

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH**

**Petition No. 52 of 2017
Date of Order: 03.01.2018**

Present: Ms. Kusumjit Sidhu, Chairperson
Ms. Anjali Chandra, Member

In the matter of : Petition under section 142, 146 and 149 of the Electricity Act, 2003 and Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, Chapter IX and in the matter of non-compliance of Punjab State Electricity Regulatory Commission (Terms and Conditions for Intra-state Open Access) (4th Amendment) Regulations, 2014 – cross subsidy surcharge wrongly charged on open access power when mandatory power cut imposed by PSPCL.

AND

In the matter of: Vardhman Special Steels Ltd., C-58, Focal Point, Phase-III, Ludhiana-141010.
.....Petitioner

Versus

Punjab State Power Corporation Limited, The Mall, Patiala.

.....Respondent

ORDER

The present petition has been filed by the petitioner under Section 142, 146 and 149 of the Electricity Act, 2003 and Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, citing non-compliance by Punjab State Power Corporation Limited (PSPCL) of Punjab State Electricity Regulatory Commission (Terms and Conditions for Intra-state Open Access) (4th Amendment) Regulations, 2014 related to non-

imposition of cross subsidy surcharge when power cut imposed by PSPCL and sought directions to PSPCL for release of payment/ refund of the cross subsidy surcharge paid, along with due Interest from FY 2011 onwards.

2. The petitioner has submitted as under:

- a) The petitioner was drawing power through open access in FY 2011, FY 2012 and FY 2013 as per prevailing PSERC Open Access Regulations. PSPCL was charging cross subsidy surcharge on power drawn under open access. This cross subsidy surcharge was also charged, when PSPCL had imposed power cut.
- b) Steel Furnace Association of India (Punjab Chapter), of which the present petitioner is also a member, filed petition no. 65 of 2011 before the Commission, challenging imposition of cross subsidy surcharge, when power cut was imposed by PSPCL with the plea that cross subsidy surcharge is paid to PSPCL to compensate the loss of cross subsidy, when power is not purchased from it. In case of power cut imposed by PSPCL, there is no power to supply to the consumers, and thus no loss of cross subsidy to PSPCL. The Commission, vide Order dated 08.08.2012, rejected the petition.
- c) Steel Furnace Association filed an Appeal (No. 38 of 2013) in Appellate Tribunal for Electricity against the Order dated 08.08.2012 in petition no. 65 of 2011. Hon'ble APTEL vide its Order dated 01.08.2014 set aside the impugned Order dated 08.08.2012 and directed the Commission to pass consequential order that no cross subsidy charge would be

levied on power available with consumers through open access to the extent of restrictions/power cuts imposed by the Distribution licensee.

- d) Based on the Order of Hon'ble APTEL, the Commission amended PSERC Open Access Regulations, 2011, and PSERC (Terms and Conditions for Intra-state Open Access) (4th Amendment) Regulations, 2014 were notified vide notification no. PSERC/Secy./Reg./96 dated 17.09.2014. These Regulations came into force from the date of their publication in the official gazette of the State i.e.18.09.2014.
- e) PSPCL was requested to refund cross subsidy surcharge paid by the petitioner i.e. ₹16,96,408/- for FY 2011 onwards. PSPCL refunded the said amount of cross subsidy surcharge amount in power bill dated 16.01.2017. However PSPCL through memo no. 387 dated 28.04.2017 demanded the petitioner to deposit the said cross subsidy surcharge and added the same in power bill dated 10.05.2017, which was deposited under protest. The plea given by PSPCL is that the refund of cross subsidy surcharge is applicable from the date of amendment of PSERC Open Access Regulations i.e. from 18.09.2014.
- f) The petition for refund of cross subsidy surcharge was filed before the Commission in 2011. Thereafter, the Commission's Order in the petition was challenged before the Appellate Tribunal, which had accepted the petitioner's stand and set aside the Commission's Order. The Commission amended its Open Access Regulations, to give effect to the Appellate Tribunal's Order.

- g) The time gap between the petition for refund of cross subsidy surcharge in 2011 and PSERC amending its open access regulations on 17.09.2014 after Appellate Tribunal's Order in 2014 came due to litigation process only at different forums. The amendment to PSERC Open Access Regulations dated 17.09.2014, may be relevant for new cases. However, in the instant case, the matter was under litigation at different fora since 2011.
 - h) It is prayed that PSPCL may be instructed to release the payment of ₹16,96,408/- deposited by the petitioner along with due interest from 2011 onwards upto the final date of payment.
3. PSPCL in its reply has submitted as under:
- a) The instant petition deserves to be dismissed as the petitioner has not availed the remedies available as per grievance settlement mechanism under PSERC (Forum and Ombudsman) Regulations, 2016.
 - b) The petitioner was drawing power through open access in the years 2011 to 2013 and PSPCL was charging cross subsidy surcharge on power drawn under open access as per its regulations.
 - c) In view of Hon'ble APTEL Order, the Commission amended its Open Access Regulations vide notification dated 17.09.2014. These regulations came into force from the date of their publication in the official gazette of the state i.e. 18.09.2014.
 - d) The CBC cell of PSPCL issued RBS no. 61/2016 dated

07.11.2016 for refunding ₹16,96,408/- for the period 05.06.2011 to 07.07.2013, which was posted in the bill of the petitioner issued on 16.01.2017. However, AAO, RAP, Focal Point, Ludhiana while checking the RBS pointed out that petitioner was not eligible for refund as CC No. 50/2014 is applicable w.e.f. 18.09.2014. As the refund given to the petitioner related to the period 05.06.2011 to 07.07.2013, notice dated 28.04.2017 was issued to the petitioner for depositing ₹16,96,408/-.

- e) PSERC (Terms and Conditions for Intra-State Open Access) (4th Amendment) Regulation, 2014, came into force from the date of their publication in the official gazette of the State i.e. 18.09.2014, so the amount of cross subsidy surcharge for the period 05.06.2011 to 07.07.2013 is not refundable.

4. Commission's Observations, Findings and Decision

The Commission has examined the submissions made in the petition, the reply filed by the respondent and documents placed on record. The petitioner has sought directions to PSPCL for refund/release of the payment of Rs. 16,96,408/- along with due interest from 2011 onwards to the actual date of payment, made on account of cross subsidy surcharge on power purchase under open access when PSPCL imposed mandatory power cuts due to non availability of power.

The observations and findings of the Commission on the issues raised in the petition are as under:

- (i) Steel Furnace Association of India (Punjab Chapter), of which Vardhman Special Steels Ltd., is also a member, filed Petition No. 65 of 2011 before the Commission with the

request that cross subsidy surcharge should not be levied on power purchase under open access, when PSPCL imposed mandatory power cuts due to non availability of power. It was submitted that provision of cross-subsidy surcharge on open access is in order to compensate the power companies for loss of cross subsidy (revenue) on account of non-purchase of power by a consumer from the power company. In case, PSPCL is not able to provide power and imposes mandatory cut on power supply, there is no power on which it loses cross subsidy, in such cases there is no valid reason to impose cross subsidy on open access power imported on those particular days, when there is power cut. The petition was admitted vide Commission's Order dated 07.12.2011. The Commission vide its Order dated 08.08.2012, decided as under:

"In view of express and unambiguous provisions under Section 42(2) of the Electricity Act 2003 and Regulation 26(1) of Punjab State Electricity Regulatory Commission (Terms and Conditions for Intra-state Open Access) Regulations, 2011, the Commission is not inclined to allow the prayer of the petitioner to add, vary, alter, modify or amend the Regulations by invoking Regulation 46 of the ibid Regulations. The request of the petitioner not to levy cross subsidy surcharge to open access consumers during mandatory power cut period is not acceded to."

- (ii) Aggrieved by Commission's Order dated 08.08.2012, Steel Furnace Association filed Appeal no. 38 of 2013 in Hon'ble APTEL. Hon'ble APTEL vide its Order dated 01.08.2014, while setting aside the Commission's aforesaid Order, observed and directed as under:

“.....(iii) In the present case the members of the Appellant Association have not opted for open access voluntarily but have been forced to procure power through open access from the short term market as a result of failure of the Distribution Licensee to meet its obligation to supply and due to imposition of restriction/power cuts on them. When the Distribution Licensee has failed to procure adequate power to meet its obligation and the consumers have been forced to procure power on their own through open access there cannot be the question of any loss to the Distribution Licensee and levy of cross subsidy surcharge for the same.

(iv) If the consumers do not procure power from the market through open access under conditions of power cuts and shut down their plants, no energy will be consumed by them and no charges will be collected by the Distribution Licensee for the period of power cut and hence no cross subsidy would be available from the charges of such subsidising consumers to the subsidized consumers. Therefore, if during the period of power restriction/power cuts, the consumer procures power from the market to continue its production instead of closing it down, no financial loss will be caused to the Distribution Licensee. Hence no compensation in the form of cross subsidy surcharge is leviable.

(v) When the members of the Appellant are able to procure power from short term market it indicates a situation where the power is available in the market for meeting the demand of these consumers. The same power could have been procured by the Distribution Licensee from the short term market to meet its obligation to supply to the consumers and avoiding imposition of power restriction/power cuts on them. If the consumers who have procured power in open access from short term market are asked to pay cross

subsidy surcharge on such drawal of power to the Distribution Licensee, it would result in rewarding Distribution Licensee for failure to meet its obligation to supply power to its consumers and penalizing consumers for no fault of theirs. In other words it will be beneficial for the Distribution Licensee to impose power cuts on the consumers and recover the Cross Subsidy charge without carrying its duty assigned under Electricity Act to meet the full demand of the consumers by making arrangements to procure adequate power.

(vi) Imposition of cross subsidy surcharge when the consumers have been forced to procure power through open access due to power restrictions/cuts imposed by the Distribution Licensee is in contravention to objectives and the provisions of the Act, National Electricity Policy and Tariff Policy and the dictum laid down by this Tribunal and Hon'ble Supreme Court which provides that the Cross Subsidy Surcharge is a compensatory charge. It strikes at the basic objective of the Electricity Act to encourage open access to promote competition.

(vii) Accordingly, we direct the State Commission to pass consequential order that no cross subsidy charge would be levied on power available with consumers through open access to the extent of restrictions/power cuts imposed by the Distribution Licensee. This finding given in this judgment has to be construed as judgment in rem and this will be applicable to all open access consumers."

- (iii) In compliance to the said Order dated 01.08.2014 passed by Hon'ble APTEL in Appeal No. 38 of 2013, the Commission vide notification no. PSERC/Secy/Reg/96 dated 17.09.2014, amended clause 26(1) of the Punjab State Electricity Regulatory Commission (Terms and Conditions for Intra-state Open Access) Regulations, 2011 as under:

“The following proviso is hereby added to clause 26(1) of the Punjab State Electricity Regulatory Commission (Terms & Conditions for Intra-state Open Access) Regulations, 2011 namely:

Provided further that such surcharge shall not be leviable on power available with consumer(s) through open access to the extent of regulatory measures imposed due to shortage of power, other than peak load hour restrictions put by the distribution licensee, on the consumer(s) through advance notification.”

The amended Regulations came into force from the date of their publication in the official Gazette of the State i.e. 18.09.2014.

- (iv) Considering the above, the Commission is of the considered opinion that in compliance of Order dated 01.08.2014 passed by Hon’ble APTEL in Appeal No. 38 of 2013, the petitioner is entitled to the refund of the amount paid to PSPCL on account of cross subsidy surcharge for the period when PSPCL imposed mandatory power cuts due to non-availability of power from the year 2011 onwards. As such, PSPCL is directed to refund the amount due in terms of the above along with interest as per applicable bank rates.**

The Petition is disposed of accordingly.

(Anjuli Chandra)
Member

(Kusumjit Sidhu)
Chairperson

Chandigarh
Dated: 03.01.2018