terms:
"xxx The process of settlement of captive RE/Solar energy was finalized on 03.12.2019, copy placed as Annexure 5. Adjustment of Solar captive energy is now being done as per approved process of the Nigam subject to schedule submitted by RE/solar captive consumers.

As per the banking agreement and approved process of Nigam, settlement of banked energy is done w.e.f. 23.01.2020. As per Banking agreement, the company was to submit slot wise schedule of injection of power in MW to SLDC Haryana as well as SE/SO if respective Discoms by 10.00 Hours on daily basis. Similarly, slot-wise schedule of power to be drawn at the drawl point was to be intimated by the company. **In the present case as the agreement was signed on 24.01.2020 to be effective w.e.f. 23.01.2019 the above procedure could not be followed retrospectively by the company. Resultantly the adjustment of energy could not be granted to the consumer for the period 23.01.2019 to 22.01.2020 (Disputed period) in the absence of requisite schedule.**

The following challenges are faced for settlement of banked energy at drawl point.

- The consumer did not schedule its generation, banked energy and drawl from banked energy w.e.f. 23.01.2019 owing to the back dated agreement.
- Scheduling is mandatory condition for settlement of energy and consumer did not schedule its energy for the period 23.01.2019 to 22.01.2020 due to back dated agreement.
- Consumer did not avail open access permission during the disputed period.
- How to settle the energy during disputed period.

In order to settle the issue adjustable amount as per Sales Instruction No. D-31/2015 without scheduling based on actual drawl of energy at Piccadilly hotel was arrived at for Rs. 25645923/-. Since the conditions of agreement are not complied with and moreover the agreement is entered in to by CE/S.O & Commercial, HVPN and CE/SO DHBVN and UHBVN, Panchkula from back date or from a retrospective date due to which the conditions of scheduling is not complied by the consumer,'

Thus, Respondent No. 3 admitted that despite the inability/impossibility of the petitioner to meet the scheduling requirement which was a condition imposed in the instant Tripartite Banking Agreement dated 24.01.2020, for the time period when such agreement was under renewal process, an amount of Rs 2,56,45,923/- was due to the petitioner as adjustment/refund amount towards injecting and drawl of power calculated according to the Sales Circular No. D-31/2015.

- l) That the respondents, while acting in most mechanical manner issued Memo No. Ch-31/81/SE/CBO/OA dated 11.11.2021 rejecting the claim for

adjustment/refund towards banked energy for the period 23.01.2019 to 24.01.2020 without assigning any reason/rational for rejecting the same. Whereas, the petitioner is entitled to approximately Rs. 6.77 crores as refund amount calculated at Rs. 6.65 per unit along with 8% interest

- m) That petitioner no. 2 has been saddled with alleged outstanding pending dues of Rs. 3,72,72,651 for the period from February 2020 till October 2021. Despite being aware of the fact that due to the Covid-19 Pandemic, the petitioner No.2 which is availing power from petitioner No.1, was ordered to be shut-down for a substantial period of the year 2020 and was allowed to only operate limitedly. Due to which the electricity “consumed” for the time period between 2020-2021 is not/was not as consumed in “normal times”. The aforesaid bill includes an amount of over Rs. 60 Lakhs as surcharge for non-payment of the bills. If the petitioners are/were given due credit/benefit of its banked power for the period w.e.f. 23.01.2019 to 24.01.2020, no amount would have been/is outstanding against the Petitioner No.2 rather the petitioners would still have excess units to their credit. Thus, the respondents cannot seek to penalize the petitioners for the alleged non-payment of bills and cannot be permitted to capitalize on their own wrongs. As such, the petitioner no. 2 prays that this amount be set-off and the electricity connection of the petitioner no. 2 may not be disconnected during the pendency of this petition.
- n) That since at this stage when the power/energy has already been injected/drawn without scheduling, the scheduling such power cannot be done for the period already gone by retrospectively i.e. from 23.01.2019 to 24.01.2020, as the condition of scheduling stipulated in the Tripartite Banking Agreement retrospectively would compel the petitioner to perform an impossible act. It is settled principle of law in the legal maxims '*lex non cogit Ad impossibilia*' which means law does not compel a man to do that which cannot possibly be performed.
- o) That the stand of the respondent authorities is totally misconceived and misplaced because the energy accounts pertaining to the time period 23.01.2019 to 24.01.2020 clearly show that the petitioner was injecting as also drawing power during the intervening period to the knowledge and consent of the respondents and it is in the said situation that the Tripartite Banking Agreement dated 24.01.2020, was made operational retrospectively with effect from 23.01.2019. Needless to mention here that the delay in renewal of Banking Agreement was solely attributable to the respondents and it is only after vigorous persuasion and intervention of this Commission, the Banking agreement for the

period beyond 22.01.2019 was executed on 24.01.2020 and the said Agreement was made operational retrospectively w.e.f. 23.01.2019.

- p) That having availed the benefit of the power banked by the petitioners, denial of adjustment/refund of such banked power would amount to unjust enrichment of the respondents which is incomprehensible and unacceptable in law.
- q) That at the time when the Tripartite Banking Agreement dated was executed, the Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2017 were in force. As per the provisions contained therein w.r.t. Banking of power, clearly stipulated that the requirement of scheduling and deviation would come into being once the Regulations for forecasting, scheduling and settlement (which were under consideration of this Hon'ble Commission for finalization) are notified. The relevant Regulation 58 of the 2017 Regulations is reproduced below for the ready reference:-

“58. Banking of RE Power. – *A generator or a captive power producer or a Consumer in the State may bank power on payment of the banking charges along with the transmission and distribution losses for availing the open access on the transmission or distribution network of the licensees for banking and drawl of banked power from the Discoms after entering into the banking agreement with the concerned Discoms at the terms and condition specified in the agreement, as follows: 1. The solar power shall be allowed to be banked with the distribution licensee(s) subject to the condition that 5% of power banked in (kind) shall be deducted toward banking charges. 2. The Energy Banked shall be permitted to be carried forwarded from month to month. The banked power shall be utilized within the same financial year failing which the unutilized energy at the end of the financial year shall lapse, and no compensation whatsoever shall be claimed/ paid for such lapsed banked energy, provided the solar energy banked during the last quarter of the financial year shall be carried forward to the next financial year. 3. The banking shall be allowed throughout the year, however, the drawl of banked power shall not be allowed during the peak season period (July to mid October).*

4. The drawl of bank power shall also be not allowed during peak load hours and time of day (ToD) tariff period.

*5. The Banked Energy Shall be calculated at the end of a month as follows:-
Banked Energy at the end of month (Ebi)= {Eg(1-losses)-Ec} * (1-b) + Eb (i1) **

*Eg = Energy Generation for the ith month * Ec = Energy consumption for the ith month * Eb (i-1) = Energy Banked at the end of previous month *b = Banking charges in kind.*

Further, as far as scheduling and deviation mechanism is concerned, the Commission in the process of finalization of Regulations on forecasting, scheduling and settlement and once these Regulations are notified the same shall be applicable.”

Further, Clause 4.2 (ix) of the Tripartite Agreement dated 24.01.2020 (P-9) also contains similar provision and reads as under:-

“4.2 Banking:

Terms and conditions of banking:

(ix) the RE power generating plant shall be governed as per HERC forecasting and scheduling Regulations, if applicable, as amended from time to time without prejudice to the terms and conditions of this agreement.”

Thus, a conjoint reading of the aforesaid provisions would show that the requirement of scheduling was to become operative only upon notification of forecasting and scheduling Regulations by this Commission. To the best of knowledge and belief of the petitioners, no Forecasting and Scheduling Regulations have been notified by this Commission for Baggase based RE captive generating plant. As such, the insistence of the authorities on scheduling of power is even otherwise untenable and without any statutory basis.

- r) That even if it is presumed for the sake of arguments that the scheduling was ‘sine qua non’ for availing the refund/adjustment of the banked power, though not conceding, still, this Commission is empowered to relax/modify/amend any of the provisions of the governing Regulations as also the agreement in question and the petitioners would thus, beseech indulgence of this Commission to exempt the petitioners from the requirement of scheduling for the period in question.
- s) Following prayers have been made:-
- i) Set aside / quash the impugned rejection letter dated 11.11.2021, being totally unjustified, unreasoned and non-speaking and contrary to the harmonious reading/interpretation of the Tripartite Banking Agreement dated 24.01.2020; and
 - ii) Direct the Respondents to refund/adjust the energy banked for the period 23.01.2019 to 24.01.2020 amounting to approximately Rs. 5.00 crores along with 8% interest from 23.01.2019 till date of payment, without illegally insisting on scheduling of power for the aforesaid period or alternatively by exempting the petitioners from the requirement of

scheduling power for the aforesaid period, based on actual injection/drawl account;

- iii) Direct the Respondents to rectify the Electricity Bills issued to respondent No. 2 for the period w.e.f. February 2020 till October 2021 by removing the surcharge that has wrongly been levied therein and also to direct the respondents to continue to extend the power supply to petitioner no. 2 and to not to disrupt/disconnect the electricity supply on account of the alleged non-payment of the above said energy dues for the period w.e.f. February 2020 till October, 2021 during the pendency of the instant petition.
- iv) Pass any other order(s) and/or direction(s) as may be deemed fit and proper by the Hon'ble Commission in the facts and circumstances of the present case.

Reply filed by DHBVN (Respondent No. 2)

3. DHBVN has filed a detailed reply dated 20.02.2022, praying to dismiss the present petition. DHBVN has submitted as under:-

- a) That the Commission vide notification dated 24.07.2018 had notified Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2017 ("RE Regulations,2017"). The RE Regulations, 2017 are binding on parties herein and have precedence over any other government policy. As per the RE Regulations, 2017 HVPNL/SLDC was required to formulate the criteria for settlement of wheeled energy at consumer end in consultation with the Stakeholders and submit the same to the Commission for approval. The procedure for banking was approved by the Commission vide order dated 13.05.2019 in PRO 22 of 2019, which *inter alia*, provides for slot wise schedule in terms of OA Regulations. The procedure/guidelines of baking of RE power which is approved vide order dated 13.05.2019, provides as under: -

"vii. As per open access regulations, 2012, by 10:00 hrs every day, the consumer shall submit slot wise schedule of power in MW to SLDC, Haryana on daily basis for the next day i.e. 00:00 hours to 24:00 hours showing his drawl from the following: -

1. *Generating through Solar Plant*
2. *Captive Power Plant.*
3. *Banked Power*
4. *Open Access Power Through exchange.*
5. *Discom power."*

- b) That the respondent No. 1 had signed an agreement dated 23.01.2015 with the petitioners for banking of power in terms of provisions in the policy for promoting Generation of Electricity through Renewable Energy Sources, notified by the Government of Haryana vide notification dated 23.11.2005 bearing no. 22/69/2005-5P. Initially the First Agreement was signed with effect from 23.01.2015 for one year and further renewed on year-to-year basis on 25.02.2016, 11.01.2017 and 19.01.2018, wherein the banked energy at drawl points of Petitioner No. 2 was settled as per Sales Circular No. D-31/2015 till 22.01.2019.
- c) That the petitioner had approached this Commission, vide case no. HERC/PRO-13 of 2019 with the following prayers:-
*“A. RE Regulations, 2017 is applicable for banking renewable energy both solar and non-solar,
B. Direct the respondents to extend the facility of banking of power to the petitioner by executing formal agreement in this regard beyond 22.01.2019,
.....”*
- d) That the Commission vide order dated 04.04.2019 decided the case and given the relevant finding as under: -
“In view of the above discussion including the case laws in the matter, the petition is allowed subject to the payment of charges and energy settlement priority set out in HERC/RE Regulations,2017.”
- e) That in view of the above decision, a Tripartite Agreement dated 24.01.2020 was entered into and executed between the Petitioner No. 1, Respondent No. 1 and 2 for banking facility in respect of power up to 3 MW beyond 22.01.2019.
- f) That in view of the Tripartite Agreement, the Petitioner No.1 was allowed to inject power from its co-generation power project into the grid and utilize the same at the address of Petitioner No.2, by using the transmission network of Haryana Power Utilities subject to specified terms and conditions of the Tripartite Agreement.

Re: Scheduling of drawl is mandatory in terms of the HERC OA Regulations.

- g) That regulation 6(13) and 6(14) of the Haryana Electricity Regulatory Commission (Open Access Regulations, 2012 “HERC OA Regulations”) provides that firm power cannot be injected into the grid prior to the operationalization of Open Access and obtaining prior approval of the State Load Dispatch Centre (“SLDC”). Further operationalization of open access is subject to successful

commercial operation of project. Relevant portion of the said regulations is reproduced below:-

“6. Procedure for grant of connectivity: -

(13) The grant of connectivity shall not entitle an applicant to interchange any firm power with the State grid unless it obtains long- term open access, medium- term open access or short-term access in accordance with the provisions of these regulations.

(14) A generating station, including a captive generating plant, which has been granted connectivity to the intra-State grid, shall be allowed to inject infirm power into the grid during testing including full load testing before commencing its commercial operation for a period not exceeding three months after obtaining prior permission of the State Load Despatch Centre. Provided that the State Load Despatch Centre while granting such permission shall keep the grid security in view and ensure that injection of such infirm power is only for the purpose of testing, prior to commencing of commercial operation of the generating station or a unit thereof.”

- h) That the scheduling of drawl is a mandatory condition for settlement of energy as per clause 42, 43 and 45 of HERC OA Regulations. The petitioner no. 2 has not scheduled its banked energy drawl for the period of 23.01.2019 to 22.01.2020 and further did not take open access permission during the period, which is a mandatory condition as per RE Regulations, 2017.
- i) That the petitioner no. 2 did not seek prior approval of the SLDC for injecting firm power and operationalization of the Short-Term Open Access (“STOA”). Thus, as such any power injected into the grid by the petitioner no. 1 prior to operationalization of Open Access cannot be considered as firm power and must be dealt as per the OA Regulations. Thus, no adjustment can be allowed to the petitioner no. 2 for the power injected prior to the execution of the STOA/Tripartite Agreement wherein no day ahead schedule is given to the Answering Respondent.
- j) That the HERC OA Regulations were amended on 03.12.2013. By way of the said amendment, Regulation 42 was amended, and a mandatory obligation was casted on the embedded consumer (who were willing to avail open access) to submit to the distribution licensee (the Respondent herein) a schedule of power through open access for all 96 slots by 10:00 AM of the day preceding the day of transaction, as under: -

“42. Eligibility criteria, procedure and conditions to be satisfied for grant of long-term open access, medium term open access and short term open access to

embedded consumers shall be same as applicable to other short-term open access consumers. However, the day-ahead transactions, bilateral as well as collective through power exchange or through NRLDC, by embedded open access consumers under short term open access shall be subject to the following additional terms and conditions:-

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

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

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

Re: Day ahead scheduling

- k) That the condition of intimating day-ahead scheduling is necessary for claiming adjustment under Regulation 43 of the HERC OA Regulation. This Commission vide order dated 17.12.2019 passed in PRO 02 of 2019 and other similar matters has held that compliance of Regulation 42 is mandatory. Relevant portion of the Order dated 17.12.2019 passed by this Hon'ble Commission is reiterated below for ease of reference: -
- "11.....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.....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. ..."*
- l) That clause 4.2 (ix) of the Tripartite Agreement provides as under:-
- "ix. The RE power generating plant shall be governed as per HERC forecasting and scheduling regulations, if applicable as amended from time to time without prejudice to the terms and conditions of this Agreement."*
- m) That HERC OA Regulations, 2012 provides as under:-
- "15(2)Day-ahead open access: (i) An application for grant of 'day ahead' open access may be submitted to the nodal agency within three days prior to the date of scheduling but not later than 1300 Hours of the day immediately preceding the day of scheduling for day-ahead transaction. For example, application for day-ahead transaction on 25th day of July shall be received from 22nd day up to 1300 hours on 24th day of July. (ii) The nodal agency shall check for resultant congestion due to the proposed 'day ahead' open access transaction and convey approval or otherwise in the format prescribed in the detailed procedure. All other provisions for intra-State short-term open access shall apply for day ahead open access."*
- n) That in view of the violation of the HERC OA Regulation and the STOA granted to the petitioner, the petitioners are not entitled/eligible for settlement/adjustment of units injected from 23.01.2019 to 24.01.2020.
- o) That the petitioners are seeking for execution of Tripartite Agreement with retrospective effect for the power injected. It is pertinent to mention that under Regulation 58 of the RE Regulations, the Regulations are in force, for the No-

Banking Arrangement Period, however, a generator or a captive power producer or a consumer in the State of Haryana may bank power on payment of the banking charges along with the transmission and distribution losses (for availing the open access on the transmission or distribution network of the licensees) for banking and drawl of banked power from the DISCOMS after entering into the banking agreement with the concerned DISCOM at the terms and conditions specified in the agreement. Regulation 58 is reiterated as under:

“58. Banking of RE Power. – A generator or a captive power producer or a Consumer in the State may bank power on payment of the banking charges along with the transmission and distribution losses for availing the open access on the transmission or distribution network of the licensees for banking and drawl of banked power from the Discoms after entering into the banking agreement with the concerned Discoms at the terms and condition specified in the agreement, as follows:.....”

- p) That in absence of any day ahead schedule, the benefits of banking cannot be extended to the Petitioners. The Answering Respondent is placing reliance on a recent order passed by this Hon'ble Commission in HERC-PRO 73 of 2020 dated 01.04.2021 wherein the Commission has observed that” obligation of the Petitioner to submit day ahead banking schedule was not dependent upon the formal signing of banking agreement or communication of format by the Respondents. The requirement of the same was enshrined in the Procedure/guidelines of banking of RE Power approved in the Order of the Commission dated 13.05.2019 (HERC/PRO-22 of 2019). Further, the said procedure has been prepared in compliance to the HERC RE Regulations, 2017 and it has been specifically provided that this Procedure shall be read in conjunction with the said Regulations. 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.”

“.... The Commission further observes that the requirement of intimation of day ahead banking schedule by the Petitioner came into existing, vide the Order of the Commission dated 13.05.2019 (HERC/PRO-22 of 2019).”

- q) That the procedures/guidelines of banking have clearly stipulated that slot wise schedule of injection of power as well as drawl of power from various sources is required to be submitted. This provision has been kept in the Regulations, to enable the DISCOMs in planning/managing their drawl of power from grid as well as implement load control measures in a cost-effective manner.

- r) That scheduling of OA consumers impacts the planning related to demand projections and scheduling of available units thereof. The DISCOMs have to bear losses/penalties for deviation in its schedule under the Deviation Settlement Mechanism and Advance Deviation Settlement Mechanism (“DSM/ADSM”). The slot wise injection and drawl of energy is completely dependent on slot wise penalty borne by the DISCOMs or losses incurred on account of scheduling expensive power.

Re: The order dated 31.01.2022 passed in HERC PRO-36 of 2021 against the same Petitioner

- s) That Petitioner No. 1 has filed the petition bearing no. 36 of 2021 before this Hon’ble Commission under regulation 73 to 77 of the HERC RE Regulations, 2017. The Petitioner in the said petition has prayed for clarification to the effect that Regulation 66 of HERC OA Regulations, 2021 specifying conditions of eligibility of a captive power producer to bank power, is not applicable on the Tripartite Agreement already entered between the petitioner herein and the respondents. In alternative, it has been prayed by the petitioner that it may be exempted from requirement of application of Regulation 66 of HERC RE Regulations, 2021. It is pertinent to mention that the Tripartite Agreement referred in the said order is same as referred herein.

- t) That Regulation 66 of HERC OA Regulations, 2021 is reproduced below for reference:

“66. Banking of RE Power. – RE based captive generating plants of owner / consumer with 100 per cent equity holding in the CPP may bank power, up to contract demand for captive/own use on payment of the banking charges along with the transmission and distribution losses (Technical loss) for availing the open access on the transmission or distribution network of the licensees for banking and drawl of banked power from the Discoms after entering into the banking agreement with the Discoms concerned at the terms and condition specified as under:

...”

- u) That Hon’ble Commission held that after HERC RE Regulations, 2021 on 30.04.2021, for control period from FY 2021-22 to FY 2024-25, it became applicable even to the contracts executed earlier and containing the general clause of applicability of such subsequent amendment/re-enactment. It is further held that once the term of the Tripartite Agreement explicitly specifies that the Regulations of this Hon’ble Commissions, as amended from time to time would

be applicable, the issue contended by the petitioner is contrary to the contractual agreement and is liable to be adjudicated against the Petitioner.

- v) That Tripartite Agreement referred in the order dated 31.01.2022 is same Tripartite Agreement referred by the Petitioners in the present petition. This Hon'ble Commission held in paragraph 8 that the Tripartite Agreement was executed on the basis of HERC RE Regulations, 2017, but it contains the clause that the said regulations as amended, re-enacted from time to time, shall be applicable. The very recital of the Tripartite Agreement as cited by the Respondent reads as under:-

“The HVPNL is a transmission Licensee owning and operating intra state transmission system of Haryana and the UHBVN/DHBVN (Discoms), are Distribution Licensee(s) engaged in the business of electricity distribution in the State of Haryana. HVPNL and Discoms are under a statutory obligation to provide non-discriminatory open access to their transmission/distribution system under the provisions of the Electricity Act, 2003. System Operation to enter into banking agreements and related issues on behalf of the Haryana Discoms, i.e. UHBVN and DHBVN and a Nodal Agency to facilitate Banking Arrangement of power from RE bagasse based Captive Generating Plants as per Haryana electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2017 and as amended from time to time (herein after referred to as the “HERC RE Regulations, 2017”).

- w) That Article 1 & 3 of the Tripartite Agreement provides as under-
“Any words and expressions used but not defined in this Agreement shall have the same meaning as defined in the Act, HERC Regulations and the Grid Code. A reference to any Regulation shall include its amendment or subsequent re-enactment if any.”

“3.1 The RE power shall be allowed to be banked with the Discoms/System Operation subject to the condition that 5% of power banked shall be deducted (in kind) toward banking charges as per HERC RE Regulations as amended or re-enacted from time to time.” (Emphasis Supplied).

- x) That the HERC RE Regulations, 2021 pertaining to banking of power, shall be applicable to the petitioners herein and petitioner No. 2 is not the 100% equity holder, thus not entitled for any banking in terms of Regulation 66 of HERC RE Regulations, 2021.

Proceedings in the Case

4. The case was heard on 15.02.2022, 17.02.2022, 06.04.2022, 21.04.2022 and 27.04.2022, as scheduled. The petitioners as well as the respondent no. 2 mainly reiterated the contents of their written submissions, which have not been reproduced herein for the sake of brevity. Respondent no. 1 and 3 were not present in any of the hearings.

Commission's Analysis and Order

5. The Commission heard the arguments of the parties at length as well as perused the written submissions placed on record by the parties. The petitioners have submitted that the credit for energy actually injected by the petitioner no. 1 under banking agreement and consumed at its premises by petitioner no. 2 since 23.01.2019, has not been granted, despite the fact that adjustment has been made in the energy accounts prepared internally by the Utilities. Per-contra, DHBVNL, in its detailed reply, has submitted that banking schedule (i.e. power to be banked and drawl from banked power) was not provided by the petitioner during this period. The schedule of banked power and drawn therefrom was required to be provided by the petitioner in view of the procedure/guidelines of banking of RE power as well as banking agreement dated 24.01.2020. Accordingly, the respondent Nigam has not allowed adjustment of power injected by petition no. 1 and consumed by petitioner no. 2.
6. After hearing the rival contentions and careful examination of the documents placed on record by the parties, the Commission proceeds to examine the issue under consideration in the present petition.

At the outset the Commission has examined the averment of the respondent Nigam that in a recent order dated 01.04.2021 passed in HERC-PRO 73 of 2020 (in the matter of Merino Penal Products Ltd.) the Commission has observed that "*obligation of the Petitioner to submit day ahead banking schedule was not dependent upon the formal signing of banking agreement or communication of format by the Respondents. The requirement of the same was enshrined in the Procedure/guidelines of banking of RE Power approved in the Order of the Commission dated 13.05.2019 (HERC/PRO-22 of 2019). Further, the said procedure has been prepared in compliance to the HERC RE Regulations, 2017 and it has been specifically provided that this Procedure shall be read in conjunction with the said Regulations. 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.*"

“... The Commission further observes that the requirement of intimation of day ahead banking schedule by the Petitioner came into existing, vide the Order of the Commission dated 13.05.2019 (HERC/PRO-22 of 2019).”

The Commission observes that in the present case, the findings of Merino Penal Products Ltd. (HERC-PRO 73 of 2020) is not applicable in the present case as Merino Penal Products Ltd. is a solar PV generating station in District Hisar, and is a captive power plant wherein the entire power generated is consumed by the Petitioner at its manufacturing premises at District Jhajjar and it has further availed the banking facility for 3.15 MW. In the case of solar PV generating power stations, special dispensation has been provided, under Haryana Electricity Regulatory Commission (Terms and Conditions for determination of Tariff from Renewable Energy Sources, Renewable Purchase Obligation and Renewable Energy Certificate) Regulations, 2017 (HERC RE Regulations, 2017), as reproduced hereunder:-

“64. Others.:-

c) The imbalance charges as per Open Access Regulation will not be applicable for Solar Power generated and consumed within the State.”

Thus, HERC RE Regulations, 2017 provide that imbalance charges as per HERC Open Access Regulations, 2012, shall not be made applicable to Solar Power generated and consumed within the State. The requirement of day ahead schedule provided under Regulation 42 and 43 of HERC Open Access Regulations, culminates into the levy of imbalance charges and these charges are not applicable for solar power generation unit. Hence, in case of solar power generating stations, the requirement of day ahead schedule was introduced under the order of the Commission dated 13.05.2019 (HERC/PRO-22 of 2019), leading to the 2nd amendment of HERC RE Regulations, 2017.

However, in the present case power is injected by petitioner no. 1 (i.e. Piccadily Agro Industries Ltd, Karnal – Jurisdiction of UHBVNL) from its 17 MW bagasse based co-generation captive power plant at Bhadson, Karnal and has availed banking facility upto 3 MW for utilization of own captive use of petitioner no. 2 (i.e. Piccadily Hotels Pvt. Ltd., Manesar – jurisdiction of DHBVN), a beneficiary under the banking agreement, being captive user. The HERC RE Regulations, 2017 has not granted any waiver with respect to applicability of imbalance charges as provided under HERC Open Access Regulations, 2012, as amended from time to time, for any renewable energy generator, other than solar. Therefore, the provisions of HERC Open Access Regulations, 2012, as amended from time to

time, with reference to the applicability of imbalance charges, shall be applicable, mutatis-mutandis.

Further, in order to execute such an arrangement, open access agreement was required to be executed in addition to banking agreement between the parties. However, as per the memo no. Ch-13/SE/SO-Sr.A.O-81 dated 31.08.2020, issued by the Superintending Engineer, DHBVN (Respondent No. 2) to the Chief Engineer, HVPNL (Respondent No.1), the petitioner has not availed any open access and this arrangement is continuing since 23.01.2015. The relevant portion of the memo no. Ch-13/SE/SO-Sr.A.O-81 dated 31.08.2020, issued by the Superintending Engineer, DHBVN (Respondent No. 2) to the Chief Engineer, HVPNL (Respondent No.1), is reproduced hereunder:-

“.....

As per the banking agreement and approved process of Nigam, settlement of banked energy is done w.e.f. 23.01.2020. As per Banking agreement, the company was to submit slot wise schedule of injection of power in MW to SLDC Haryana as well as SE/SO if respective Discoms by 10.00 Hours on daily basis. Similarly, slot-wise schedule of power to be drawn at the drawl point was to be intimated by the company. In the present case as the agreement was signed on 24.01.2020 to be effective w.e.f. 23.01.2019 the above procedure could not be followed retrospectively by the company. Resultantly the adjustment of energy could not be granted to the consumer for the period 23.01.2019 to 22.01.2020 (Disputed period) in the absence of requisite schedule. The following challenges are faced for settlement of banked energy at drawl point.

- *The consumer did not schedule its generation, banked energy and drawl from banked energy w.e.f. 23.01.2019 owing to the back dated agreement.*
- *Scheduling is mandatory condition for settlement of energy and consumer did not schedule its energy for the period 23.01.2019 to 22.01.2020 due to back dated agreement.*
- *Consumer did not avail open access permission during the disputed period.*
- *How to settle the energy during disputed period.”*

De-hors the signing of open access agreement, the provisions of HERC Open Access Regulations, 2012, as amended from time to time, are mutatis mutandis applicable on the petitioners. The relevant provisions of the Open Access Regulations, are reproduced hereunder:-

“6. Procedure for grant of connectivity: -

(13) The grant of connectivity shall not entitle an applicant to interchange any firm power with the State grid unless it obtains long- term open access, medium- term open access or short-term access in accordance with the provisions of these regulations.

(14) A generating station, including a captive generating plant, which has been granted connectivity to the intra-State grid, shall be allowed to inject infirm power into the grid during testing including full load testing before commencing its commercial operation for a period not exceeding three months after obtaining prior permission of the State Load Despatch Centre. Provided that the State Load Despatch Centre while granting such permission shall keep the grid security in view and ensure that injection of such infirm power is only for the purpose of testing, prior to commencing of commercial operation of the generating station or a unit thereof.”

In view of the above, as provided under the provisions of Regulation 6(13) and 6(14) of the HERC OA Regulations, firm power cannot be injected into the grid prior to the operationalization of Open Access and obtaining prior approval of the State Load Dispatch Centre (“SLDC”).

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

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

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

reduced to 3 MW, then his admissible total drawl in that time slot shall be 9 MW. i.e. 6 MW from the licensee and 3 MW through open access.

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

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

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

Provided that in case the quantum of energy through open access as per schedule accepted by power exchange is less than the quantum intimated as per the schedule submitted at 10.00 hrs by the embedded open access consumer to the licensee, then he shall inform the SLDC / distribution licensee about the slot-wise accepted schedule of power through open access and his total admissible draw and settlement of energy at the drawl point shall be regulated /settled as provided in regulation 42 and 43 respectively.

(3) During peak load hour restrictions, the embedded open access consumer shall be entitled to bring open access power upto his contract demand without the requirement of any approval of special dispensation from the licensee provided his total drawl i.e. drawl through open access plus the drawl from the licensee does not exceed his contract demand. Further he shall restrict his drawl from the distribution licensee to

peak load exemption limit/special dispensation allowed by the licensee. In case the total drawl of the consumer exceeds the contract demand by more than 5% at any time during the month as per his energy meter, the demand surcharge as per relevant schedule of tariff approved by the Commission from time to time shall be leviable. For the purpose of calculating demand surcharge in such cases, the total energy drawl during the month including the energy drawl through open access shall be considered. The consumption charges for the energy drawl through open access, for the purpose of levy of demand surcharge, will be worked out at the applicable tariff for the category to which the consumer belongs.

(4) The peak load exemption charges (PLEC) shall be leviable on the energy drawn in a month during peak load hours from the distribution licensee and through open access as under:-

Xx

xx

xx

(5) Imbalance charges shall be applicable for embedded open access consumers as provided in regulation 24 of these regulations subject to the provisions of regulation 4.”

It is imperative to set out the relevant regulatory background by which the condition as mandated under Regulation 42 was prescribed. Regulation 42 of the OA Regulations was amended on 03.12.2013, vide which a mandatory obligation was cast on the embedded consumer to submit to the distribution licensee a schedule of power through open access for all 96 slots by 10:00 AM of the day preceding the day of transaction. The reason behind such an amendment has been provided by the Commission in the above said Regulations itself, as under:-

“The Commission feels that it would not be fair and justifiable if any losses of the distribution licensee on account of energy transactions by open access consumers get passed on, directly or indirectly, to other consumers. The Commission, to address these problems /difficulties, after a careful consideration of all these aspects, has prescribed certain additional conditions for grant of open access in case of day ahead transactions by open access consumers. The foremost among these additional conditions is that for day ahead transactions, the open access consumers shall submit a confirmed slot wise schedule of power through open access and from the licensee for the next day at 10:00 hours of the previous day to the distribution licensee and SLDC. In case there are any reductions in his open access schedule when it is finally accepted / cleared by the power exchange, he would be required to manage his drawl from the licensee as

per his total drawl accordingly. In case he exceeds his admissible drawl in any time-slot, penalty will be leviable. Amendments have been made in the relevant regulations accordingly. The principle that has been based upon to arrive at these conclusions is simple i.e. in case a consumer wants to avail the benefit of cheaper power, he should be ready to face the associated risks also if any.”

[Emphasis Supplied]

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

The averment of the petitioner that the information of adjustable banked energy is available with the respondent Nigam, does not hold ground for the simple reason that as per the OA Regulations, the Open Access Consumers shall provide the day ahead schedule before 10:00 Hours. However, in the present case the petitioner has admittedly failed to comply with the regulations. It is to be noted that there is a specific purpose for intimating schedule before 10:00 hrs and there would be no point if the schedule is intimated at a later time as the load and schedule planning of the answering respondent cannot be altered afterwards. Accordingly, if the schedule is not provided within the prescribed time limit, the Respondent will have to purchase the electricity to the extent of the entire contract demand of the consumer.

Thus, the scheduling of drawl is a mandatory condition for settlement of energy as per clause 42 and 45 of HERC OA Regulations. The petitioner no. 2 has not scheduled its banked energy drawl for the period of 23.01.2019 to 22.01.2020 and further did not take open access permission during the period, which is a mandatory condition as per HERC RE Regulations, 2017 read with HERC OA Regulations, 2012.

The Commission further referred to the procedure/guidelines of banking of RE Power approved in the Order of the Commission dated 13.05.2019 (HERC/PRO-22 of 2019), reproduced hereunder: -

“vii. As per Open Access Regulations 2012, by 10:00 hrs every day, the consumer shall submit slot wise schedule of power in MW to SLDC, Haryana on daily basis for the next day i.e. 00:00 hrs to 24:00 hrs showing his drawl from the following:-

- 1. Generation through Solar Plant.*

2. *Captive Power Plant.*
3. *Banked Power.*
4. *Open Access Power through Exchange.*
5. *Discom power.*

Similarly, the generator shall also submit slot wise schedule of injection of power in MW to SLDC, Haryana on daily basis and power to be drawn at each of the drawl point.”

From the above, the Commission observes that the procedure/guidelines for banking has clearly stipulated that the petitioner was required to provide day ahead schedule showing his drawl from various sources.

The Commission is not convinced with the arguments of the petitioner that banking agreement executed on 24.01.2020 w.e.f. 23.01.2019, first time contained the condition of providing day ahead schedule of banking, whereas the banking facility was provided w.e.f. 23.01.2015 and the condition of ‘day ahead schedule’ was never imposed upon the petitioners. Therefore, the same cannot have retrospective applicability w.e.f. 23.01.2019. The Commission observes that the obligation of the petitioner to submit day ahead banking schedule was not dependent upon the formal signing of open access agreement or banking agreement or communication of format by the respondents. The requirement of the same was enshrined in the HERC Open Access Regulations, 2012, as amended from time to time and later on recapitulated in the ‘procedure/guidelines of banking of RE Power’ approved in the Order of the Commission dated 13.05.2019 (HERC/PRO-22 of 2019). Further, the said procedure was been prepared in compliance to the HERC RE Regulations, 2017 and it has been specifically provided that this procedure shall be read in conjunction with the said Regulations. 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 plain reading of the aforesaid provision establishes the fact that meaning/interpretation of the said provision is crystal clear and the same by no stretch of imagination is open to more than one interpretation, which may require indulgence of this Commission or any court of competent jurisdiction to choose the interpretation which represents the true intent of the said Regulation.

The Commission observes that the power plant of the petitioner no. 1 is also governed by Haryana Electricity Regulatory Commission (Deviation Settlement Mechanism and related matters) Regulations, 2019. The scheduling and deviation mechanism has been kept in order to enable the respondents to forecast load-generation balance in real-time as well as settle deviations and transmission loss at the grid level for every time block.

In view of the above, the Commission is of the considered view that power injection and drawl schedule is of utmost importance; hence a statutory requirement, to enable the DISCOMs to forecast load and plan its power procurement. The said provision has been kept in the Regulations, to enable the DISCOMs in planning / managing their drawl of power from the grid as well as implement load control measures in a cost effective manner. For the foregoing reasons, as stated supra the present petition is accordingly dismissed, being devoid of merits.

7. In terms of the above order, the present petition is disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 13.05.2022.

Date: 13.05.2022
Place: Panchkula

(Naresh Sardana)
Member

(R.K. Pachnanda)
Chairman