

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

**APPEAL NO. 260 OF 2018  
AND  
APPEAL NO. 43 OF 2021**

Date : **15.09.2022**

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson  
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

**APPEAL NO. 260 OF 2018**

**In the matter of:**

1. **RENEW POWER LIMITED**  
Commercial Block -1, Zone 6,  
Golf Course Road, DLF City Phase –V,  
Gurugram – 122009  
Haryana.
2. **RENEW SAUR URJA PVT. LTD.**  
138, Ansal Chamber-II, Bikaji Cama Place,  
New Delhi – 110066
3. **RENEW WIND ENERGY (BUDH-3) PVT. LTD.**  
138, Ansal Chamber- II,  
Bikaji Cama Place  
New Delhi – 110066
4. **RENEW SAUR VIDYUT PVT. LTD.**  
138, Ansal Chambers – II  
Bhikaji Cama Place  
New Delhi – 110066

.....Appellant(s)

**VERSUS**

1. **BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED**  
Through its General Manager  
KR Circle, Bengaluru – 560 001
2. **CHAMUNDESHWARI ELECTRICITY SUPPLY COMPANY LTD.**  
Through Managing Director,  
No. 29, Kaveri Grameena Bank Road,  
Hinkal, Vijayanagar, 2<sup>nd</sup> Stage,  
Mysuru – 570 017.

3. **MANGALORE ELECTRICITY SUPPLY COMPANY LIMITED**

Through its Chairman and Managing Director  
MESCOM Bhavana,  
Kavoor Cross Road,  
Bejai, Mangaluru – 575 004.

4. **HUBLI ELECTRICITY SUPPLY COMPANY LIMITED**

Through its Managing Director  
P.B. Road, Navanagar  
Hubballi – 580 025.

5. **GULBARGA ELECTRICITY SUPPLY COMPANY LIMITED**

Through its Managing Director  
Station Road, Kalaburagi – 585102, Karnataka.

6. **KARNATAKA ELECTRICITY REGULATORY COMMISSION**

Through its Secretary,  
No. 16, C-1, Millers Tank Bed Area,  
Vasanth Nagar, Bengaluru – 560052  
Karnataka, India.

...Respondent(s)

Counsel for the Appellant (s) : Mr. Anand K. Ganesan  
Ms. Ashabari Thakur

Counsel for the Respondent (s) : Mr. S. Sriranga Subbanna, Sr. Adv.  
Ms. Sumana Naganand  
Ms. Samiksha Jain for R-1 & R-3

**APPEAL NO. 43 OF 2021**

**In the matter of:**

**TULSYAN NEC LIMITED**

Through its Chief Financial Officer  
No.37, Kaveriappa Layout,  
Millers Tank Bund Road,  
Vasanth Nagar  
Bangalore – 560052

... Appellant(s)

**VERSUS**

1. **BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED**

Through its General Manager,  
KR Circle,  
Bengaluru – 560 001

2. **KARNATAKA ELECTRICITY REGULATORY COMMISSION**

Through its Secretary,  
No. 16, C-1, Millers Tank Bed Area,  
Vasanth Nagar, Bengaluru – 560052  
Karnataka, India

.... Respondent(s)

Counsel for the Appellant (s) : Mr. Anand K. Ganesan  
Ms. Ashabari Thakur

Counsel for the Respondent (s) : ----

**J U D G E M E N T** (Oral)

**PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON**

1. The appellants in the two captioned appeals are open access customers drawing electricity from sources other than the distribution licensees operating in the State of Karnataka. They are aggrieved by the determination of additional surcharge under Section 42(4) of the Electricity Act, 2003 by *Karnataka Electricity Regulatory Commission* (hereinafter referred to variously as, “KEREC” or “State Commission”) by Order dated 14.05.2018 on Petitions (OP nos. 52-56 of 2017) which had been presented by the distribution licensees operating in the State of Karnataka, the said licensees being respondents in these appeals. By the impugned decision, the State Commission has, *inter alia*, directed that open access customers procuring power from sources other than renewable energy generators (such sources inclusive of power exchanges) which have been granted concessional wheeling charges shall pay an additional surcharge of Rs.0.54/unit while open access customers procuring power from

renewable energy generators who have been granted concessional wheeling charges shall pay additional surcharge of Rs.0.13/unit, such levy not to be applicable to the captive consumers to the extent of their captive consumption and to be in force for the period of Financial Year (FY) 2018-19.

2. The prime contention of the appellants challenging the legality, correctness and propriety of the above determination is that it is not based on scientific data as was necessary, it not having been “conclusively demonstrated” that the obligation of a licensee, in terms of the existing power purchase commitments, has been and continues to be affected, or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract.

3. It is pointed out that the levy of additional surcharge on wheeling charges is permitted by the law, in terms of provision contained in Section 42(4) with the avowed objective “*to meet the fixed cost of such distribution licensee arising out of his obligation to supply*”. It is also pointed out that National Tariff Policy 2016 guides the process on the subject at hand as under:

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

4. The State Commission has framed Open Access Regulations which are of 2004 vintage, applicable to the period of FY 2018-19, wherein the principle set out in the National Tariff Policy 2016 has been adopted in Regulation 11 reading thus:

*“11. Open Access Charges*

*The charges for the use of the transmission/distribution system by an open access customer shall be regulated as under:*

*...*

*(vii) According to section 42(4) of the Act, additional surcharge as may be specified by the Commission on charges of wheeling are payable by the consumer seeking open access for receiving supply from a source other than the distribution licensee of his area of supply to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The open access customer shall be liable to pay such additional surcharge as may be determined by the Commission from time to time. Such additional surcharge shall be 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. However, in the case of new open access customer (i.e. if the open access customer was not a consumer of the licensee), no such additional surcharge is payable.”*

5. The appellants had submitted objections to the proposal for levy of the additional surcharge as brought before the State Commission through the above-mentioned petitions for approval. But, it appears the submissions in opposition have not been properly or comprehensively dealt with by the State Commission in the impugned decision.

6. We agree that the basic rationale for imposition of additional surcharge is that the distribution licensees having entered into Power Purchase Agreements (PPAs) based on the demand in the State, under

which there is an obligation to pay fixed charges, are entitled to the compensatory relief in the nature of additional surcharge. But, for this it is necessary for the distribution licensee demonstrates that they are unable to schedule power under the PPAs on account of open access customer taking power from other sources, the power procured by the licensees consequently getting stranded, this resulting in obligation on their part to pay fixed charges, the relief in the nature of additional surcharge being compensatory [*SESA Sterlite v. OERC* reported in (2014) 8 SCC 444 and *Maharashtra State Electricity Distribution Company Limited v JSW Steel Limited & Ors.* (2022) 2 SCC 742]

**7.** It is the contention of the appellants that most basic data that is essential to be gathered for examining whether or not there is any stranded capacity on account of the drawal of power by the open access customers from other sources comprises the information as to the extent to which the licensees were compelled to back down any long term power source during the time blocks when there was open access concession, the distribution licensees were constrained to procure power on short term basis, and the distribution licensee had to take resort to power cuts or regulate the power supply in the State this being indicative of insufficient availability of power to meet the actual demand.

**8.** In the submissions of the appellants, in order to examine and compute the claim of stranded capacity and computation of additional surcharge, information as to open access consumption, unscheduled

capacity, short term power purchase and power cuts imposed, if any, on time block basis is sine qua non. The submission is that since such exercise was not undertaken by the Commission, it cannot be said that the distribution licensees had conclusively demonstrated their case for approval of the rate proposed for determination of the additional surcharge.

**9.** As noted earlier, the impugned order relates to FY 2018-19. At the hearing, we were informed that similar orders have been passed continuing the regime of additional surcharge under Section 42(4) of the Electricity Act, 2003 by the Commission for the subsequent control periods, from time to time. It is not denied that such subsequent orders were not brought to challenge and thus have attained finality and are binding on all parties including the open access customers in which category the appellants herein fall.

**10.** Against the above backdrop, the learned counsel for the appellants fairly conceded that it would be appropriate that suitable directions for future are given to the Commission, the appellants not pressing the present appeals for any relief *qua* FY 2018-19.

**11.** The learned counsel for the distribution licensees submitted that he has no objection to the limited directions that are now being pressed for.

**12.** On the foregoing facts, and in the circumstances, we direct that the State Commission shall bear in mind the submissions of the appellants in above nature which, of course, they will be entitled to expound further at

the hearing as and when the Commission sets about to pass an order of such nature for the next control period.

**13.** We would impress upon the Commission the need to bear in mind the guidance on the subject provided not only by the National Tariff Policy but also the Regulations framed by the Commission itself wherein the muster prescribed is *conclusive demonstration* of existence of the factors justifying such levy.

**14.** The appeals are disposed of in above terms.

**(Sandesh Kumar Sharma)**  
Technical Member

vt/mkj

**(Justice R.K. Gauba)**  
Officiating Chairperson