



Delhi Electricity Regulatory Commission
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 17

No. F. 11(1477)/DERC/2017-18/5731

Petition No. 14/2017

In the matter of: **Petition u/s 142 and 42(2) of the Electricity Act, 2003 against the non-compliance of the Distribution Licensees of Delhi and regarding incorrect imposition of wheeling charges and non-adherence of DERC Open Access Orders dated 24.12.2013 and 18.05.2015, read with Regulations 17 and 18 of DERC (Open Access) Regulations, 2005.**

Gaurav Nand,
Consumer Representative
T-44 Karampura,
New Delhi 110015

....Petitioner

Vs.

1. BSES Rajdhani Power Limited
Through its: **CEO**
BSES Bhawan, Nehru Place,
New Delhi-110019
2. Tata Power Delhi Distribution Ltd.
Through its Managing Director
Grid Sub Station Building
Hudson Lines, Kingsway Camp,
Delhi 110 009
3. BSES Yamuna Power Ltd.
Through its: **CEO**
Shakti Kiran Building,
Karkardooma
New Delhi – 110092
4. State Load Despatch Centre
Delhi Transco Limited
33KV Sub Station Building,
Minto Road,
New Delhi 110 002

...Respondent

Coram: Sh. B.P. Singh, Member

ORDER

(Date of Order: 18.01.2018)

1. The instant Petition has been filed by Mr. Gaurav Nand against BRPL (Respondent No. 1), TPDDL (Respondent No. 2), BYPL (Respondent No. 3) and SLDC (Respondent No. 4) for alleged incorrect imposition of wheeling charges

and non-adherence of DERC Open Access Orders dated 24.12.2013 and 18.05.2015, read with Regulations 17 and 18 of DERC (Open Access) Regulations, 2005. The petitioner has made following prayers in the Petition:-

- (i) Direct the Respondents No. 1, 2 and 3 (BRPL, BYPL and TPDDL namely) to levy Wheeling Charges on the quantum (in MWh) cleared by NLDC in Collective Transactions for Open Access Consumers of Delhi as per the Commission's Open Access Orders dated 24.12.2013 and 18.05.2015.
- (ii) Direct the Respondents No. 1, 2 and 3 to refund the amount incorrectly levied while imposing wheeling charges on the consumers within a month's time.
- (iii) Non-Compliance of the provisions of Commission's Orders dated 24.12.2013 and 18.05.2015 by the Respondents shall be dealt as per Section 142 of the Electricity Act, 2003.
- (iv) Issue such direction for the smooth implementation of Open Access and promotion of Competition in the sector.

SUBMISSIONS BY THE PETITIONER

2. The petitioner has made following submissions in the petition that;

- a) According to the Open Access Orders passed by the Commission dated 24.12.2013 and 18.05.2015 for the recovery of open access charges (Wheeling charges, Cross-subsidy surcharge and Additional surcharge) the mechanism for imposition of wheeling charges calculation on its scheduled quantum and not on its contract capacity is clearly explained as below:

Para 11A of DERC Order dated 24.12.2013 *"Transmission and Wheeling charges shall be leviable as determined by DERC. The charges will be levied on the quantum in MWh cleared by the concerned SLDC for bilateral transactions and National Load Despatch Centre (NLDC) in case of collective transactions. Provided that when the capacity has been reserved consequent to bidding, the Open Access charges will be taken as determined through bidding."*

Clause 4, DERC Order dated 18.05.2015 *"The transmission charges, Wheeling charges, Additional Surcharge & Cross Subsidy Surcharge shall be levied on open access quantum cleared by the nodal agency."*

- b) the DERC Open Access Orders are clear regarding the imposition of Wheeling charges on the scheduled quantum cleared in MWH by NLDC. However, the Respondents No. 1, 2 and 3 are not complying with the mechanism of imposition of wheeling charges explained in the Open Access Orders and are imposing the wheeling charges on the contract capacity of the consumers.
- c) the Respondent No. 1, BRPL started the flawed practise by calculating the wheeling charges on the full contract demand instead of calculating the same on its scheduled quantum. This matter was clarified by the Respondent No. 4, SLDC and Minutes of meeting was issued on 18.10.2016 however even after such clarification BRPL did not comply with the directions and the other distribution licensees also joined this trend of calculating the wheeling charges on full contract demand instead of calculating it on the scheduled open access quantum cleared in MWH by NLDC in collective Transactions.
- d) the Respondent no. 2, TPDDL and Respondent No. 3, BYPL were raising all its previous monthly open access bills in line with DERC Open Access orders dated 24.12.2013 and 18.05.2015 for the collection of various open access charges including Wheeling charges, Cross subsidy surcharge and additional surcharge since the issuance of Open Access Order in 2012 till December, 2016, but when no relevant measures were taken against the Respondent no. 1, BRPL and no stern action was taken against them, the Respondent no. 2, TPDDL also started imposing wheeling charges on the contract capacity of the consumers.
- e) the Respondent No. 3, BYPL too became part of incorrect wheeling charges imposition after following the flawed trend of Respondent No. 1, BRPL. It was raising all its bills correctly since the issuance of the Open Access Order in 2012 till December 2016 but all of a sudden BYPL sent an exorbitantly high retrospectively calculated bill with arrears and imposed an amount of Rs. 1.2 crores by calculating the wheeling charges on the contract capacity of the consumer. While DERC order is very clear on the imposition of Wheeling Charges on the Scheduled Open Access Quantum cleared by NLDC (Nodal Agency of Power Exchange Transactions) but the Respondent No. 3, BYPL is misinterpreting the Regulation 11(1) of DERC Open Access Regulations, 2005 for the imposition of Wheeling Charges on the consumer. The extract of the Regulation is given below:

“11(1) Non-Utilisation of open access capacity: In the event of inability of the short term open access customer to utilize, continuously for more than four hours, on any day, full or substantial part of the capacity allocated to him, such a short term open access customer shall inform the respective state load dispatch centre of his inability to utilize the capacity allocated to him. However, such short term open access customer shall bear full transmission and/or wheeling charges based on the original capacity till the time such capacity is allocated to the customer.”

- f) Discoms are misinterpreting the above Regulation 11(1) of DERC Open Access Regulations, 2005 on the basis of the reserved capacity in regard to the imposition of wheeling charges on the consumer. In collective transactions or power exchange market, schedules are reserved through bidding in a day ahead market. Therefore, the reserved capacity as per the above regulation has to be correctly interpreted and imposed on the day-ahead scheduled quantum that has been placed for bidding in a day-ahead market. It is further submitted before the Commission that these DERC Open Access Regulations, 2005 was notified in 2005 when Collective transactions (Power Exchange) was not even in existence, and power exchange was operationalised in the country in the year 2008 (after the DERC Open Access Regulations, 2005). Also, to implement Open Access guidelines, the DERC notified detailed Open Access order dated 24.12.2013 and later amended on 18.05.2015 to give full clarity for the implementation of Collective Transactions (Power Exchange) and to give effect to its Regulation and Order with practical implementation in regard to the recovery of various open access charges (Cross-subsidy, Additional Surcharge and Wheeling charges) including the aforementioned subject-matter i.e. the imposition of wheeling charges.
- g) BYPL not only incorrectly calculated the wheeling charges on the contract capacity but also revised the previous bills of the consumer M/s Avdhut Swami Metal Works retrospectively and raised an arrear bill of Rs. 1.20 crores on the consumer. The consumer deposited the Bill under protest as per section 56 of the Electricity Act, 2003 but BYPL threatened to encash its BG (Bank Guarantee) maintained in favor of BYPL.
- h) the respondent No. 4, SLDC called a meeting on 02.03.2017 under Regulation 16(1) of DERC Open Access Regulations, 2005 to resolve the issue of wheeling charges in which the Respondent No. 3, BYPL submitted that it shall encash the BG of the consumer. The Respondent No. 4, SLDC wrote a letter to the Commission on 3.03.2017 under Regulation 16(2) of DERC Open Access Regulations, 2005 to resolve the above wheeling

charges matter on an urgent basis as BYPL will encash the BG of the Consumer M/s Avdhut Swami Metal Works.

- i) since the DERC Open Access Regulation, 2005 was notified before the operationalisation of Collective Transactions (Power Exchanges operationalised in 2008) and hence to give clarity and effectiveness and to implement Open Access in Delhi as per Electricity Act, 2003 and the CERC/DERC applicable open access guidelines, the DERC notified a detailed open access order dated 24.12.2013 and later amendment on 18.05.2015 to give full clarity for the implementation of Collective Transactions (Power Exchange) and to give effect to its Regulation and Order with practical implementation in regard to the recovery of various open access charges (Cross Subsidy Surcharge, Additional Surcharge and Wheeling Charges) wherein it is explicitly given that the wheeling charges shall be calculated on the scheduled quantum of the consumer. It is further submitted that the order dated 18.05.2015 also stated the imposition of Wheeling on scheduled open access quantum only.

- j) the Petitioner herein in the capacity of a consumer Representative of the HT Consumers of Delhi and a recognized consultant before the DERC, JERC, CERC and the Delhi Government under the Umbrella of the Organization, IERS and wants to accentuate the non-compliance by the Discoms for the imposition of the wheeling charges on the contract capacity. This practice is illegal and contravenes the Open Access Orders wherein the mechanism of imposition has been clearly and explicitly explained. The wheeling charges shall be levied on the quantum in MWH cleared by the concerned SLDC for bilateral Transaction and NLDC for Collective Transactions.

SUBMISSIONS BY THE RESPONDENTS

3. The Respondent No. 1, BRPL and Respondent No. 3, BYPL submitted a joint reply to the petition stating the following:
 - a) The present petition ought to be dismissed in limine in view of the Order of the Commission dated 01.06.2017 in "The Matter of Determination of Open Access Charges and related matters". In terms of Clause 2.1 (3) of the said Order, "...The Transmission charges, wheeling charges shall be levied on the maximum open access quantum approved by the nodal agency in its conditional consent form ST-5B...."

Clause 11(2) of the same Order also records, *inter alia*, that:

"...Notwithstanding such repeal, anything done or purported to have been done under the repealed Order shall be deemed to have been done or purported to be done under this order...."

There is thus a "deeming fiction" contained in the said Order dated 01.06.2017. It is therefore submitted that if, under the Old Orders dated 24.12.2013 and 08.05.2015, the licensee had been charging transmission and wheeling charges on the maximum quantity approved by SLDC (and not on the actual drawl), such billing is "...deemed to have been done ...under this Order...". Hence, by virtue of the said deeming fiction, all such actions taken earlier, but in accord with the current dispensation have been ratified retrospectively by this Order.

On this short ground alone, the present petition is liable to be dismissed.

- b) the present petition is an abuse of the process of court since the present petitioner does not have a *locus standi* to maintain the present petition. The petition itself records that the petitioner is preferring the same as a "consumer representative". The petitioner is not an "authorized consumer representative" under Section 94(3) of the Electricity Act, 2003. The petitioner is nothing but an interloper who is, to the best of the Respondent's belief trafficking in litigation. The petition as framed suggests that the Petition is preferred on behalf of certain unnamed and undisclosed consumers. It is submitted that none of those consumers is a petitioner in the cause. The only petitioner is one "Mr. Gaurav Nand" who undisputedly is not an open access consumer. The petition is also not framed, nor could it so be, in a representative capacity. There is no *lis* between the petitioner and the licensees nor does the petition disclose any *lis*. The petition only discloses the facts of one consumer by the name of "Avdhut Swami Metal Works". The fact is that Avdhut Swami itself has preferred its own petition under Section 142 against BYPL. Hence, for the present petitioner to prefer his own petition in his independent and individual capacity in the guise of a "consumer representative" and espousing the cause of only Avdhut Swami in the petition is a clear and unmitigated abuse of the process of this Hon'ble Commission.
- c) the present petition is also not maintainable also for the reason that the essence of the dispute raised by the petitioner is *strictu-senso* a dispute between a consumer and a licensee pertaining to bills raised by the licensee on such consumer. It is hence a 'billing dispute' in the guise of a petition under Section 142 of the electricity Act, 2003. It is submitted that

the present petition has been filed deliberately, willfully and wrongly invoking Section 142 of the Electricity Act, 2003 with the express intention of avoiding the individual consumers invoking their Statutory remedy of raising such dispute before the Consumer Grievance Redressal Forum (CGRF) under Section 42 (5) of the Electricity Act, 2003. It is submitted that as laid down by the Hon'ble Supreme Court, this Hon'ble Commission would ordinarily not exercise jurisdiction in a matter which strictly and properly is ascribable to a dispute under Section 42 (5) to be raised before the CGRF.

- d) the present petition alleges violation of the Order of the Commission dated 18.05.2015 apart from the fact that the Order dated 18.05.2015 was passed without hearing the licensee, the said order is pending in Appeal before the Hon'ble APTEL in Appeal No. 164-165 of 2015.
- e) the charging of wheeling charges by the licensee was and is completely in accordance with the 2005 Open Access Regulations of the Commission. Clause 11 of the Regulation reads as under;

"11. Non-utilisation of open access capacity:

In the event of inability of the short-term open access customer to utilize, continuously for more than four hours, on any day, full or substantial part of the capacity allocated to him, such a short term open access customer shall inform the respective State Load Dispatch Centre of his inability to utilize the capacity, along with reasons, thereof, and may surrender the use of capacity allocated to him. However, such short-term open access customer shall bear full transmission and/or wheeling charges based on the original reserved capacity till the time such capacity is allotted to some other customer."

- f) the Regulations as they stand are eminently clear that the short-term open access consumers shall bear the full transmission and/or wheeling charges based on the original reserved capacity. The licensees have billed the short-term open access consumers like the petitioner herein on the basis of originally reserved capacity. It is therefore submitted that as such no fault can be laid at the hands of the licensees.
- g) the petitioner has sought to contend on the billing by the licensees on the basis of the original reserved capacity is erroneous and for this purpose the petitioner relies on the orders of this Hon'ble Commission dated 18.05.2015 and 24.12.2013. It is submitted that under the law the Regulations of the Commission framed under Section 181 of the Electricity

Act, 2003 would supersede and over ride the orders passed by the Commission. Hence, if there is at all any conflict in the provisions of the Orders and the Regulations, the Regulations will prevail and to the extent of such conflict the Orders would non-est and void. As such there can be no question of the licensee allegedly violating the orders of this Commission if such alleged action is in accordance with the Regulations framed by the Commission. Undisputedly the billing by the licensees is fully in accordance with the Regulations of this Commission. This is even more so when the self same issue has been specifically raised before this Hon'ble Commission in the submissions filed on 20.01.2017 and this Hon'ble Commission having accepted the licensees submissions have corrected the position in its Order dated 01.06.2017. It is submitted that the Order dated 01.06.2017 in this regard has specifically, ratified the position as it always stood under the 2005 DERC Open Access Regulations.

h) even in meetings between various stakeholders including the SLDC, the Commission has agreed in the meeting held on 23.06.2015 that Cross Subsidy Surcharges and Additional Surcharge has to be levied on the approved quantum of power and not on the actual consumption. In point of fact, the Respondent licensees have been charging Cross Subsidy Surcharge and Additional Surcharge only on actual consumption which, today, is completely in accord with the recent Order dated 01.06.2017.

4. The Respondent No. 2 M/s TPDDL in its written submissions has also made similar submissions as made by Respondent No. 1 & 3.

ANALYSIS AND ORDER

5. The Commission vide order dated 12.06.2017 has already decided on the maintainability of the petition on the issue of *locus standi* of the petitioner.

6. On the issue whether the transmission and/or wheeling charges are applicable on the quantum cleared by the SLDC or on the original capacity allocated the Consumer, it is relevant to mention that the Orders on Open Access should be read in conjunction with the relevant Regulations and if there is some conflict between the provisions of the Regulations and the provisions of the Orders made thereunder, the law is very clear on the supremacy of the Regulations over the Orders. Therefore, the Regulations will prevail to the extent of such conflict.

7. Regulation 11(1) of the DERC Open Access Regulations, 2005 on transmission and wheeling charges is reproduced as under:

*“11(1) Non-Utilization of open access capacity: In the event of inability of the short term open access customer to utilize, continuously for more than four hours, on any day, full or substantial part of the capacity allocated to him, such a short term open access customer shall inform the respective state load dispatch centre of his inability to utilize the capacity allocated to him. **However, such short term open access customer shall bear full transmission and/or wheeling charges based on the original capacity allocated to the customer** till the time such capacity is allotted to some other customer.”*

It is evidently clear from the Regulation 11(1) of the DERC Open Access Regulations, 2005 that the transmission and/or wheeling charges are payable on the original capacity allocated to the consumer.

8. In view of the aforesaid, no intervention of the Commission is warranted and the Petition is dismissed.
9. Ordered Accordingly.

**Sd/-
(B.P. Singh)
Member**