



**JOINT ELECTRICITY REGULATORY COMMISSION
FOR THE STATE OF GOA AND UNION TERRITORIES
GURUGRAM**

QUORUM

Shri M.K. Goel, Chairperson

Petition No. 45/2021

Date of Hearing: 15.06.2021

Date of Order : 19.08.2021

In the matter of:

Petition under Section 9, 42, 86 & other applicable provisions of the Electricity Act, 2003 read with the provisions of the JERC (Connectivity and Open Access in Intra-State Transmission and Distribution) Regulations, 2017.

And in the Matter of :

Amplus Energy Solutions Private Limited

Registered Office:

A-57, DDA Sheds,
Okhla Industrial Area, Phase – II,
Delhi – 110020

Corporate Office:

Level 6, Emaar MGF The Palm Square,
Golf Course Ext. Road, Sector – 66,
Gurugram – 122102 (Haryana)

....Petitioner

Versus

The Electricity Department,
Government of Goa (EDG),
Vidyut Bhawan, Panaji,
Goa.

...Respondent

Present

For the Petitioner

1. Shri Anand K. Ganesan, MSA Partners
2. Shri Damodar Solanki, MSA Partners (Lawyer representing Amplus Energy Solutions)
3. Shri Daryl De Sales, Amplus Energy Solutions
4. Shri Himanshu Kamal Tripathi, Amplus Energy Solutions

For the Respondent

1. Shri Stephans Fernandes, Superintending Engineer Electricity Department, Goa
2. Shri Avinash Varee, Feedback Infra, Consultant Electricity Department, Goa
3. Shri Ankit Jain, Feedback Infra, Consultant Electricity Department, Goa

ORDER

The Petitioner through this petition has prayed as under –

1. Clarify and declare that there is no restriction on the quantum of open access that can be granted to the captive consumer in relation to the contract demand that such consumer maintains with the distribution licensee;
2. Clarify and declare that imbalance charges under Regulation 5.2(1)(b) would not be applicable to a consumer who avails of open access from the solar and wind energy sources

3. Clarify and declare that Additional Surcharge under Section 42(4) of the Electricity Act is not applicable on captive generation and captive consumption of electricity;
4. Clarify that the wheeling charges of 23 paise /kwh determined by the Hon'ble Commission would be applicable to the long-term open access granted to the companies of the Petitioner's Group; and
5. Pass such other further order as this Hon'ble Commission may deem just in the facts of the present case.

The Commission heard both the Petitioner and the Respondent at length on dt. 15.06.2021. Both the Petitioner and Respondent have advanced their arguments in detail.

The Petitioner's contentions in brief are as under:-

1. The Petitioner and its subsidiaries are desirous of establishing Solar Generating Plants in the State of Goa to operate as captive Power Plants. Since establishing Solar Plants entails substantial investments, which is to be service over the life of the plant, it is essential that there is legal, regulatory and commercial certainty in relation to the applicability of the Regulations for the investors of the solar generating plants and also to the consumers in Goa. In the above circumstances, the Petitioner has preferred the present petition seeking interpretation and clarification on the Open Access Regulations of the Hon'ble Commission.
2. The Petitioner is not aggrieved by the Open Access Regulations framed by this Hon'ble Commission, nor is challenging the provisions of the said Regulations, but is merely seeking a clarification from this Hon'ble Commission on certain aspects of the Regulations for regulatory certainty for the renewable energy projects to be established and investments to be made in the State of Goa. Further, the clarifications are being sought only with respect to the renewable energy based captive power plants.
3. The Petitioner has submitted that there is in fact no dispute between the Petitioner and the Respondent on the issue of Open Access capacity vis-a-vis contract demand.
4. It is admitted that the Open Access Regulations do not contain any provision to restrict the quantum of open access of a consumer to the extent of its contract demand maintained with the distribution licensee.

5. While the technical feasibility and system requirements are required to be gone into at the time of grant of open access, there is no pre-condition that the open access cannot be applied for a quantum more than the contract demand with the distribution licensee, subject to availability of line capacity.
6. The Regulation 2.1 only provide for the minimum quantum of consumption threshold, above which the open access can be applied for and granted. Even this threshold is not applicable to captive power plants, in terms of the first proviso to Regulation 2.2(2).
7. This is in consonance with the provision of Section 9(2) of the Electricity Act, which provides an absolute right of open access to the captive consumer for carrying electricity from its captive generating plant to the destination of its use, which right is only subject to the availability of adequate transmission facility.
8. The consumer can always have a particular contract demand and can take open access over and above the contract demand. It is the choice of the consumer to either restrict the open access capacity within the contract demand or obtain open access in addition to the contract demand. This is the correct position in law and the Respondent has also not disputed the same.
9. The principle that the open access quantum cannot be limited to the extent of the contract demand that a consumer maintains with the distribution licensee has been settled by the Hon'ble Appellate Tribunal in the case of Maharashtra State Electricity Distribution Company Limited vs. Maharashtra Electricity Regulatory Commission & Ors., by judgment dated 01.08.2014 in Appeal Nos. 59 and 116 of 2013, the relevant excerpts of which has been quoted at Pages 10-12 of the Petition.
10. In the hearing, the only apprehension of the Respondent was that the Respondent ought not to be obligated to supply more than the Contract Demand. There is no difficulty on the above. In this regard, the following is the understanding of the Petitioner and also the Respondent:
 - (a) The obligation of the Respondent to supply is only of the Contract Demand. This obligation cannot be expanded by the open access approval being granted.
 - (b) The open access can be obtained over and above the contract demand. This is however subject to the line capacity being verified and available.

- (c) The consumer can have contract demand for part of the requirement and open access for part of requirement. There is no obligation for open access to be subsumed within the contract demand.
11. The above can be explained by way of an example:
- (a) A consumer may have a contract demand with the respondent for 10 MW and open access capacity for 9 MW over and above the contract demand.
- (b) The 9 MW open access approval will be granted only if the line is in a position to accommodate the 9 MW.
- (c) In such a situation, the consumer should be in a position to draw power up to the contract demand of 10 MW at any point of time and over and above 9 MW from open access sources.
- (d) The obligation of the Respondent would be limited to supply of 10 MW only as per the contract demand.
12. In the above circumstances, it is submitted that the Hon'ble Commission may clarify that under the Open Access Regulations, there is no restriction on the capacity for open access to a captive generating plant and captive consumer, qua the contract demand maintained by the consumer with the Respondent – licensee.
13. The Petitioner further submitted that there does not appear to be any dispute between the parties regarding the imbalance charges as there is no restrictions for the open access capacity to be limited to the contract demand, a consumer can always maintain the open access capacity over and above the contract demand. Any additional drawl, over and above the open access quantum and the contract demand will only be subject to imbalance charges under the prevailing regulations of the Hon'ble Commission.
14. Regulation 5.2 of the Open Access Regulations deals with the applicability of imbalance charges. Regulation 5.2(1)(b) specifically deals with an open access consumer, who is also a consumer of the distribution licensee. While the imbalance charges are to be dealt with in terms of the ABT mechanism to be introduced and implemented by the Hon'ble Commission, the Hon'ble Commission has also given a transient provision for the levy of imbalance charges till the intra-state ABT is introduced.
15. The Hon'ble Commission has in the said provision limited the quantum of electricity that a partial open access consumer can draw from the distribution licensee –

'Admissible Drawal', which provision is applicable only to such cases where the open access quantum is limited to the contract demand and the contract demand reduces to the extent of the open access quantum.

16. The illustration given by the Hon'ble Commission to the said provision also deals with a case where the open access quantum is limited to the contract demand that the open access consumer maintains with the distribution licensee. The provision and the illustration, inter-alia, reads as under:

"Till the implementation of Intra-State ABT, the charges shall be regulated as below:

The quantum of drawal of electricity by a partial Open Access Consumer from the Distribution Licensee during any Time Block of a Day should not exceed the "Admissible Drawal" of electricity by the Open Access Consumer which is the difference of Contract Demand and maximum quantum of Open Access for which approval has been granted by the Nodal Agency.

[Illustration: If an Open Access Consumer with a Contract Demand of 10 MW has been given an approval for a maximum Open Access quantum of 6MW for a period of 3 Months, the Admissible Drawal of electricity from the Distribution Licensee during any Time Block shall be 4 MW for any Day during a period of 3 Months.]"

17. It is submitted that the provision by its very nature cannot be applied to renewable plants, particularly solar plants, where the generation is only for part of the day.
18. The above provision requires the Contract Demand to be reduced by the extent of the maximum open access quantum granted, to arrive at the "Admissible Drawal". This can be applied to a conventional generator, who can generate electricity for the entire 96 time-blocks and on round the clock basis. In such circumstances, the consumer can possibly replace the contract demand quantum with the open access for the entire duration of the open access approval.
19. Since the open access approval is on capacity basis, the above quoted provision by its very nature cannot apply to a solar plant for the following primary reasons:
 - (a) A solar generating plant, by its very nature, can generate electricity only for part of the day and not on round-the-clock basis. In such cases, for the time period when there is no solar generation, the consumer has no option but to draw electricity from the distribution licensee.

- (b) A solar generating plant can on an average generate electricity at a Capacity Utilisation Factor (CUF) of about 18%. Therefore, even if the consumer has an open access capacity of, say, 4 MW, the quantum of power available from the open access source would be only about 18% of 4 MW. The consumer again has no option but to draw the balance capacity from the distribution license.
20. Applying the above quoted provision in the Open Access Regulations as such would mean that the consumer would be prevented from drawing electricity from the distribution licensee to the full extent of the contract demand, even during the time blocks when there is no solar or wind generation.
21. In the above circumstances, it is submitted that the above quoted provision in the Open Access Regulations, by its very nature cannot apply to a renewable energy source such as a solar generator. It would be an impossibility in law for a consumer procuring power from a solar plant to draw electricity to the full quantum of the open access capacity for the entire time period and substitute the contract demand to such extent.
22. Therefore, the above Regulation has to necessarily be read and interpreted to not apply to solar generating plants. Similar would the case for a wind generator also. As stated above, any interpretation to the contrary would mean an impossibility to be performed. It is a well settled principle that law cannot require an impossible action to be performed.
23. The interpretation of a provision has to be in a manner so as to not result in injustice, absurdity, inconvenience, hardship or anomaly.
24. Reference can be made to the Hon'ble Supreme Court's decision in "Rakesh Wadhawan v. Jagdamba Industrial Corpn.", (2002) 5 SCC 440, whereby the Hon'ble Supreme Court has held as under:

"24. It is a settled rule of construction that in case of ambiguity, the provision should be so read as would avoid hardship, inconvenience, injustice, absurdity and anomaly. Justice G.P. Singh in his Statutory Interpretation (2001 Edn.) states (at p. 113):

"In selecting out of different interpretations 'the court will adopt that which is just, reasonable and sensible rather than that which is none of those things' as it may be presumed 'that the legislature should have used the word in that interpretation which least offends our sense of justice'. If the grammatical construction leads to some absurdity or some repugnance or inconsistency with the rest of the

instrument, it may be departed from so as to avoid that absurdity, and inconsistency. Similarly, a construction giving rise to anomalies should be avoided.”

25. The same has been reiterated by the Hon’ble Supreme Court in its decision in “H.S. Vankani v. State of Gujarat”, (2010) 4 SCC 301, which inter-alia, reads as under:

“43. It is a well-known rule of construction that the provisions of a statute must be construed so as to give them a sensible meaning. The legislature expects the court to observe the maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void). The principle also means that if the obvious intention of the statute gives rise to obstacles in implementation, the court must do its best to find ways of overcoming those obstacles, so as to avoid absurd results. It is a well-settled principle of interpretation of statutes that a construction should not be put on a statutory provision which would lead to manifest absurdity, futility, palpable injustice and absurd inconvenience or anomaly.

.....

48. The above legal principles clearly indicate that the courts have to avoid a construction of an enactment that leads to an unworkable, inconsistent or impracticable results, since such a situation is unlikely to have been envisaged by the rule-making authority. The rulemaking authority also expects rule framed by it to be made workable and never visualises absurd results. The decision taken by the Government in deputing the non-graduates (1979-1981 batch) to a two-year training course and graduates (1980-1981 batch) to a one year training is in due compliance with Rule 10 of the 1969 Rules and Rule 18 of the 1974 Rules and the seniority of both the batches has been rightly settled vide Orders dated 12-10-1982 and 5-3-1987 and the Government has committed an error in unsettling the seniority under its proceedings dated 29-9-1993.”
26. The intention of the Hon’ble Commission is also not to apply such restrictions to renewable plants such as solar, where the power is infirm in nature. This is evident by the fact that the Hon’ble Commission has also exempted the solar plants from the scheduling for banked units, on the principle of intermittent nature of the generation.
27. The solar generators, who cannot generate on 24 hours basis and have to also operate at a much lower CUF than conventional generators, cannot be applied the imbalance charges on the assumption that the open access capacity granted would substitute the contract demand of the consumers.

28. Without prejudice to the above contention, it is further stated that the provision requiring the reduction of Contract Demand to 'Admissible Drawal' presupposes the open access quantum to be within the contract demand. It cannot by its very nature apply to a situation wherein, the open access quantum is over and above the contract demand. There could be cases where the consumer voluntarily limits the open access quantum to the extent of the contract demand, particularly in cases where there is a transmission constraint in the line to the consumer. The consumer in such a case, requiring the augmentation of the line capacity, voluntarily limits his open access quantum to the extent of the contract demand with the condition that at no point of time would the total drawl from the distribution licensee as well as the open access sources would exceed the quantum of contract demand. In such an event, there is no requirement to examine the line capacity, as the existing line is presumed to have enough capacity to the extent of contract demand. The very grant of a contract demand with the distribution licensee establishes the fact that the existing line is sufficient to carry electricity to the full extent of the contract demand.
29. In such an event, there is no requirement to examine the line capacity, as the existing line is presumed to have enough capacity to the extent of contract demand. The very grant of a contract demand with the distribution licensee establishes the fact that the existing line is sufficient to carry electricity to the full extent of the contract demand.
30. However, the above provision in Regulation 5.2(1)(b) cannot be applied to a case where the restriction on the open access quantum up to the contract demand does not apply. In such an event, it is the right of the consumer to draw electricity to the full quantum of the contract demand and also draw electricity from open access sources.
31. In case the consumer overdraws the electricity over and above the contract demand, the consumer would be governed by the penal charges as regulated by the Hon'ble Commission in the retail supply tariff orders of the Respondent-licensee. However, there is no provision for reduction in the drawl that the consumer has to necessarily be forced into from the distribution licensee qua the contract demand that such consumer maintains with the distribution licensee.
32. Therefore, the provision for restricting the Contract Demand to the Admissible Drawal and the consequent levy of Imbalance Charges cannot also be applied to cases where the Open Access quantum is not restricted by the Contract Demand. The natural consequence of there being no restriction on the open access quantum to the extent of the contract demand would be that the imbalance charges as provided Regulation 5.2(1)(b) would not apply in such cases.

33. It is also relevant to mention that in terms of Regulation 5.2(3), the generator is subject to the Deviation Settlement Mechanism Regulations of the CERC for any under-injection or over-injection of electricity. Further, considering the nature of solar and wind generating plants, Proviso (v) to Regulation 5(1) of the Deviation Settlement Mechanism Regulations, 2014 provides for the generators to be paid as per the Schedule given, and the deviation charges to be applied on the generator as per the provisions contained in the said Regulations. The said provision, inter-alia, reads as under: “...

(v) The wind or solar generators which are regional entities shall be paid as per schedule. In the event of actual generation being less than the scheduled generation, the deviation charges for shortfall in generation shall be payable by such wind or solar generator to the Regional DSM Pool as given in Table-1 below:”

34. The same principle also ought to apply in the State, namely, that the entire schedule is deemed as supply and the implication of imbalance charges is on the generator as per the DSM Regulations of the CERC. The imbalance charges specified in Regulation 5.2(1)(b) ought not apply to the consumer procuring power from wind and solar generators.

35. The Petitioner further submitted that captive generators are not liable to pay additional surcharge under Section 42(4) of the Electricity Act.

36. The Respondent has contended that the exemption under the Electricity Act for captive plants is only for cross-subsidy surcharge under the 4th proviso to Section 42(2) and therefore Additional Surcharge under Section 42(4) is payable. This is incorrect.

37. It is submitted that the very provision of Section 42(4) does not apply in the case of captive consumption of electricity. The said provision reads as under:

“Section 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.”

- 38. The said section refers to “receive supply of electricity from a person other than the distribution licensee”. The term “supply” is defined in Section 2(70) of the Electricity Act as under:

“(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer;”

- 39. Accordingly, one of the essential conditions to be satisfied under Section 42(4) of the Electricity Act is that there is a supply of electricity from a person to a consumer. The supply is sale of electricity to a consumer as defined in the Act. Accordingly, for the purpose of levy of additional surcharge, there has to be sale of electricity by the Seller to the Purchaser, which is not the case in captive consumption.

- 40. The Electricity Act deems the captive consumption of electricity as one’s own electricity, with the right to carry such electricity from the captive generating plant to the destination of its use. The same is also evident from the definition of ‘Captive Generation Plant’ under Section 2(8) and Section 9 which deals with captive generation, as under:

“Section 2. Definitions.- In this Act, unless the context otherwise requires,-

.....

(8) “Captive generating plant” means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such cooperative society or association;

.....

9. Captive generation.-

- (1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

.....

- (2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes

of carrying electricity from his captive generating plant to the destination of his use.”

41. In terms of the above, the electricity generated by the Captive Power Plant is for his own use. Accordingly, there is an essential distinction between sale of electricity by a person to another person which constitute supply within the scope of Section 42(4) and generation of electricity for his own use. The expression ‘supply’ is not used in Section 9, as the law deems the electricity as the consumer’s own electricity.
42. Further, the Electricity Rules permits shareholders to also be deemed as the owners of the electricity and therefore, consume the electricity captively. The Electricity Act does not recognize it as a transaction of purchase and sale of electricity, but only deems it as captive consumption.
43. Therefore, in terms of the provisions of Section 42(4) itself, the Additional Surcharge is not payable in respect of the quantum of electricity generated by the Captive Power Plant or a Group Captive Power Plant, and consumed by a captive user when such generating plant and captive user fulfils the conditions mentioned in Section 2(8) of the Act and Rule 3 of the Electricity Rules, 2005.
44. The above issue has also been settled by the Hon’ble Appellate Tribunal in its judgment and order dated 27.03.2019 in Appeals No. 311 & 315 of 2018, wherein the Hon’ble Tribunal has held that Additional Surcharge cannot be levied on captive consumption of electricity. The relevant excerpts of the order has been quoted at Page Nos. 21-22 of the Petition.
45. The Petitioner further submitted that there is no dispute between the parties on the applicability of the wheeling charges of ₹ 2.21/kwh for LT levels and ₹ 0.23/kwh for HT level as determined by the Hon’ble Commission.
46. However, while the above charges have been determined by the Hon’ble Commission on per unit basis, Regulation 4.1 of the Open Access Regulations states that the Transmission charges for Long-Term Open Access consumers shall be determined on capacity basis. The said Regulation reads as under:
 - “4.1 An Open Access Consumer using the Intra-State Transmission System, shall pay transmission charges to the State Transmission Utility or the Intra-State Transmission Licensee other than the State Transmission Utility for usage of their system as determined by the Commission in the Tariff Order from time to time:

Provided that transmission charges shall be payable on the basis of contracted capacity in case of Long-term and Medium-term Open Access Consumers and on the basis of scheduled load in case of Short-term Open Access Consumers.”

47. Since the only determination by the Hon’ble Commission is on per unit basis, the Hon’ble Commission may clarify that the said charges would be applicable to all the open access consumers in the State. The only reason such clarification is sought for is that there should not be any ambiguity or hindrance at any stage on the open access being granted, for the reason of the charges to be collected by the licensee. The Petitioner is neither seeking any amendment of the tariff order or is otherwise seeking separate charges to be determined, but only seeking a clarification that the charges as determined should be made applicable and there ought not to be any issue of the open access to be granted on this count.
48. It is further submitted that since regulatory certainty for investments in renewable energy is essential, the Hon’ble Commission may also specify that the transmission charges at the present level will apply to all projects being implemented now, for the life time of such projects. Any revisions in the transmission charges would apply only to projects which are to be established post such revision.

The submissions of the Respondent are as under:-

Issue No. 1. Open Access Capacity vis-a-vis Contract Demand

1. That when the Consumer having a particular contract demand with the distribution licensee which will cater his maximum connected load in day-day needs. If such consumer opts for Open Access quantum higher than the contract demand then such consumer shall apply for load enhancement with the Distribution licensee provided that there is sufficient availability of line capacity.
2. That any clause over and above the Sanctioned demand will explain the distribution infrastructure as the same is maintained considering the contract demand of all its consumers.
3. That in accordance with Section 9(2) of the Electricity Act 2003, Captive generating plant has the right to open access for carrying electricity from his captive generating plant to the destination of his use subjected to availability of adequate transmission facility.

4. That The Regulation 2.2 (2) of the JERC (Connectivity and open Access in Intra State Transmission and Distribution) Regulations, 2017 is as shown below:

“2.2 Eligibility for Open Access and Conditions to be satisfied

2. Subject to the provisions of these Regulations,

- a) a Trading Licensee;
- b) a generating company which owns or operates and/or intends to own and/or operate a Generating Station in the State, including a captive power plant; and
- c) a Consumer having a Contract Demand in accordance with Clause 2.1 of the Regulations and connected to the Distribution System of the Licensee, provided the Applicant is connected through an independent feeder emanating from a grid sub-station

Shall be eligible for Open Access to the Distribution System of a Distribution Licensee on payment of the wheeling and other charges as may be determined by the Commission in accordance with Chapter 4 of these Regulations.

Provided that when a person, who has established a captive power plant, opts for Open Access for carrying the electricity to the destination of his own use, the limitation of Contract Demand as specified in Clause 2.1 of Regulations shall not be applicable.

As per the above mentioned regulation who has established a captive power plant, opts for Open Access for carrying the electricity to the destination of his own use without any restriction on the contract demand. The Hon'ble Commission shall also consider/ notice that the captive power plant can be group captive plant set up by any co-operative society or association of persons who have minimum 26% equity in the project and must consume 51% of the power by such co-operative society or associations. In such case there will be single injection point and multiple drawal points for usage of electricity by the individual person of the group.

5. That the Petitioner in their written submission submitted that the Open access quantum can be over and above the contract demand i.e, the ED-Goa is liable to supply power upto to the contract demand at any point of time in such case this becomes the admissible drawal and the total contract demand of the consumer becomes summation of admissible drawal and open access quantum in accordance

with the Regulation 5.2(1)(b) of The JERC (Connectivity and open Access in Intra-State Transmission and Distribution) Regulations, 2017.

6. That in accordance with the Regulation 7A.1(2) of the JERC (Connectivity and Open Access in Intra-State Transmission and Distribution) (First Amendment) Regulations, 2020, with regard to the banking of the renewable energy where upto 20% of the total energy generated by renewable energy generating station can be banked with the distribution licensee with banking charges. This banking provision shall provide the open access consumer to adjust this banked power during unavailability of solar power with the open access quantum.

Issue No. 2. Imbalance Charges:

7. That Imbalance charges are basically settlement between the scheduled energy and actual energy. The JERC (Connectivity and open Access in Intra-State Transmission and Distribution) Regulations, 2017 are applicable for all types of open access consumers. Also, the Regulations 4.9 of the aforementioned Regulations refers to the applicability of the Open Access charges for short-term, Medium-term and Long-term open access consumers. As per the Regulations 4.9, Imbalance charges are applicable for all types of Open Access Consumers, i.e., Short, Medium & Long Term OA Consumers
8. That the Regulation 5.2(1)(b) in the aforementioned Regulations, the methodology of computation of over drawal and determination of Imbalance Charges thereof is provided in detail. The same is reproduced below as:

5.2 Imbalance Charges

1. Settlement of Energy at Drawal Point in Respect of Open Access Consumer, or Trading Licensee on Behalf of Open Access Consumer
.....
 - b. Open Access Consumer, who is also a Consumer of the Distribution Licensee

In case of deviation between the schedule and the actual drawal in respect of an Open Access Consumer who is a Consumer of Distribution Licensee shall come under the purview of the Intra-State ABT, as notified by the Commission and shall be settled based on the composite accounts for imbalance transactions issued by SLDC on a weekly cycle in accordance with the Deviation Charges specified by the Commission. Billing, collection and disbursement of any amounts under the above transactions shall be in accordance with the -State ABT, as may be applicable from time to time.

Till the implementation of Intra-State ABT, the charges shall be regulated as below:

The quantum of drawal of electricity by a partial Open Access Consumer from the Distribution Licensee during any Time Block of a day should not exceed the "Admissible Drawal" of electricity by the Open Access Consumer which is the difference of Contract Demand and maximum quantum of Open Access for which approval has been granted by the Nodal Agency.

(Illustration: If an Open Access Consumer with a Contract Demand of 10 MW has been given an approval for a maximum Open Access quantum of 6MW for a period of 3 Months, the Admissible Drawal of electricity from the Distribution Licensee during any Time Block shall be 4 MW for any Day during a period of 3 months).

i. Overdrawal

The overdrawal by an Open Access Consumer who is a Consumer of the Distribution Licensee shall be settled as under:

- i. Fixed Charges on the Admissible Drawal of electricity by the Open Access Consumer from the Distribution Licensee, even if there is no drawal from the Distribution Licensee.
- ii. Energy charges corresponding to drawal from a Distribution Licensee by the Open Access Consumer limited to Admissible Drawal of electricity by the Open Access Consumer, at the applicable energy charge rates of the Distribution Licensee.

- iii. Additional fixed charges at the rate of 125% of normal fixed charges, for demand above the Admissible Drawl of electricity by the Open Access Consumer.
 - iv. Energy charges on any drawal above the Admissible Drawal of electricity by the Open Access Consumer at the rate of charges for temporary connection for the same category.
- ii. Under drawal
In case of under drawal with respect to scheduled energy, Open Access Consumer shall not be paid any charges by the Distribution Licensee”

With reference to the above regulations, if a consumer of contract demand 15 MW opts for partial open access quantum of 10 MW from a Solar Power plant, then in accordance with the Regulation 5.2(1)(b) JERC Open Access Regulations 2017, the admissible drawal of electricity from the distribution licensee during any time block will be 5 MW. So in this scenario the partial open access consumer would be able to meet the load demand through open access arrangement and rest load demand through the distribution licensee. Any drawal over and above 5 MW from Discom would be considered as over drawal and in such case, the Open Access consumer is liable to pay the Imbalance Charges as described above.

9. That the Respondent procures majority of the power from the central generating stations and have no control over generation of power. Further any variation in the schedule energy drawal at the Goa periphery will attract the Deviation Settlement Mechanism (DSM) charges payable by ED-Goa which subsequently increases the power procurement cost. Since the power from the renewable energy source is intermittent in nature and whenever there is non-availability of open access renewable power, then the open access consumer shall draw full/partial quantum of the open access capacity from ED-Goa for the entire time period to meet the load demand. Therefore it will affect the Scheduling of Power by ED-Goa and will have no control on the same and will attract penalties in terms of Deviation Settlement Mechanism.
10. That during the off peak load hrs ED-Goa has surplus energy and during peak load Hrs i.e 18:00 hrs to 23:00 hrs ED-Goa has deficit energy where it procures power

from the open market at higher rate to cater the load demand of the consumers. During the peak load period there is no availability of the solar power and the demand of such open access consumer shifts to ED-Goa which burdens ED-Goa to buy power at much higher rate and subsequently increases the power purchase cost which is against the interest of the consumer. ED Goa also submits that the distribution infrastructure is planned based on the contract demand (including that of Open Access) of all its consumers and in case of over drawal by any 4consumer, the entire infrastructure gets overloaded and put all other consumers at risk of interruption of power.

Issue No. 3. Non- Applicability of Additional Surcharge under Section 42(4) of the Electricity Act, 2003

11. The Section 42(4) of the Electricity Act 2003 reads as follows:

“Section 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”.

The above section clearly refers that the applicability of the additional surcharge is under the purview of the State Commission.

The Petitioner refers that the word “Supply” in the above context as sale of electricity to consumer as defined in the Electricity Act 2003.

12. Further as per the Section 9 of the Electricity Act 2003 which deals with Captive Generation is shown below:

Section 9 (captive generation):

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

(2) Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.”

At the 1st Provision of Section 9(1) of the Electricity Act 2003 also refers to the Word “Supply” which does not mean sale of electricity in that context . So on the basis of a word it cannot be interpreted that the Additional Surcharge is not leviable on Captive Generating plant.

12. While at Section 42(2) -4th Provision of the Electricity Act 2003 it is explicitly mentioned that Cross Subsidy Surcharge is not 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. With regard to Additional Surcharge it is no-where mentioned in similar way. Moreover, JERC (Connectivity and open Access in Intra-State Transmission and Distribution) Regulations, 2017 have not excluded Captive Consumers from the ambit of Additional Surcharge.

Issue No. 4: Wheeling and Transmission Charges:

14. That in accordance with the Regulation 4.1(1) and 4.2(1) of the JERC (Connectivity and open Access in Intra-State Transmission and Distribution) Regulations, 2017, which says that the open access consumer shall pay transmission charges and distribution charges to the utility for using the transmission / distribution system as determined by the Hon’ble Commission in the Tariff Order from time to time.

15. That the Hon’ble Commission has approved the Open Access Charges for FY 2021-22 vide its Tariff Order dated 30th March 2021. Since ED-Goa is a deemed licensee with the main purpose to transmit, distribute and retail supply of electricity in its license area the Hon’ble Commission in the aforementioned Tariff Order has approved wheeling charges of Rs. 2.21/Kwh for LT Level and Rs. 0.23/kWh for HT/EHT Level for FY 2021-22.

16. That in case an Open Access or Captive Consumers wheels power using the distribution network of ED-Goa, such consumer is liable to pay the applicable Wheeling Charges and bear the Wheeling Losses approved by the Hon'ble Commission from time to time.

The Commission has considered the submissions of both the Petitioner and Respondent. It has also examined the Petition and the entire record placed before it along with reply of the Respondent and rejoinder filed by the Petitioner. Further the written arguments filed by both the parties are also considered by the Commission.

Besides above the Commission has also examined the specific provisions of the Act, the relevant provisions of the JERC (Connectivity and open Access in Intra State Transmission and Distribution) Regulations, 2017 and other rules and regulations made thereunder.

Regulation 2.1 provide as under:-

2.1 Phasing of Open Access

1. *Open Access shall be allowed to all Consumers where the maximum power to be made available at any time exceeds the threshold level of 1 MVA subject to the satisfaction of the conditions contained in these Regulations:*

Provided that the Commission may allow Open Access to Consumers seeking Open Access for capacity less than 1 MVA through a separate Order at such time as it may consider feasible having regard to operational constraints and other factors.

Regulation 4.1 Transmission Charges

1. *An Open Access Consumer using the Intra-State Transmission System, shall pay transmission charges to the State Transmission Utility or the Intra-State Transmission Licensee other than the State Transmission Utility for usage of their system as determined by the Commission in the Tariff Order from time to time:*

Provided that transmission charges shall be payable on the basis of contracted capacity in case of Long-term and Medium-term Open Access Consumers and on the basis of scheduled load in case of Short-

term Open Access Consumers. For Open Access for a part of a Day, the transmission charges shall be payable as under:

- a. Up to six (6) hours in a Day in one (1) block: 1/4th of the charges for Long-term and Medium-term users;*
- b. More than six (6) hours and up to twelve (12) hours in a Day in one (1) block: ½ of the charges for Long-term and Medium term users; and*
- c. More than twelve (12) hours and upto twenty-four (24) hours in a Day in one (1) block: equal to Long term and Medium-term users*

Provided further that where a dedicated Transmission System has been constructed for the exclusive use of or is being used exclusively by an Open Access Consumer, the transmission charges for such dedicated system shall be worked out by Intra-State Transmission Licensee and got approved by the Commission. These charges shall be borne entirely by such Open Access Consumer till such time the surplus capacity is allotted and used for by other Open Access Consumers or other purposes, after which these transmission charges for such dedicated system shall be shared in the ratio of allotted capacities.

- 2. When capacity has been reserved consequent to bidding, the transmission charges will be taken as determined through bidding in accordance with Clause 3.7(1) (vii).*
- 3. 75% of charges collected from the Short-term Open Access Consumers shall be adjusted towards reduction in the charges payable by the Long-term and Medium-term Open Access Consumers. The remaining 25% of the charges collected from Short-term Open Access users shall be retained by the respective Licensee:*

Provided that in case of any conflict between this provision and a similar provision in the Multi-year Tariff Regulations, the provision contained in the Multi-year Tariff Regulations shall prevail.

4.2 Wheeling Charges

- 1. An Open Access Consumer using a Distribution System shall pay to the Distribution Licensee such wheeling charges, on the basis of*

actual energy drawal at the consumption end, as may be determined by the Commission in the Tariff Order from time to time:

Provided that for Open Access for a part of a Day, the wheeling charges shall be payable as under:

- a. Up to six (6) hours in a Day in one (1) block: 1/4th of the charges for Long-term and Medium-term users;*
- b. More than six (6) hours and up to twelve (12) hours in a Day in one (1) block: ½ of the charges for Long-term and Medium term users; and*
- c. More than twelve (12) hours and upto twenty-four (24) hours in a Day in one (1) block: equal to Long term and Medium-term users*

Provided further that where a dedicated Distribution System has been constructed for exclusive use of an Open Access Consumer, the wheeling charges for such a dedicated system shall be worked out by the Distribution Licensee and got approved from the Commission. These charges shall be borne entirely by the Open Access Consumer till such time the surplus capacity is allotted and used for by other persons or purposes after which these wheeling charges for such dedicated system shall be shared in the ratio of the allotted capacities.

- 3. Wheeling Charges shall not be applicable in case a Consumer or Generating Station or Licensee is not utilizing the distribution network for the purpose of receiving power through Open Access.*
- 3. When capacity has been reserved consequent to bidding, the wheeling charges shall be taken as determined through bidding in accordance with Clause 3.7(1) (vii).*
- 4. 75% of charges collected from the Short-term Open Access Consumers shall be adjusted towards reduction in the charges payable by the Long-term and Medium-term Open Access Consumers. The remaining 25% of the charges collected from Short-term Open Access users shall be retained by the respective Licensee:*

Provided that in case of any conflict between this provision and a similar provision in the Multi-year Tariff Regulations, the provision contained in the Multi-year Tariff Regulations shall prevail.

Regulation 5.2 Imbalance Charges

1. Settlement of Energy at Drawal Point in Respect of Open Access Consumer, or Trading Licensee on Behalf of Open Access Consumer

a. Open Access Consumer, who is not a Consumer of the Distribution Licensee

Deviations between the scheduled and the actual drawal in respect of a Full Open Access Consumer shall come under the purview of the Intra-State ABT, as notified by the Commission and shall be settled based on the composite accounts for imbalance transactions issued by SLDC on a weekly cycle based on net metering in accordance with the Deviation Charges specified by the Commission. Billing, collection and disbursement of any amounts under the above transactions shall be in accordance with the Commission's Orders on Intra-State ABT, as may be applicable from time to time:

Provided that till the time Intra-State ABT mechanism is not notified by the Commission, any under drawal shall be settled in accordance with the provisions of the Deviation Settlement Mechanism notified by CERC from time to time:

Provided that till the time Intra-State ABT mechanism is not notified by the Commission, any over drawal shall be settled at higher of the applicable deviation rates (as notified in the CERC Deviation Settlement Mechanism Regulations 2014 amended from time to time) or the temporary tariff applicable for the Consumer category as determined by the Commission from time to time:

Provided that if the Commission has not specified temporary tariff for a category, charges at the rate of 125% of the normal category shall be applicable.

- b. *Open Access Consumer, who is also a Consumer of the Distribution Licensee*

In case of deviation between the schedule and the actual drawal in respect of an Open Access Consumer who is a Consumer of Distribution Licensee shall come under the purview of the Intra-State ABT, as notified by the Commission and shall be settled based on the composite accounts for imbalance transactions issued by SLDC on a weekly cycle in accordance with the Deviation Charges specified by the Commission. Billing, collection and disbursement of any amounts under the above transactions shall be in accordance with the Commission's Orders on Intra-State ABT, as may be applicable from time to time.

Till the implementation of Intra-State ABT, the charges shall be regulated as below:

The quantum of drawal of electricity by a partial Open Access Consumer from the Distribution Licensee during any Time Block of a Day should not exceed the "Admissible Drawal" of electricity by the Open Access Consumer which is the difference of Contract Demand and maximum quantum of Open Access for which approval has been granted by the Nodal Agency.

[Illustration: If an Open Access Consumer with a Contract Demand of 10 MW has been given an approval for a maximum Open Access quantum of 6MW for a period of 3 Months, the Admissible Drawal of electricity from the Distribution Licensee during any Time Block shall be 4 MW for any Day during a period of 3 Months.]

- i. *Overdrawal*

The overdrawal by an Open Access Consumer who is a Consumer of the Distribution Licensee shall be settled as under:

- i. *Fixed Charges on the Admissible Drawal of electricity by the Open Access Consumer from the Distribution Licensee, even if there is no drawal from the Distribution Licensee.*
- ii. *Energy charges corresponding to drawal from a Distribution Licensee by the Open Access Consumer limited to Admissible Drawal of electricity by the Open*

Access Consumer, at the applicable energy charge rates of the Distribution Licensee.

iii. Additional fixed charges at the rate of 125% of normal fixed charges, for demand above the Admissible Drawl of electricity by the Open Access Consumer.

iv. Energy charges on any drawal above the Admissible Drawal of electricity by the Open Access Consumer at the rate of charges for temporary connection for the same category.

ii. Underdrawal

In case of underdrawal with respect to scheduled energy, Open Access Consumer shall not be paid any charges by the Distribution Licensee.

5.2 3. *Settlement of Energy at the Injection Point in respect of a Generating Company or a Trading Licensee on Behalf of a Generating Company*

Any under-injection or over-injection with respect to the schedule approved by the SLDC by a generating company or a Licensee shall be settled in accordance with the CERC Deviation Settlement Mechanism Regulations 2014 amended from time to time.

Section – 2 (70) of Electricity Act, 2003

(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer;

Section 9 (captive generation):

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

[Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under subsection (2) of section 42.]

- (2) *Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:*

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission.”

Section 42 of the Electricity Act, 2003

- (3) *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 1[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:

3[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.]

- (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.*

The petitioner has approached the Commission by way of present petition filed under Sections 9, 42, 86 of Electricity Act, 2003 read with the provisions of JERC (Connectivity and Open Access in Intra-State Transmission and Distribution) Regulations, 2017 seeking following reliefs:

“(a) Clarify and declare that there is no restriction on the quantum of open access that can be granted to the captive consumer in relation to the contract demand that such consumer maintains with the distribution licensee;

(b) Clarify and declare that imbalance charges under Regulation 5.2(1)(b) would not be applicable to a consumer who avails of open access from solar and wind energy sources;

- (c) *Clarify and declare that Additional Surcharge under Section 42(4) of the Electricity Act is not applicable on captive generation and captive consumption of electricity;*
- (d) *Clarify that the wheeling charges of 23 paise /kwh determined by the Hon'ble Commission would be applicable to the long-term open access granted to the companies of the Petitioner's Group; and*
- (e) *Pass such other further order as this Hon'ble Commission may deem just in the facts of the present case."*

Upon completion of pleadings, final arguments of both the parties were heard on 15th June 2021 and both parties were directed to file written submissions. Subsequently, a limited hearing was also granted to the parties on 29th July 2021 pursuant to an objection raised by the counsel for the petitioner in respect of the written submissions filed by the counsel for the Respondent.

The present petition is a peculiar case wherein the petitioner has approached the Commission to seek clarifications in respect of certain provisions of JERC (Connectivity and Open Access in Intra-State Transmission and Distribution) Regulations, 2017 without any real cause necessitating indulgence by the Commission.

The petitioner has no grievance on account of any regulation and omission regarding implementation of these regulations on the part of the Electricity Department, State of Goa which has been impleaded as a respondent in the present petition. It is also not the case of the petitioner that it has been put to any hardship due to implementation or interpretation of the said Open Access Regulations in a particular manner. At the same time there is no challenge to any provision of the said Regulations. In fact, the only attempt of the petitioner in the present case has been to "discuss" or give reasons for a particular interpretation / reading of various provisions of the Open Access Regulations. Shorn of verbosity, the present petition is bereft of any real cause of action for approaching the Commission.

In its own words, the petitioner has preferred the present petition to seek clarifications from the Commission to give legal, regulatory and commercial certainty to the petitioner in relation to the applicability of the Open Access Regulations particularly on renewable energy/solar plant projects before the petitioner and its subsidiaries establish solar plants in the State of Goa. The petitioner and its subsidiaries, if desirous of establishing solar generating plants in the State of Goa to operate as captive power plants, may take the decision based on their understanding of the applicable Open Access Regulations 2017. The Commission, to say the least, has been vested with wide jurisdiction under Section 86 of the Electricity Act, 2003 and is also empowered under Section 181 to make regulations by

notification consistent with this Act and the rules generally to carry out the provisions of this Act. But it is certainly not the role of the Commission to elucidate legal provisions to any entity like the petitioner in the instant case so that such entity can take a commercial decision of whether to do a particular activity / business. The exercise, as sought to be done in the present case by the petitioner, is undoubtedly an abuse of the process of law.

So far as the provisions of Open Access Regulations 2017 as attempted to be discussed in the present case – as none of the provisions have been challenged by the petitioner and as no cause appears to exist as on date, the Commission is of an opinion that the Open Access Regulations 2017 have no ambiguity and these regulations are absolutely clear and there is no need to provide any further clarification as sought in present petition.

For the reasons stated above, the Commission, does not find it necessary to discuss the arguments of the petitioner in detail. In the event, the petitioner is aggrieved by the Open Access Regulations or any part of it, the petitioner is within its right to approach appropriate forum. The present petition is misconceived and classic example of abuse of process of law. At the same time the Commission is not inclined to accept the arguments advanced by the petitioner. However, the Commission is convinced with the arguments made by the Respondent. In view of the above the Commission hereby dismisses this Petition.

Ordered accordingly.

Sd/-

(M.K Goel)
Chairperson

Certified Copy



(Rakesh Kumar)
Secretary