

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 154 OF 2016 & IA No.330 of 2016

APPEAL NO. 155 of 2016 & IA No.333 of 2016

AND

APPEAL NO.293 of 2016 & IA No.599 of 2016

Dated : 09th August, 2019

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

APPEAL NO. 154 OF 2016 & IA No.330 of 2016

IN THE MATTER OF :

1. Birla Textile Mills

Sai Road, Bhatouli Khurd,
P.O. Baddi, Distt Solan- 173205.

2. Inox Air Products Ltd.,

Vill. Kunjahl, Industrial Area, Barotiwala,
Distt Solan – 174103 (HP).

3. Open Access Users Association

2nd Floor, D-21, Corporate Park,
Sector-21, Dwarka,
New Delhi, Delhi 110075

...Appellants

VERSUS

1. Himachal Pradesh Electricity Regulatory Commission

Keonthal Commercial Complex,
Khalini, Shimla,
Himachal Pradesh 171002.

2. Himachal Pradesh State Electricity Board Limited

Vidyut Bhawan, Kumar House,
Chaura Maidan, Shimla,
Himachal Pradesh 171004

3. Himachal Pradesh State Load Despatch Centre

Keonthal Commercial Complex,
Khalini, Shimla,
Himachal Pradesh 171002

Counsel for the Appellant (s) : Mr. Parinay Deep Shah
Ms. Surabhi Jain
Ms. Ritika Singhal

Counsel for the Respondent(s) : Mr. Pradeep Misra
Mr. Manoj Kumar Sharma for R-1

Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Ms. Neha Garg for R-2

APPEAL NO. 155 of 2016 & IA No.333 of 2016

Ambuja Cement Limited,

Unit-SULI, Village-Rauri,
P.O. Darlaghat, The. Arki.
District Solan,
Himachal Pradesh

VERSUS

1. Himachal Pradesh State Electricity Board Limited

Vidyut Bhawan, Kumar House,
Chaura Maidan, Shimla,
Himachal Pradesh 171004

2 Himachal Pradesh Electricity Regulatory Commission

Keonthal Commercial Complex,
Khalini, Shimla,
Himachal Pradesh 171002.

Counsel for the Appellant (s) : Mr. Saurabh Jain
Mr. Piyush Joshi
Mr. Sidharth Jain

Counsel for the Respondent(s) : Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Ms. Neha Garg for R-1

Mr. Pradeep Misra
Mr. Manoj Kumar Sharma for R-2

APPEAL NO.293 of 2016 & IA No.599 of 2016

1. M/s J.B. Rolling Mills Limited,
Village Rampur Jattan, Kala Amb.,
Distt. Sirmour (H.P.),
Pincode – 173030

2. M/s H.M. Steel Limited,
Vill. Johron,
Tehsil Nahan,
Distt. Sirmour(H.P.),
Pincode – 173030

...Appellants

VERSUS

- 1. Himachal Pradesh Electricity Regulatory Commission**
Keonthal Commercial Complex,
Khalini, Shimla,
Himachal Pradesh 171002.
- 2. Himachal Pradesh State Electricity Board Limited**
Through its Executive Director (Personnel),
Vidyut Bhawan, Kumar House,
Chaura Maidan, Shimla,
Himachal Pradesh 171004.

Counsel for the Appellant (s) : Mr. R.L Verma

Counsel for the Respondent(s) : Mr. Pradeep Misra
Mr. Manoj Kumar Sharma for R-1

Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Ms. Neha Garg for R-2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by short term open access consumers (hereinafter referred to as the "Appellants") under Section 111 of the Electricity Act, 2003 challenging the Order dated 18.02.2016 ("**Impugned Order**") passed by the Himachal Pradesh Electricity Regulatory Commission ("**State Commission**") in Petition No. 103 of 2015 whereby the State Commission has determined the Additional Surcharge to be recovered by the Himachal Pradesh State Electricity Board Limited ("**HPSEBL**") from the short-term open access consumers in Himachal Pradesh. The State Commission has worked out an additional surcharge of Rs. 78 paise per kWh only to be paid on the open access consumption to the extent to which they avail open access for the period 24.02.2016 to 31.07.2016. The Appellants herein being short-term open access users are aggrieved by the exorbitant amount of additional surcharge which has been wrongfully and erroneously calculated by the State Commission under Section 42(4) of the Electricity Act, 2003 (**EA 2003**) and the Himachal Pradesh Electricity Regulatory Commission (Cross Subsidy Surcharge, Additional Surcharge and Phasing of Cross Subsidy) Regulations, 2006.

2. BREIF FACTS OF THE CASE(S)

Brief facts of the case(s) are as follows:

- 2.1** In Appeal No.154 of 2016, the Appellant is the consumer of Respondent HPSEBL and in order to reduce the cost of power, the Appellant in accordance with the provisions under Section 42 of the Electricity Act, 2003 started buying power through Short Term Open Access (STOA) at their Suli and Nalagarh units in Himachal Pradesh from Indian Energy Exchange (IEX) since June 2015. The Appellants are short term open access consumers as defined under Section 2(15) of the Electricity Act, 2003, operating in the area of supply of HPSEBL and receiving electricity by it. Appellant No. 1 is a unit of Sutlej Textiles and Industries Limited , engaged in the production of quality yarn. The Appellant has a contracted demand of [12000 KVA] with Respondent No. 2. Appellant No. 1 is sourcing 72 MUs from IEX through short-term open access per month. Appellant No. 2 is a large scale manufacturer of industrial gases. The Appellant No. 2 has a contracted demand of [7000 KVA] with the Respondent No. 2. It sources [29788 MWh] from the power exchange through open access. Appellant No. 3, Open Access Users Association was formed in the year 2012 under Societies Registration Act XXI of 1860. Today, the Appellant has almost 265

Industries ranging from steel cement, aluminum, automobiles, textiles, plastic, paper, glass and fertilizers as its Members. The Appellant No. 3 has been working pro-actively to facilitate issues related to open access for industries and facilitating a competitive power market in the country.

- 2.2** In Appeal No.155 of 2016, the Appellant is the consumer of Respondent HPSEBL and in order to reduce the cost of power, the Appellant in accordance with the provisions under Section 42 of the Electricity Act, 2003 started buying power through Short Term Open Access (STOA) at their Suli and Nalagarh units in Himachal Pradesh from Indian Energy Exchange (IEX) since June 2015.
- 2.3** In Appeal No. 293 of 2016, Appellant No.1 is a registered partnership firm and the Appellant No.2 is a Company registered under the Companies Act, 1956.
- 2.4** Respondent No. 1, State Commission is the Electricity Regulatory Commission for the State of Himachal Pradesh and is discharging functions under the provisions of the EA 2003.
- 2.5** Respondent No. 2 is the distribution licensee in the state of Himachal Pradesh. The Respondent No. 2 was constituted on 1st September, 1971 in accordance with the provisions of Electricity

Supply Act (1948) and has been reorganized as Himachal Pradesh State Electricity Board Ltd. w.e.f. 14.06.2010 under the Company's Act 1956. Respondent No. 2 is responsible for supply of uninterrupted & quality power to all categories of consumers in Himachal Pradesh under the EA 2003.

2.6 The Respondent No. 3 is the State Load Despatch Centre under Section 31 of EA 2003. The Respondent No. 3 is *inter alia* responsible for the optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State.

3. Questions of law :-

The Appellants have raised following questions of law:-

3.1 Appeal No.154 of 2016

A. Whether in the facts and circumstances of the case, the State Commission has correctly derived the methodology for determination of the Additional Surcharge payable by the Open Access consumers to the distribution licensee as per the provisions of subsection (4) of section 42 of the Electricity Act, 2003 read with Regulation 6 of the Additional Regulations, 2006 and Regulation 27 of the Open Access Regulations, 2010?

- B.** Whether the State Commission was correct in introducing a new methodology for calculating the Additional Surcharge in the Impugned Order which was not informed to the stakeholders/open access consumers?

- C.** Whether the State Commission has violated the principles of natural justice?

- D.** Whether the State Commission has correctly proceeded with determination of Additional Surcharge despite noting that the data submitted by Respondent No. 2 had great scope for improvement?

- E.** Whether the State Commission is right in failing to determine the stranded generation capacity caused due to STOA?

- F.** Whether the State Commission should have determined the rate of Additional Surcharge without considering the total fixed costs paid by the Respondent No. 2 towards actual stranded power?

- G.** Whether the State Commission was correct in determining Additional Surcharge as the per unit fixed cost on the basis of the projected generation and fixed costs for five NTPC generating stations?

- H.** Whether the State Commission should have considered that as per the Merit Order for 2014-15, the power from the five NTPC generating stations have been actually considered for contingency reserve, banking and surplus power for the state?

- I.** Whether in the facts and circumstances of the case, the State Commission is right in computing the Additional Surcharge to be as high as 78 paise per/kWh?

- J.** Whether the State Commission has erred in relying on insufficient data to compute the Additional Surcharge?

- K.** Whether Respondent No. 2 has failed in efficient banking of power, resulting in surplus power, the cost of which is being borne by STOA consumers under the guise of Additional Surcharge?

- L.** Whether the State Commission has erred by not considering that for the period 2014-15, the units sold by Respondent No. 2 on the IEX is far more than the units procured by STOA?

- M.** Whether the State Commission has erred by not computing the total demand charges paid by the open access consumers and off-setting the same against the fixed costs for the stranded power?

3.2 Appeal No.155 of 2016

- A.** Whether the impugned order passed by the HPERC is arbitrary, illegal and has been erroneously passed and as such the same is liable to be set-aside being bad in law?

- B.** Whether a consumer is liable to pay additional surcharge to HPSEBL for availing Short Term Open Access even when they continue to pay fixed charges by way of contract demand charges?

- C.** Whether a consumer is liable to pay additional surcharge calculated by HPERC in a manner contrary to the provision under sub-section 4 of section 42 of the Electricity Act?

- D.** Whether the HPERC has erred in law by not appreciating that petition filed by HPSEBL does not confirm with the mandatory provision specified under Sub-Regulation 3 of Regulation 6 of the Himachal Pradesh Electricity Regulatory Commission (Cross Subsidy Surcharge, Additional Surcharge and Phasing of Cross Subsidy) Regulations, 2006?

- E.** Whether HPERC is justified in blindly believing all the contentions of HPSEBL which are without any basis or proof thereto?

- F.** Whether the rate of additional surcharge fixed by HPERC vide impugned order being higher than the wheeling charge is illegal correct and can be sustained?

- G.** Whether the manner in which the additional surcharge has been levied is contrary to the spirit of National Electricity Policy and against the policy for promoting STOA?

3.3 A.No.293 of 2016

- A.** Whether the Commission was justified in upholding the levy of additional surcharge in contravention of Electricity Act and Regulation framed thereunder?

- B.** Whether a consumer is liable to pay additional surcharge to the Distribution Licensee for availing power supply under Short Term Open Access even when there is no clear demonstration by the Distribution Licensee regarding the same?

- C.** Whether the Commission was justified in holding that the additional surcharge can exceeds the wheeling charges as it is surcharge on wheeling charges?

4. In all these appeals, the issues raised by the Appellants are similar in nature. Therefore, we thought fit to take up all the appeals together by passing a common judgment and order in the interest of justice and equity.

5. Shri Parinay Deep Shah, learned counsel appearing for the Appellant has filed the written submissions for our consideration as under:-

I. **No Identification of Stranded Capacity**

5.1 Regulation 6(3) of HPERC Additional Surcharge Regulations 2006 provides that the additional surcharge shall become applicable only if is ***conclusively demonstrated*** that the obligation of a licensee in terms of power purchase commitments, has been and continues to be ***stranded*** or there is an ***unavoidable obligation to bear fixed cost*** consequent to such a contract. The fundamental flaw in the methodology for additional surcharge calculation adopted in the Impugned Order dated 18.02.2016 is non-identification of stranded capacity which is the direct result of short term open access (**STOA**) i.e. identification of power in those time blocks, where the generating capacity is available but not scheduled solely due to consumers availing power via open access.

5.2 The basis of the above principle is that Additional surcharge is levied on open access consumers under Section 42 of the EA, 2003

since the Distribution Licensee has the mandatory obligation to supply to its consumers under Section 43. To supply to its consumers, the Discom has power supply agreements with different generators and incurs fixed cost on account of the said agreements regardless of whether it schedules power under the said agreements or not. Therefore, when the Open Access Consumers procure power from sources other than the Discom, the Discom may still incur fixed cost on account of the capacity being stranded. Therefore, additional surcharge is a mechanism devised to specifically compensate the Discom *only* for the cost incurred on account of Stranded capacity, where open access consumer takes power from any source other than Discom. It is germane to note that the ultimate goal of the Electricity Act 2003 is that the consumers should reduce dependence on the State Discoms and should have the freedom to procure power from any source they choose, and Open Access is promoted under the Act to achieve the said objective. Therefore, Clause 8.5.1 of National Tariff Policy specifically reiterates that additional surcharge should not be so onerous that it eliminates competition i.e. power under open access should not become so expensive by payment of Additional Surcharge that the consumers have no option but to procure power from the Distribution Licensee. In view of this, the Commission

ought to have followed its own regulation in the strictest sense i.e. only that fixed cost which is incurred by Discom on account stranding of power due to STOA, should be used to calculate the additional surcharge and not all fixed cost incurred by the Discom.

5.3 The principle of how additional surcharge should be calculated has been captured in Clause 8.5.4 of the National Tariff Policy which is the same principle as the one captured in Regulation 6(3) i.e. only if it is **conclusively demonstrated** that power purchase commitments are **stranded** or there is an **unavoidable obligation to bear fixed cost.**

5.4 It is clear from the aforesaid provisions that additional surcharge ought to be calculated by determining the stranded capacity attributable to withdrawal of power under Open Access. It is germane to mention that Open Access is not the only reason for stranding of power i.e. power gets stranded on account of many factors for example, the Discom can back down generating stations due low requirement of power by its consumers on account of events such as the rains, festivals, gazette holidays or other many reasons for which generating stations are backed down. There is no denial of this fact by any of the Respondents. Therefore, consumption under open access is one amongst many other

reasons for stranding of power, but in terms of provisions stated above, additional surcharge may be calculated only and only on capacity stranded on account of open access and not otherwise.

5.5 Therefore, the Commission ought to have identified stranded capacity which is a direct result of consumption under open access i.e. power in those time blocks where the generating capacity is available but not scheduled solely due to consumers availing power via open access.

5.6 However, the Impugned Order has neither identified any stranded capacity nor drawn any correlation between the stranded capacity and the power drawn under open access while calculating additional surcharge. In fact, in terms of the Impugned Order, it is presumed by the State Commission that all power drawn under open access will lead to stranding of power, therefore rendering Regulation 6 redundant i.e. the State Commission has not demonstrated that there is Stranding of power on account of STOA leave alone conclusively demonstrating the same. There is not even a whisper of any Stranding of power on account of STOA in the Impugned Order. The Impugned Order has given a complete go by to Regulation 6(3).

5.7 The Impugned Order records in Paragraph 8 (ii), that “*The Commission finds that it will be a fair proposition to consider the fixed costs of Anta (gas), Auriya (gas), Rihand – I, Rihand -II, and Rihand -III projects for determination of the rate of additional surcharge. Even though the quantum of total power surrendered from these projects is more than the quantum of short term open access, the impact to be considered shall be restricted to the same due to STOA as the Commission shall work out only per kWh rates*”

Therefore, the State Commission has assumed that every unit of power under Open Access will lead to stranding of power, fixed cost of which is being passed on to the Appellants, which is grossly unfair and contrary to the provisions of law. The Impugned Order has calculated the average fixed cost of the five NTPC generating stations for the entire FY 2014-15, without first ascertaining the actual number of units surrendered from the stations in the time slots during which STOA was availed by consumers and second without enquiring whether the power surrendered from the aforementioned generating stations was at all due to open access. The State Commission failed to even consider which plants were backed down and fixed costs incurred from on account of open access. The State Commission ought to have accurately determined the stranded capacity on the basis of 1. Total stranded

capacity 2. Hourly availability declared by the generator 3. Hourly schedules given by the petitioner 4. hourly schedules of open access transactions by open access consumers 5. Total fixed charges paid by the Appellant 6. Total energy scheduled by the petitioner 7. Total energy consumed by open access consumers

II. Fixed Cost considered for Months in which no STOA

5.8 The methodology of the State Commission to first work out per unit cost on the basis of expected net generation and then calculating average fixed cost per kWh is completely erroneous, since this methodology takes into account fixed cost of generating station throughout the year, whereas STOA is not even taken by the Appellant throughout the Impugned Order. For instance no STOA was taken in the months of April, June, July, September, October and November 2014. This is evident from the table submitted by the Respondent No. 2 at which is a part of its petition for determination of additional surcharge and lists out all the months during which STOA was taken.

III. Stranded Capacity can be identified

5.9 Respondent No. 2 stated in its petition for determination of additional surcharge that “3.1 (iii) Correspondingly, surrendered power and IEX drawl power by open access consumer per slot in a

month has been taken and in order to ensure that only such power surrendered is taken for calculating additional surcharge, which corresponds to power stranded because of open access consumers only, the lower amount of IEX drawl power by open access consumer per slot and surrendered power for the corresponding slot is taken as the quantum for the stranded power for the month due to open access consumer". It is germane to mention that while there were some faults with the methodology used by Discom, however the calculations done by the Discom in its petition for additional surcharge proves that a correlation between stranded capacity and STOA can be drawn. If the amount of Mus backed down conclusively due to power purchase through open access and fixed costs cannot be ascertained accurately, the total amount of stranded power procurement cost should have been worked out on daily basis to be apportioned amongst the open access customers importing power during the period when additional surcharge is leviable.

IV. 5 expensive generating stations randomly picked to calculate additional surcharge

5.10 The Commission has chosen 5 expensive generating stations randomly to calculate the fixed cost. Amongst the 5, Anta and Auriya are two of the most expensive Generating Stations from

which power is procured by Respondent No. 2. At Paragraph 8 (ii), the Commission picks 5 random generating stations without any explanation as to why these very generating stations were picked to calculate the additional surcharge. The fixed cost of these being expensive generating stations is quite high. The Commission has calculated the fixed cost on basis of these stations, which is grossly unfair. The Commission does not provide any explanation as to why these generating stations were chosen randomly. Further, it is clear from Commission's own Orders that Respondent No. 2 has executed the supply agreements with these stations without any intent to procure power from them. It is evident from the merit order for FY 2015 in MYT order for FY 14-15 to 18-19 dated 12.06.2014, that Rihand III has been allocated for the contingency reserve power in the State i.e. in case of any unforeseeable difficulty i.e. shut down of any large generating station, increase in sales within the State etc.; power from Rihand I and II, Anta has been allocated for banking of power by the Respondent No. 2; and lastly power from Auriya has been considered as surplus in the State. Further the Commission notes in paragraph 7.8.24 of the Order dated 12.06.2014 that "... This surplus power is the most expensive power in the merit order which is primarily available from thermal CGS. The Petitioner should either avoid purchasing power from

such stations by surrendering their allocation on longer time periods or should make appropriate arrangements for disposal of such surplus power in a manner that average cost of procurement of such surplus power is realized.”The Commission further notes in paragraph 7.8.27 that “7.8.27 The cost of the surplus power is the most expensive which ranges from Rs. 4.03/kWh to Rs. 4.34/kWh during FY15. As per the submissions of actual power purchase and sales for FY14, it is observed that the sale of surplus power by the Petitioner in IEX is at an average rate of Rs. 2.19/kWh which is substantially lower than the average procurement cost. The Commission therefore directs the Petitioner to undertake adequate measures for avoiding the burden of its inefficient power purchase planning on the consumers.” The Commission has further noted in the same Order that “5.1 (d) The Objectors questioned the need for power procurement from certain plants such as Anta, Auria which were at a substantially higher tariff” and further that “5.2.5 The Commission is of the Opinion that HPSEBL needs to maintain an optimal mix of power purchase from different sources for ensuring reliable supply to its consumers throughout the year.the Commission will look into isolating the retail tariff from the impact of costly power purchase, in merit order, in excess of State requirement.” The Commission had recorded in First Annual

Performance Review Order for 3rd Control Period (FY 15-19) that “5.7.26 In view of the directions of the Commission with respect to surrender of costly power, the Petitioner has already written to the Government for surrendering the costly power available from gas based stations of Anta, Auriya and Dadri with effect from 01.04.2016. Therefore, the Commission has not considered availability of energy from these stations during FY 16.” It is clear from the above that the power from the generating stations considered in the Impugned Order for calculation of additional surcharge were not even envisaged to be scheduled. The Commission has noted in the Order dated 12.06.2014 that “8.1.28 The Commission in chapter 7 of this Tariff Order has talked about the need for HPSEBL to show commercial prudence in its power arrangements and avoid purchasing costly surplus power. The same has been treated in the ARR as purchase of surplus power under PPA obligation and the sale of this surplus power have been considered similar to the purchase cost to exclude any impact of the difference in purchase and sale cost of this surplus power on the consumers in the State.” It is evident that the Respondent No. 2 has inefficiently planned its power purchase. Instead of cancelling PPAs which are financially unviable the Impugned Order seeks to

burden a small segment of consumers on account of failure of the Discoms to review the unviable PPAs.

V. Admittedly erroneous data used

5.11 It is germane to state that the data on basis of which the Additional Surcharge has been calculated is admittedly erroneous as recorded in the Impugned Order. However, the State Commission has justified erroneous data on the ground that the additional surcharge is being levied from a prospective date and rejection of claim would amount to absolving the open access consumers from paying additional surcharge. The Impugned Order states as follows:

“The Commission observes that the systematic data relating to stranded capacity based on an objective approach is an important input for determining the additional surcharge. The Commission partly agrees with the view of the objectors with regard to the qualitative content of the data submitted by HPSEBL and feels that there is a lot of scope of improve the quality of data. It also agrees that the rate of Rs. 1.84 per kWh, as proposed by HPSEBL, is totally unrealistic and unreasonable. The Commission however does not accept the plea that claim should be rejected straightway particularly when the Commission intends to apply the rate of additional surcharge from a prospective date only and the rejection of claim would amount to absolving the short term of open access consumers from paying the additional surcharge even to the extent it is legitimately due, which is, in fact, already overdue.”

VI. Violation of Principle of Natural Justice

5.12 The methodology followed by the State Commission in the Impugned Order was not part of the petition submitted by the

Respondent No. 2. The State Commission did not propose the methodology of calculating the Additional Surcharge on the basis of the per unit fixed cost of five NTPC generating stations at the time of hearing. Such methodology was a complete deviation from the Respondent No. 2's methodology. The methodology under the Impugned Order was not even discussed during the public hearing stage. As a result the Appellants did not have the opportunity to provide their objections/suggestions on viability of the formula devised by the State Commission. Therefore, the State Commission has violated the principles of natural justice by passing the Impugned Order without affording the stakeholders adequate opportunity to comment on the change in methodology for computation of additional surcharge. The public notice to comment on a methodology which was completely replaced in the final Order and not even discussed in the public hearing amounts to a red herring and ineffective public notice. The State Commission came up without a completely new formula without giving any opportunity to the Appellants to comment on it, and thus rendered the whole process of public hearing farcical. The State Commission should have worked out the methodology prior to issuance of public notice and invited comments on its methodology and that of the Distribution Licensee. The very objective of a public hearing i.e.

there should be a transparent process of determination, has been defeated in the Impugned Order. If the State Commissions are allowed to adopt a completely different methodology which was never notified to public before being adopted, it would defeat the very objective of public hearing in as much as the State Commissions could formulate a methodology and not inform the public of it in the public notice and subsequently simply adopt it in the final Order. This would lead to absurdity and every State Commission could simply make a mockery of the whole process of inviting public objections on something completely different from which it would ultimately deviate absolutely and thus never even giving the relevant stakeholder a chance to comment. This Hon'ble Tribunal may consider the Appellants' submissions while adjudicating this present matter.

6. Shri Pradeep Misra, learned counsel appearing for the Respondent No.1 / State Commission has filed the written submissions for our consideration as under:-

6.1 The appellants have filed above noted appeals against the order dated 18.02.2016 passed by Himachal Pradesh Electricity Regulatory Commission (hereinafter referred to as the Commission) in Petition No. 103 of 2015 whereby the Commission has determined additional surcharge to be recovered by Respondent

No.2 (HPSEBL) from open access consumers for the period 24.02.2016 to 31.07.2016.

6.2 The following details are relevant for the purpose of the present case:-

(i) Electricity Act, 2003 (hereinafter referred to as the Act) came into force on 10.06.2003. Section 42 (4) of the Act provides as follows:

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

(ii) Government of India issued National Electricity Policy in the year 2005 of which clause 5.8.3 of the said policy provides as under :-

“5.8.3 under sub-Section (2) of Section 42 of the Act, a surcharge is to be levied by the respective State Commissions on consumers switching to alternate supplies under open access. This is to compensate the host distribution licensee serving such consumers who are permitted open access under Section 42 (2), for loss of the cross-subsidy element built into the tariff of such consumers. An additional surcharge may also be levied under sub-Section (4) of Section 42 for meeting the fixed cost of the distribution licensee arising out of his obligation to supply in cases where consumers are allowed open access. The amount of surcharge and additional surcharge levied from consumers who are permitted open access should not become so onerous that it eliminates competition that is intended to be fostered in generation and supply of power directly to consumers through the provision of Open Access under Section 42(2) of the Act. Further it is essential that the surcharge be reduced progressively in step

with the reduction of cross-subsidies as foreseen in Section 42(2) of the Electricity Act, 2003.”

- (iii) The Central Government issued National Tariff Policy on 06.01.2006, the relevant provisions of the said policy are as follows:

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

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

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

- (iv) The Commission has framed HPERC (Cross subsidy surcharge, Additional Surcharge and Phasing of Cross Subsidy) Regulations, 2006 w.e.f. 21.08.2006 wherein regulation 6 provides for additional surcharge which reads as follows:

“6. Additional surcharge – (1) An open access consumer shall also pay to the distribution licensee an additional surcharge to meet the fixed cost of such distribution licensee arising out of his obligation to supply as provided under sub-Section (4) of Section 42 of the Act.

(2) *Additional surcharge will be payable by any consumer including any consumer who puts up a captive plant for his own use.*

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

(4) *Each distribution licensee shall submit to the Commission, details of fixed costs, which the licensee is incurring towards his obligation to supply.*

(5) *In determining the additional surcharge, the Commission shall scrutinize the details of fixed costs submitted by the distribution licensee and invite and consider objections, if any, from the public and affected parties.*

(6) *The additional surcharge shall be determined on annual basis and it can be collected either as one-time payment or on monthly basis.”*

- (v) The commission has framed HPERC (Short Term Open Access) regulation 2010 effective from 02.05.2010 which provides as under:-

“27. Surcharge. – (1) In addition to the wheeling charges, an open access customer, other than the captive generating customer, availing open access in distribution shall pay a surcharge specified by the Commission in the Himachal Pradesh Electricity Regulatory Commission (Cross Subsidy Surcharge, Additional Surcharge and Phasing of Cross Subsidy) Regulations, 2006.

(2) The amount of surcharge shall compensate for the loss in the current level of cross-subsidy from the category of consumers to which the open access customer belongs and

shall be paid to the respective distribution licensee of the area of supply.

(3) The surcharge shall be progressively reduced in the manner as specified by the Commission in the Himachal Pradesh Electricity Regulatory Commission (Cross Subsidy Surcharge, Additional Surcharge and Phasing of Cross Subsidy) Regulations, 2006.”

- (vi) This Tribunal passed the judgment on 01.08.2014 in Appeal No. 59 of 2013 Maharashtra State Electricity Distribution Company Limited Vs. MERC &Ors., wherein the right of distribution licensee to claim additional surcharge has been upheld. Since the appellants are not challenging the validity of imposition of additional surcharge but only questioning the quantum/rate of surcharge, replying respondent are not making any submission regarding the validity of imposition of additional surcharge or the right of distribution licensee to demand additional surcharge. Only the rate of additional surcharge is involved in the present case.
- (vii) The Commission has passed MYT order for the FY 2015 to FY 2019 on 12.06.2014. The commission in para 9.5.1 of the said order requested the distribution licensee to submit the proposal for levying additional surcharge to open access consumers.
- (viii) Respondent No.2 filed Petition No. 103 of 2015 during September, 2015 for determination of additional surcharge on the consumers availing STOA. In the said petition respondent no.2 proposed

additional surcharge of Rs. 1.58 per unit for short term open access consumers and prayed that the said rate be approved by the Commission.

- (ix) Appellant filed objection/suggestion to the said petition filed by Respondent no.2 on 28.10.2015. The association of open access user's association has also filed its comments.
- (x) Public hearing was conducted on 30.01.2016 in which besides the representative of open access user's association the appellants also participated. Name of persons who have taken part in public hearing are mentioned in table 2 at Internal Page 4 & 5 of the impugned order.
- (xi) The commission after prudence check has determined the rate of additional surcharge as 78 paise per kWh vide its order dated 18.02.2016. The said rate was applied from 24.02.2016 to 31.07.2016 or till any other date as may be revised by the Commission in accordance with para 9.3 of the order (impugned order).
- (xii) The commission while issuing tariff order dated 25.05.2016 provided that additional surcharge of 78 paise per kWh as determined in the previous order shall continue to be applicable till determination of fresh rate.

(xiii) The commission has subsequently determined the rate of additional surcharge as 49 paisa per kWh. Which is applicable from 01.11.2016. Against the said order the appellant has filed Appeal No.115 of 2017 which is pending for decision.

6.3 The submissions on behalf commission, Respondent no.1 are as follows:

- a. The Commission has determined the rate after prudence check. There is no such illegality or infirmity in the order passed by the Commission which requires any interference by this Tribunal.
- b. The rate determined by the Commission became part of tariff issued on 25.05.2016 which is has not been challenge by the appellants.
- c. The Appellants must have recovered the cost of Electricity from the purchaser of their goods and the effect of additional surcharge must have passed on to the consumer. They hence if the rate is revised, then it would be unjust enrichment in the hands of the appellants.

d. The Appellants have not shown that the rate fixed by the Commission is so onerous that it will eliminate the competition.

In view of aforesaid facts and circumstances, the appeals deserve to be rejected for devoid of merits.

7. Smt. Swapna Seshadri, learned counsel appearing for the Respondent No.2 / Himachal Pradesh State Electricity Board Ltd. has filed the written submissions in Appeal No.154 of 2016 & batch for our consideration as under:-

7.1 Issues raised :

- (i)** There is a violation of natural justice since the formula adopted by the State Commission was not the formula proposed by HPSEBL and therefore, the Appellant could not file objections to the same;
- (ii)** The State Commission has merely loaded the expensive fixed costs in the Additional Surcharge without establishing stranded costs;
- (iii)** The Additional Surcharge can be imposed only for those time period when the consumers avail the Short Term Open Access and not otherwise;

- (iv) HPSEBL has been careless about entering into power purchase agreements and costs of the same cannot be passed on as Additional Surcharge;
- (v) General grounds of lack of perfect data or Additional Surcharge being an impediment to open access;

7.2 The Appellants have challenged that there is no stranded capacity of HPSEBL. On the other hand, the Appellant itself has computed Additional Surcharge at 37 paise/unit, which is on the basis that there is stranded capacity.

7.3 It is also otherwise conclusively demonstrated before the State Commission that HPSEBL had substantial stranded capacity which is the basis of the determination of additional surcharge.

SUBMISSIONS OF HPSEBL

7.4 Before dealing with the issues raised in the appeal, HPSEBL wishes to place on record the law holding the field, namely the provisions of the Electricity Act, 2003, the judgments of the Hon'ble Supreme Court and the Additional Surcharge Regulations.

ELECTRICITY ACT, 2003

"42. Duties of distribution licensee and open access -

(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

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

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such

supply shall be of a common carrier providing non-discriminatory open access.

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

.....
Section 43. (Duty to supply on request): --- (1) 1[Save as otherwise provided in this Act, every distribution] licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply:

Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission:

Provided further that in case of a village or hamlet or area wherein no provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.

1[Explanation.- For the purposes of this sub-section, "application" means the application complete in all respects in the appropriate form, as required by the distribution licensee, along with documents showing payment of necessary charges and other compliances.]

(2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1) :

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.

(3) If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.

Judgment of the Hon'ble Supreme Court.

SESA Sterlite v. OERC (2014) 8 SCC 444

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

Additional Surcharge Regulations

8 Additional surcharge .- (1) *An open access consumer shall also pay to the distribution licensee an additional surcharge to meet the fixed cost of such distribution licensee arising out of his obligation to supply as provided under subsection (4) of section 42 of the Act.*

(2) Additional surcharge will be payable by any consumer including any consumer who puts up a captive plant for his own use.

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

(4) Each distribution licensee shall submit to the Commission, details of fixed costs, which the licensee is incurring towards his obligation to supply.

(5) In determining the additional surcharge, the Commission shall scrutinize the details of fixed costs submitted by the distribution licensee and invite and consider objections, if any, from the public and affected parties.

(6) The additional surcharge shall be determined on annual basis and it can be collected either as one time payment or on monthly basis.

7.5 HPSEBL as a distribution licensee has a universal supply obligation and has to supply to all consumers who request for supply. As against the same, in the State of Himachal Pradesh, all consumers

are only short term open access consumers and there is not a single medium term or long term open access consumers. This means that such consumers maintain their contract demand with HPSEBL and also take open access. This is a purely a commercial decision of the consumers and many consumers take supply through open access in a few time slots and from HPSEBL in other time slots.

- 7.6** HPSEBL cannot proceed on the basis that it need not supply electricity to the short term open access consumers and need not plan to purchase this electricity or simply surrender this electricity. There is not a single open access consumer in the State of Himachal Pradesh who has severed its relationship with HPSEBL and all of them maintain their contract demand. This means that HPSEBL has to be ready to supply electricity to such consumers.
- 7.7** Given the fact that HPSEBL had tied up substantial capacity to meet the demand in the State and that the capacity was getting stranded when the open access consumers were taking supply from third party sources on short-term basis, HPSEBL had filed Petition No. 103 of 2015 before the State Commission for determination of Additional Surcharge to be paid by Short Term Open Access

consumers purchasing power from within/outside the State of Himachal Pradesh.

7.8 In the proceedings before the State Commission, the following were conclusively established:

- (a) There was substantial backing down and non-scheduling of electricity by HPSEBL during the time blocks where open access supply was resorted to by consumers. To such extent, the capacity was stranded on account of open access consumers;
- (b) There was an unavoidable obligation on the part of the HPSEBL to pay fixed charges on account of non-scheduling of electricity;
- (c) Such fixed charges on stranded power, to the extent of the open access quantum was to be compensated by the open access consumers in terms of Section 42(4) of the Electricity Act.

7.9 The Appellants have only challenged the impugned order on technicalities without appreciating that the concept and purpose of additional surcharge is to ensure that the fixed cost on account of stranded power is to be compensated by the open access consumers and is not a burden on the general body of consumers.

There is no concept of the general body of consumers bearing the burden or subsidizing the open access consumers, which would be the effect of dispensing with additional surcharge in cases where the distribution licensees have surplus capacity tied up.

7.10 Further, in the impugned order, the State Commission has considered the fixed charges corresponding to power which was actually stranded to decide the quantum of additional surcharge and not the power which is stranded for any other reasons. Therefore, there is no flaw in the methodology of computing the additional surcharge, as alleged by the Appellant.

7.11 Moreover, the Short Term Open Access Consumers avail open access at a short notice at their own will and commercial convenience which leads to power management problems to HPSEBL. The Short Term Open Access Consumers avail Short Term Open Access only in those slots in which power is cheaper. Therefore, the quantum of additional surcharge as decided by the State Commission, based on the methodology and data submitted by the HPSEBL is justified.

7.12 In the above background, the findings of the State Commission in the Impugned Order is as under

vi) The average per kWh recovery from EHT consumers through Demand Charges, as considered for the purpose of estimation of revenue under the Tariff Order for FY 16, is 69.26 paise per unit. After adjusting 24.5 paise/kWh (i.e. 50% of the wheeling charges works out to Rs. 44.76 paise /kWh. In view of the discussions in preceding paragraphs, the fixed costs computed on above lines shall be reduced by 44.76 paise/kWh to arrive at the rate of additional surcharges. It is worth mentioning here that the POC/ Transmission Charges of Power Grid and HPPTCL are not being adjusted out of Demand Charges due to the reason that these charges have been considered as a part of fixed cost recoverable through additional surcharge. In case these are not considered in this manner, the aforesaid rate of 44.76 paise/kWh will get reduced correspondingly.

.....

10. Determination of Additional Surcharge Rate

The Commission considers the rate computed in Table-5 above, as quite reasonable from the point of view of the open access consumers as well as HPSEBL. Accordingly, in view of above and based on other findings in the preceding paragraphs, the Commission determines the rate of additional surcharge and associated conditions, as under:-

(a) Additional surcharge shall be payable by the consumers of HPSEBL availing Short-term Open Access @ 78 paise per/kWh on the energy deliverable at the consumer end, which shall be computed on the basis of the energy scheduled under short term open access for each time slot. However, the additional surcharge shall be curtailed in the following situations-

(i) in respect of the time slots for which HPSEBL may impose energy cuts, no additional surcharge shall be payable;

(ii) if a consumer is not able to draw full quantum of the energy scheduled in any time slot due to transmission and/or distribution system constraints, the additional surcharge shall not be payable for the energy which could not be drawn by the consumer through short term open access due to such constraints in such time slot.

(b) The above rate of additional surcharge shall come into force on 24th February, 2016 and shall be applicable till 31st July, 2016 or till any other date as may be revised by the Commission in accordance with para 9.3 of this order.

(c) The above rate shall be considered as a fixed rate in respect of the duration for which it remains applicable and shall not be subject to any revision due to any true-up etc.”

7.13 Therefore, the State Commission has followed the following principles –

- (a) The expensive power purchases have been excluded from the computations. This is for the reason given that even if there was no open access consumption, the said power would not have been scheduled.
- (b) The demand charges of Rs. 44.76 paise per Kwh (out of total tariff) recovered from the consumers has been reduced from the Additional Surcharge computations.
- (c) When there are energy cuts imposed by HPSEBL, no Additional Surcharge is leviable.
- (d) When consumer is unable to draw full quantum of energy due to constraints in the transmission / distribution system no Additional Surcharge is leviable.

7.14 In the above background, the response to the issues raised by the Appellants are as under –

RE: Violation of natural justice

7.15 The contention of the Appellant that since the formula adopted by the State Commission is different from the formula proposed by HPSEBL and therefore, there is a violation of the principle of natural justice to the consumers is without any merit.

7.16 Tariff fixation is an inquisitorial proceeding and the State Commissions take an informed decision with reasons based on the material before it. If the submissions of the Appellants are accepted, the State Commission would be required to circulate a draft order to the Appellants and then seek comments and pass the Tariff Order.

7.17 In fact, the State Commission has acted in favor of the consumers by tweaking the formula proposed by HPSEBL. If HPSEBL's formula would have been accepted, the Additional Surcharge would have been even higher.

7.18 The public notice was issued on the petition filed by HPSEBL and all consumers were heard, many consumers also proposed alternate formulas before the State Commission. After hearing all parties, the State Commission has decided the matter. There is no violation of the principles of natural justice as being contended.

RE: The State Commission has merely loaded the expensive fixed costs in the Additional Surcharge without establishing stranded costs

7.19 It will be clear from a perusal of the reply filed by HPSEBL before this Tribunal that all relevant data was available before the State Commission. In fact, the stranding of capacity was much higher than the open access demand and therefore the stranding only to the extent of the open access demand was taken into consideration for determination of additional surcharge.

7.20 This also establishes that there is actual stranding of capacity to the extent of open access consumers, which is required to be compensated in the form of additional surcharge under Section 42(4) of the Electricity Act. Further, the marginal variations in the grid conditions etc. cannot be taken as a defense to avoid the payment of additional surcharge, when there is substantial stranded capacity.

7.21 In fact, the data shown by the Appellants itself establishes that the grid variations is only marginal and due to real time operation of the grid and not over-drawal as a design for meeting the demand in the State. Further, the State Commission has given a substantial benefit to the open consumers by taking the fixed cost of only the

generators under the merit order for the purpose of determination of additional surcharge and not all the generators.

7.22 The reliance on CEA data to claim deficit in the State is also misplaced. Firstly, it relies on selective historical data and further the contention raised is in fact contrary to the very submission of the Appellants that the stranded capacity is for other reasons than the open access consumers. Further, the Appellant itself has submitted that the additional surcharge should be around 37 paise per unit.

7.23 It is also incorrect to allege that there was no identification of stranded capacity. The State Commission has only taken into account the backing down/non-scheduling of capacity is solely on account of lack of demand in the state and to the extent the open access consumers take power from 3rd party sources. This established that such capacity stranded is on account of open access consumers and but for the open access supply, such consumers would have taken supply from HPSEBL resulting in capacity to such extent not being stranded. The State Commission has taken only such capacity which has remained stranded due to open access consumers.

RE: The Additional Surcharge has to be calculated for those time period when the consumers avail the Short Term Open Access and not otherwise

7.24 The submission of the Appellants is completely misconceived and denied. In fact, the submissions goes completely contrary to section 42 (4) of the Electricity Act, 2003. On a plain reading of the above provision, the surcharge under Section 42 (4) of the Electricity Act is for the purpose of meeting the fixed cost of the distribution licensee on account of its obligation to supply. The obligation to supply is provided under Section 43 of the Electricity Act.

7.25 The Electricity Act provides for the following charges to be levied by the distribution licensee on open access consumers and which are towards particular purposes:

- (a) **Wheeling charges:** The wheeling charges are payable only if the electricity lines of the distribution licensee are used. In case of dedicated transmission lines etc., where no part of the distribution system is used, no wheeling charges are payable;
- (b) **Cross-subsidy surcharge:** This is to compensate for the existing level of cross-subsidy in the system.
- (c) **Additional surcharge (Section 42(4)):** This is payable to compensate for any stranded capacity of the distribution

licensee on account of consumers taking supply through open access.

7.26 The concept of additional surcharge was envisaged in a situation wherein the distribution licensee has entered into long term power purchase agreements and is under an obligation to pay fixed charges, but a part of the capacity tied up under the Power Purchase Agreements are left stranded on account of open access consumers purchasing electricity from third party sources.

7.27 The distribution licensees have a universal supply obligation, namely to supply to any person on demand in the state. In anticipation of the peak demand in the state, the distribution licensee is expected entered into power purchase agreement on long term basis with generators and others. Under such power purchase agreements, the distribution licensee is required to pay fixed charges to the generator irrespective of whether the electricity is actually scheduled on a daily basis. If however, after entering into a power purchase agreement to meet the demand of the State, because of the consumers taking electricity open access, there is a part of the capacity left idle and stranded, then corresponding to the same, the distribution licensee is required to be fixed charges to the generators. To compensate for such standard capacity and liability

to pay fixed charges caused on account of the open access consumers, the additional surcharge is prescribed under Section 42(4) of the Electricity Act, and for no other purpose.

7.28 Therefore, it cannot be that for each and every 15 minute time block, a separate Additional Surcharge will be determined. The Additional Surcharge is levied only on the actual open access purchases by the consumers and is not levied when there is no open access levy.

7.29 Further, during the time blocks when the open access is being procured, the stranded capacity has been considered.

7.30 There is no concept of the general body of consumers bearing the burden or subsidizing the open access consumers, which would be the effect of dispensing with additional surcharge in cases where the distribution licensees have surplus capacity tied up.

RE: HPSEBL has been careless about entering into power purchase agreements and costs of the same cannot be passed on as Additional Surcharge;

7.31 The submissions of the Appellants have no merit at all. HPSEBL is one of the best performing utilities in the country, which is evident by the fact that the total Transmission and Distribution losses of the

HPSEBL which is less than 13%. This is after achieving 100% metering to all consumers in the State despite the harsh terrain.

7.32 HPSEBL has also acted in a prudent manner, by promoting substantial capacity of generation (primarily renewable generation) in the State and also having long term PPAs with various sources within and outside the State to be in a position to meet the total demand for electricity in the State of Himachal Pradesh. HPSEBL also procures very substantial quantum of electricity from renewable sources, thus over-achieving the non-solar RPO on a consistent basis.

7.33 The total contracted capacity tied up by HPSEBL on medium/long term basis is 2522 MW, which is sufficient to meet the total demand in the State of Himachal Pradesh.

7.34 In addition, HPSEBL has also been entering into demand management arrangements in the nature of banking arrangements with other states, wherein HPSEBL would make electricity available in months where there is substantial surplus (summer months) and get the electricity on returnable basis in the winter months when the demand in the State increases. All this goes on to reduce the

burden on the consumers, including the levy of additional surcharge.

7.35 However, after entering into a power purchase agreement to meet the demand of the State, because of the consumers taking electricity open access, there is a part of the capacity left idle and stranded, then corresponding to the same, the distribution licensee is required to be fixed charges to the generators. To compensate for such standard capacity and liability to pay fixed charges caused on account of the open access consumers, the additional surcharge is prescribed under Section 42(4) of the Electricity Act, and for no other purpose.

7.36 The State Commission has given a substantial benefit to the open consumers by taking the fixed cost of only the generators under the merit order for the purpose of determination of additional surcharge and not all the generators. Further, the Appellant itself has submitted that the additional surcharge should be around 37 paise per unit. Therefore, the identification of stranded capacity is even accepted by the Appellant.

RE: General grounds of lack of perfect data or Additional Surcharge being an impediment to open access;

7.37 It is not correct that HPSEBL has failed to put on record the correct complete data. The entire details of the power purchase cost, the stranded capacity, the open access consumption etc. have been filed with the State Commission and have been considered in passing the impugned order. It is wrong that there are any scheduled load shedding for energy cuts imposed by HPSEBL and which may have influenced the calculations carried out by the State Commission.

7.38 There will never be absolutely perfect data. However, it is respectfully submitted that sufficient data has been furnished by the HPSEBL for all ninety six blocks of each day of the months in which short term open access has been availed and no sampling has been done. The details of the stranding due to short term open access only have been included and the implications of the power stranded due to other reasons have not been included. All the prudent practices of merit order operation have been followed.

7.39 It is also incorrect that HPSEBL has failed to follow numerous directives of the State Commission with regard to parking of its power effectively. HPSEBL has been entering into banking arrangements from time to time with utilities in the country based on

the demand of the other utilities from time to time. Such banking arrangements are not unilateral which can be done at the choice of HPSEBL, but has to be based on the requirements of the other utilities in the country. The power purchase agreements are entered into by HPSEBL to meet the total demand in the state and when the capacity is surplus, while at the same time open access supply is being resorted to by consumers, the fixed cost corresponding to such surplus capacity needs to be recovered from the open access consumers by way of additional surcharge as is provided for in Section 42(4) of the Electricity Act.

7.40 It is not that fixed costs of surplus power are being passed on the open access consumers. It is also wrong that the impugned order is passing on the cost of inefficient banking on to the open access consumers. It is also baseless to contend that the stranded capacity is on account of inefficient power planning by HPSEBL. All the power purchases by HPSEBL are approved by the State Commission and are entered into to cater to the expected demand in the state.

7.41 It is also a fact that none of the open access consumers take electricity from 3rd parties through long-term agreement, whereas all such open access purchases is on short-term raises and primarily

on day ahead basis. HPSEBL has an obligation to supply on demand to the consumers in the State and cannot plan power purchases considering the day ahead purchases being made by the consumers.

7.42 It is also baseless for the Appellant to contend that HPSEBL should surrender the long-term PPAs. Power purchase agreement cannot be executed or surrendered on unilateral basis as is sought to be contended on simplistic basis by the Appellant. The additional surcharge is determined for the open access consumers as a general body and cannot be equated on one on one basis with each open access consumers. It cannot also be based on the present quantum and future quantum of open access or variation of the open access quantum on a day-to-day basis.

7.43 The Appellants also procure electricity through short term open access without any commitment in the long term. The power procurement by the licensee cannot be based on such short term procurement by the open access consumers. The Appellant is seeking to avoid the legitimate charges payable for taking supply through open access, which cost would otherwise be owned by the general body of consumers in the state which is impermissible. The

Appellant cannot seek the subsidized cost of the general body of consumers, which the present appeal effectively seeks to contend.

7.44 Thus, there is no merit in the appeal and the appeal needs to be dismissed with costs

8. **We have heard learned counsel appearing for the Appellant, learned counsel for the Respondent Commission and learned counsel for the Respondent/DISCOM at considerable length of time and have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeals for our consideration:-**

Issue No.1: Whether in the facts and circumstances of the case, the State Commission has correctly derived the methodology for determination of the additional surcharge payable by the open access consumers to the distribution licensee as per various statutory provisions?

Issue No.2: Whether the State Commission while determining the quantum of additional surcharge payable by open access consumers has violated the principles of natural justice?

Our Consideration & Analysis:

8. **ISSUE NO.1:-**

8.1 Learned counsel for the Appellant submitted that as per Regulation 6(3) of HPERC Additional Surcharge Regulations 2006, the

additional surcharge shall become applicable only if it is conclusively demonstrated that the obligation of a licensee in terms of power purchase commitments, has been and continues to be stranded. Learned counsel pointed out that the fundamental flaw in the methodology adopted by the State Commission in calculation of additional surcharge in the Impugned Order is non-identification of stranded capacity which is the direct result of short term open access (STOA) i.e. identification of power in those time blocks, where the generating capacity is available but not scheduled solely due to consumers availing power through open access. Learned counsel further contended that the ultimate goal of the Electricity Act, 2003 is that the consumers should reduce dependence on the State Discoms and should have the freedom to procure power from any source they choose, and the Open Access is promoted under the Act to achieve the said objective. He invited reference to Clause 8.5.1 of National Tariff Policy which provides that additional surcharge should not be so onerous that it eliminates competition. Learned counsel vehemently submitted that the principle of how additional surcharge should be calculated has been captured in Clause 8.5.4 of the National Tariff Policy which is the same principle as the one captured in Regulation 6(3) i.e. only if it is

conclusively demonstrated that power purchase commitments are stranded or there is an unavoidable obligation to bear fixed cost.

8.2 Learned counsel was quick to submit that the impugned order has neither identified any stranded capacity nor drawn any correlation between the stranded capacity and the power drawn under open access while calculating additional surcharge. In fact, in the Impugned Order, it has been presumed by the State Commission that all power drawn under open access will lead to stranding of power which is a complete go by to Regulation 6(3). Learned counsel contended that the State Commission ought to have accurately determined the stranded capacity considering hourly availability declared by the generator, hourly schedules given by the petitioner, hourly schedules of open access transactions by open access consumers, total fixed charges paid by the Appellant, total energy scheduled by the Appellants, total energy consumed by open access consumers etc..

8.3 Learned counsel for the Appellant advancing his arguments further submitted that the methodology of the State Commission to first work out per unit cost on the basis of expected net generation and then calculating average fixed cost per unit is completely erroneous because this methodology takes into account fixed cost of

generating station throughout the year, whereas STOA is not even taken by the Appellants throughout the year. Further, he submitted that while there were some faults with the methodology used by Discom, however it proves that a correlation between stranded capacity and STOA can be drawn. Learned counsel further submitted that while calculating the fixed cost and in turn, additional surcharge, the State Commission has chosen at random 5 expensive generating stations. He contended that in fact, power from the generating stations considered in the impugned order for calculation of additional surcharge were not even envisaged to be scheduled. Learned counsel alleged that the Respondent/Discoms has not planned its power purchase efficiently and instead of cancelling PPAs which are financially unviable has sought to burden a small segment of open access consumers.

- 8.4** Learned counsel further contended that even the data on basis of which the Additional Surcharge has been calculated is admittedly erroneous as recorded in the Impugned Order itself. However, the State Commission has justified erroneous data on the ground that the additional surcharge is being levied from a prospective date and rejection of claim would amount to absolving the open access

consumers from paying additional surcharge. The relevant portion of the Impugned Order is as under:-

“The Commission observes that the systematic data relating to stranded capacity based on an objective approach is an important input for determining the additional surcharge. The Commission partly agrees with the view of the objectors with regard to the qualitative content of the data submitted by HPSEBL and feels that there is a lot of scope of improve the quality of data. It also agrees that the rate of Rs. 1.84 per kWh, as proposed by HPSEBL, is totally unrealistic and unreasonable. The Commission however does not accept the plea that claim should be rejected straightway particularly when the Commission intends to apply the rate of additional surcharge from a prospective date only and the rejection of claim would amount to absolving the short term of open access consumers from paying the additional surcharge even to the extent it is legitimately due, which is, in fact, already overdue.”

8.5 Per contra, learned counsel for the Respondent /State Commission submitted that the additional surcharge as applicable has been determined by the State Commission duly considering various provisions under the Electricity Act, National Tariff Policy and its own regulations. Learned counsel vehemently submitted that the State Commission has framed HPERC Cross subsidy surcharge, Additional Surcharge and Phasing of Cross Subsidy) Regulations, 2006 which became effective from 21.08.2006 under which Regulation 6 provides for additional surcharge which reads as follows:

“6. Additional surcharge – (1) An open access consumer shall also pay to the distribution licensee an additional surcharge to meet the fixed cost of such distribution licensee

arising out of his obligation to supply as provided under sub-Section (4) of Section 42 of the Act.

(2) Additional surcharge will be payable by any consumer including any consumer who puts up a captive plant for his own use.

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

(4) Each distribution licensee shall submit to the Commission, details of fixed costs, which the licensee is incurring towards his obligation to supply.

(5) In determining the additional surcharge, the Commission shall scrutinize the details of fixed costs submitted by the distribution licensee and invite and consider objections, if any, from the public and affected parties.

(6) The additional surcharge shall be determined on annual basis and it can be collected either as one-time payment or on monthly basis.”

8.6 Learned counsel for the Commission contended that the Commission has also framed HPERC (Short Term Open Access) Regulation 2010 which became effective from 02.05.2010 and inter alia provides that in addition to the wheeling charges, an open access consumer shall pay a surcharge specified by the Commission as per its Regulations, 2006. To substantiate his submissions, learned counsel placed reliance on this Tribunal's

judgment dated 01.08.2014 in Appeal No. 59 of 2013 *Maharashtra State Electricity Distribution Company Limited Vs. MERC &Ors.*, wherein the right of distribution licensee to claim additional surcharge has been upheld. He submitted that the Appellants are not challenging the validity of imposition of additional surcharge but only questioning the quantum of surcharge. Learned counsel was quick to point out that the rate of additional surcharge has been duly cross checked by the Commission and the additional surcharge of Rs. 1.58 per unit proposed by Discom has been brought down to 78 paise per kWh vide its order dated 18.02.2016. He further submitted that the Commission while issuing tariff order dated 25.05.2016 provided that the additional surcharge of 78 paise per kWh shall continue to be applicable till determination of fresh rate.

8.7 Learned counsel vehemently submitted that the State Commission has subsequently determined the rate of additional surcharge as 49 paisa per kWh which is applicable from 01.11.2016. Learned counsel accordingly summed up his submissions and reiterated that the State Commission has determined the rate for additional surcharge after prudence check and there is no illegality or infirmity in the order passed by the Commission. It does not require any interference of this Tribunal.

8.8 Learned counsel for the Respondent/Discom/HPSEBL submitted that the issue of additional surcharge has been settled by a number of authorities namely the judgments of Hon'ble Supreme Court as well as this Tribunal. As such, nothing is left regarding the validity of imposition of additional surcharge and only question in the Appeals pertain to its quantum of the additional surcharge. Learned counsel further submitted that the State Discom has a universal supply obligation and has to supply to all consumers who request for supply. In the State of Himachal Pradesh, all consumers are only short term open access consumers and there is not a single medium term or long term open access consumers which means that such consumers maintain their contract demand with HPSEBL and also take open access. In fact, this is a purely commercial decision of the consumers and many consumers take supply through open access in a few time slots and from HPSEBL in other time slots depending upon cost of power.

8.9 Learned counsel for HPSEBL was quick to point out that there is not a single open access consumer in the State of Himachal Pradesh who has surrendered the power to be supplied by State Discom and all of them have maintained their contract demand. This means that

HPSEBL has to be ready to supply electricity to all such consumers. Contrary to the contentions of the Appellants, it has been conclusively established before the State Commission that there was substantial backing down and non-scheduling of electricity by HPSEBL during the time blocks where open access supply was resorted to by consumers. To such extent, the capacity was stranded on account of open access consumers. Further, there is an unavoidable obligation on the part of the HPSEBL to pay fixed charges on account of non-scheduling of electricity from the generators and such fixed charges on stranded power was to be compensated by the open access consumers in terms of Section 42(4) of the Electricity Act. Learned counsel for the State discom vehemently submitted that the Appellants have only challenged the impugned order on technicalities without appreciating that the concept and purpose of additional surcharge is to ensure that the fixed cost on account of stranded power is to be compensated by the open access consumers and is not a burden on the general body of consumers. Learned counsel further contended that while going through the findings of the State Commission in the impugned order, there does not appear any flaw in the methodology of computing the additional surcharge as alleged by the Appellants. Moreover, the Short Term Open Access Consumers avail open

access at a short notice at their own will and commercial interest which leads to power management problems to HPSEBL. In fact, the Short Term Open Access Consumers avail Short Term Open Access only in those slots in which power is cheaper and as such, the quantum of additional surcharge as decided by the State Commission, based on its methodology and data submitted by the HPSEBL is duly justified. Learned counsel further submitted that the State Commission has excluded expensive power purchases from the computations for the reason that even if there were no open access consumption, the said power would not have been scheduled. Additionally, the demand charges of Rs. 44.76 paise per Kwh recovered from the consumers has been reduced from the additional surcharge computations and when there are power cuts imposed by HPSEBL, no additional surcharge is leviable. Besides, if the consumer is unable to draw full quantum of energy due to constraints in the transmission / distribution system, no Additional Surcharge is leviable.

8.10 Regarding the contentions of the Appellants that the State Commission has merely loaded the expensive fixed cost in the additional surcharge without establishing stranded cost, learned counsel for the Respondent/Discom submitted that while going

through the relevant data submitted by HPSEBL before the State Commission, it is crystal clear that the stranding of capacity was much higher than the open access demand and, therefore, the stranding only to the extent of the open access demand was taken into consideration for determination of additional surcharge. Further, the marginal variations in the grid conditions etc. cannot be taken as a defence to avoid the payment of additional surcharge, when there is substantial stranded capacity. Learned counsel vehemently submitted that the State Commission has given a substantial benefit to the open access consumers by taking the fixed cost of the generators only under the merit order for the purpose of determination of additional surcharge and not all the generators. Regarding the additional surcharge needs to be calculated for those time period when the consumers actually avail the Short Term Open Access and not otherwise, the learned counsel submitted that such submissions of the Appellants are completely misconceived and the same goes contrary to Section 42(4) of the Act. It is also not practical that for each and every 15 minute time block, a separate additional surcharge is determined. In the instant case, during the time blocks when the open access is being availed, the stranded capacity has been considered. Learned counsel refuted the allegations of the Appellants that HPSBL has

failed to put on record the correct/complete data. He submitted that sufficient data relating to power purchase cost, stranded capacity, open access consumers etc. have been filed before the State Commission and have been duly considered by the Commission while passing the impugned order.

8.11 While summing up their contentions, learned counsel for the Respondent Commission and Respondent Discom reiterated that the State Commission has duly analysed the data while passing the impugned order and as such, the interference of this Tribunal is not required.

Our Findings:-

8.12 We have carefully gone through the rival contentions of the learned counsel for the Appellants and learned counsel for the Respondents and also taken note of the judgments relied upon by them. While referring to various provisions under the Act, various policies and relevant regulations of HPSERC, it is crystal clear that the additional surcharge shall become applicable when it is conclusively demonstrated that the power purchased by distribution licensee through long term commitments has been and continued to be stranded. In the instant case, it is not in dispute that why the

additional surcharge has been imposed but the real dispute is regarding the quantum of additional surcharge. The Appellants have challenged the impugned order of the State Commission only to the extent of methodology for calculation of the additional surcharge and its quantum. Learned counsel for the Appellants has contended that the impugned order has neither identified any stranded capacity nor drawn any co-relation between the stranded capacity and the power drawn under open access.

8.13 It is further noted that the Appellants have argued for their own methodology for calculation of the additional surcharge and have emphasised to a figure of 37 paise/per unit. The other argument of the Appellants is that there was not sufficient accurate data before the State Commission and as such the whole basis of calculation is admittedly erroneous. Learned counsel for the Appellants, among others, has also contended that the stranded capacity, whatsoever, is mainly due to inefficient power planning of Respondent/Discom for which open access consumers are being penalised. On the other hand, learned counsel for the Respondent Commission and Respondent/ Discom have contended that the additional surcharge has been levied on the open access consumers strictly in line with provisions of the Electricity Act, National Tariff Policy and the

relevant Regulations of the State Commission. Learned counsel for the State Commission placed his reliance on this Tribunal's judgment dated 01.08.2004 in A.No.59 of 2013 in the case of MSEDCL vs. MERC & Ors. wherein the right of distribution licensee to claim additional surcharge has been upheld. Taking note of the contentions of the learned counsel for both the parties, it is relevant to note that Appellants have not challenged the validity of imposition of additional surcharge and, therefore, we do not intend to look into this aspect anything more.

8.14 We have perused the impugned order to note that various data and additional surcharge proposed by Respondent / Discom has been adequately analysed by the State Commission before passing the impugned order. For instance, HPSEBL had proposed the reference additional surcharge of Rs.1.58/per unit , but after prudence check, the Commission has allowed only Rs.0.78/per unit. Learned counsel for the State Commission also submitted that the rate of additional surcharge from 01.11.2016 has been fixed at Rs.0.49/per unit which is very close to the calculated figure of the Appellants. In view of the universal service obligations of the State Discom with long term power purchase agreements with generators, it is a legitimate entitlement of the State Discom to claim

additional surcharge from the open access consumers in case of stranded power. The State Commission, being the Regulator of the Electricity supply in the State is mandated to strike a balance between all stakeholders including generators, State Discoms, consumers including open access consumers etc..

8.15 In view of the above deliberations, we hold that the State Commission has adequately analysed various data submitted by Respondent/Discom and has applied its prudence check before passing the reasoned order dated 18.02.2016. Accordingly, we find no infirmity or illegality in the impugned order and intervention of this Tribunal does not call for.

9. ISSUE NO.2:-

9.1 Learned counsel for the Appellants submitted that the methodology followed by the State Commission in the impugned order was not part of the petition submitted by the Respondent/Discom and also the Commission did not propose the same at the time of hearing. As such, such methodology was a complete deviation from the methodology proposed by Respondent/Discom i.e. HPSEBL. Learned counsel further alleged that the said methodology was not even discussed during the public hearing and as a result the

Appellants did not have the opportunity to submit their objections/suggestions on viability of the formula devised by the State Commission. Learned counsel contended that in light of the above, the State Commission has violated the principles of natural justice by passing the Impugned Order without affording the stakeholders adequate opportunity to offer comments on the change in methodology for computation of additional surcharge. Learned counsel for the Appellants was quick to submit that the State Commission came up with a completely new formula without giving any opportunity to the Appellants to comment on it, and thus rendered the whole process of public hearing farcical.

9.2 Learned counsel for the Appellants further submitted that the very objective of a public hearing is to make the whole process of tariff determination transparent which in the present case has been defeated. In fact, the State Commission ought to have worked out the methodology prior to issuance of public notice and invited comments from various stakeholders including distribution licensee. Learned counsel alleged that if the State Commissions are allowed to adopt a completely different methodology which was never notified to public before being adopted, this would lead to absurdity and every State Commission could simply make a mockery of the

whole process of inviting public objections on something completely different from which it would ultimately deviate absolutely. Learned counsel vehemently submitted that the narration brought out regarding the public hearing and adoption of new methodology by the State Commission, indicated as above, is nothing but violation of the principles of natural justice.

9.3 *Per contra*, learned counsel for the Respondents at the outset submitted that the contention of the Appellants that since formula adopted by the State Commission is different from the formula proposed by HPSEBL and, therefore, there will be violation of principles of natural justice to the consumers is without any merit. Learned counsel further submitted that tariff fixation is an inquisitorial proceeding and the State Commissions take an informed decision with reasons based on the material available before it. If the submissions of the Appellants are accepted, the State Commission would be required to circulate a draft order to the Appellants and then seek comments and pass the Tariff Order. Learned counsel vehemently submitted that in fact, the State Commission by rejecting the proposal of Respondent /Discom has acted in favor of the consumers by tweaking the formula proposed by HPSEBL. It is crystal clear from the fact that If DISCOMs

formula was accepted by the Commission, the additional surcharge would have been much higher (Rs.1.58/unit).

9.4 Learned counsel for the Respondents contended that the public notice was issued on the petition filed by HPSEBL and all consumers were heard. Many consumers also proposed alternate formulae before the State Commission. After hearing all parties, the State Commission has decided the matter applying its mind and prudence check. In the process, there does not remain a doubt that the State Commission has not acted in a transparent manner and also not given adequate opportunity to the stakeholders as being now alleged by the Appellants. Learned counsel pointed out that as brought out earlier, the State Commission is required to take decision based on the material placed before it through the petitions and also in the public hearing. It is, therefore, summed up that there is no violation of the principles of natural justice as has been contended by the Appellants in the Appeal.

Our Findings:-

9.5 We have carefully considered the contentions of the learned counsel for both the parties and also taken note of the reasoning given by the State Commission in the impugned order. What thus transpires that the public notice was duly issued by the

Respondent/Discom based on its petition filed before the State Commission. Thereafter, the State Commission conducted public hearing with all the stakeholders and heard their point of view. In the process, many consumers had also proposed their alternate formula other than that proposed by HPSEBL before the State Commission. After hearing all the parties and taking note of all the materials placed before it, the State Commission has decided the matter and passed the impugned order with cogent reasoning in the matter. As per the mandate given to it, the State Commission is required to strike a balance among all the stakeholders including the State Discom with an objective of safeguarding the interest of consumers at large. In the process of this exercise, the State Commission is empowered to apply its prudence check, own analysis, own methodology etc. and bring out a judiciously balanced order. This is what has been adopted and carried out by the Respondent Commission in the instant matter. Accordingly, we do not find a substance in the contentions of the Appellants that the State Commission has violated the principles of natural justice.

ORDER

For the forgoing reasons, as stated supra, we are of the considered opinion that issues raised in the instant appeals being Appeal No.

154 of 2016 , 155 of 2016 and 293 of 2016 filed by the Appellants are devoid of merits and hence, the Appeals are dismissed.

In view of the dismissal of the Appeals, the relief sought in the IA Nos. 330 of 216, 333 of 2016 and 599 of 2016 do not survive for consideration and accordingly stand disposed of.

The Impugned order passed by Himachal Pradesh State Electricity Regulatory Commission dated 18.02.2016 in Petition No. 103 of 2015 is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this 09th day of August, 2019.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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