

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:01st August, 2014

Present:

HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 38 of 2013

M/s. Steel Furnace Association of India
Dhandari Industrial Focal Point
Ludhiana-141 010

... Appellant

Versus

1. Punjab State Electricity Regulatory Commission
SCO No.220-221, Sector 34-A,
Chandigarh

2. Punjab State Power Corporation Ltd.
The Mall,
Patiala-147 001

.....Respondent

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Hemant Singh
Ms. Sikha Ohri
Ms. Ruth Elwin
Ms. Surbhi Sharma
Mr. Anurag Sharma
Mr. Sunil Sharma

Counsel for the Respondent (s) : Mr. Sakesh Kumar for R-1
Mr. Anand K Ganesan
Ms. Swapna Seshadri for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON

“Whether a Consumer is liable to pay Cross Subsidy Surcharge to the Distribution Licensee for availing power supply under Open Access even during the period when the Distribution Licensee was unable to supply power to the said Consumer and had imposed power cuts on the consumer”?

1. This is the question posed in this Appeal.
2. M/s. Steel Furnance Association of India is the Appellant herein.
3. The Appellant filed a Petition before the Punjab State Commission praying for the direction that Cross Subsidy Surcharge should not be levied by the State Power Corporation on the Appellant when it purchased power under Open Access from outside when the Power Corporation was not able to supply power to the Appellant due to the power cuts imposed by the Power Corporation.
4. This prayer was rejected by the State Commission by the Impugned Order dated 8.8.2012.

5. Aggrieved by this Order, the Appellant has filed this Appeal.
6. The short facts are as follows:
 - (a) The Appellant is an Association of manufacturers of steel who use industrial arc furnace as part of their industrial process.
 - (b) The members of the Appellant are the power intensive consumers of the Punjab State Power Corporation Limited, the Distribution Company (Power Corporation), the 2nd Respondent.
 - (c) The tariff imposed on the consumers of the Power Corporation was the highest in the State of Punjab.
 - (d) When the Appellant was not getting supply of power from the Power Company due to the mandatory power cuts, the Appellant was constrained to purchase power from outside under the Open Access system because of cheap power available outside the State.
 - (e) At this stage, in 2011, the State Commission framed Regulations as Punjab State Electricity Regulatory Commissions (Terms and Conditions for Intra State Open Access) Regulations, 2011.

(f) On the strength of these Regulations, the Distribution Company, the Power Corporation collected the Cross Subsidy Surcharge from the Appellant's Association even when there was no supply of power from the Distribution Company due to the power cuts.

(g) As against this, the Appellant filed a Petition under Regulation 46 of the Punjab State Electricity Regulatory Commission (Terms and Conditions for Intra State Open Access) Regulations, 2011 praying for alteration, modification or amendments of the provisions of these Regulations so that the Appellant was not bound to pay the Cross Subsidy Surcharge to the Distribution Company whenever there was no power supply from the Distribution Company.

(h) The State Commission after entertaining the said Petition issued notice to the State Power Corporation. The Punjab Power Corporation filed a reply stating that the Cross Subsidy Surcharge is leviable as per the provisions of Section 42 (2) of the Electricity Act, 2003 as well as the provisions of the Punjab State Electricity Regulatory Commission (Intra State Open Access Regulations, 2011) irrespective of the fact that the Power Corporation was unable to supply power to

the Open Access consumers and had imposed power cuts on them.

(i) The State Commission after considering the submissions of both the parties rejected the claim of the Appellants holding that the Appellant is liable to pay the Cross Subsidy Surcharge when they buy power under the Open Access from outside during the period when the power was not supplied by the Power Corporation due to the power cuts.

(j) On being aggrieved by this Impugned Order dated 8.8.2012, the Appellant has presented this Appeal.

7. The learned Senior Counsel appearing for the Appellant, has made the following submissions assailing the Impugned Order:

(a) The interpretation which has been given by the State Commission in respect of Section 42 (2) and Regulation 26 of the Intra-State Open Access, Regulations, 2011, is not valid. Section 42 (2) of the Electricity Act, 2003 has to be read with overall purpose of electricity reforms legislation under which the Open Access regime was introduced. The pedantic and mechanical interpretation of the provisions of the Electricity Act, 2003 and

Regulations by the State Commission have resulted in absurdity.

(b) The law certainly did not envisage a situation where the licensee is unable to supply power, in breach of its universal supply obligation. In the present case, the Distribution Licensee, the Respondent is trying to seek a benefit of its own default. If the interpretation given in the Impugned order is accepted, then the Distribution Licensee would make money by not supplying power at all, on the basis of the revenue that comes on account of cross subsidy surcharge. It is settled position of law that no authority can be allowed to take advantage of its own wrong.

(c) The Distribution Licensee's duty to supply power on request is sacrosanct. U/s 42(1) and Section 43(1) the Distribution Licensee has been cast with an obligation to supply electricity to any premises, upon an application by the owner or occupier of such premises. Without fulfilment of this duty, no corresponding benefits can be claimed by the Distribution Licensee. Therefore, a purposive interpretation has to be given to the provisions of the statute to remove any manifest absurdity and to prevent unjust results.

(d) A schematic reading of Section 42 (1) and 42(2) makes it abundantly clear that a Distribution Licensee can benefit from the levy of cross subsidy surcharge only if it fulfils the corresponding obligation of supplying power. Any other interpretation sought to be given by the State commission would not only defeat the object and purpose of the Act but also would lead to a manifestly unjust result.

8. On the strength of these grounds, it has been argued by the Appellant that the rejection of the claim made by the Appellant before the State Commission was on the wrong interpretation of the provisions of the Act as well as the Regulations and therefore, the Impugned Order is called for interference.
9. In reply to the above grounds, the learned Counsel appearing for the State Commission (R-1) as well as the State Power Corporation (R-2) have made the following submissions:

(a) In exercise of its statutory powers, the State Commission has framed and notified the Punjab State Electricity Regulatory Commission (Terms and Conditions for Intra-State Open Access) Regulations, 2011. Under Regulation 26, the Cross

Subsidy Surcharge is leviable on every subsidising consumer taking electricity through Open Access. Section 42 (2), first proviso also provides for Open Access on payment of Cross Subsidy Surcharge. The only circumstance in which the payment of Cross Subsidy Surcharge is not levied, is in the case of captive consumption of electricity. Therefore, so long as the consumer takes electricity through Open Access from 3rd party, the cross subsidy surcharge is payable by the Open Access consumers to the Distribution Licensee.

(b) The cross subsidy surcharge is triggered once a consumer takes electricity through open access and the same has no co-relation to the actual supply made by the Distribution Licensee or any power cuts imposed by the Distribution Licensee on the consumer. Even in cases where a consumer does not take any part of the electricity from the Distribution Licensee, the cross subsidy surcharge is payable.

(c) The Distribution Licensee u/s 43 of the act is under universal supply obligation to supply electricity to any consumer on request irrespective of the fact that the consumer is an industrial consumer or domestic consumer or an agricultural

consumer. To compensate the Distribution Licensee for having the universal supply obligation and having to cater to consumers who pay below the cost of supply, the compensatory charges are levied on the industrial consumers taking electricity supply from the 3rd parties. This concept of cross subsidy surcharge is well settled under the provision of the Electricity Act, 2003 and the Regulations framed therein.

10. On the strength of these submissions, the learned Counsel for the R-1 and R-2 argued in detail in justification of the Impugned Order.
11. In the light of the rival submissions, the only question which arises in this Appeal as quoted above is this: **“Whether a Consumer is liable to pay Cross Subsidy Surcharge to the Distribution Licensee for availing power under Open Access even when the Distribution Licensee was not in a position to supply power and had imposed power cuts on the consumer during the period when Open Access was obtained “?**
12. Before dealing with this question, let us refer to the findings rendered by the State Commission in the Impugned Order:

“10. The law regarding the Open Access is enunciated in Section 42(2) of the Electricity Act 2003 as under:-

“42. *Duties of Distribution Licensees and open access –*

(1) -----

(2) The State Commission shall introduce open access in such phases and subject to such conditions (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilized to meet the requirements of current level of cross subsidy within the area of supply of the Distribution Licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 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.

Further regarding cross subsidy surcharge, Regulation 26 of Punjab State Electricity Regulatory Commission (Terms and Conditions for Intra-state Open Access) Regulations, 2011 specifies:

“26. Cross subsidy surcharge

1). *If open access facility is availed of by a subsidising consumer of a Distribution Licensee of the State, then such consumer, in addition to transmission and/or wheeling charge, shall pay cross subsidy surcharge determined by the Commission. Cross subsidy surcharge determined on Per Unit basis shall be payable, on monthly basis, by the open access. Consumers based on the actual energy drawn during the month through open access.*

Provided that such surcharge shall not be leviable to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.”

The bare perusal of the above provisions of Law and Regulations clearly shows that except in the case of a person who has established a captive generating plant carrying the electricity to the destination of his own use, cross subsidy surcharge is payable by all other open access consumers based on the actual energy drawn during the month through open access. There is no provision in the Electricity Act 2003 or

Regulations which indicates in any manner that open access power imported during period of power cut is exempt from the levy of cross subsidy surcharge.

11. 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.

13. The crux of the findings rendered by the State Commission is as follows:

(a) The law relating to Open Access and Cross Subsidy has been referred to in Section 42(2) of the Electricity Act, 2003.

(b) Regarding Cross subsidy surcharge, the relevant provision has been specified in Regulation 26 of the Intra State Open Access Regulations.

(c) The perusal of the relevant Sections and Regulations would show that the Cross Subsidy Surcharge is payable by all Open Access Consumers based on the actual energy drawn during the month through Open Access. The only

exception is provided to the person who has established a captive generating plant for carrying the electricity to the destination of his own use.

(d) These provisions would not indicate the Open Access Consumers during the period of power cut is exempted from the levy of Cross Subsidy Surcharge.

(e) In view of these provisions namely Section 42(2) of the Act, 2003 and Regulations, 26 of the Intra State Open Access Regulations, 2011, the State Commission is not inclined to allow the prayer of the Petitioner to amend the Regulations by invoking Regulation 46 of the said Regulations. Therefore, the prayer of the Petitioner for directing the Distribution Licensee not to levy the cross subsidy surcharge to Open Access consumers during the power cut period cannot be granted. Thus, the Petition is dismissed.

14. Bearing these findings rendered by the State Commission in the Impugned Order in mind, let us now deal with the question framed in this Appeal.
15. Let us first examine the facts of the case and circumstances in which the members of the Appellant Association have to obtain open access.

16. The members of the Appellant Association are the consumers of the Power Corporation, the Distribution Licensee (R-2) having an Agreement for their respective contract demand and are paying demand and energy charges as decided by the State Commission to the Distribution Licensee for the electricity drawn by them. The Distribution Licensee from time to time has been imposing power restrictions/power cuts on them at short notice through telephone messages and also lifting the same at short notice according to its power availability. During the period of restriction/power cut, the options available to the consumers is either to shut down/scale down their production depending on the restriction or to operate their captive power plant, if they have any, or to procure power from the short term market through open access.
17. We also find that the Distribution Licensees have frequently been resorting to the power restrictions/power cuts on the Appellant's members. According to the Appellant, the arc furnace steel industrial units need power in the range of 20-30 MW and it is not feasible to generate own power through a captive power plant. In these circumstances, these consumers have no other option but to procure power from short term market through open access if they want to maintain production and carry out their business. In other words, the consumers have been forced to procure power through open

access as a result of the restrictions/power cuts imposed by the Distribution Licensee due to inadequate power sourced by them to meet the full demand of the consumers.

18. In the present case, the consumers have not procured power through open access for economic reasons i.e. for the reason that the power procured through open access worked out to be cheaper than the tariff of the Distribution Licensee but because of the compulsion due to failure of the Distribution Licensee to arrange adequate power to meet its obligation to supply power to these industrial consumers.
19. Let us examine the related provisions of the Electricity Act, 2003. The relevant portions of Section 42 and 43 are reproduced below:

“42. Duties of Distribution Licensee and Open Access.-

(1) It shall be the duty of a Distribution Licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.

(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to

all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the Distribution Licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003) by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.

(3) Where any person, whose premises are situated within the area of supply of a Distribution Licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires

a supply of electricity from a generating company or any licensee other than such Distribution Licensee, such person may, by notice, require the Distribution Licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the Distribution Licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

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

.....

“43. (1) Save as otherwise provided in this Act, every Distribution Licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply.”

.....

“(2) It shall be the duty of every Distribution Licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1) :

Provided that no person shall be entitled to demand, or to continue to receive, from a

licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.

(3) If a Distribution Licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.

44. Exceptions from duty to supply electricity.- Nothing contained in section 43 shall be taken as requiring a Distribution Licensee to give supply of electricity to any premises if he is prevented from doing so by cyclone, floods, storms or other occurrences beyond his control.”

20. According to the above provisions of the Act, the Distribution Licensee has an obligation to supply electricity to the consumer in his area except when it is prevented from supplying electricity due to cyclone, floods, storms or other occurrences beyond his control, provided the consumer makes due payment for the supply of the electricity. Section 42(2) provides for introduction of open access by the State Commission and such open access has to be allowed on payment of a surcharge in addition to charges for wheeling as determined by the State Commission. However, such surcharge is not leviable in case open access is provided to a person who has established captive generating plant for carrying electricity to the destination of his own use. Such

surcharge has to be utilized to meet the requirement of current level of cross subsidy within the area of supply of the Distribution Licensee. Thus, the Electricity Act, 2003 provides an option to a consumer to avail power from sources other than the Distribution Licensee of its area. The situation where a consumer is compelled to procure power through Open Access due to power cuts imposed by the area Distribution Licensee on the consumer due to its inability to meet its obligation to supply is not stipulated and therefore, the provisions have to be interpreted for such a situation from the scheme of the Act.

21. It is necessary to look at the object of the Act and the context of its enactment before construing the relevant provisions thereof. The object and purpose of the Act lies in its preamble to unshackle the electricity industry which it seeks to achieve by adopting inter-alia, measures conducive to the development of the electricity industry and promoting competition. Competition is a significant factor for unleashing the electricity industry. One of the factors to promote competition is the availability of open access to the consumers.
22. The Electricity Act 2003 enables competition between Generating Company, Trading licensee, other Distribution Licensees and the area Distribution Licensee in supplying electricity to the consumer. However, in the process, the

area Distribution Licensee should not be put to loss by migration of a subsidizing consumer and for that purpose surcharge is leviable on Open Access consumers to compensate the area Distribution Licensee and to meet the requirement of cross subsidy to subsidized consumers. Similarly, additional surcharge is also leviable on open access consumer for compensating the Distribution Licensee for the fixed cost (stranded cost) incurred by the Distribution Licensee arising out of its obligation to supply to that consumer.

23. The National Electricity Policy has the following provisions regarding open access.

“5.4.2 The Act provides for a robust regulatory framework for Distribution Licensees to safeguard consumer interests. It also creates a competitive framework for the distribution business, offering options to consumers, through the concepts of open access and multiple licensees in the same area of supply.”

“5.4.5 The Electricity Act 2003 enables competing generating companies and trading licensees, besides the area Distribution Licensees, to sell electricity to consumers when open access in distribution is introduced by the State Electricity Regulatory Commissions. As required by the Act, the SERCs shall notify regulations by June 2005 that would enable open access to distribution networks in terms of sub-section 2 of section 42 which stipulates that such open access would be allowed, not later than five years from 27th January 2004 to consumers who require a supply of electricity where the maximum power to be made

available at any time exceeds one mega watt. Section 49 of the Act provides that such consumers who have been allowed open access under section 42 may enter into agreement with any person for supply of electricity on such terms and conditions, including tariff, as may be agreed upon by them. While making regulations for open access in distribution, the SERCs will also determine wheeling charges and cross-subsidy surcharge as required under section 42 of the Act.”

“5.8.3 Under sub-section (2) of Section 42 of the Act, a surcharge is to be levied by the respective State Commissions on consumers switching to alternate supplies under open access. This is to compensate the host Distribution Licensee serving such consumers who are permitted open access under section 42(2), for loss of the cross-subsidy element built into the tariff of such consumers. An additional surcharge may also be levied under sub-section (4) of Section 42 for meeting the fixed cost of the Distribution Licensee arising out of his obligation to supply in cases where consumers are allowed open access. The amount of surcharge and additional surcharge levied from consumers who are permitted open access should not become so onerous that it eliminates competition that is intended to be fostered in generation and supply of power directly to consumers through the provision of Open Access under Section 42(2) of the Act. Further it is essential that the Surcharge be reduced progressively in step with the reduction of cross-subsidies as foreseen in Section 42(2) of the Electricity Act 2003.”

24. The tariff policy provides for cross subsidy surcharge and additional surcharge for open access as under:-

“8.5 Cross-subsidy surcharge and additional surcharge for open access

8.5.1 National Electricity Policy lays down that the amount of cross subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access.

A consumer who is permitted open access will have to make payment to the generator, the transmission licensee whose transmission systems are used, distribution utility for the wheeling charges and, in addition, the cross subsidy surcharge. The computation of cross subsidy surcharge, therefore, needs to be done in a manner that while it compensates the Distribution Licensee, it does not constrain introduction of competition through open access. A consumer would avail of open access only if the payment of all the charges leads to a benefit to him. While the interest of Distribution Licensee needs to be protected it would be essential that this provision of the Act, which requires the open access to be introduced in a time-bound manner, is used to bring about competition in the larger interest of consumers.

Accordingly, when open access is allowed the surcharge for the purpose of section 38, 39, 40 and sub-section 2 of section 42 would be computed as the difference between (i) the tariff applicable to the relevant category of consumers and (ii) the cost of the Distribution Licensee to supply electricity to the consumers of the applicable class. In case of a consumer opting for open access, the Distribution Licensee could be in a position to discontinue purchase of power at the margin in the merit order.

Accordingly, the cost of supply to the consumer for this purpose may be computed as the aggregate of (a) the weighted average of power purchase costs (inclusive of fixed and variable charges) of top 5% power at the margin, excluding liquid fuel based generation, in the merit order approved by the SERC adjusted for average loss compensation of the relevant voltage level and (b) the distribution charges determined on the principles as laid down for intra-state transmission charges.

Surcharge formula:

$$S = T - [C (1 + L/100) + D]$$

Where;

S is the surcharge

T is the Tariff payable by the relevant category of consumers;

C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power

D is the Wheeling charge

L is the system Losses for the applicable voltage level, expressed as a percentage

The cross-subsidy surcharge should be brought down progressively and, as far as possible, at a linear rate to a maximum of 20% of its opening level by the year 2010-11.”

25. The provisions of the National Electricity Policy and the Tariff Policy regarding open access are summarized as under:-

(a) The Act enables competing Generating companies and trading licensees besides the area Distribution Licensees to sell electricity to open access consumer. The State Commissions have to notify regulations to enable open access in the distribution system network under Section 42(2) of the Act. The State Commissions while making the regulations shall also determine wheeling charges and cross subsidy surcharge as required under Section 42 of the Act.

(b) The surcharge to be levied on consumers switching to alternate supplies under open access is to compensate the host Distribution Licensee for loss of cross subsidy element built into the tariff of such consumers. Similarly additional surcharge is leviable to compensate the Distribution Licensee for the fixed cost i.e. the stranded cost, of the Distribution Licensee incurred to meet its obligation to supply to that open access consumer, if any. However, such cross subsidy surcharge or additional surcharge should not be so onerous that it eliminates competition in generation and supply. Further, the surcharge has to

be reduced progressively in line with the reduction of cross subsidy.

c) The computation of cross subsidy surcharge needs to be done that it compensates the Distribution Licensee but at the same time it does not constrain introduction of competition through open access.

d) The formula given in the tariff policy is devised so as to compensate the Distribution Licensee for the loss suffered on account of the consumer migrating to alternate supplier. The cross subsidy surcharge is computed as the difference of tariff applicable to the consumer and the cost of the Distribution Licensee to supply electricity to the consumer.

26. This Tribunal in a number of judgments has held that cross subsidy surcharge is a compensatory charge and the logic behind the provision for cross subsidy is that but for the open access the consumer would have taken electric supply from the Distribution Licensee and in the result the consumer would have paid the tariff applicable for such supply which would include an element of cross subsidy for certain other categories of consumers, which are subsidized.

27. This Tribunal in judgment dated 09.02.2010 in Appeal nos. 119 & 125 of 2009 in the matter of Chhattisgarh State Power

Distribution Co. Ltd Vs. Aryan Coal Benefications Pvt. Ltd.
has held as under:-

“17. The cross subsidy surcharge, which is dealt with under the proviso to sub-section 2 of Section 42, is a compensatory charge. It does not depend upon the use of Distribution Licensee’s line. It is a charge to be paid in compensation to the Distribution Licensee irrespective of whether its line is used or not in view of the fact that but for the open access the consumers would have taken the quantum of power from the licensee and in the result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers..”

28. This Tribunal in judgment dated 03.10.2011 in Appeal no. 193 of 2011 in the matter of DLF Utilities Limited Vs. Haryana Electricity Regulatory Commission and Anr. has held as under:-

“22. In OCL India Ltd. Vs. OERC : 2009 ELR (APTEL) 765, it has been held inter alia that the underlying philosophy behind cross subsidy surcharge is that a consumer has to compensate for the loss sustained by the Distribution Licensee. Thus necessarily open access has not been restricted by Section 42 (2) on the lines of the Distribution Licensee. It is a compensatory charge payable to the Distribution Licensee on the logic that but for the open access a consumer would have taken quantum of power from a Distribution Licensee in which case a consumer was required to pay a tariff that definitely has an element of cross subsidy. Reference to sub-section (2) of Section 42 in sub-section (2) of Section.....”

29. Hon'ble Supreme Court in judgment dated 25.4.2014 in Civil Appeal No. 5479 of 2013 in the matter of M/s. Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission & Ors. has held as under:

“25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge – one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the Distribution Licensee arising out of his obligation to supply. The presumption, normally is that generally the bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts – one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects.

26. Through this provision of open access, the law thus balances the right of the consumers to procure power from a source of his choice and the legitimate claims/interests of the existing licensees. Apart from ensuring freedom to the consumers, the provision of open access is expected to encourage competition amongst the suppliers and also to put pressure on the existing utilities to improve their performance in terms of quality and price of supply so as to ensure that the

consumers do not go out of their fold to get supply from some other source.”

“28. Therefore, in the aforesaid circumstances though CSS is payable by the Consumer to the Distribution Licensee of the area in question when it decides not to take supply from that company but to avail it from another Distribution Licensee. In nutshell, CSS is a compensation to the Distribution Licensee irrespective of the fact whether its line is used or not, in view of the fact that, but for the open access the consumer would pay tariff applicable for supply which would include an element of cross subsidy surcharge on certain other categories of consumers. What is important is that a consumer situated in an area is bound to contribute to subsidizing a low and consumer if he falls in the category of subsidizing consumer. Once a cross subsidy surcharge is fixed for an area it is liable to be paid and such payment will be used for meeting the current levels of cross subsidy within the area. A fortiori, even a licensee which purchases electricity for its own consumption either through a “dedicated transmission line” or through “open access” would be liable to pay Cross Subsidy Surcharge under the Act. Thus, Cross Subsidy Surcharge, broadly speaking, is the charge payable by a consumer who opt to avail power supply through open access from someone other than such Distribution Licensee in whose area it is situated. Such surcharge is meant to compensate such Distribution Licensee from the loss of cross subsidy that such Distribution Licensee would suffer by reason of the consumer taking supply from someone other than such Distribution Licensee.”

30. The findings of the Hon’ble Supreme Court in the above judgment are summarized as under:

(a) The issue of open access surcharge is very crucial and implementation of provisions of open access depends upon judicious determination of surcharge by the State Commissions. Open access consumers are generally consumers who pay relatively higher tariff and exit of such consumer would adversely affect the finances of the Distribution Licensee on account of -

- i) Its ability to cross subsidise the vulnerable sections of the society,
- ii) Recovery of fixed costs incurred by the licensee as part of his obligation to supply to that consumer (stranded cost).

The mechanism of surcharge is to compensate the Distribution Licensee on above two counts.

(b) Through the provision of open access, the law balances the rights of the consumer to procure power from a source of his choice and the interests of the Distribution Licensee. Apart from ensuring freedom to the consumer, the provision of open access puts pressure on the Distribution Licensee to improve its performance in terms of price and quality of supply so that the consumers do not migrate to other suppliers.

(b) Cross Subsidy Surcharge is payable by the consumer when it decides not to take supply from the Distribution Licensee but takes from other sources. Cross Subsidy charge is a compensation to the Distribution Licensee in view of the fact that but for the open access the consumer would pay tariff applicable for supply which would include an element of cross subsidy. Such cross subsidy surcharge has to be paid as determined by the State Commission even if the line of the Distribution Licensee is not used by the open access consumer.

31. In the present case, the consumers 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 restrictions/power cuts on them. When the Distribution Licensee has failed to procure adequate power to meet its obligation to supply to the consumers who in turn have been forced to procure power through open access, there cannot be any question of any loss to the Distribution Licensee and levy of cross subsidy surcharge for the same. This is because when the power cut is imposed on a subsidising consumer, the Distribution Licensee is not expected to receive revenue for electricity from such consumers as during that period, there is no supply of power.

32. If the consumers do not procure power from the market through open access under such conditions of power cuts imposed on them by the Distribution Licensee and shut down their plant, 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 subsidizing consumers to the subsidized consumers. Similarly if the power restriction is imposed on the industrial consumer by the Distribution Licensee and the consumer shuts down its production accordingly, the power drawal of the consumer will reduce to that extent and on such reduction no charges and consequently no cross subsidy will be collected by the Distribution Licensee for subsidizing the subsidized consumer categories. 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.

33. Another important aspect to be noticed is that when the members of the Appellant are able to procure power from the short term market, it indicates the situation where power is available in the market for meeting the demand of these consumers. The same power can be procured by the

Distribution Licensee from short term market to meet its obligation to supply to these consumers and thus avoiding imposition of power restrictions/cuts on the consumers. However, the Distribution Licensee has chosen not to procure the power from short term market presumably because such power is available at higher rates or because of its financial constraints.

34. 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, it would result in rewarding the Distribution Licensee for not meeting its obligation to supply power to its consumers and penalising the 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 cross subsidy surcharge instead of carrying out its duty assigned under the Electricity Act for making arrangements to procure adequate power to meet the full demand of its consumer. If the consumers can arrange power from the short term market, Distribution Licensee also can procure the same power and meet its obligation to supply and claim the power purchase cost in the ARR. Imposition of Cross Subsidy under the conditions of power cuts will discourage the consumers to procure power in Open Access when the cost of power in short term power market is high and will result in loss of production. This will be against the consumer's interest and will defeat the objective of introducing Open Access in the Act.

35. In short, it has to be observed that the imposition of cross subsidy surcharge on the consumers 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 provide that Cross Subsidy Surcharge is a compensatory charge for the loss suffered by the Distribution Licensee and that charges should not be so onerous that it eliminates competition and discourages the consumer to procure power from the short term power market through Open Access. Thus, it strikes at the basic objective of the Electricity Act to encourage open access to promote competition.
36. Section 42(2) of the Electricity Act providing for open access and cross subsidy surcharge is preceded by Section 42(1) which provides that it shall be duty of a Distribution Licensee to supply electricity in accordance with the provisions contained in the Act. Law gave a choice to the consumer to avail power form alternate sources other than the area Distribution Licensee for encouraging competition.
37. However, in the present case, the consumers have been forced to avail open access due to failure of the Distribution Licensee to meet its supply obligation under Act. Reading of Section 42 as a whole would lead to a conclusion that a Distribution Licensee can not benefit from the levy of cross subsidy surcharge under Section 42(2) when it has failed to discharge its duty towards its consumers under Section 42 (1) and has not suffered financial loss due to availing of Open Access by the consumer.

38. Let us now refer to Open Access Regulation. Regulation 26 of the Open Access Regulations, 2011 specifies:

“26 Cross subsidy surcharge

1) If open access facility is availed of by a subsidising consumer of a Distribution Licensee of the State then such consumer, in addition to transmission and/or wheeling charge shall pay cross subsidy surcharge determined by the Commission. Cross subsidy surcharge determined on Per Unit basis shall be payable, on monthly basis, by the open access consumers based on the actual energy drawn during the month through open access.

Provided that such surcharge shall not be leviable to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.”

39. Thus, as per the Regulations, subsidizing consumers of the Distribution Licensee availing open access have to pay cross subsidy surcharge determined by the State Commission. However, when power cuts are imposed on subsidizing consumers, for the period of power cuts, they cease to be the subsidizing consumers as they are not permitted to take power from the Distribution Licensee and as such, there is no recovery of charges by the Distribution Licensee for supply of electricity during that period. Therefore, there is no valid reason to recover cross subsidy surcharge on the quantum of power to the extent of power

restriction/cut which the consumer was forced to procure from open market through open access.

40. Further, the State Commission also has power to remove difficulties and power to add, vary, alter or modify under its Regulations. In the circumstances of the case, it should have exercised its power to relax the provision of the Regulation to direct that cross subsidy surcharge would not be levied on the power availed by the consumers through open access to the extent of power restriction/cut imposed by the Distribution Licensee.
41. Learned Senior Counsel for the Appellant has informed that due to onerous conditions imposed on them, the quantum of open access availed by the subsidizing consumers has reduced considerably and as a result they are suffering production loss. We feel that this is not a desirable situation. When the Distribution Licensee is failing to procure adequate power to meet its obligation to supply to its consumer, there is no justification in imposing onerous levies to make procurement of power by the consumers through open access commercially unviable and make the consumers to suffer production loss by scaling down/shutting down their production and incur loss during the period of power cuts.

42. Learned Counsel for the Respondent no.2 has relied on 2009 (APTEL) 765 in the case of OCL India Ltd. Vs. Orissa Electricity Regulatory Commission & Ors. In OCL case the Appellant earlier had a business of manufacturing sponge iron in addition to cement and refractories and power from its captive power plants was being used for cement and refractory plants and sponge iron plant. On 27.11.2007, the iron and steel unit of Appellant got demerged and the holding of Appellant in the captive power plant became less than 26% and it became the captive power plant of the iron and steel unit. Thereafter, the Appellant started using energy from the captive power plant of the Iron & Steel unit. The Appellant had applied for sanction of additional demand which was provided after a lapse of time as the transmission licensee had to lay the transmission line. The Appellant sought waiver of cross subsidy from 30.3.2008 to 30.4.2009. The Tribunal found that the unit for which additional power was required was completed only after 30.4.2009 and the line had to be constructed by the transmission licensee and as such, the Distribution Licensee was not responsible for delay in providing additional supply. Under those circumstances, the Tribunal held that cross subsidy surcharge had to be paid by the Appellant.

43. The above finding in OCL case would not be applicable to the present case where the Distribution Licensee imposed

power restriction/cut on its consumers due to its inability to procure adequate power and meet its obligation under the Act, forcing the consumers to procure power through open access. Thus, OCL case would not be of any help to the Respondent no.2.

44. **Summary of our findings:**

i) This Tribunal in a number of judgments has held that cross subsidy surcharge is a compensatory charge and the logic behind the provision for cross subsidy is that but for the open access, the consumer would have taken electric supply from the Distribution Licensee and in the result the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy for certain other categories of consumers, which are subsidized.

(ii) Hon'ble Supreme Court in the matter of Sesa Sterlite Ltd. has held that Cross Subsidy Surcharge ("CSS") is payable by the consumer when it decides not to take supply from the Distribution Licensee but takes from other sources. CSS is a compensation to the Distribution Licensee in view of the fact that but for the Open Access the consumer would pay

tariff applicable for supply which would include an element of cross subsidy. Such cross subsidy surcharge has to be paid as determined by the State Commission even if the line of the Distribution Licensee is not used by the open access consumer.

(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 form 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.

45. In view of above findings, the Appeal is allowed. The Impugned Order is set-aside. The State Commission is directed to pass consequential orders which would be applicable to all open access consumers. The Registry is also directed to send a copy of this order to the Central Commission and all State Commissions.

46. Pronounced in open court on **this 01 August of 2014.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:01 August, 2014

√REPORTABLE/~~NON-REPORTABLE~~