

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**APL No. 177 OF 2021 & IA No. 752 OF 2021 &  
IA No. 1122 OF 2021 & IA No. 1125 OF 2021**

**Dated: 15<sup>th</sup> November, 2021**

**Present: Mr.Ravindra Kumar Verma, Officiating Chairperson  
Mr. Justice R.K. Gauba, Judicial Member**

**In the matter of:**

**Tamil Nadu Spinning Mills Association  
#2, Karur Road,  
Modern Nagar, Dindigul – 624 001  
Tamilnadu. .... Appellant(s)**

**Versus**

- 1. Tamil Nadu Electricity Regulatory  
Commission,  
Rep. by its Secretary,  
4th Floor, SIDCO Corporate Office Building,  
Thiru.Vi.Ka. Industrial Estate,  
Guindy, Chennai-600 032, Tamil Nadu .... Respondent No.1**
- 2. Tamil Nadu Generation and Distribution  
Corporation Ltd (TANGEDCO)  
144, Anna Salai,  
Chennai – 600 002.  
Represented by its  
Chairman and Managing Director. .... Respondent No.2**
- 3. Indian Wind Power Association (IWPA)  
Door No. E, 6<sup>th</sup> Floor, Tower-1,  
Shakti Towers, No.766,  
Anna Salai, Chennai – 600 002.  
Tamil Nadu  
Through its Secretary General .... Respondent No.3**
- 4. Southern India Mills Association**

**‘Shanmukha Manram’  
41, Race Course,  
Coimbatore-641 018.  
Tamil Nadu**

**Through its Secretary General**

**.... Respondent No.4**

- 5. Watsun Infrabuild Private Limited  
Survey No. 356 & 391  
Periya Kumara Palayam Village,  
Gudimangalam Via, Dharapuram Taluk,  
Tirupur District – 642 201.  
Tamilnadu.  
Rep.by its Authorised Signatory**

**.... Respondent No.5**

- 6. Tamil Nadu Power Producers Association  
(TNPPA)  
No.6, Sardar Patel Road, Guindy,  
Chennai-600 032.Tamil Nadu  
Through its Secretary**

**.... Respondent No.6**

**Counsel on record for the Appellant(s):**

**Mr. Sanjay Sen, Sr. Adv.  
Mr. Kumar Mihir  
Ms. Mandakini Ghosh**

**Counsel on record for the Respondent(s):**

**Mr. Basava Prabhu Patil, Sr. Adv.  
Ms. Anusha Nagarajan for Res  
Discom(TANGEDCO)/R-2**

**Mr. Abhishek Kaushik for  
Impleader**

## **JUDGMENT**

**PER MR. RAVINDRA KUMAR VERMA, OFFICIATING  
CHAIRPERSON**

1. The present appeal has been filed by Tamil Nadu Spinning Mills Association (hereinafter referred as **“the Appellant”**) against the impugned order dated 15.04.2021 passed by the Tamil Nadu

Electricity Regulatory Commission (hereinafter referred as “**the Commission/State Commission or Respondent No.1/TNERC**”), in M.P. No. 18 of 2020.

2. The Appellant, Tamil Nadu Spinning Mills Association (TNSMA) is a Registered Association, established on 29.08.1997 for the exclusive purpose of representing and addressing the problems and grievances of the spinning mills situated in the State of Tamil Nadu, as a whole.
3. The Respondent No. 1, Tamil Nadu Electricity Regulatory Commission (TNERC) is the State Regulatory Commission for the State of Tamil Nadu, exercising powers and discharging functions under the provisions of the Electricity Act, 2003.
4. The Respondent No.2, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) is the Distribution Licensee in the State of Tamil Nadu.
5. The Respondent No. 3, Indian Wind Power Association (IWPA) is an Association of WEGs representing both captive and open access consumers and other WEGs selling their power to State Utility, the 2<sup>nd</sup> Respondent.
6. The Respondent No. 4, Southern India Mills Association (SIMA) is an Association, similar to the Appellant and its members are all captive consumers of wind energy / solar energy and they are open access customers also.

7. The Respondent No. 5, Watsun Infrabuild Private Limited is a Company which is a wind generator engaged in the business of dealing with wind energy with its shareholders, under the captive mode as per Electricity Rules 2005.
8. The Respondent No. 6, Tamil Nadu Power Producers Association (TNPPA) is an Association of Power Producers, who produce power for captive consumption and also for open access for sharing the generated power among their shareholders as per the norms provided under Electricity Rules 2005.
9. The Respondent No.2 had filed a Petition being M.P. No. 15 of 2017 in the year 2017, seeking approval to levy additional surcharge before the State Commission. However, the said petition was withdrawn by the Respondent No.2, TANGEDCO and accordingly, the State Commission vide its order dated 23.09.2019 ordered to dismiss the petition as withdrawn.
10. The Respondent No.2 filed a petition again being M.P. No. 18 of 2020, under the TNERC (Grid Connectivity and Intra-State Open Access) Regulations 2014, *inter alia* for determination of Additional Surcharge payable by Open Access consumers, availing power under open access. The prayers made by the Respondent No.2 in its petition were as under:

*“(i)to uphold the obligation of the State Distribution licensee in terms of power purchase agreements has been and continues to be stranded and there is an unavoidable obligation and incidence to bear fixed costs consequent to such agreements.*

*(ii) Determine the additional surcharge of Rs.1.23/kWh payable by Open Access consumers.*

*(iii) Consider the information submitted by TANGEDCO for determining the amount of additional surcharge.*

*(iv) Pass such other further orders as the Commission may deem fit and proper in the circumstances of the case.*

*(v) To permit to make further submissions, addition and alteration to this Petition as may be necessary from time to time.*

11. The Respondent No.2, in the said petition had stated that the Open Access consumers are now buying considerable quantum of power, under open access and on the other hand TANGEDCO also have tied up considerable quantum of power purchase, considering the requirement of power in the present and in future and the power purchase is made from different sources, to meet out the peak load shortages and to maintain grid stability only. Accordingly, the Respondent No.2 filed this petition, to determine additional surcharge, payable by open access consumers on the quantum of power purchase through open access, using the network of Distribution Licensee in line with Section 42 (4) of Electricity Act 2003, in line with the procedure stipulated under Regulation 24 of TNERC (Grid Connectivity and Intra-State Open Access) Regulations 2014, which deal with "Additional Surcharge".

12. The State Commission heard the said Petition on several dates i.e. on 04.08.2020, 08.09.2020, 22.09.2020, 20.10.2020, 03.11.2020, 24.11.2020 and vide its order dated 24.11.2020, the State Commission admitted the petition, to the extent of claim of additional surcharge on the third party purchase and IEX transactions only i.e., on non-CGP and the petitioner was directed to file additional affidavit providing necessary data for the Consideration of the State Commission.
13. It is stated that the Respondent No. 2 herein filed a subsequent affidavit on 10.12.2020 before the State Commission.
14. The said Petition was subsequently heard by the State Commission on 15.12.2020 and 29.12.2020 and on 29.12.2020, the Respondent No.2 herein was directed by the State Commission to webhost the petition along with other documents seeking comments from the stakeholders.
15. Pursuant to the above, the Appellant has filed its detailed objections to the aforesaid petition on 28.01.2021 before the 2<sup>nd</sup> Respondent.
16. The Respondent No.2 herein thereafter filed its reply on 02.03.2021 to the objections filed by the Appellant.
17. The State Commission on its own thereafter reserved the order on 16.03.2021, by passing the following order, even without providing

any opportunity for the Appellant and other connected Respondents to place their arguments on the matter.

*“Thiru. S. R. Rajagopal, Additional Advocate General appeared for TANGEDCO. Thiru. S. P. Parthasarathy, Advocate appeared for TASMA (R-1). Thiru. Rahul Balaji, Advocate appeared for IWPA (R-2) and SIMA (R-3). Thiru. Sumant Nayak, Advocate from M/s. Desai & Diwanji Advocate & Solicitors (R-4) appeared for M/s. Watsun Infrabuild Limited (R-4) and filed written arguments note. Commission observed that the affidavits filed by the respondents are sufficient and further arguments are not required. Orders reserved.”*

18. Thereafter, the State Commission has however, passed the impugned order on 15.04.2021, *interalia* holding as under:

*“8.12. The Petitioner has the total sanctioned demand for the Sale of power to the tune of (8890+75990) 84880 MW consisting both HT and LT category consumers. From the submissions of the petitioner, we find that, TANGEDCO has the contracted capacity of 21654 MW for power purchase including own generation; during the period from October 2019 to March 2020, as stated by the State Load Despatch centre, maximum availability was 14483.20 MW and the average availability was 11783.01 MW. So the Fixed capacity charges payable by the TANGEDCO can be claimed and restricted to the maximum level of 14483.20 MW only. DISCOMS are always has its obligation to supply under 42(4) of the Electricity Act 2003. Though it has the huge sanctioned demand of sale of power, the petitioner is managed the liability towards fixed charges restricting to the level to meet its peak demand and forecasted demand during a particular period of time; or otherwise, fixed charges would be manifold than the claimed one. From this, we accept that, the Petitioner is obligated to maintain the readiness of the supply to the consumers under various conditions, including outages of Gen. units, transmission constraints, seasonal load variations and increase in demand due to addition of new consumers. Moreover, it cannot be denied by the stakeholders (Open Access consumers) that OA consumer has chosen a person other*

*than the distribution licensee of its area to supply the power to him, even well knowing the availability of power in the Distribution licensee's grid, which makes the petitioner's capacity stranded.*

...

*8.15. The Commission is of the considered view that, unless fixed costs due to stranded capacity are recovered from OA consumers, this burden would be unjustly loaded onto other Consumers of Distribution Licensee. The Commission believes it would be unfair and unwarranted to pass such burden of fixed cost recovery of such stranded cost to other consumers through tariff hike.*

*8.16. Under Section 42(4) of the Electricity Act 2003, the Additional surcharge shall be levied to meet the fixed cost incurred by the distribution licensee arising out of his obligation to supply. The Additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded. Under Regulation 24(2) of Grid connectivity and Intra state open access Regulations, the distribution licensee is obligated to prove the stranded capacity. Therefore, in extract, to justify the claim of Additional Surcharge, the petitioner has to provide the (i) Fixed capacity charges incurred by the petitioner towards the available capacity and (ii) the quantum of continuously stranded capacity of the petitioner...*

.....

*8.19.4. The block wise energy scheduled by the Open Access consumers is compared with the stranded capacity i.e., "capacity not availed" on the Distribution licensee's part; the comparison is made to justify that since the claim is made only from the Open access consumers. In every block, the least of the "OA scheduled energy" or "Capacity not availed" is considered to arrive at the "Average stranded capacity" for the entire period of six months i.e., October 2019 to March 2020. The data furnished in this petition is scrutinised with reference to the SLDC's data and corrected wherever required. From this comparison, we find that, there is an average stranded capacity of 557.55 MW during the six months period.*

.....

*8.21.1. The petitioner has furnished the Capacity Availability, Scheduled, not availed and Open access allowed details (Maximum, minimum, Average) based on monthly average basis. Most of the stakeholders have suggested to consider the 15 minutes block wise data to ascertain the stranded capacity if any. In this connection, it would be pertinent to mention that Telangana ERC has considered the 15 minutes block wise data to arrive the average stranded capacity. The Gujarat ERC has considered the hourly data comparison to arrive the average stranded capacity and calculated the Additional surcharge.*

*Therefore, the Commission has considered the 15 minutes block wise data in respect of the Available capacity, Scheduled capacity, OA scheduled capacity, etc., From the scrutiny of these data, it is found that, the average un-availed capacity during the October 2019 to March 2020 is 1956.26 MW*

*8.21.2. OA scheduled energy:*

*The petitioner has considered that the capacity stranded due to OA consumer is 609.56 MW; the petitioner has considered the „maximum scheduled quantum of OA Power“ as the capacity stranded.*

*In this regard, it would be pertinent to state that, the maximum scheduled quantum of 609.56 MW cannot be said to be the stranded capacity throughout the period of six months, it may not be fair. Therefore, the actual OA scheduled energy have been taken into consideration based on the block wise data given.*

*8.21.3. Capacity stranded due to OA consumer:*

*In every block, the least of the “OA scheduled energy” or “Capacity not availed” is considered to arrive at the “Average stranded capacity” for the entire period of six months i.e., October 2019 to March 2020. Based on this comparison, 557.55 MW has been arrived as stranded capacity for which the OA consumer is entitled to compensate to the Distribution licensee.*

*8.21.4. Total Fixed charges:*

*The Petitioner has calculated Rs.8521.41 Crores as its Fixed capacity charges incurred during the said period of Oct’19 to*

Mar'20. The Commission has gone through each element of Fixed charges and allowed Rs.7702.27 Crores as calculated under Table-2 above. Therefore, the Fixed charges per MW arrived by the petitioner for Rs.0.67 Crores is not accepted; it has been revised to Rs.0.65 Crores/MW based on the details revised under Table-3.

**8.21.5. Energy scheduled:**

The Scheduled energy furnished by the petitioner is 48693 MU; but the petitioner has not furnished any break up for this scheduled energy. Hence, we could not verify the correctness of the data furnished. On verifying with the SLDC data, it is found that, during the period from October 2019 to March 2020, TANGEDCO has scheduled the energy for the quantum of 43159 MU only, therefore, it has been taken into calculation of per unit Transmission charges incurred by the Licensee.

**8.21.6. Transmission charges :**

The petitioner has considered Rs.2013 Crores as its actual Transmission charges, but the Transmission charges paid towards LTOA/MTOA/STOA under the head "STOA charges" has been erroneously considered by the petitioner under "Fixed capacity charges". Therefore, the STOA charges paid to tune of Rs.420.71 Crores has been disallowed under "Fixed capacity charges" and taken into consideration under Transmission charges. The total Transmission charges has been arrived at Rs.2433.82 Crores and Transmission charges incurred per unit by the petitioner is arrived as Re.0.56.

8.21.7. Energy consumed by OA consumer from DISCOM is arrived at 2017.80 MU i.e., Gross consumption less OA scheduled energy. The petitioner's claim of 2669.24 MU is not considered since it has considered both the OA consumption as well as power drawn from DISCOM. The Net demand charges to be adjusted from the Stranded fixed capacity charges is Rs.174.40 Crores based on the Transmission & Distribution charges calculated under Sl.no.24 in the Table-3 above.

8.21.8. Based on the above approach, a gap for recovery of Additional surcharge is arrived at the rate of Re.0.85 / kWh.

.....  
8.21.11. We have our considered view that, if the Additional surcharge so calculated at Re.0.85 per Unit as above is fixed, the all-inclusive price of the electricity may be higher than the electricity tariff now chargeable to the consumer by the Distribution licensee. On this score, the Commission taking into account the interest of both the parties in fixation of the Additional Surcharge, we have decided to levy 80% of the Additional surcharge so calculated above shall be recoverable from the Open Access consumers i.e., Re.0.70 per Unit (Re.0.85 x 80% = Re.0.68 rounded off to Re.0.70).

#### 8.22. Applicability of Additional Surcharge:

*In view of the above observations, the Commission decides that –*

- ✓ *The Additional Surcharge as determined under the Table-3 above is applicable to the consumers who purchase the power through Third party Sale and power exchanges (viz., IEX, PXI, etc.,)*
- ✓ *The Open Access consumers shall pay the Additional Surcharge at the rate of Re.0.70 per kWh on the quantum of the electricity scheduled by them.*
- ✓ *The additional surcharge of Re.0.70 per kWh is collectable by the petitioner TANGEDCO from 16.4.2021 to 30th September 2021.”*

19. Being aggrieved by the Impugned Order dated 15.04.2021 passed by the State Commission, the Appellant has presented the instant appeal.

### **Submission of Appellant**

- A. Additional surcharge being a tariff component cannot be determined / levied in the absence of a tariff petition without filing

ARR petition and true up petitions from 2016-17 onwards and only by considering a provisional true-up

20. The Impugned Order is illegal for it violates Regulation 24 of TNERC (Grid Connectivity and Intra-State Open Access) Regulations, 2014. This is clear from the Impugned Order itself, more particularly at Para 2.5 of the Impugned Order which *inter alia* states as follows:

*“2.5. Hearing on the petitioner and the Consumer Associations, the Commission admitted the petition as maintainable. The Petitioner prayed to levy Additional Surcharge to all open access consumers, including captive consumers, by amending Regulation 24(4) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations 2014. But the Commission has not permitted the petitioner to file the I.A for amending the prayer; and admitted to the extent of claim of additional surcharge on the third party purchase and IEX transactions only i.e., on non-CGP.*

21. The following was the Dissenting Note provided by one of the Members of the State Commission, which was not properly responded by the State Commission, before passing the impugned order in M.P. No. 18 of 2020 dated 15.04.2021.

“During the hearing held on 24.11.2020, Dr. T. Prabhakara Rao, Member, reserved his opinion, as Additional surcharge Petition does not deserve part admission for the reason that the petitioner has not filed the Tariff petition; true-up of accounts can be taken up only after prudent check of accounts. Despite repeated reminders the licensee has not filed Tariff petition”.

22. However, after the demitting of the office by the said Dr. T. Prabhakara Rao the erstwhile Member of the State Commission on 24.12.2020, the matter was further processed by the remaining Member and Chairperson on their own and accordingly, the impugned order was passed on 15.04.2021, without anyway responding or reacting to the Dissenting Note of the erstwhile Member, who has recorded this opinion so strongly.
23. The Additional surcharge has been levied vide the impugned order even when the State Commission has itself admitted that the true-up of TANGEDCO has not taken place from 2016-17 onwards and that tariff determination has not happened since 2017-18 onwards. The State Commission has only proceeded on the basis of data provided by the Respondent TANGEDCO, without making any prudent check and without proper determination of the cost as envisaged under the Tariff Regulations and the Statute. The relevant extract of the Impugned Order is as below:

*“8.17.2. Every component of these details were taken for scrutiny by the Commission based on the details certified by the Statutory auditor. As the true-up of expenditure and revenue is pending for the year from 2016-17 to till date, the Commission decided to carry out preliminary true up of fixed cost for the period from October 2019 to March 2020. From the certified details obtained from the TANGEDCO, certain items of the Fixed cost were disallowed for the reasons stated below, to arrive the Fixed capacity charges for the period from October 2019 to March 2020.”*

Can there be a provisional true-up only, for the period from October 2019 to March, 2020, when the tariff determination and true-up has not taken place from 2016-17 and 2017-18 onwards

respectively. The failure to determine the tariff and undertake the true-up, is not only a violation of the Tariff Regulations namely, TNERC-Tariff Regulations 2009, but also violates the full bench judgment of this Tribunal in OP No. 1 of 2011 dated 11.11.2011. The relevant paras are extracted as below:

*“65. In view of the analysis and discussion made above, we deem it fit to issue the following directions to the State Commissions:*

- i. Every State Commission has to ensure that Annual Performance Review, true-up of past expenses and Annual Revenue Requirement and tariff determination is conducted year to year basis as per the time schedule specified in the Regulations.*
- ii. It should be the endeavour of every State Commission to see that the tariff for the financial year is decided before 1st April of the tariff year. The State Commission could consider making the tariff applicable only till the end of the financial year so that the licensees remain vigilant to follow the time schedule for filing of the application for determination of ARR/tariff.*
- iii. In the event of a delay in filing of the ARR, Truing-Up and Annual Performance Review, beyond 31st December, the State Commission must initiate suo-moto proceedings for tariff determination in accordance with Section 64 of the Act read with clause 8.1 (7) of the Tariff Policy.*
- iv. In determination of ARR/ Tariff, the revenue gaps ought not to be left and Regulatory Asset should not be created as a matter of course except where it is justifiable, in accordance with the Tariff Policy and the Regulations. The recovery of the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably within Control Period. Carrying cost of the Regulatory Asset shall be allowed to the utilities to avoid problem of cash flow.*

v. *Truing up shall be carried out regularly and preferably every year.*

vi. *Fuel and Power Purchase cost is a major expense of the Distribution Company and is uncontrollable. Every State Commission must have in place a mechanism for adjustment of Fuel and Power Purchase cost in terms of Section 62 (4) of the Act. The Fuel and Power Purchase cost adjustment should preferably be on monthly basis as per the Central Commission's Regulations for the generating companies but in no case exceeding a quarter. Any State Commission which does not already have such formula/mechanism in place, must within 6 months of the date of this order must put in place such formula and ensure its implementation latest by 1.4.2013.*

*66. We direct all the State Commissions to follow these directions scrupulously, and send the periodical reports by 1st June of the relevant financial year about the compliance of these directions to the Secretary, Forum of Regulators, who in turn will send the status report to this Tribunal and also place it on its website."*

Therefore, the alleged Provisional True-Up exercise found to be done for the period from October 2019 to March 2020, for the purposes of determination of Additional Surcharge alone is not a genuine True-Up and determining the additional surcharge on the sole basis of such provisional figures submitted by the Respondent TANGEDCO, without following a prudent check and the other exercises of tariff and related jurisdiction of the State Commission, cannot be countenanced in any manner whatsoever.

24. In fact, the TANGEDCO in one of its replies dated 31.10.2020 has specifically clarified the following:

*“4. It is submitted that this petition is filed under TNERC (Grid Connectivity and Intra-State Open Access) Regulations, 2014 as a miscellaneous petition.... This is not a tariff petition since a tariff petition is filed for all category of consumers (HT and LT) covering 3.10 Crore consumers for fixing retail tariff. This petition is filed before the Hon'ble TNERC for recovery of fixed cost from only 3200 open access consumers (i.e. 0.0001%) towards stranded capacity as per the regulation 24(4) of TNERC (Grid Connectivity and Intra-State Open Access) Regulations, 2014.”*

25. Thus, despite the TANGEDCO clearly stating that the said Petition was not a Tariff Petition, the Commission went ahead to do a True Up of a selective period, without insisting on the Distribution Licensee to get True Up done for past years. Surprisingly, TANGEDCO is the only Distribution Licensee to have got additional surcharge approved by a State Commission, without getting the True Up approved for the past many years.
26. It is stated that in the absence of a True Up exercise, it is not possible for the Regulator to assess the exact financial position of the Respondent No.2 TANGEDCO and determine any levy to compensate it, only on the basis of alleged account statements and that too for only for six months, even if the same are certified by the Statutory Auditors.
27. In the absence of True Up for the past many years, adopting a method of provisional Truing-Up to determine and levy additional surcharge without engaging the stakeholders in the process of evolving a prudent check, is no way permitted either under the

Electricity Act 2003 or under the Tariff Policies or even under the ISOA Regulations 2014 of the State Commission.

28. It is stated that the 'TNERC (Terms and Conditions for Determination of Tariff for Intra State Transmission / Distribution of Electricity under MYT Framework) Regulations, 2009 ( hereinafter referred as "MYT Regulations") mandate in regulation 3 thereof that the licensee seeking tariff for multi-year shall furnish ARR along with estimated revenue, business plan, Capital investment plan, trajectory of specific variables, true up among other details for each year of the control period in the formats specified in the Tariff Regulations along with the tariff petition and the Commission has to undertake annual review of licensee's performance at the end of each year of the control period.
29. Further, Chapter IV, Regulation 23 of the MYT Regulations provide that the Distribution Licensee shall file application for determination of tariff under MYT framework for each year of the control period for retail supply of electricity along with ARR in accordance with the procedure notified in the Tariff Regulations.
30. It is respectfully submitted that none of the above mandatory acts have been undertaken by the Respondent TANGEDCO and therefore, the Commission completely neglecting its own regulatory responsibilities, has erred to determine and levy the additional surcharge which is part of the tariff on the basis of the alleged provisional true up and without any opportunity to the stake holders to verify the same in complete violation of the MYT Regulations.

B. The State Commission has delegated its powers for receiving objections to TANGEDCO by violating Section 97 of the Electricity Act, 2003.

31. Besides to the fact that there was no opportunity provided to the stakeholders as mandated by the Regulation, to make a prudent check of the Accounts of the TANGEDCO, whether such a levy of Additional Surcharge is really warranted or not, the State Commission has greatly violated Section 97 of the Electricity Act 2003 also, by delegating its own power to the TANGEDCO, which is not possible under the canons of law.

32. It is pertinent to note that opportunity needs to be provided to the stakeholders to make comments / objections by the State Commission which is mandatory under Regulation 24(3) as extracted below.

*“24(3) The distribution licensee shall submit to the Commission on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply. The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge:”*

33. However, instead of the State Commission dealing with the matter of stakeholder consultation and receiving objections if any, for consideration before passing the impugned order, has delegated the functions of the Commission to the TANGEDCO, to undertake the stakeholder process. Such a delegation is nowhere possible under

Section 97 of the Electricity Act 2003. Section 97 of the Electricity Act 2003 is reproduced below for instant reference.

*“Section 97. (Delegation):*

*The Appropriate Commission may, by general or special order in writing, delegate to any Member, Secretary, officer of the Appropriate Commission or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the powers to adjudicate disputes under Section 79 and Section 86 and the powers to make regulations under section 178 or section 181) as it may deem necessary.”*

34. It is pertinent to note that fixation of Additional Surcharge would squarely fall under Section 86(1) of the Electricity Act 2003, as the Additional Surcharge so fixed, would be of Tariff in nature. Therefore, there is a great violation found in such delegation provided to the TANGEDCO in the instant matter and such a delegation not only violates Section 97 of the Electricity Act 2003, but also contravenes the Regulation of the State Commission itself, as specifically made under Regulation 24(3) of the Grid Connectivity and ISOA Regulations 2014 as extracted above.

C. The additional surcharge has been levied in violation of Regulation 24 of TNERC (Grid Connectivity and Intra-State Open Access) Regulations, 2014

35. Regulation 24 of TNERC (Grid Connectivity and Intra State Open Access) Regulations, 2014 is extracted as below:

*“24. Additional Surcharge. –*

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

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

*(3) The distribution licensee shall submit to the Commission on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply. The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge:*

*Provided that any additional surcharge so determined by the Commission shall be applicable only to the new open access customers.*

*(4) Additional surcharge determined on per unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access: Provided that such additional surcharges shall not be levied in case distribution access is provided to a person who has established a captive generation plant for carrying the electricity from such plant to the destination of his own use.”*

From the above Regulation 24, the following acts to be followed by the State Commission has been found not followed while issuing the impugned order determining the Additional Surcharge with effect from 16.04.2021 at the rate of 70 paise / KWh.

- i. No opportunity was provided to the stakeholders as mandated under Regulation 24(3).
- ii. No opportunity of prudent check was provided to the stakeholders to check even the provisional truing-up figures.
- iii. No objections have been called for as made available under Regulation 24(3).
- iv. The Commission has not properly scrutinized the statement of calculation of fixed cost on its own, without depending up on the reports of the Statutory Auditors.
- v. Certain fixed costs related to network assets which have to be recovered through wheeling charges, where also considered by the State Commission for in the process of determination of Additional Surcharge.

D. Any additional surcharge so determined by the Commission shall be applicable only to the new open access customers.

36. Even though the proviso Clause under Regulation 24 (3) clearly provides that Additional Surcharge can only be imposed on new open access consumers, the Impugned Order, however, contrary to the regulations and in excess thereof, proceeds to impose on all open access consumers to levy Additional Surcharge and even those who are purchasing power from the exchanges from time in

memorial are being permitted to levy with Additional Surcharge. This is clear from Para 8.22 of the Impugned Order as extracted below:

*“8.22. Applicability of Additional Surcharge: In view of the above observations, the Commission decides that –*

- *The Additional Surcharge as determined under the Table-3 above is applicable to the consumers who purchase the power through Third party Sale and power exchanges (viz., IEX, PXI, etc.,)*
- *The Open Access consumers shall pay the Additional Surcharge at the rate of Re.0.70 per kWh on the quantum of the electricity scheduled by them.*
- *The additional surcharge of Re.0.70 per kWh is collectable by the petitioner TANGEDCO from 16.4.2021 to 30th September 2021.”*

37. An “Open Access Customer” has been defined in Clause 3(q) of the TNERC (Grid Connectivity and Intra State Open Access) Regulations 2014 as under:

*“3(q) ‘open access customer’ means a consumer, trader, distribution licensee or a generator who has been granted open access under these Regulations;”*

38. Further, Clause 2(l) of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission)

Regulations, 2008 defines an “Open Access Customer” in the following manner.

“2(l) ‘open access customer’ means a person who has availed or intends to avail of open access under these regulations and includes a short-term transmission customer as defined in any other regulations, specified by the Commission or a generating company (including captive generating plant) or a licensee or a consumer permitted by the State Commission to receive supply of electricity from a person other than distribution licensee of his area of supply, or a State Government entity authorized to sell or purchase electricity;”

39. Usually IEX / Bilateral Power is being availed under the Inter-State Open Access Route and therefore, the definition of ‘Open Access Customer’ has to be referred only to the CERC Regulations 2008. However, in the case of any Intra-State Open Access, like Third Party Open Access alone, the TNERC Regulations 2014 are applicable.

40. Any Open Access Customer who is willing to avail power from IEX / Bilateral / Third Party Routes, is required to apply for Open Access Approval as per Chapter 4 (Application Procedure and Approval) of the Grid Connectivity and ISOA Regulations 2014. Sourcing of IEX power comes under the definition of Short-Term Open Access and the Grid Connectivity and ISOA Regulations 2014 of the State Commission, in Clause 16 thereof while dealing with the matters relating to Inter-State Power, provides as.

*“16. Consent by STU, SLDC or Distribution Licensee. –*

*(1) Inter-State open access. - STU in the case of application for grant of long-term open access and SLDC in the case of grant of medium-term open access and short term open access shall convey its consent or otherwise as per the provisions of Central Electricity Regulatory Commission's Regulations or Orders in force. In case of applicant connected to the distribution licensee, the said distribution licensee shall convey its consent or otherwise within 3 days of receipt of the request of the applicant."*

41. A bare perusal of the same would make it evident that getting a NOC from the Distribution Licensee and a Standing Clearance from the SLDC, has become a routine practice, for grant of Inter State Open Access to the Open Access Customers. It is respectfully stated that the NOC/ Standing clearance is given in a standard format as an administrative function without any detailed scrutiny unlike the application for grant of open access for the first time.
  
42. Therefore, under all the above-mentioned regulations, the term "New Open Access Customer", has to mean only such a Customer who has applied for a fresh/ newly for Open Access and the said term cannot in any manner include a Customer, who has been already availing Open Access with the Distribution Licensee / SLDC for a long time continuously. Therefore, any Open Access Customer, who for the first time applies for grant of new Open Access, by rejecting / leaving the electricity being provided by the Distribution Licensee, would alone be considered as a New Open Access Customer.

43. Apart from the above, Clause 19(1)(g) of the TNERC Grid Connectivity and Intra State Open Access Regulations 2014 provides as under:

*“19(1)(g) An existing open access customer shall have the priority higher than new open access applicants under respective category provided the former applies for its renewal thirty days prior to the expiry of existing term of open access;”*

A bare perusal of the same would establish that there is a clear distinction between an existing Open Access Customer and a New Open Access Customer and an Open Access Customer applying for NOC and Standing Clearance on a month-on-month basis, due to the prevailing practices, cannot be treated as New Open Access Customers. Thus, in no manner can an existing open access consumer be treated at par with a new open access consumer, as is being sought to be contended by the respondent TANGEDCO, when it incorrectly argued that the proviso only means that additional surcharge can be levied prospectively on all open access customers.

E. No conclusive proof that there is continuous stranded capacity on account of open access consumers

44. Section 42(4) of the Electricity Act, 2003 provides for levy of such additional surcharge in the following manner:

*“42 Duties of distribution Licensee and open access  
.....*

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

A bare perusal of the aforesaid provision makes it clear and evident that additional surcharge can be levied only to meet out the fixed cost of a Distribution Licensee, arising out of its obligation to supply power and therefore, in order to justify the levy of additional surcharge, the licensee has to conclusively prove that it is not able to cover its fixed cost in full in any other manner.

45. Further, Clause 24(2) of the Grid Connectivity and Intra State Open Access Regulations 2014 mandates as under:

“24(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.”

46. It is stated that the State Commission and the TANGEDCO, neither in the underlying Petition being M.P. No. 18 of 2020, or in the order of the State Commission impugned before this Tribunal in Appeal No. 177 of 2021, have clearly demonstrated the concept that the DISCOM is suffering and that its power “continuing to be stranded or

there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract”.

47. On the contrary, while presenting the revised TN Budget 2021-22, before the TN State Assembly on 13.08.2021, the Finance Minister of the State of Tamil Nadu has mentioned in his Budget Speech as below.

*“95) While the aggregate installed power generation capacity in Tamil Nadu is 32,646 MW including wind and solar capacity of 13,128 MW, the actual maximum availability of power during peak requirement is only 14,351 MW as against the peak demand of 16,846 MW. The main reason for peak requirements being unmet is that wind energy is seasonal and solar energy is available only during the day. Almost 2,500 MW of power has had to be bought on the power exchanges to meet peak needs. Thus the statement that Tamil Nadu turned a power surplus State over the last few years is inaccurate.”*

Therefore, the concept of “continuing to be stranded” is not conclusively demonstrated by the Respondent TANGEDCO and therefore, the levy of additional surcharge cannot be justified in any manner.

48. In the instant case, the stranded capacity calculated by the State Commission is 557.55 MW whose fixed costs are now to be borne by the open access consumers who are purchasing power from the third parties or from the power exchanges. The manner of computation of this stranded capacity is also questionable for the fact that Tamil Nadu is purchasing power on a RTC basis on short term to fulfil its supply commitments. IEX in its submissions before

the Commission on the issue of purchase of RTC power has inter alia stated as follows:

*“ 7.3.3 The petitioner has not been able to demonstrate continuous stranded capacity as per above mentioned principle. In fact, when seen with respect to the short term power and Renewable energy power procured (to the tune of 531 MW and 2720 MW) during Oct<sup>19</sup> to Mar<sup>20</sup>, the backed down quantum seems to have emerged due to short/medium term power & RE power procurement by TANGEDCO rather than OA.*

Oct-19-Mar 20	Mus	MW
STOA	2,329	532
RE Power	2,978	2,719

The submissions of IEX Ltd are recorded in the Impugned Order. It is quite clear that the purchase of short-term power on RTC basis was throughout the year and as such, appears to be a commercial decision of the Respondent TANGEDCO to reduce the overall power purchase cost. Surely, the alleged stranded capacity and determination of Additional Surcharge in the aforesaid circumstances is wrong for the reason that either the Respondent TANGEDCO is deliberately not scheduling expensive power or there is a shortage of power for which it has to procure power on a short term RTC basis. In either of the two cases, Additional Surcharge, cannot be imposed without proper analysis of facts which the State Commission has failed to do.

49. At Para 8.12 of the Impugned Order the Commission has held as follows:

*“8.12. The Petitioner has the total sanctioned demand for the Sale of power to the tune of (8890+75990) 84880 MW consisting both HT and LT category consumers. From the submissions of the petitioner, we find that, TANGEDCO has the contracted capacity of 21654 MW for power purchase including own generation; during the period from October 2019 to March 2020, as stated by the State Load Despatch Centre, maximum availability was 14483.20 MW and the average availability was 11783.01 MW. So the Fixed capacity charges payable by the TANGEDCO can be claimed and restricted to the maximum level of 14483.20 MW only.”*

50. If the aforesaid assessment is correct, then there is no question of stranded capacity in the grid. Pursuant to the Impugned Order, on 21.04.2021, a notification/instruction has been issued by TANGEDCO which has stated as below:

*“Based on the above, all the Superintending Engineers of the Distribution Circles have been instructed vide reference 2<sup>nd</sup> to take necessary action for billing.*

*In this connection, the Chief Financial Controller/General is requested to communicate whether GST is applicable on the Additional Surcharge amount with effect from 16.04.2021.*

*This may be treated as very urgent as corresponding HT billing programme has to be modified and enable for commencing billing from 1.05.2021 onwards”*

51. Apart from that, there is no data as to the reason for power plants for not scheduling power against contracted capacity which could also be for reasons of high renewable energy being integrated into the grid, purchase of cheaper power from the exchange, technical issues in the plant, non-availability of transmission systems/outages. However, none of these issues have been analyzed/considered by the State Commission. The period for which calculations for Additional Surcharge has been made, is based on data from October 2019-March 2020. This period also falls partly in the wind season which is on account of retreating purchase of cheaper power from the exchange, technical issues in the plant, non-availability of transmission systems/outages. However, none of these issues have been analyzed/considered by the State Commission.
52. While compared with the large portfolio of sources of power, the TANGEDCO handles in the State, the stranded quantum is very minimum, working out to less than 1% only. Further, the power supply in Tamilnadu is not without any load shedding. Load shedding in the State is a very common affair experienced at all Sub-Stations in an intermittent manner during all the days of a year. Therefore, even though the SLDC is not providing any Load Shedding details in its Daily Report, the facts of Load Shedding enforced on all the days cannot be anyway suppressed or refused. Therefore, such small gaps of less than 1% between the demand and supply, is being always managed by Load Shedding enforced by the 2nd Respondent TANGEDCO and therefore, such small gaps in supply and demand cannot warrant a levy of Additional Surcharge in the guise of stranded capacity.

53. Apart from the above, it is stated that Data was available based on the orders of the State Commission, to the extent of the quantum of power approved to be purchased by the TANGEDCO during various periods. However, there was no data made available in the public domain, to verify and comment, as to the fact of how much quantum of power was actually supplied by the TANGEDCO. In the absence of the same, the exact stranded capacity as claimed by the TANGEDCO cannot be demonstrated clearly. If the approvals for purchases are more than the actual requirement, such difference between the actual approvals and actual supplies, cannot always be treated as stranded.

F. No opportunity provided to the open access customers by the State Commission in proper manner to defend the fixation of additional surcharge

54. Further, Clause 24(3) of the Grid Connectivity and Intra State Open Access Regulations 2014 as quoted above, provides as under:

*“24(3) The distribution licensee shall submit to the Commission on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply. The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge.”*

55. Therefore, the State Commission was statutorily mandated to provide suitable opportunity for the stakeholders, before fixing the quantum of Additional Surcharge, as proposed by the Distribution Licensee. The Commission would have obtained necessary comments / objections if any, before it determined the amount of

Additional Surcharge, as mandated in Clause 24(3), to the extent extracted above. In turn, it is only the Distribution Licensee floated the copy of the petition in M.P. No. 18 of 2020 and called for comments. Accordingly, the Appellant has filed Detailed Comments. Hence, the comments/objections so filed by the Stakeholders were not properly allowed for placing before the Commission for arguments and the Commission has finalized the order, without providing any opportunity for the stakeholders, before it passed the impugned order on approving the quantum of the Additional Surcharge as ordered in the impugned order dated 15.04.2021 in M.P. No. 18 of 2020. By this way, the State Commission has completely neglected its obligation to place the matter for obtaining objections if any by the stakeholders and accordingly, violated its own Regulation as provided in Clause 24(3) to the extent extracted above.

56. Without prejudice to the same, it is stated that the State Commission proceeded to do a provisional true-up on its own, in the present proceedings meant for levy of Additional Surcharge and as such, no opportunity was given for any arguments on merits pursuant to filing of objections/suggestions by the Appellant. Surely, true-up cannot be done in an ad-hoc manner for collateral purposes to benefit TANGEDCO. It is surprising that how the State Commission did not insist up on filing of ARR petition in over three years and (that true-up has not been conducted since 2016-17) and proceeded to determine Additional Surcharge, without enquiry into the costs as has to be necessarily done. The Tariff Policy, 2016 at Para 8.5.4 inter alia provides as follows:

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

The present Impugned Order violates the Tariff Policy which now held to be statutory in nature. Clearly, the aforesaid mandate under the Tariff Policy has not been followed. There is no ‘conclusive’ determination of stranded capacity on a ‘continuous’ basis. The Impugned Order is based on mere surmises and conjectures. For discussion on merits, reference may be made to Para 8.17 onwards.

G. The fixed costs relating to network assets have been considered while calculating additional surcharge in violation of Regulation 24(2)

57. Clause 24(2) of the Grid Connectivity and Intra State Open Access Regulations 2014 provides as under:

*“24(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.”*

58. Despite the said prohibition, the State Commission while determining the Additional Surcharge as 70 paise / unit, erroneously considered the fixed costs related to network assets also.
59. It is stated that the State Commission has approved the fixed cost for Oct to Mar 2019 as Rs. 3443 Crores, which works out to Rs. 6887 crores of annual fixed cost by calculation. In the previous Tariff Order dated 11.08.2017 in TP No. 1 of 2017, the fixed cost approved by the Commission, for the immediate preceding financial year 2018-19, was only Rs. 5285 Crores and for the periods preceding 2018-19, was between Rs. 4900 and Rs. 5000 Crores. Therefore, a huge increase of Rs. 1887 crores has been allowed by the Commission as fixed cost, when it was fixed Rs.3443 Crores for 6 months for the period from October to March 2019 alone. In the impugned order, it is mentioned that the fixed cost is in line with the ARR approved in the previous orders even though the Commission has not dealt with it independently.
60. It is stated that normally with age, interest cost would come down, while R&M and wages would increase. However, in the instant case, the Commission provided an increase of more than 35%, compared to previous year, without any cogent explanation
61. The State Commission has adopted a Formula, wherein from the demand charges paid by the OA consumers during this period, the components of transmission charges and wheeling charges, in respect of the power availed by OA consumers during the said period, has been deducted and the remaining alone is considered as charges to be adjusted against the fixed cost of stranded

capacity. This is not correct as the HT Tariff determined by the State Commission in the earlier order includes the transmission charges and network cost, as part of the cost of supply and the tariff is determined based on the cost of supply. When the OA consumers avail power from the TANGEDCO, the tariff they pay includes the transmission and wheeling charges incurred by the TANGEDCO to supply power to them. Therefore, to deduct those charges from the demand charges paid is not correct and would amount to duplication of recovery. The demand charges paid by the consumers are to be adjusted against the fixed cost of the stranded capacity. Therefore, by applying a correct method of calculation the Additional Surcharge now fixed at the rate of 70 paise / unit would come down quite drastically. For the OA power, transmission charges are paid by the OA consumers separately and hence TANGEDCO would not be burdened with that. If it is included again, then it would amount to double taxation.

H. Levy of additional surcharge amounts to unjust enrichment

62. The HT Consumers in the State of Tamilnadu, are classified to pay their charges for the electricity they consume with the Distribution Licensee, under a Two-Part Tariff System. In such a type of Two-Part Tariff System, the total Current Consumption Charges Bill, is divided into Two Parts. The first one is on the charges towards consumption of electricity in units (kilowatt hour-kWh) and is called as energy charges. The second is on the fixed charges and is called as demand charges (KVA Charge). The first charge depends on the units of energy consumed by the consumer. The second charge is

on fixed charges and is based on the maximum demand or contracted demand, contracted by the consumer.

63. As per the prevailing tariff order in Tamilnadu, the HT consumers are charged with Rs.6.35 / Unit during normal hours and with 20% additional charge, on the units consumed during the morning and evening peak hours of 6.00 AM – 9.00 AM and 6.00 PM and 9.00 PM (6 hours in a day) as energy charges.
64. In addition to paying the unit consumption charges or energy charges on actual units consumed at the above rates, the HT Consumers are also paying demand charges calculated on the maximum demand contracted to the extent of Rs.350 / KVA.
65. Therefore, whether any HT consumer consumes electricity from the Distribution Licensee or not, the HT consumer is liable to pay the fixed charge to the extent of the sanctioned demand at the rate of Rs. 350 / KVA or to the extent of 90% of the sanctioned demand, if the recorded demand falls below 90% of the sanctioned demand/maximum demand. Any demand exceeded beyond the sanctioned demand / maximum demand, is liable to be paid, two times of the normal demand charges (ie) Rs.700/KVA as excess demand charges.
66. The relevant operative portions of the Retail Tariff Order of State Commission in TP No. 1 of 2017 dated 11.08.2017 is reproduced below, which is currently in force at the State of Tamilnadu.

*“2.17.25 It is clarified that the Demand Charges are levied to recover a part of the fixed costs of TANGEDCO. Only the variable cost of generation and power purchase is variable in*

*nature, and the balance, which contributes around 50% of TANGEDCO's ARR is fixed in nature. Generally, the fixed costs comprise O&M expenses, Depreciation, Interest on Loans, Return on Equity, Interest on Working Capital, etc. Such fixed costs have to be incurred by TANGEDCO, irrespective of the units consumed by a particular consumer in any month. The revenue from the Fixed/Demand Charges levied on HT Industrial consumers as well as other LT and HT consumers, comprises only around 19% of the total revenue earned by TANGEDCO. Thus, only 19% of the ARR is recovered from the Fixed/Demand Charges, and the balance is recovered through the Energy/Variable Charges."*

*6.1.1.7 Billable Demand: In case of HT Consumers, maximum Demand Charges for any month will be levied on the kVA demand actually recorded in that month or 90% of the contracted demand, whichever is higher. Provided, that whenever the restriction and control measures are in force, the billable demand in case of two-part tariff for any month will be the actual recorded maximum demand or 90% of demand quota, as fixed from time to time through restriction and control measures, whichever is higher.*

**6.1.2 High Tension Tariff I A:**

Tariff category	Commission Determined Tariff	
	Demand Charge in Rs/kVA/ month	Energy charge in Paise per kWh (Unit)
High Tension Tariff I A	350	635

Therefore, it is evident that the HT Consumers are charged with a Two-Part Tariff System, one under demand charges to cover the fixed costs and other under energy charges to cover the cost on energy supplied, as per the above Table.

67. Accordingly, the levy of Additional Surcharge, on the premise that the TANGEDCO is incurring fixed charges, while the consumers

neglect the Utility Power and move for power from other open access sources, is not sustainable, on the reason that such OA consumers are already paying towards the fixed charges regularly, by way of demand charges at the rate of Rs.350/KVA as explained above. Hence, the rationale behind the levy and collection of additional surcharge is not fitting with the system and it amounts to double taxation and / or unjust enrichment on the part of TANGEDCO.

I. The levy of additional surcharge is adversely affecting open access regime in the State of Tamil Nadu

68. This new levy of Additional Surcharge is in addition to the levy of Rs. 1.67/unit that is being levied as Cross Subsidy Surcharge (CSS). As a result, a consumer in Tamil Nadu who opts for open access, has to bear as a part of his transaction cost, transmission charges and losses (CTU & STU as the case may be) and also CSS and now the Additional Surcharge. This new levy has made open access transactions completely unviable in the State. As a result, the industry has to now, drastically curtail buying power from the open market after the Impugned Order was passed.

69. It appears that prior to the Impugned Order, the average transaction from power exchange was 15 MUs/day which has now fallen to 5-6 MUs/ day. This is likely to fall further once the new regime settles down. The impact of this new regime is being acutely felt by all the industries which are currently suffering on account of a pan India economic slowdown and such a substantial increase in cost of power, which is a major input cost, will make them uncompetitive.

They will be all forced to cut down on shifts or shut down their production levels if suitable remedial steps are not taken.

70. A full bench of this Tribunal in the case of RVK Energy Pvt Ltd vs. Central Power Distribution Co. of Andhra Pradesh Ltd &Ors (Appeal No. 169 of 2005) Judgment dated 05.05.2007 has held that:

*“26. It must not be forgotten that wheeling charges and the surcharge are not the only charges which a consumer is required to pay for using open access. It may also be required to pay additional surcharge on the charges of wheeling to meet the fixed cost of the distribution licensee under sub-section (4) of Section 42 of the Act. The Regulatory Commissions are required to keep in view the fact that the concept of equal opportunity is essential element of open access woven into the fabric of the aforesaid provisions. In case use of open access by a consumer is made onerous by imposing excessive levies, it will amount to barring open access to him. This will result in discrimination of the consumer qua the licensee and generator. Therefore, the above provisions must be looked at, keeping in view the object and reasons of the Act. The provisions must be worked out to promote open access as it will boost competition. Competition benefits the consumer. It pulls down the prices. It improves the quality of service to the consumers. In case open access is inhibited by making it uneconomical for the consumer to choose its source of power, it will have deleterious effect on competition resulting in scarcity of electricity and high tariff. Open access must be utilized to mop up every bit of power available with the generators to surmount shortages and outages of electricity. This is possible in case the surcharge and additional surcharge is reasonable.*

.....

*30. The Policy has been issued under Section 3 of the Act. It has a statutory flavor. The Regulatory Commission is required to abide by the National Electricity Policy and*

*Tariff Policy issued by the Central Government as long as they are in consonance with the Act. The National Electricity Policy and Tariff Policy are prepared by the Central Government in consultation with the Authority for development of the power system based on optimal utilization of its resources such as coal, natural gas, nuclear substances and hydro and renewable resources of energy. Optimal utilization of resources will take place only when generator is assured of the use of the wires for transmitting electricity to the licensees and consumers. In this context open access assumes importance. In case open access is made available for transmitting electricity to the end user at a cost which is higher than the cost at which the distribution licensee of the area supplies energy to the consumers, the concept of open access becomes meaningless.*

*In case, cost to use open access is high, there cannot be optimal use of capacities and resources. The optimal use of capacities and resources is the mandate of Section 3 of the Act. Besides the emphasis placed on competition in electricity sector by the preamble to the Act would be reduced to a platitude. Such a situation would be contrary to the preamble of the Act and the very spirit of Section 3. The submission of the learned counsel for the distribution companies that the Central Government did not have jurisdiction to lay down the method and manner for calculating the surcharge cannot be countenanced in law. The submission is accordingly rejected.*

*31. ....There must be no impediment for consumer, generator or a utility to utilize wires for moving the electricity to the desired destinations, without which generation would be wasted. This can be possible in case wheeling charges, cross subsidy surcharge or additional surcharge are not excessive. Every unit of electricity must be allowed to be evacuated. Country cannot afford to waste energy by restricting open access through a price mechanism which is not in consonance with the provisions of the Act.*

*....*

*33. Though the suggestions cannot be implemented, it is*

*for the Regulatory Commissions to translate the spirit of the Act into reality by imposing realistic charges for wheeling, cross subsidy surcharge and/or additional surcharge. Once the Appropriate Regulatory Commission has introduced open access within one year of the appointed date, a right vests in the consumer to ask for open access for securing electricity from a source of its choice so that it is able to access quality power. This vested right cannot and ought not to be defeated by imposing excessive charges on the consumers requiring open access. We do not agree with the learned counsel for the distribution licensees that neither the consumers nor the generators have a vested right to seek open access. This contention falls foul of the object of the Act, its context and the above provisions.*

*34. The order of the Regulatory authorities should incentivise generation. Factors which deter private investment for generation, transmission and distribution must be removed.*

*The levy of wheeling charge, cross subsidy surcharge and additional surcharge ought not to be rapacious. The Regulatory Commissions have a statutory duty to levy reasonable charges so that entrepreneurs come forward to setup generation plants and distribution and transmission systems. In case the Tariff Policy relating to open access, which is in consonance with the Act, is ignored by the Regulatory Commissions, it will have injurious effect on the life of the people”*

71. In view of the above, it is the duty of the State Commission to ensure that there are no excessive charges and that the open access regime in the State remains viable. It is stated that the Additional Surcharge is to be levied in addition to the Wheeling Charges only, as provided under Clause 24 (1) and it cannot be in multiplication of wheeling charges either three times or four times as the case may be.

72. However, in the State of Tamil Nadu, the Wheeling Charges are fixed and collected from Open Access Consumers, at the rate of 21.05 paise / unit, with effect from 11.08.2017 onwards, through the Order in TP No. 1 of 2017 dated 11.08.2017, whereas the Additional Surcharge alone works out to 70 paise / unit, through the impugned order, which makes the Additional Surcharge more than three times of the Wheeling Charge itself.

73. The Order in TP No. 1 of 2017 dated 11.08.2017 determined the Wheeling Charges as under:

“5.8.5 The annual distribution charges for FY 2017-18 (excluding power purchase) as approved in Chapter 4 is shown in the Table below:

Table 5-27: Approved Annual Distribution Charges for FY 2017-18 (Rs. Crore)

Sl.No.	Particulars	Rs. Crore
1.	Net O&M expenses	5394
2.	Interest on Loan and Finance Charges	2555
3.	Interest on Working Capital	0
4.	Depreciation	1173
5.	Return on Equity	0
6.	Other Debits	0
7.	Annual Distribution Charges	9122
8.	Less: Interest on Consumer Security Deposits	613
9.	Net Annual Distribution Charges	8509

*5.8.6 As HT consumers are eligible for Open Access, the above Annual Distribution charges have been allocated to them in the ratio of the HT distribution network to the total of HT and*

*LT distribution network. The allocation has been done in the same ratio as submitted by TANGEDCO.*

5.8.7 Based on the above ratio and the approved Annual Distribution Charges, the approved Wheeling Charges per unit for FY 2017-18 is shown in the Table below:

Table 5-28: Approved Wheeling Charges for FY 2017-18

Wheeling Charges	Commission
Energy fed into Grid (in MU)	97,903.15
Transmission Loss up to 110 kV	3.91%
Less: Energy consumed at 230 kV and 110 kV	4,714.95
Energy sent out to Distribution Network	89,360.19
Less: Loss up to 33kV network	1.52%
Energy fed into 33kV and below	88,001.91
Total Annual Wheeling Charges (Rs. Crore)	1852.36
Wheeling charges for Open Access Customer (Paisa/ unit)	21.05

74. Therefore, the entire calculation made in the impugned order, to approve and levy the Additional Surcharge is totally erroneous, without taking in to consideration of all the factors of collection of demand charges etc., to meet out the fixed cost, in a Two-Part Tariff System, as explained above and hence, it has to be set aside.

75. The Tariff Order of the State Commission dated 11.08.2017 has already factored all the fixed costs of the 2nd Respondent TANGEDCO with respect to its distribution system (wires etc.) and has arrived at a cost as KVA charges or MD charges @ Rs.350 / KVA. Therefore, whether the HT consumer avails the energy from

TANGEDCO or not, the HT consumer has to pay the KVA charges without fail. Hence, levying additional surcharge over and above the KVA charges and wheeling charges is amounting to double taxation, while the KVA charges and wheeling charges have already been arrived at, taking into consideration of all fixed costs related to distribution system of TANGEDCO.

76. It is also pertinent to note that while approving Cross Subsidy Surcharge @ Rs.1.67/KWh, through its order dated 11.08.2017 in TP No. 1 of 2017, the State Commission has already factored the component of fixed cost, when the Open Access Consumers source power from other than captive sources like power from IEX by collective transactions and on bilateral powers and also on powers from Third Party Sources. Therefore, attempting to make one more levy by way of Additional Surcharge @ Rs.0.70/KWh once again, is amounting to double taxation of consumers exclusively sourcing power from IEX / Bilateral / Third Party Routes. This is aimed to allow the TANGEDCO to enrich by unlawful means and without following any of the principles laid down for the determination of Additional Surcharge. To this extent, the State Commission has greatly violated all the canons of law, including its own Regulations as submitted already.
77. It is also pertinent to point out that the Commission approves the tariff subsidy from state Government based on the retail tariffs approved for various categories. In a recently issued Order dated 30.09.2021 in 7 of 2021, the Commission approved provisional subsidy for FY 21-22 for various categories for which subsidy commitment was provided by the Government. As no tariff revision

has taken place even for the subsidized categories over past many years, the government subsidy is in effect being loaded on the industries by imposing Additional surcharge on them. The industries are being forced to make good the revenue shortfall accrued on account of non-revision of tariffs and non-determination of cost reflective tariffs of the subsidized categories.

78. To upshot of all the above submissions, they can be condensed as below.

- i. There was no True-Up Petitions and ARRs filed by the TANGEDCO after 2017 and therefore, there was no prudent check made available to the consumers / stakeholders, to verify the requirement of revenue by way of Additional Surcharge, as allowed by the State Commission in the impugned order.
- ii. The Dissenting Order of one of the Members of the State Commission, recorded before his Demitting Office on 24.12.2020, while the Adjudication Proceedings were going on in M.P. No. 18 of 2020 to fix the Additional Surcharge, which culminated the issuance of the impugned order finally, was not duly considered in any manner. The Member Demitted Office is an IAS Officer and his remarks need to be well conceived for all reasons. But there was a total negligence committed to consider his observations before passing the impugned order dated 15.04.2021.
- iii. The Stranded Capacity was not anyway demonstrated properly and continuously by the 2<sup>nd</sup> Respondent, as required under Regulation 24(2) of the Grid Connectivity and ISOA

Regulations 2014, which is a pre-requisite for considering to permit the levy of Additional Surcharge.

- iv. The Assessment of fixed cost has been erroneously made and the State Commission has not correctly assessed the fixed cost in proportion to the fixed costs that was finalized earlier based on prudent checks. Hence, unless the fixed costs are correctly assessed by a prudent check, the levy of Additional Surcharge would be superfluous and would make the 2<sup>nd</sup> Respondent TANGEDCO to enrich itself for the mistake of the State Commission.
- v. Various Parameters to be looked in to, before fixing the Additional Surcharge, were not fully looked in to and found followed and thereby the State Commission has violated its own Regulations at very many areas.
- vi. The stakeholders were not provided with any opportunity as mandated under Regulation 24(3) and the State Commission has not received the objections on its own and has however delegated such functions unlawfully to the TANGEDCO which is not permissible in law under Section 97 of the Electricity Act 2003. There was no public hearing held and there was no opportunity provided for the stakeholders to make any pleadings as per the requirements of the State Commission's own Conduct of Business Regulations 2004.
- vii. Already, the consumers now newly obligated to pay the Additional Surcharge, are also paying Demand Charges separately, to meet out the fixed costs of the TANGEDCO and the Energy Charges also on the energy consumed separately to the TANGEDCO, under a Two-Part Tariff System and therefore, making one more levy to cover fixed

charges by way of Additional Surcharge, is no way tenable to law and then it amounts to double taxation.

- viii. Already, the consumers now newly obligated to pay the Additional Surcharge, are also paying the Cross Subsidy Surcharge @ Rs.1.67 / KWh, which was determined by the State Commission, taking in to the facts of fixed charges, through its order dated 11.08.2017 in TP No. 1 of 2017. Therefore, making one more levy to cover the so called fixed charges by way of and in the guise of Additional Surcharge, is no way tenable to law and then it amounts to double taxation.
- ix. While the Additional Surcharge has to be determined only on the Wheeling Charges alone, the quantum of Additional Surcharge now fixed at 70 paise / unit, exceeds the actual Wheeling Charge itself which is available at 21.05 paise / unit and hence, such an exorbitant levy by more than three times of the Wheeling Charge is totally illegal.
- x. The levy of 70 paise / unit notified as Additional Surcharge, has not anyway exempted the existing Open Access Consumers from the levy as any levy of Additional Surcharge is applicable only to New Open Access Consumers. This has not been correctly ensured and clearly in the impugned order. The levy of 70 paise / unit now notified by the impugned order dated 15.04.2021 is not anyway made applicable specifically to the New Open Access Consumers alone, as provided under the Proviso Clause under Regulation 24 of the Grid Connectivity and ISOA Regulations 2014. Therefore, making the Additional Surcharge applicable to all the Open Access Consumers, whether they are new or

continuing, is a great violation committed by the State Commission against its own Regulations.

- xi. The State Commission has not clearly appraised the matter, whether the continuous stranded capacity is only due to the Open Access Consumers alone or is there any other reasons for making the continuous stranded capacity on account of the 2<sup>nd</sup> Respondent TANGEDCO.
- xii. The comments and suggestions made by the Petitioner and the other stakeholders were not properly acted up on the and considered before passing the impugned order by providing suitable opportunities for such stakeholders by making participation in the adjudication proceedings. Even though the Petitioner has made a Detailed Comment on 28.01.2021, neither the State Commission nor the TANGEDCO has appraised the comments in letter and spirit and the TANGEDCO has provided only a ceremonious reply, which the State Commission has extracted in the impugned order without applying its mind whether such comments deserve any consideration or not. The whole adjudication proceedings were continued without following the norms provided under the State Commission's own Regulations namely Conduct of Business Regulations 2004.
- xiii. The 2<sup>nd</sup> Respondent TANGEDCO is always enforcing load shedding invariably in all areas without any exception, saying some reason or other and therefore, if there is a stranded capacity, such load shedding is no way required and the stranded capacity would take care the energy requirements without the system getting to experience the load shedding

every day. Therefore, the claimed stranded capacity, is only a myth and it is not in reality anywhere in the State. Except for taxing some categories of consumers alone for the reasons best known to the Respondents, the Additional Surcharge was determined and permitted to be levied by the State Commission. Therefore, the Additional Surcharge determined and permitted to be levied through the impugned order, is not at all required in any manner and it is only making the TANGEDCO to unjustifiably enriched.

- xiv. Even the Finance Minister, while making his Budget Speech in the Floor of the TN State Assembly on 13.08.2021, has categorically admitted that the State of Tamilnadu is not a Power Surplus State. When that being the position, the question of TANGEDCO keeping continuous stranded capacity, is no way demonstrated and there is a clear hand and glove nexus found in the impugned order, between the TANGEDCO and the State Commission, because of the reason that the State Commission is totally manned mostly by the officials of the TANGEDCO and is functioning like an extended arm of the TANGEDCO.

79. In view of all the above, the Impugned order being untenable and contrary to the provisions of the Electricity Act, 2003, the Applicable Regulations and the National Tariff Policy, is liable to be set aside in order to protect the interest of the industry in the State of Tamil Nadu at large.

## **Submissions of Impleader/Tamil Nadu Electricity Consumer Association**

### **A) Demand Charges vis-à-vis Energy Charges under a Two-Part Tariff System:**

80. The HT Consumers in the State of Tamilnadu are classified to pay their charges for the electricity they consume with the Distribution Licensee, under a Two-Part Tariff System.
81. In such a type of Two-Part Tariff System, the total Current Consumption Charges Bill is divided into Two Parts. The first one is on the charges towards consumption of electricity in units (kilowatt hour-kWh) and is called as energy charges. The second is on the fixed charges and is called as demand charges (KVA Charge). The first charge depends on the units of energy consumed by the consumer. The second charge is on fixed charges and is based on the maximum demand or contracted demand, contracted by the consumer.
82. In Tamilnadu scenario, the HT consumers are charged with Rs.6.35 / Unit during normal hours and with 20% additional charge, on the units consumed during the morning and evening peak hours of 6.00 AM – 9.00 AM and 6.00 PM and 9.00 PM (6 hours in a day) as energy charges.
83. The HT consumers, in addition to paying the unit consumption charges or energy charges on actual units consumed at the above

rates, are also paying demand charges calculated on the maximum demand contracted to the extent of Rs.350 / KVA.

84. Therefore, whether any HT consumer consumes electricity from the Distribution Licensee or not, the HT consumer is liable to pay the fixed charge to the extent of the sanctioned demand at the rate of Rs. 350 / KVA or to the extent of 90% of the sanctioned demand, if the recorded demand falls below 90% of the sanctioned demand/maximum demand. Any demand exceeded beyond the sanctioned demand / maximum demand, is liable to be paid, two times of the normal demand charges (ie) Rs.700/KVA as excess demand charges.
85. The relevant operative portions of the Retail Tariff Order of State Commission in TP No. 1 of 2017 dated 11.08.2017 is reproduced below, which is currently in force at the State of Tamilnadu.

*“2.17.25 It is clarified that the Demand Charges are levied to recover a part of the fixed costs of TANGEDCO. Only the variable cost of generation and power purchase is variable in nature, and the balance, which contributes around 50% of TANGEDCO’s ARR is fixed in nature. Generally, the fixed costs comprise O&M expenses, Depreciation, Interest on Loans, Return on Equity, Interest on Working Capital, etc. Such fixed costs have to be incurred by TANGEDCO, irrespective of the units consumed by a particular consumer in any month. The revenue from the Fixed/Demand Charges levied on HT Industrial consumers as well as other LT and HT consumers, comprises only around 19% of the total revenue*

earned by TANGEDCO. Thus, only 19% of the ARR is recovered from the Fixed/Demand Charges, and the balance is recovered through the Energy/Variable Charges.”

.....

.....

*6.1.1.7 Billable Demand: In case of HT Consumers, maximum Demand Charges for any month will be levied on the kVA demand actually recorded in that month or 90% of the contracted demand, whichever is higher. Provided, that whenever the restriction and control measures are in force, the billable demand in case of two-part tariff for any month will be the actual recorded maximum demand or 90% of demand quota, as fixed from time to time through restriction and control measures, whichever is higher.*

**6.1.2 High Tension Tariff I A:**

<i>Tariff category</i>	<i>Commission Determined Tariff</i>	
	<i>Demand Charge in Rs/kVA/ month</i>	<i>Energy charge in Paise per kWh (Unit)</i>
<i>High Tension Tariff I A</i>	<i>350</i>	<i>635</i>

86. Therefore, it could be seen that the HT Consumers are charged with a Two-Part Tariff System, one under demand charges and other under energy charges as per the above Table.

87. Therefore, attempting to levy the Additional Surcharge, on the reason that the TANGEDCO is incurring fixed charges, while the consumers neglect the Utility Power and move for power from other open access sources, is not sustainable, on the reason that such OA consumers are already paying towards the fixed charges regularly, by way of demand charges at the rate of Rs.350/KVA as explained above. Hence, the rationale behind the levy and collection of additional surcharge is not fitting with the system and it amounts to double taxation.

88. The following link and the attached papers would throw much light on the subject as how the calculation of Demand Charges or KVA Charges are arrived at in a Two-Part Tariff System.

B) The quantum of Additional Surcharge exceeds the Wheeling Charge itself by more than three times:

89. For the levy of Additional Surcharge, the Electricity Act 2003, mandates as below in Section 42(4).

*“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.”*

90. In line with the above, the State Commission has framed the Grid Connectivity and ISOA Regulations 2014 also, as below explaining the method of approval of Additional Surcharge in Clause 24.
91. For the instant reference, Clause 24 of the Grid Connectivity and ISOA Regulations 2014 is reproduced below.

*“24. Additional Surcharge:-*

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

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

*(3) The distribution licensee shall submit to the Commission on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply. The Commission shall scrutinize the statement of calculation of fixed*

*cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge:*

*Provided that any additional surcharge so determined by the Commission shall be applicable only to the new open access customers.*

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

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

92. Therefore, the Additional Surcharge is an addition to the Wheeling Charges only, as provided under Clause 24 (1) and it cannot be in multiplication of wheeling charges either three times or four times as the case may be.
93. The Wheeling Charges are fixed and collected from Open Access Consumers, at the rate of 21.05 paise / unit, with effect from 11.08.2017 onwards, through the Order in TP No. 1 of 2017 dated 11.08.2017, whereas the Additional Surcharge alone works out to 70 paise / unit, through the impugned order, which makes the Additional Surcharge more than three times of the Wheeling Charge itself.

94. The Order in TP No. 1 of 2017 dated 11.08.2017 needs to be referred as how the Wheeling Charges have been fixed.

*“5.8.5 The annual distribution charges for FY 2017-18 (excluding power purchase) as approved in Chapter 4 is shown in the Table below:*

*Table 5-27: Approved Annual Distribution Charges for FY 2017-18  
(Rs. Crore)*

<i>Sl.No.</i>	<i>Particulars</i>	<i>Rs. Crore</i>
<i>1.</i>	<i>Net O&amp;M expenses</i>	<i>5394</i>
<i>2.</i>	<i>Interest on Loan and Finance Charges</i>	<i>2555</i>
<i>3.</i>	<i>Interest on Working Capital</i>	<i>0</i>
<i>4.</i>	<i>Depreciation</i>	<i>1173</i>
<i>5.</i>	<i>Return on Equity</i>	<i>0</i>
<i>6.</i>	<i>Other Debits</i>	<i>0</i>
<i>7.</i>	<i>Annual Distribution Charges</i>	<i>9122</i>
<i>8.</i>	<i>Less: Interest on Consumer Security Deposits</i>	<i>613</i>
<i>9.</i>	<i>Net Annual Distribution Charges</i>	<i>8509</i>

*5.8.6 As HT consumers are eligible for Open Access, the above Annual Distribution charges have been allocated to them in the ratio of the HT distribution network to the total of HT and LT distribution network. The allocation has been done in the same ratio as submitted by TANGEDCO.*

5.8.7 Based on the above ratio and the approved Annual Distribution Charges, the approved Wheeling Charges per unit for FY 2017-18 is shown in the Table below:

Table 5-28: Approved Wheeling Charges for FY 2017-18

<i>Wheeling Charges</i>	<i>Commission</i>
<i>Energy fed into Grid (in MU)</i>	<i>97,903.15</i>
<i>Transmission Loss up to 110 kV</i>	<i>3.91%</i>
<i>Less: Energy consumed at 230 kV and 110 kV</i>	<i>4,714.95</i>
<i>Energy sent out to Distribution Network</i>	<i>89,360.19</i>
<i>Less: Loss up to 33kV network</i>	<i>1.52%</i>
<i>Energy fed into 33kV and below</i>	<i>88,001.91</i>
<i>Total Annual Wheeling Charges (Rs. Crore)</i>	<i>1852.36</i>
<i>Wheeling charges for Open Access Customer (Paisa/ unit)</i>	<i>21.05</i>

95. Therefore, the entire calculation made in the impugned order, to approve and levy the Additional Surcharge is totally erroneous, without taking in to consideration of all the factors of collection of demand charges etc., to meet out the fixed cost, in a Two-Part Tariff System, as explained above and hence, it has to be set aside.
96. The Tariff Order of the State Commission dated 11.08.2017 has already factored all the fixed costs of the 2<sup>nd</sup> Respondent

TANGEDCO and has arrived at a cost as KVA charges or MD charges @ Rs.350 / KVA. Therefore, whether the HT consumer avails the energy from TANGEDCO or not, the HT consumer has to pay the KVA charges without fail. Hence, levying additional surcharge over and above the KVA charges is amounting to double taxation, while the KVA charges have already been arrived at, taking in to consideration of all fixed costs of the TANGEDCO.

97. It is also not out of context to mention that it may not be relevant to compare wheeling charge & ASC on a per unit basis, since both rates are determined with reference to the different energy levels.

C) Who is a New Open Access Customer?

98. As per the proviso Clause under Clause 24 of the Grid Connectivity and ISOA Regulations 2014, the levy of Additional Surcharge is made applicable only to New Open Access Customer. For the instant reference, the Proviso Clause is reproduced below.

*Provided that any additional surcharge so determined by the Commission shall be applicable only to the new open access customers.*

99. In this connection, the definition provided under Clause 3(q) of the Grid Connectivity and ISOA Regulations 2014 for the term “Open Access Customer” is reproduced below.

*“3(q) ‘open access customer’ means a consumer, trader, distribution licensee or a generator who has been granted open access under these Regulations;”*

100. In this connection, the definition provided under Clause 2(l) of the Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations, 2008 for the term “Open Access Customer” is reproduced below.

*“2(l) ‘open access customer’ means a person who has availed or intends to avail of open access under these regulations and includes a short-term transmission customer as defined in any other regulations, specified by the Commission or a generating company (including captive generating plant) or a licensee or a consumer permitted by the State Commission to receive supply of electricity from a person other than distribution licensee of his area of supply, or a State Government entity authorized to sell or purchase electricity;”*

101. Therefore, in the case of Open Access Customers, depending up on the source of power they avail, the need to apply the Regulation would arise, whether it could be under CERC Regulations 2008 or under TNERC Regulations 2014. Normally, IEX / Bilateral Power is being availed under the Inter-State Open Access Route and therefore, the definition of ‘Open Access Customer’ has to be referred only to the CERC Regulations 2008. In the case of any Intra-State Open Access, like Third Party Open Access alone, it has to be referred with the TNERC Regulations 2014.
102. Normally in the case of any Open Access Customer, willing to avail power from IEX / Bilateral / Third Party Routes, would apply for

Open Access Approval as per Chapter 4 (Application Procedure and Approval) of the Grid Connectivity and ISOA Regulations 2014.

103. Sourcing of IEX power is coming under the definition of Short-Term Open Access. Further, the Grid Connectivity and ISOA Regulations 2014 of the State Commission, specifically makes as below, in Clause 16, while dealing with the matters relating to Inter-State Power.

*“16. Consent by STU, SLDC or Distribution Licensee. –*

*(1) Inter-State open access. - STU in the case of application for grant of long-term open access and SLDC in the case of grant of medium-term open access and short term open access shall convey its consent or otherwise as per the provisions of Central Electricity Regulatory Commission’s Regulations or Orders in force. In case of applicant connected to the distribution licensee, the said distribution licensee shall convey its consent or otherwise within 3 days of receipt of the request of the applicant.”*

104. Therefore, getting a NOC from the Distribution Licensee and a Standing Clearance from the SLDC, has become a routine practice, for grant of Inter State Open Access to the Open Access Customers. Therefore, under all the above, the term “New Open Access Customer”, would always mean to refer, any Customer who applies for the Open Access, only newly and therefore, does not mean any Customer, who has been dealing with the Scheme of Open Access already with the Distribution Licensee / SLDC. Therefore, any Open Access Customer, newly first time applies for

grant of Open Access, by skipping of the power provided by the Utility, would alone be considered as a New Open Access Customer. This has to be applied, when there is no specific definition provided either under the CERC Inter State Open Access Regulations 2008 or under the State Commissions Intra State Open Access Regulations 2014 to define the term “New Open Access Customer”.

105. Further, under Clause 19(1)(g) of the Grid Connectivity and Intra State Open Access Regulations 2014 of the State Commission, it has been made as below.

*“19(1)(g) An existing open access customer shall have the priority higher than new open access applicants under respective category provided the former applies for its renewal thirty days prior to the expiry of existing term of open access;”*

106. Therefore, from the above Clause, it could be understood that who would be an existing Open Access Customer and who would be a New Open Access Customer. Just on the reason on an Open Access Customer applying for NOC and Standing Clearance on a month-on-month basis, due to the system so provided, such continuing Open Access Customers, cannot be treated as New Open Access Customers.

D) The reason behind fixing a 6 months period to review the levy of Additional Surcharge

107. In the Grid Connectivity and ISOA Regulations 2014, in Clause 24 (3), it has been made as below.

*“24(3) The distribution licensee shall submit to the Commission on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply. The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge:”*

108. From the above, it could be seen that the period of 6 months, so fixed in Clause 24(3) of the above Regulation, is to make a calculated statement of fixed cost, by which the licensee would be incurring, towards its obligation to supply power, is to access exactly by a quantum as how the diversion happens from the consumers availing power from the DISCOM to Open Access Power. Therefore, any Customer already receiving supplies through Open Access Power, needs to be exempted and he would have been assessed already for the quantum and therefore, such existing Open Access Customers, would not be taken in to consideration to calculate the statement of fixed costs, by which the licensee would be newly incurring towards its obligation to supply power.
109. It could be seen that the fixed costs submitted by TANGEDCO for the period from Oct 2019 to March 2020, are relating to mostly to the disallowance of Return on Equity and extraordinary expenses. Therefore, the following are the issues that need to be considered.
110. Commission has not carried out the True-Up exercise, since last 5 years and no prudent check of accounts of the 2<sup>nd</sup> Respondent

TANGEDCO has happened, with stakeholders' participation. At such a scenario whether the Commission can undertake such True-Up for a part of the financial year (Oct to Mar 2019-20), when the True-Up for the previous financial years has not been made yet.

111. This aspect assumes significance, for the reason that if during the True-Up exercise of the previous years, if any disallowances are made, it would have a cascading effect during 2019-20 and to that extent, the fixed cost determined by the Commission for determination of Additional Surcharge may warrant redetermination.
112. Further, the Commission has stated that it has collected the 15-minutes time-block data, to determine the average stranded capacity and however, the calculations so stated to be collected and checked prudently, have not been any way placed for a prudent check by the stakeholders in any manner. As the calculations of stranded capacity, is one of the key factors in the determination of Additional Surcharge, the Commission ought to have published this data for the prudent check of the stakeholders. Hence, the whole process of determination of stranded capacity and consequential determination of Additional Surcharge is opaque and not transparent.
113. Neither the TANGEDCO has filed the ARR / True-Up Petitions nor the Commission initiated Suo Motu Proceedings to approve the ARR, for the FY 2019-20. This has not happened since few years from 2016-17 onwards. Therefore, the Commission has not gone through a detailed review of their revenue available and requirement and also the expenses they require by way of a prudent check. This

opportunity of prudent check is also not made available to the stakeholders in any manner.

114. Therefore, the calculation of stranded capacity, based on a 6 months calculation as provided in the Regulation is on a different standard and not as envisaged in the impugned order.

E) Whether the power purchase commitments are continuing to be stranded altogether always

115. Further, according to Clause 24(2) of the Grid Connectivity and Intra State Open Access Regulations 2014, it has been made as below.

*“24(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.”*

116. Either by the Petition filed by the TANGEDCO in M.P. No. 18 of 2020, or by the order of the State Commission impugned before this Tribunal in Appeal No. 177 of 2021, neither the 2<sup>nd</sup> Respondent nor the 1<sup>st</sup> Respondent have clearly demonstrated the concept that the DISCOM is suffering out of its position by *“continuing to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract”*. On this reason also, the impugned order needs to be set aside.

117. It is pertinent to note that while the revised TN Budget 2021-22 was placed before the TN State Assembly on 13.08.2021, the Finance

Minister has mentioned in his Budget Speech as below. Therefore, the concept of “continuing to be stranded” is no way demonstrated by the 2<sup>nd</sup> Respondent TANGEDCO.

*“95) While the aggregate installed power generation capacity in Tamil Nadu is 32,646 MW including wind and solar capacity of 13,128 MW, the actual maximum availability of power during peak requirement is only 14,351 MW as against the peak demand of 16,846 MW. The main reason for peak requirements being unmet is that wind energy is seasonal and solar energy is available only during the day. Almost 2,500 MW of power has had to be bought on the power exchanges to meet peak needs. Thus the statement that Tamil Nadu turned a power surplus State over the last few years is inaccurate.”*

F) No opportunity provided to the Open Access Customers by the State Commission in proper manner to defend the fixation of Additional Surcharge

118. Further, according to Clause 24(3) of the Grid Connectivity and Intra State Open Access Regulations 2014, it has been made as below.

*“24(3) The distribution licensee shall submit to the Commission on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply. The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge:”*

119. Accordingly, the Commission ought to have provided suitable opportunity for the stakeholders, before the Commission decided to

fix the quantum of Additional Surcharge, as proposed by the Distribution Licensee. The Commission would have obtained necessary comments / objections if any, before it determined the amount of Additional Surcharge, as mandated in Clause 24(3), to the extent extracted above. In turn, it is only the Distribution Licensee floated the copy of the petition in M.P. No. 18 of 2020 and called for comments. Accordingly, the Appellant has filed Detailed Comments. However, neither the Commission nor the 2<sup>nd</sup> Respondent have found appraised over the comments in any manner. Hence, the comments/objections so filed by the Stakeholders were not properly allowed for placing before the Commission for arguments and the Commission has finalized the order, without providing any opportunity for the stakeholders, before it passed the order on approving the quantum of the Additional Surcharge as ordered in the impugned order dated 15.04.2021 in M.P. No. 18 of 2020. By this way, the State Commission has completely neglected its obligation to place the matter for obtaining objections if any by the stakeholders and accordingly, violated its own Regulation as provided in Clause 24(3) to the extent extracted above.

- G) The Dissenting Note of the Member of the State Commission not responded properly both by the State Commission in passing the impugned order or by the 2<sup>nd</sup> Respondent while providing the Counter in the matter covered by Appeal No. 177 of 2021.

120. The following was the Dissenting Note provided by one of the Members of the State Commission, which was not properly

responded by the State Commission, before passing the impugned order in M.P. No. 18 of 2020 dated 15.04.2021.

*“During the hearing held on 24.11.2020, Dr.T.Prabhakara Rao, Member, reserved his opinion, as Additional surcharge Petition does not deserve part admission for the reason that the petitioner has not filed the Tariff petition; true-up of accounts can be taken up only after prudent check of accounts. Despite repeated reminders the licensee has not filed Tariff petition”.*

121. However, after the demitting of the office by the said Dr. T. Prabhakara Rao the erstwhile Member of the State Commission on 24.12.2020, the matter was further processed by the remaining Member and Chairperson on their own and accordingly, the impugned order was passed on 15.04.2021, without anyway responding or reacting to the Dissenting Note of the erstwhile Member, who has recorded this opinion so strongly. On this reason also, the impugned order needs to be set aside.

H) Whether the non-filing of ARR and True-Up Petitions from 2016-17 onwards would not vitiate the levy of Additional Surcharge by considering a provisional True-Up

122. The 2<sup>nd</sup> Respondent TANGEDCO has not filed the True-Up Petitions for the year 2016-17 and for all the subsequent years. There was no ARR also found filed by the TANGEDCO after 2016-17. Hence, in the absence of ARR and True-Up Petitions, no consumer is unable to assess the exact financial position of the 2<sup>nd</sup> Respondent TANGEDCO and how it requires to be compensated by a prudent

check of the financial position. In the absence of the same, for so many years, going by a method of adopting by provisional Truing-Up, is no way permitted either under the Electricity Act 2003 or under the Tariff Policies or even under the ISOA Regulations 2014 of the State Commission.

123. Therefore, in the absence of true up for the past many years, the Commission has done a preliminary true up on its own, as provided by the 2<sup>nd</sup> Respondent TANGEDCO and accordingly, the Commission has passed the impugned order, without engaging the stakeholders in the process of evolving a prudent check. This is against the Commission's own Regulations.

I) The Commission has committed a great error in considering the fixed costs relating to network assets.

124. Further, according to Clause 24(2) of the Grid Connectivity and Intra State Open Access Regulations 2014, it has been made as below.

*“24(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.”*

125. Much contrary to the above provision of the Regulation in Clause 24(2), while arriving at the quantum of the Additional Surcharge fixed at 70 paise / unit, in the impugned order, the State Commission has erroneously considered the fixed costs related to network assets also, which process is no way approved by the ISOA

Regulations 2014. Such consideration of fixed costs related to network assets, has to be recovered only through Wheeling Charge and not through the Additional Surcharge on Wheeling Charges. For this reason also, the impugned order needs to be set aside.

126. The Commission has approved the fixed cost for Oct to Mar 2019 as Rs. 3443 Crores, which works out to Rs. 6887 crores of annual fixed cost by calculation. In the previous Tariff Order dated 11.08.2017 in TP No. 1 of 2017, the fixed cost approved by the Commission, for the immediate preceding financial year 2018-19, was only Rs. 5285 Crores and for the periods preceding 2018-19, was between Rs. 4900 and Rs. 5000 Crores. Therefore, a whopping increase of Rs. 1887 crores has been allowed by the Commission as fixed cost, when it was fixed Rs.3443 Crores for 6 months for the period from October to March 2019 alone. In the impugned order, it is mentioned that the fixed cost is in line with the ARR approved in the previous orders. But however, the Commission has not dealt with it independently. This is another element that would significantly influence the calculations and making a whopping increase without any iota of justification.
127. Normally with age, interest cost would come down, while R&M and wages would increase. But, for having the Commission provided an increase of more than 35%, compared to previous year, needs convincing explanations which is totally absent in the impugned order.
128. The Commission has adopted a Formula, wherein from the demand charges paid by the OA consumers during this period, the

components of transmission charges and wheeling charges, in respect of the power availed by OA consumers during the said period, has been deducted and the remaining alone is considered as charges to be adjusted against the fixed cost of stranded capacity. This is not correct. The HT Tariff determined by the Commission in the earlier order includes the transmission charges and network cost, as part of the cost of supply and the tariff is determined based on the cost of supply. When the OA consumers avail power from the TANGEDCO, the tariff they pay includes the transmission and wheeling charges incurred by the TANGEDCO to supply power to them. Therefore, to deduct those charges from the demand charges paid is not correct and would amount to duplication of recovery. The demand charges paid by the consumers are to be adjusted against the fixed cost of the stranded capacity. Therefore, by applying a correct method of calculation the Additional Surcharge now fixed at the rate of 70 paise / unit would come down quite drastically. For the OA power, transmission charges are paid by the OA consumers separately and hence TANGEDCO would not be burdened with that. If it is included again, then it would amount to double taxation.

J) Because of the impugned order, all the existing Open Access Customers have been forced to move to CGP system, instead of coming back to TANGEDCO

129. Due to the cost of 70 paise / unit levied as Additional Surcharge, the existing Open Access Customers of IEX / Bilateral / Third Party sources are finding it difficult to continue with the Open Access System, where they have been paying only Rs.1.67 / unit alone as

Cross Subsidy Surcharges. Because of the new addition to 70 paise / unit as Additional Surcharge, besides to their other Open Access Charges like on Wheeling etc., the whole Open Access System has become unviable to them and they have all shifted to CGP Mode through Group Captive System. Because of the same, the TANGEDCO's Revenue so far received has become zero, as no Cross Subsidy Surcharge or Additional Surcharge as the case may be, is not liable to be paid, when they move to Group Captive CGP Mode.

K) The stranded capacity as claimed by the 2<sup>nd</sup> Respondent is not only due to the Open Access Consumers.

130. The stranded capacity as claimed by the TANGEDCO would not be directly attributable to Open Access Consumers alone. The following other reasons may also contribute to the stranded capacity.

- i. Wrong planning leading to excess tie up than projected demand
- ii. Sporadic weather disturbances leading to load crash
- iii. Transmission Constraints
- iv. Non-availability of fuels (e.g. gas, coal, etc.)
- v. Spinning reserves created as part of the safety measures
- vi. Temporary allocations in Central Generating Stations
- vii. Accommodation to peak generation of Hydro Power Plants
- viii. Accommodation of generation of Renewable Energy sources leading to backing down other generators
- ix. Replacement of costlier power with the reasonable source

131. Therefore, attributing the stranded capacity only on the reason of the Open Access Customers and shifting their power requirements to other suppliers would not be the exact reason for making the TANGEDCO to have stranded capacity.
132. The Commission has given the details of energy consumed during the total period of 6 months and the energy availed by the OA consumers from the DISCOM during the said period. However, there was no break-up data available towards the same and therefore, no stakeholder is able to verify the correctness of the data. Further, it is not sure, if the Commission has considered only the Third-Party OA consumers or has even included the captive Open Access Consumers also. Hence, it requires a thorough and prudent check of the method of calculations and in the absence of such a data, the quantum of the Additional Surcharge cannot be accepted as such.

#### L) Load Shedding

133. While compared with the large portfolio of sources of power, the TANGEDCO handles in the State, the stranded quantum is very minimum, working out to less than 1% only.
134. It is also pertinent to note that the power supply in Tamilnadu is not without any load shedding. Load shedding in the State is a very common affair experienced at all Sub-Station in an intermittent manner during all the days of a year. Therefore, even though the SLDC is not providing any Load Shedding details in its Daily Report, the facts of Load Shedding enforced on all the days cannot be

anyway suppressed or refused. Therefore, such small gaps of less than 1% between the demand and supply, is being always managed by Load Shedding enforced by the 2<sup>nd</sup> Respondent TANGEDCO and therefore, such small gaps in supply and demand cannot warrant a levy of Additional Surcharge in the guise of stranded capacity.

M) Data not available in the Public Domain for comments as how much quantum was utilized for the actual supply vis-à-vis the contracted quantum, as approved by the State Commission

135. Data was available based on the orders of the State Commission, to the extent of the quantum of power approved to be purchased by the TANGEDCO during various periods. However, there was no data made available in the public domain, to verify and comment, as to the fact of how much quantum of power was actually supplied by the TANGEDCO. In the absence of the same, the exact stranded capacity as claimed by the TANGEDCO cannot be demonstrated clearly. If the approvals for purchases are more than the actual requirement, such difference between the actual approvals and actual supplies, cannot always be treated as stranded.

N) Another Additional Surcharge Petition is under proposal to the extent of 85 paise / unit in M.P. No. 30 of 2021 for the next half year commencing from 01.10.2021 onwards up to 31.03.2022.

136. With the all deficiencies as found in the impugned order in M.P. No. 18 of 2020 dated 15.04.2021, the TANGEDCO has filed another petition for seeking further levy of Additional Surcharge to the extent

of 85 paise / unit for the next spell of another half year commencing from 01.10.2021. This needs to be kept in abeyance, till a decision is found out in the present Appeal in Appeal No. 177 of 2021.

### **Reply of Respondent No.2/TANGEDCO**

137. All averments, submissions and contentions raised in the Appeal are denied, except those which are specifically admitted in the present Counter. None of the submissions of the Appellant may be construed to have been admitted by the Respondent No. 2 merely on the ground of specific non-traverse.

138. It is submitted that TANGEDCO filed a Petition (M.P. No. 18 of 2020) under TNERC (Grid connectivity and Intra-State Open Access) Regulations, 2014, for determination of additional surcharge payable by open access consumers, towards recovery of stranded fixed cost of electricity between October 2019 to March 2020. The petition was admitted by the TNERC on 24.11.2020. After inviting written comments and suggestions from various stakeholders, to which TANGEDCO submitted its reply, the TNERC analysed the views, objections, replies and after prudence check the impugned order dated 15.04.2021 was passed. It is respectfully submitted that there is no infirmity with the Impugned Order and the present Appeal has no merit.

139. The Electricity Act, 2003 provides that the following charges may be levied by the distribution licensee on open access consumers:

(a) Wheeling charges (Section 42(3): 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 (Section 42(2): Cross-subsidy surcharge may be levied to compensate for loss of the existing level of cross-subsidy unrecovered due to consumers availing open access.

(c) Additional surcharge (Section 42(4)): Additional surcharge is payable to compensate for any stranded capacity of the distribution licensee on account of consumers taking supply through open access.

140. Section 42 (4) of the Electricity Act provides for the levy of additional surcharge, which reads as under:

*"42. Duties of distribution licensee and open access -*

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

141. Regulation 24 of the TNERC Grid Connectivity and Intra State Open Access Regulations 2014 ("ISOA Regulations"), which deals with levy of additional surcharge is reproduced below.

#### 24. Additional Surcharge:–

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

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

(3) *The distribution licensee shall submit to the Commission on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply. The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge:*

*Provided that any additional surcharge so determined by the Commission shall be applicable only to the new open access customers.*

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

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

142. Thus, in terms of the Act and Regulations in force, a distribution licensee is permitted to levy additional surcharge to compensate for the fixed cost, which arises from the distribution licensee's obligation to pay for the stranded capacity caused by open access consumers. The levy of additional surcharge has also recognised and upheld by the Hon'ble Supreme Court in the case of SESA Sterlite v. OERC (2014) 8 SCC 444, relevant extracts whereof are reproduced below:

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

143. It is submitted that a petition (M.P. No. 15 of 2017) for levy of additional surcharge was initially filed before the commission on 06.09.2017. Although the said petition was admitted, it was taken up for hearing after 1 ½ years, by which time, the data submitted to substantiate the claim of additional surcharge became outdated and irrelevant. Hence, the Petition was withdrawn by TANGEDCO by way of a memo requesting the TNERC to allow TANGEDCO to file

a fresh petition with current data. The earlier petition was accordingly withdrawn as recorded by the TNERC in its order dated 23.09.2019, and M.P. No. 18 of 2020 was filed for determination of additional surcharge, submitting data relevant for the period, October 2019 to March 2020.

144. It is submitted that the TNERC has, in accordance with the requirements of the ISOA Regulations, duly considered all relevant data, including block-wise data of scheduling of power, and data relating to fixed cost after prudence check, and tabulated the same in the Impugned Order. It is submitted that the TNERC has arrived at a rational and reasonable method, consistent with the Act and the ISOA Regulations for computing the stranded fixed cost and the additional surcharge. The TNERC has also considered relevant provisions and orders passed in similar circumstances by other State Electricity Regulatory Commissions.

145. It is pertinent to mention that in a similar appeal filed by M/s. Birla Textile Mills and others against M/s. Himachal Pradesh Electricity Regulatory Commission and Himachal Pradesh State Electricity Board Limited, before this Tribunal vide Appeal No. 155 of 2016 & IA No.333 of 2016, in which similar issues had been raised by the appellants therein, this Tribunal was pleased to decline interference with the Commission's order. Relevant extracts from the order of this Tribunal are reproduced hereinunder:

*“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 present appeal is also being agitated on almost similar grounds and in the order passed in APPEAL NO. 155 of 2016 & IA No. 333 of 2016 the further findings of this TRIBUNAL is as follows.

*“.....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 A. No. 154 of 2016 & batch Page 65 of 72 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 A. No. 154 of 2016 & batch Page 66 of 72 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 A. No. 154 of 2016 & batch Page 67 of 72 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.....”*

*“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. Electricity Act, 2003 (EA 2003) and the Himachal Pradesh Electricity Regulatory Commission (Cross Subsidy Surcharge, Additional Surcharge and Phasing of Cross Subsidy) Regulations, 2006. 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.”*

It is submitted that to the knowledge of the answering Respondent, the above decision has not been reversed so far.

146. It is also pertinent to mention that in spite of the fact that the Respondent No. 2 M/s. TANGEDCO claimed Rs. 1.23 /kWh as Additional Surcharge on Open Access Consumers along with supporting documents, the TNERC has, on the principles and methodologies set out in the Impugned Judgment, allowed levy of additional surcharge only to the extent of Rs. 0.70 per kWh.

147. That the impugned judgment is fully justified and the same has been passed taking into consideration all relevant statutes, consistent with

the approach taken by other State ERCs in various orders, and after duly considering all relevant facts and data.

148. It is respectfully submitted that the Impugned Judgment only allows for levy of additional surcharge so that the loss faced by TANGEDCO on account of stranding of its fixed cost on account of open access, is compensated by the open access consumers. Such levy is entirely consistent with the provisions of the statute and regulations. If TANGEDCO is not permitted to recover such stranded costs, it would increase the regulatory assets of TANGEDCO.

149. It is submitted that it is TANGEDCO's obligation to maintain sufficient capacity on standby, even for open access consumers. As per chapter 7 clause 33 (3) of the ISOA Regulations, "*.....Open access consumers of the Distribution Licensee are eligible for standby support from the Distribution Licensee*". It is especially pertinent that open access consumers avail power from other sources, when available at a cheaper price, and upon non-availability of power at cheaper cost, they avail power from TANGEDCO. In order to maintain uninterrupted supply to all consumers it is necessary for TANGEDCO to maintain the quantum of open access capacity readily available to meet the load as and when power is drawn by the Open Access consumers.

150. For instance, an OA consumer may purchase around 600 MW from IEX on a Sunday when the power is available at a cheaper rate, but on Monday the same OA consumer may not purchase from the IEX, due to non-availability of power at cheap price for which DISCOM

has to supply the power. The DISCOM is thus always under the obligation to maintain stand by capacity taking into account.

151. An illustration of switch over by open access consumers during January 2021 is submitted below:

DATE	POWER OFF-TAKE BY OA CONSUMERS IN IEX IN MW	TIME IN HRS FROM	TIME IN HRS TO	POWER AVAILED FROM TANGEDCO
31.01.21	545	19:00	20:00	NIL
01.02.21	5	19:00	20:00	540

In the above instance, it can be seen that the OA consumer who availed power from the exchange on 31.1.21, did not avail such power on 01.02.21, which clearly shows that they have been availing power from TANGEDCO. Thus, TANGEDCO had to maintain stranded capacity of 545 MW.

152. From the above it is clear that the consumers those who are availing power through Third party sale and power exchanges (viz IEX, PEX etc.) are causing stranded capacity and the fixed charges for the stranded capacity must be compensated by way of additional surcharge in addition to cross subsidy surcharge and wheeling charges.

153. It is pertinent that the TNERC, after due consideration decided to follow the Gujarat model for arriving at the stranded capacity. The procedure for arriving at stranded capacity followed by the Gujarat Electricity Regulatory Commission is as follows:

In Gujarat, additional surcharge has been levied from 2014 onwards. In order dated 12.03.2014 (Petition No. 1302 of 2013), whereby, the GERC determined the methodology for computation of additional surcharge for open access consumers after consultation with all stakeholders, it was *inter alia* stated as follows:

*10.30. While deriving the stranded cost it must be kept in mind that the fixed cost arrived at for the stranded capacity shall be purely attributable to the Open Access Consumers and the distribution licensee, which has the universal service obligation, is appropriately compensated for allowing such open access. The formula for arriving at the stranded cost on account of the Open Access Consumers as well as the compensation to the distribution licensee for its universal service obligation is kept at Annexure-I.*

*The Regulation 25 (3) of the GERC (Terms and Conditions of Intra-State Open Access) Regulations 2011 provides that on the basis of six months data the calculation of obligation of licensee to supply be evaluated with consideration of stranded power procurement of the licensees. In view of the above, the six-monthly details for the period from April 2013 to September 2013 as submitted by the GUVNL, is analyzed and Additional Surcharge on per unit basis is determined as given below- (i) In order to derive the stranded capacity due to Open Access Consumers, the Commission has considered the hourly data of surplus capacity (available capacity – scheduled capacity) vis - a- vis scheduled capacity of OA consumers. The lower of the surplus capacity as shown above and capacity scheduled by OA consumers is considered as stranded capacity for the hour. The average stranded capacity due to OA consumers for the six months period (April 2013 to September 2013) works out as 739 MW.*

154. The same methodology has been followed by the TNERC to arrive at the stranded capacity due to open access for the period from 01.10.2019 to 31.03.2020 by considering the energy availability,

scheduled capacity and open access scheduled quantum based on each 15 min block wise data from SLDC.

### **Findings and analysis**

155. We have heard the Appellant, Impleader, Respondents, have gone through the appeal, replies/written submissions and other documents placed before us. Our observations on the various issues raised in the appeal are as under: -

### **Statutory and regulatory framework**

156. We note the following provisions made in the Electricity Act, 2003 and the TNERC Grid Connectivity and Intra State Open Access Regulations 2014.

157. Under Section 43 of the Electricity Act, 2003 ("**Act**"), a distribution licensee is under a universal obligation to supply electricity upon request.

158. Section 42 of the Act lays down the duties of a distribution licensee and provides for open access:

***"Section 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 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:*

*Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt*

*(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.***

159. Section 42(4) confers the power for levy of additional surcharge on the charges of wheeling, to meet the fixed cost the distribution licensee arising out of its obligation to supply electricity.

160. Regulation 24 of the TNERC Grid Connectivity and Intra State Open Access Regulations 2014 (“**ISOA Regulations**”) provides for the methodology to be adopted for levy of additional surcharge on the following terms:

*“24. Additional Surcharge:–*

*(1) An open access customer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee **an additional surcharge on the charges of wheeling, in addition to***

wheeling charges and cross-subsidy surcharge, **to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under subsection (4) of section 42 of the Act.**

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

(3) The distribution licensee shall submit to the Commission on six monthly basis, **a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply.** The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge:

Provided that any additional surcharge so determined by the Commission shall be applicable only to the **new open access customers.**

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

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

161. From the reading of the above it is clear that under the Electricity Act, 2003, when a consumer or class of consumers are permitted by State Commission 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.**

162. It is also noted that that neither the statutory provision, Section 42(4) of the Act, nor Regulation 24 of the ISOA Regulations, is under challenge. In terms of the ISOA Regulations, for the purpose of determination of ASC, the distribution licensee is required to submit to the State Commission, a detailed statement of fixed costs which the licensee is incurring. The State Commission is required to scrutinize such statement, ascertain objections and determine the ASC.

163. We note the submission of the TANGEDCO that neither the statutory provision, Section 42(4) of the Act, nor Regulation 24 of the ISOA Regulations, is under challenge. Therefore, the rationale and basis for levy of ASC cannot be questioned. It is also noted that no case has been urged that the procedure in terms of Regulation 24 of the ISOA Regulations has not been followed.

164. It is also noted that as per the framework of the Act and the ISOA Regulations, the **relevant factors for determination of ASC are fixed cost and stranded capacity.**

## **Petition and Procedure followed by the State Commission**

165. TANGEDCO in its initial petition, M.P. No. 18 of 2020, sought levy of ASC on all open access consumers including captive consumers. An application was moved by TANGEDCO to amend the prayer to require the State Commission to amend Reg. 24(4) of the ISOA Regulations, 2014 to include captive consumers, which was not permitted by the State Commission. Therefore, the petition ultimately only dealt with ASC on third party open access and IEX transactions (non-CGP).
166. In the Petition, TANGEDCO had submitted its computation for ASC on the basis that the maximum Open Access Quantum allowed was to be treated as stranded capacity. On this premise, TANGEDCO claimed ASC at Rs. 1.40. The State Commission directed TANGEDCO to adopt the Gujarat model for computation of ASC, on which basis, TANGEDCO revised the computation and claimed Rs. 1.23 per unit as ASC.
167. TANGEDCO submitted that between October 2019-March 2020, the fixed cost/ capacity charges paid by TANGEDCO was Rs. 8521.41 Crores and total power purchased by open access consumers was 7982 MU. TANGEDCO submitted that its stranded capacity computed on the basis of the unrecovered fixed cost was submitted to be 1963.5 MW, with the equivalent capacity of open access consumers as 1822 MW.

168. TANGEDCO submitted all such information as was required by the State Commission. As contemplated under Regulation 24(3) of the ISOA Regulations, TANGEDCO submitted the information based on its audited financial statements. Since most objectors represented that the Commission has to take into consideration 15 minutes block-wise data, TANGEDCO also provided such data.
169. **We note** that the Petition was web-hosted pursuant to the State Commission's direction in the hearing held on 29.12.2020 seeking comments from stakeholders. Comments were filed by several stakeholders, including the Appellants herein. TANGEDCO also filed its replies to the comments raised by the stakeholders. After due consideration of such comments and replies, the State Commission passed the Impugned Order. We are of the opinion that the argument of the Appellant that the opportunity was not provided to the stakeholders to make submissions is without any basis and is rejected.

**Justification for Levy of ASC and methodology adopted by the Commission**

170. The State Commission has, after due consideration of the data submitted by TANGEDCO, and objections raised by various stakeholders, determined the ASC.
171. The State Commission arrived at the fixed cost in respect of:
- (a) The own generating stations of TANGEDCO after carrying out a provisional true-up;

- (b) Fixed capacity charges incurred towards power purchase costs from Central Generating Stations (as per tariff approved by the CERC); IPP plants and LTOA traders (as per PPAs); and renewable energy plants (as per the generic tariff orders of the Commission).

172. For arriving at the stranded capacity that can be attributed to open access consumers, the State Commission adopted the following methodology:

- (a) The State Commission considered 15-minute block-wise data, as certified by the State Load Dispatch Centre (“**SLDC**”) for the period between October 2019 to March 2020;
- (b) The block-wise energy scheduled by the open access consumers (“**OA Scheduled Energy**”) was compared with the capacity not availed on the part of the distribution licensee (“**Capacity not Availed**”) for each such block;
- (c) In each time-block, the least of OA Scheduled Energy and Capacity not Availed was considered, and on this basis, the average stranded capacity for the entire period of six months was computed.

**We are of the opinion** that the aforesaid methodology for arriving at the stranded capacity is reasonable and rational. Since where the stranded capacity is greater in quantum than the OA Scheduled Energy, only the OA Scheduled Energy is considered

as capacity stranded on account of open access, it does not saddle the open access consumers with such part of the fixed cost that may be stranded for other reasons.

173. Due adjustment has been made to adjust the demand charges paid by the open access consumers and there is no double charging. Ultimately, the stranded fixed cost has been divided by the scheduled open access energy.

174. The detailed computation of ASC @ Rs. 0.85 per unit on the above principles has been set out by State Commission in the Impugned Order.

175. The State Commission has, in order to rationalize the ASC and ensure that the total charges levied on open access customers does not render open access un-competitive, further reduced the ASC from Rs. 0.85 per unit to Rs. 0.70 per unit.

### **Requirement of True-Up for the purpose of arriving at Fixed Cost**

176. Appellant has submitted that true up of TANGEDCO has not taken place from 2017-17 onwards and that tariff determination has not happened since 2017-18 onwards. The State Commission has only proceeded on the basis of data provided by the respondent TANGEDCO, without making any prudent check.

177. Per Contra, the TANGEDCO has submitted that the ISOA Regulations are not under challenge. Regulation 24(3) provides for submission of statement of fixed cost every 6 months and does not make determination of additional surcharge dependent upon approved ARR or true up figures. The figures submitted by TANGEDCO to the State Commission were based on audited financial statements. The Commission has undertaken prudence check and only upon provisional true-up, arrived at the fixed cost payable.

178. In any event, as evident from the Impugned Order, the fixed cost of TANGEDCO consists of the following components:

- TANGEDCO's own generating stations – fixed cost provisionally trued-up by the Commission;
- CGS or inter-state generating stations and inter-state transmission costs - figures (as trued-up by CERC) have already been taken into consideration;
- IPPs and LTOA traders – fixed cost taken as per capacity charges under the respective PPAs entered into with such IPPs and LTOA traders;
- Renewable energy plants – fixed cost as per determination under generic tariff orders by the Commission.

Therefore, the question of true-up of TANGEDCO's tariff is only relevant for arriving at fixed cost with respect to generating stations within the State.

179. We note the submission of the TANGEDCO that assuming that if only approved power purchase costs is to be taken into consideration then also additional surcharge, computed on the basis of power purchase costs approved by the TNERC in the last tariff order dated 11.08.2017 and other relevant costs approved by CERC, is Rs. 0.65 per unit. TANGEDCO has submitted that In the meanwhile, at least additional surcharge on the basis of such approved costs must be taken into consideration.

#### **New open access customers**

180. The Appellant has submitted that the Regulation 24(3) stipulates that open access has to be levied upon 'new open access customers' only.

181. TANGEDCO has submitted that by way of the Impugned Order, the State Commission has directed that ASC as determined there under shall be collectable from 16.04.2021 to 30.09.2021 from consumers who purchase the power through third party sale and power exchanges.

183. Thus, as per the Impugned Order, each consumer who avails power from third party sources during the stipulated period

16.04.2021 to 30.09.2021 is a new open access customer upon whom ASC is levied.

184. TANGEDCO has submitted that the said interpretation is consistent with the underlying principle for levy of ASC as well as the practice followed while availing open access. Since the purpose of levy of ASC is to compensate the distribution licensee for stranding of capacity and consequently stranded fixed cost, irrespective of the duration of the open access permission, each time a consumer seeks to schedule power through open access, such consumer is effectively a “new consumer”. In this context, it is relevant that under the Grid Code, scheduling of power takes place on a daily basis. [*Regulation 8(5) of the Grid Code*]

185. It is therefore submitted that each open access customer who schedules power from a third-party source or power exchange through open access within the period [16.04.2021 to 30.09.2021] is a new open access customer.

186 It is submitted that if any other interpretation is given, it would render the levy of additional surcharge meaningless considering that the fixed cost will remain stranded.

187. Without prejudice to the above, and purely in the alternative, each time that open access permission expires, and has to be availed, the open access customer becomes a new open access customer. Each application for open access is a fresh application. There is no concept of renewal of open access under the ISOA Regulations.

**[Procedure for grant of LTOA, MTOA and STOA are found in Regulations 13, 14 and 15 respectively of ISOA Regulations]**

188. Reference to Regulation 19 of the ISOA Regulations is also misplaced, inasmuch as the said Regulation only provides for priority in allotment and has no bearing upon levy of ASC.

189. In view of the above we agree with the interpretation of New Open Access consumer as given in the Impugned order.

**Demand Charge does not fully recover the fixed cost.**

190. It is the case of TANGEDCO that the demand charges payable by open access consumers to TANGEDCO does not compensate fully the fixed cost payable by TANGEDCO to generators, as tariffs are heavily skewed where more than 60% of fixed cost is recovered through energy charges from the consumers.

191. As a result, unless the energy is sold and energy charge is recovered, more than 60% of the fixed cost remains unrecovered. In fact, as demonstrated by TANGEDCO in its Counter- Affidavit, the fixed cost that remains unrecovered from open access customers is Rs. 2.35 per unit.

192. It has been submitted by TANGEDCO that as is demonstrated from the computation of ASC in the Impugned Order, the demand charge recovered from open access customers (after deducting components pertaining to transmission and distribution costs) has been adjusted against the stranded fixed cost, in order to arrive at

the net stranded fixed cost to be recovered from open access customers.

193. This again ensures that there is no double-recovery of fixed cost from the open access customers.

194. We note the submission of TANGEDCO that in any event, when fixed cost is stranded on account of open access consumers, such stranded fixed cost is recovered from the regular consumers of TANGEDCO as well as open access customers. Therefore, the fact that some part of the fixed cost is being recovered through demand charge is irrelevant. As held by the State Commission in the Impugned Order *“unless fixed costs due to stranded capacity are recovered from OA consumers, this burden would be unjustly loaded onto other Consumers of Distribution Licensee. The Commission believes it would be unfair and unwarranted to pass such burden of fixed cost recovery of such stranded cost to other consumers through tariff hike.”*

**ASC is levied to compensate for continuous stranding of capacity attributable to open access**

195. The primary plea urged by the Appellants in the Appeal is that it is incumbent upon TANGEDCO to demonstrate continuous stranding of capacity.

196. TANGEDCO has submitted that the State Commission has relied upon data certified by the SLDC to ascertain the stranding of capacity. Further the methodology adopted in the Impugned Order

ensures that only such capacity that is stranded on account of open access consumers is taken into consideration for levy of ASC.

197. The other contention urged by the Appellants is that since TANGEDCO has to purchase power through STOA and from the exchange, capacity cannot be said to be stranded.

198. TANGEDCO has submitted as under:

- (a) There is no load shedding in the State of Tamil Nadu and restriction and control measures have been lifted in the year 2015 itself. In fact, without any load shedding by TANGEDCO, it had already met its peak demand of 15664 MW at 19.05 hrs on 19.03.20, during Oct 2019 to Mar 2020.
- (b) As noted and directed by the Commission in its Tariff order No. 1 of 2017 dated 11.08.2017 (at para no.4.15.7) as well as the Impugned Order, short term power procurement is necessitated for efficient power procurement, to meet peak demand, seasonal imbalances etc.
- (c) In fact, the continuous shifting of source by open access consumers leads to stranding. As the distribution licensee, TANGEDCO is enjoined to maintain standby support for open access customers in terms of Regulation 33(3) of the ISOA Regulations.

199. TANGEDCO has relied on the Judgment passed by this Tribunal **Appeal No. 154 of 2016 dated 09.08.2019, Birla Textile Mills & Ors. v. Himachal Pradesh Electricity Regulatory Commission &**

**Ors.**, wherein this Tribunal has rejected similar challenges to the levy of additional surcharge and refrained from interfering with the methodology adopted by the State Commission while computing additional surcharge.

200. We are of the opinion that the methodology adopted by the State Commission in the Impugned Order is correct as it clearly demonstrates continuous stranding of the capacity on account of open access consumers resulting into non recovery of fixed cost.

201. We note the submission of TANGEDCO that due to stranding of capacity on account of open access consumers, a significant portion of the fixed cost is unrecovered. In fact, Rs. 2.35 per unit is the unrecovered fixed cost from open access consumers. Despite this, the ASC determined in the Impugned Order is only Rs. 0.70/- per unit.

202. We agree with the submission of TANGEDCO that The Appellants' plea that levy of ASC would burden the open access consumers who are already paying CSS at Rs. 1.67 per unit has no bearing upon the levy of ASC. Firstly, the statutory basis, and purpose of levy of ASC and CSS is entirely different. This has been recognized by the Hon'ble Supreme Court in **SESA Sterlite v. OERC (2014) 8 SCC 444 @ para 25**.

203. We also note that if the contentions of the Appellants were to be accepted, it would tantamount to requiring all other consumers of TANGEDCO to bear the burden of choice exercised by open

access customers. We also agree with the State Commission that it is unfair to saddle other consumers with such unrecovered cost.

204. In view of the above we are of the considered opinion that the Impugned Order dated 15.04.2021 passed by the Respondent No. 1/ TNERC in the M.P.No. 18 of 2020 does not call for any interference by this Tribunal and accordingly the Appeal No. 177 of 2021 is dismissed as devoid of merit.

205. During the course of hearing TANGEDCO assured that the petitions for approval of ARR for all the pending years shall be filed by them by the end of November, 2021. We direct TANGEDCO to expeditiously file the petitions for approval of ARR for all the pending years by the end of November, 2021. We also direct the Respondent No. 1/ TNERC to take up the task of determination of tariff on fast track mode and pass the Tariff Order within three months from date of pronouncement of this Judgment.

206. The pending applications, if any, are disposed of in above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO  
CONFERRING ON THIS 15<sup>th</sup> DAY OF NOVEMBER, 2021.**

**(Justice R.K. Gauba)  
Judicial Member**

**(Ravindra Kumar Verma)  
Officiating Chairperson**

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**REPORTABLE/NON-REPORTABLE**

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