

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:-

Thiru M.Chandrasekar

.... Chairman

and

Thiru K.Venkatasamy

.... Member (Legal)

M.P.No. 19 of 2021

M/s. R.S.Yarns and power (pvt) Ltd,
40(1) , SV Colony East,
9th Street, PN Road, Tirupur

... Petitioner

**(Thiru S.P. Parthasarathy
Advocate for the Petitioner)**

Versus

1. The Chairman and Managing Director,
Tamil Nadu Generation and Distribution
Corporation Limited, (TANGEDCO)
144, Anna Salai,
Chennai - 600 002.

2. The Chief Financial Controller,
Tamil Nadu Generation and Distribution
Corporation Limited,(TANGEDCO)
144, Anna Salai,
Chennai - 600 002.

... Respondents

**(Thiru M.Gopinathan
Standing Counsel for TANGEDCO)**

**Dates of hearing : 15-06-2021; 06-07-2021; 27-07-2021;
10-08-2021; 07-09-2021; 28-09-2021;
26-10-2021; 16-11-2021; 30-11-2021;
15-12-2021; 11-01-2022; 25-01-2022;
08-02-2022; 22-02-2022; 01-03-2022;
15-03-2022; 29-03-2022 and 05-04-2022**

Date of order : 26-04-2022

ORDER

The M.P.No.19 of 2021 came up for hearing on 05/04/2022. The Commission, upon perusal of the petition and connected records and after hearing the submissions of the petitioner and the respondent hereby makes the following order:-

1. Prayer of the Petitioner in M.P No. 19 of 2021:-

The Petitioner has sought to issue clarification as to whether additional surcharge on wheeling charges applicable to the open access consumers having drawal voltage over and above 66 kV who source electricity from the Third party Power Generators having injection voltage over and above 66 kV or not, under the provisions of the Electricity Act, 2003 and to pass such orders as deemed fit.

2. Facts of the case:-

The petitioner is having a license for trading of electricity issued by TNERC. It needs clarification on whether the additional surcharges on wheeling charges issued by this Commission in the Order in M.P. No. 18 of 2021 dated 15.4.2021 is applicable to open access consumers having drawal voltage over and above 66 KV or not.

3. Contentions of the Petitioner:-

3.1. The petitioner is a private limited company registered under the Companies Act 1956 and having a license for trading of electricity issued by the Commission issued vide Order No. TLA No.1/2011 dated 16.11.2012. In pursuance to the above order the Petitioner is engaged in Intra-State trading of electricity in the State of Tamil Nadu.

3.2. The Commission in Order in MP No.18/2021 dated 15.4.2021, imposed additional surcharge for open access consumers who buys electricity from IEX and Third party in an application filed by the respondent herein.

3.3. The petitioner was not a party to the proceedings and however they are aggrieved with the above said orders to the extent of applicability of the order to the open access consumers who comes under the Transmission network category, who source the electricity from the Third party generators who are injecting the electricity at 110 KV and above voltage level.

3.4. The petitioner is aggrieved only against the applicability of the order and not against the enhancement of the additional surcharge on wheeling charges and hence the applicant is filing this miscellaneous application before this Tribunal seeking for a clarification.

3.5. For addressing and better understanding of the grievance of the applicant the relevant portions of the orders of the e Commission is extracted hereunder:-

"2.2. The petitioner, TANGEDCO has stated that the power purchase is made from different sources to meet out the peak load shortages and to maintain grid stability only. They have filed this petition to determine additional surcharge payable by open access consumers on quantum of power purchase through open access using network of distribution licensee in line with Section 42(4) of Electricity Act 2003 as below;-

"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"

3.6. TANGEDCO is distribution network of TANGEDCO comprises 66KV, 33KV, 22KV and 11 KV sub transmission system.

3.7. Thus from the submission of the TANGEDCO and from section-42 (4) of Electricity At 2003, it is clear and categorical that the additional surcharge on the charges of wheeling shall be applicable to the open access consumers of the distribution network of TANGEDCO, who source electricity from the generators comprising of 66KV, 33KV, 22KV and 11KV alone and not to the open access consumers having drawal voltage over and above 66KV who source electricity from Third party power generators having injecting voltage over and above 66KV.

3.8. The wheeling charges are not applicable to the open access consumers having drawal voltage over and above 66 KV who source electricity from third party power generators having injecting voltage over and above 66 KV.

3.9. When wheeling chargers are not applicable to open access consumers having drawal voltage over and above 66 KV, who source electricity from the third party power generators having injecting voltage over and above 66 kv, the additional surcharge on wheeling charges are not applicable.

3.10. Thus as per the Electricity Act 2003, collecting additional surcharge from the open access consumers having drawal voltage over and above 66 KV who source electricity from the third party power generators having injection voltage over and above 66 KV is not sustainable and against the provisions of the Act and hence the applicant is entitled for such legal clarification.

4. Contentions of the Respondent:-

4.1. The open access consumers are liable to pay Additional Surcharge on the charges of wheeling. The section 42 (4) of the Electricity Act provides following provisions related to 'Additional Surcharge'.

"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."

4.2. The provisions in the Regulation 24 of the TNERC Grid Connectivity and Intra State Open Access Regulations 2014 are reproduced below:

24. Additional Surcharge:-

(1) An open access customer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge on the charges of wheeling, in addition to wheeling charges and cross-subsidy surcharge, to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under subsection (4) of section 42 of the Act.

(2) This additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.

4.3. As per Electricity Act 'Wheeling' is defined as follows:

"wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62.

4.4. The open access consumers are liable to pay additional surcharge on the charges of wheeling. The section 42 (4) of the Electricity Act deals with wheeling of energy. It implies that all consumers availing power other than Distribution Licensee has to pay the Additional Surcharge irrespective of the level of voltage drawal. There are no such category of consumers who are exempted from paying Additional Surcharge since it is recovery of stranded capacity charges. Distribution Licensee is supplying power to all category of consumers in all voltage levels. It is the duty of the Distribution Licensee to maintain the Backup supply for the open Access consumers.

4.5. In the Commission's Order in M.P.No.18 of 2020 dated 15.04.2021 the para nos. 2.2 and 3.4 are the short notes and description of the Distribution Licensee. The TANGEDCO filed additional Affidavit on 24.12.2020 in which the Additional Surcharge was calculated based on Gujarat Model and it was prayed as follows.

"8.0 Prayer:

In view of the above, it is most respectfully prayed that this Hon'ble Commission may be pleased to:

- *Determine the additional surcharge of Rs.1.23/kWh payable by Open Access consumers.*
- *Consider the information submitted by TANGEDCO for determining the amount of additional surcharge.*
- *Pass such other further orders as the Commission may deem fit and proper in the circumstances of the case.*

- *To permit to make further submissions, addition and alteration to this Petition as may be necessary from time to time.”*

Hence the prayer made for all open access consumer those who are buying power other than Distribution licensee as per the regulations has to pay the Additional Surcharge.

4.6. In the findings of the Commission’s order dated 15.04.2021 in para 8.6 it is as follows:-

"8.6. But it is also provided under Section 42(4) of the Electricity Act 2003 that, a consumer or class of consumers receiving supply of power from a person other than the distribution licensee, shall be liable to pay the Additional surcharge, to meet the fixed cost of such distribution licensee arising out its obligation. TANGEDCO in its petition has stated that it has the stranded capacity of 1961.63 MW during October 2019 to March 2020, for which TANGEDCO has to pay fixed (capacity) charges to the Generators as per the terms and conditions of PPA irrespective of utilisation of generation.”

4.7. The levy of additional surcharge has also been upheld by the Hon’ble Supreme Court in the case of, SESA Sterlite v. OERC (2014) 8 SCC 444 wherein it is clearly mentioned the levy of additional surcharge and cross subsidy are essential which is reproduced as below:-

"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.”

4.8. The levy of additional surcharge is different from cross subsidy and wheeling charges. The stranded capacity charge is common for the consumers who are availing power through Open Access by using the TRANSCO or TANGEDCO network irrespective of voltage level. In view of the above, the petition may be dismissed.

5. Rejoinder filed by the Petitioner:-

5.1. The Counter filed by the 2nd Respondent, does not contain any useful or valid points for consideration to defend his case in hand in any manner. In contra, the Respondent is attempting to suppress all the facts over the availability of documents issued by TANGEDCO in the present subject matter and accordingly, making incorrect statements before the Commission.

5.2. The case of the Petitioner is that additional surcharge on wheeling charges in order of this Commission in M.P.No.18/2020 dated 15.04.2021 is not applicable to the Open Access Consumers having drawal voltage over and above 66KV, who source electricity from Third Party Power Generation having injecting voltage over and above 66 kV since there exists only the usage of Transmission Network, and not the Distribution Network at any point of time.

5.3. Section 42(4) of the Electricity Act, 2003 and Regulation 24 of the TNERC's Grid Connectivity and Intra State Open Access Regulations, 2014 are reproduced below:-

"Section 42 (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"

Regulation 24(1) of the Regulation "An open access customer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge on the charges of wheeling, in addition to wheeling charges and cross-subsidy surcharge, to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under subsection (4) of section 42 of the Act.

5.4. From the above extracted provisions of the law, it clear that open access consumers, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge on the charges of wheeling. While so, when the Generator injects the Power at 110 kV and above and the Consumer Draw the Power at 110 kV level and above, there exists only the usage of Transmission Network, and not the Distribution Network. In such cases 'wheeling charge' itself is not applicable and the wheeling charge will be levied if the injection or drawl voltage is at 33KV or below. Hence when wheeling charges itself is not applicable when the Generator injects the Power at 110 kV and above and the Consumer Draw the Power at 110 kV level and above the question of levying additional surcharge on the charges of wheeling does not arise.

5.5. In this regard, the 2nd Respondent has already issued clarification being Lr. No.CFC/FC/DFC/AS.3/REV/D.No.53/11,dt.19.06.2012 and Lr.No.CFC/REV/FC/DFC/AAO/HT/D.NO.119/13, dated. 06.03.2013. The tabulated statement in the circular dated 06.03.2013 is reproduced below:-

“Applicable of Wheeling charge in respect of Injection and Drawal Voltage:

Sl. No.	Injection Voltage	Drawal Voltage	Description
1.	230 KV	230 KV	Not Applicable
2.	230 KV	110 KV	
3.	230 KV	33 KV	
4.	230 KV	22 KV	Applicable
5.	230 KV	11 KV	
6.	110 KV	230 KV	Not Applicable
7.	110 KV	110 KV	
8.	110 KV	33 KV	
9.	110 KV	22 KV	Applicable
10.	110 KV	11 KV	
11.	33 KV	230 KV	
12.	33 KV	110 KV	
13.	33 KV	33 KV	
14.	33 KV	22 KV	
15.	33 KV	11 KV	
16.	22 KV	230 KV	
17.	22 KV	110 KV	
18.	22 KV	33 KV	
19.	22 KV	22 KV	
20.	22 KV	11 KV	
21.	11 KV	230 KV	
22.	11 KV	110 KV	
23.	11 KV	33 KV	
24.	11 KV	22 KV	
25.	11 KV	11 KV	

From the above it clear that the HT consumers procured energy from IEX or WEG or any Power Generating Station i.e. the injection voltage is 110 KV and drew power at 110 KV and as per the tabulation the wheeling charge is not applicable. The wheeling charge will be levied if the injection or drawal voltage is at 33 KV or below.

5.6. The 2nd Respondent has issued another clarification being Memo.No.CFC/FC/DFC/AAO,HT/AS.3/REV/D.NO.429/18, dt.25.01.2019 which is reproduced below:-

"In the reference first cited, the Superintending Engineer / Vellore has requested to clarify that whether the wheeling charges is applicable (or) not applicable for the energy procured from IEX and WEG when the drawal voltage level is at 110 and above,

2. In this connection, the Superintending Engineer is hereby informed as follows:

2.1. In accordance with the Section 2(76) of the Electricity Act, 2003, "wheeling" means the operation whereby the distribution system and associated facilities of a transmission or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62 of the Electricity Act, 2003. Therefore, the Wheeling charges which are paid to distribution licensee for the use of distribution system and associated facilities by another person for the conveyance of electricity. The licensees, generating stations, captive generating plants and consumers shall be eligible for open access to distribution system of a distribution licensee on payment of the wheeling charges as may be determined by the Commission.

2.2. As per provisions of regulation 9(1) of the Open Access Regulation 2005, Order No.2, dated: 15.05.2006, Commission's suo-motu proceedings dt. 16.05.2008 and Order No.1 dated 30.03.2012, 20.06.2013, 12.12.2014 and 11.08.2017, the wheeling charges has to be collected on the energy injected into distribution network. In this regard, the relevant portion of the Commission's Suo-Motu proceedings dt.16.05.2008 is reproduced below:

9. Response of TNERC

9 (1) *The above contentions are incorrect for the following reasons:*

(xi). The transmission charge recoverable from open access customer was computed with reference to the capacity of the transmission system. The wheeling charges recoverable from the open access customer was computed with reference to the energy injected into the network 22111 kV and below after adjusting the consumption and loss at network of 33 kV and above from the input energy.-----”

From the above, it is clearly observed that wheeling charges has to be collected for the energy injected (including line loss) into the distribution network after adjusting the consumption and line loss up to the transmission network. The network of 110 KV voltage level and above is called Transmission network. Per contra, the network of 33 KV voltage level and below is called Distribution network. Therefore, Wheeling charges is applicable only for the energy injected / drawal at the voltage level from 33 KV, 22 KV and 11 KV at the rate fixed by the Commission from time to time, and the wheeling charge prevailing at present is Re.0.2105 / kWh. Hence, the wheeling charges should be computed on the energy fed into the distribution network.

5.7. Based on the above, wheeling charges have to be collected for the energy injected (including line loss) into the distribution network after adjusting the consumption and line loss up to the transmission network. In the present case of the Petitioner, the injection and drawal in network of 110 KV voltage level and above is purely coming under the Transmission network and not under the network of 33 KV voltage level coming under the Distribution network. Therefore,

wheeling charges is applicable only for the energy injected / drawal at the voltage level from 33 KV, 22 KV and 11 KV at the rate fixed by this Commission from time to time. Hence, the wheeling charges should be computed on the energy fed into the distribution network and not on transmission network. Hence the question of levying additional surcharge on the charges of wheeling does not arise.

5.8. Only on this background that 2nd Respondent himself sought for levying additional surcharge on the quantum of power purchased through open access using the network of distribution licensee. Hence the TANGEDCO itself have not prayed the Commission to claim of Additional Surcharge payable by Open Access Consumers on quantum of power purchase through open access using the Network of Transmission Licensee. Also, there is no provision in the Electricity Act to claim the Additional Surcharge from the Open Access Consumers on quantum of power purchase through open access using the Network of Transmission Licensee.

6. Written Submission of the Respondent:-

6.1. As per Electricity Act 2003 'Wheeling' is defined as follows:

"wheeling" means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62.

6.2. The provisions in the Regulation 32 of the TNERC Grid Connectivity and Intra State Open Access Regulations 2014 are reproduced below:

"32. Losses. -

(1) Transmission losses. -

(a) Inter-State transmission. -

The open access customers shall bear the energy losses in the transmission system in accordance with the provisions specified by the Central Commission.

(b) Intra-State transmission. -

The open access customers shall bear average energy losses in the transmission system as estimated by the State Load Dispatch Centre. The information regarding average energy losses for the previous fifty two weeks shall be posted on the website of the State Load Dispatch Centre. Fortnightly average transmission loss in the system on all open access customers shall be monitored by the SLDC.

(2) Distribution loss. -

In case of distribution open access, the Licensee shall estimate the losses for each category of voltages and furnish to the Commission. These losses as approved by Commission shall be borne by the open access customer."

6.3. Section 8.5 of the National Tariff Policy provides following provisions that deal with calculation of cross subsidy surcharge and applicability of additional surcharge to be paid by open access consumers.

"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."

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

6.4. The clause 8.5.6 also stipulates that in case of outages of generator supplying to a consumer on open access, standby arrangements should be provided by the licensee on the payment of tariff---

6.5. The open access consumers are liable to pay additional surcharge, line losses, Network cost (Transmission Charge for TRANSCO and WHEELING charges to TANGEDCO) for wheeling of Energy.

6.6. All consumers availing power other than from Distribution Licensee has to pay the Additional Surcharge irrespective of the level of voltage drawl.

6.7. Distribution License is supplying power to all category of consumers in all voltage levels. Also it is the duty of the Distribution Licensee to maintain the Backup supply for the open Access consumers irrespective all voltage levels. TRANSCO providing network for wheeling energy and charge transmission charge for its network usage.

6.8. The levy of additional surcharge is different from cross subsidy and wheeling charges. The stranded capacity charge is being recovered through additional surcharge.

6.9. The levy of additional surcharge is also upheld by the Hon'ble Supreme Court in the case of, SESA Sterlite v. OERC (2014) 8 SCC 444 it is clearly mentioned the levy of additional surcharge and cross subsidy are essential which is reproduced as below.

"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."

6.10. On the aforesaid reasons, the Respondent prayed to dismiss the petition and render Justice.

7. Written submissions of the Petitioner:-

7.1. The Petitioner has filed the present application seeking clarification as to whether the additional surcharge on wheeling charges in order of this Commission in M.P.No.18/2020 dated 15.04.2021 are applicable to the Open Access Consumers having drawal voltage over and above 66KV. who source electricity from Third Party Power Generation having injecting voltage over and above 66 kV or not, in view of the provisions of the Electricity Act, 2003.

7.2. The Respondent TANGEDCO (Distribution licensee) had approached this Commission vide M. P. No.18 of 2020 seeking determination of Additional Surcharge payable by open access consumers availing power under open access using the distribution network of the distribution licensee (TANGEDCO) in line with section 42(4)

of the Electricity Act, 2003 and Regulation 24 of the TNERC (Grid Connectivity and Intra-State Open Access) Regulations, 2014.

7.3. Further TANGEDCO in its petitioner in M.P.No.18 of 2020 has stated that the distribution network of TANGEDCO comprises of 66KV, 33KV, 22KV and 11 KV sub-transmission system and additional surcharge is to be determined on the open access consumers availing power under open access using the distribution network of the distribution licensee (TANGEDCO) only. Hence the scope of the prayer in M.P.No.18 of 2020 as prayed by TANGEDCO is only for determining additional surcharge on the open access consumers availing power under open access using the distribution network of the distribution licensee (TANGEDCO) and not for other open access consumers availing open access from the transmission network of TANTRANSCO (transmission utility) which is 110KV or above supply lines.

7.4. It is clear that open access consumers, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge on the charges of wheeling. Accordingly this Commission vide its order dated 15.04.2021 in M.P.No.18 of 2020 has determined Rs.0.70 per unit as additional surcharge payable by open access consumers availing power under open access using the distribution network of the distribution licensee (TANGEDCO) with effect from 16.04.2021.

7.5. The case of the Petitioner is that additional surcharge on wheeling charges in order of this Commission in M.P.No.18/2020 dated 15.04.2021 is not applicable to the Open Access Consumers having drawal voltage over and above 66KV, who source

electricity from Third Party Power Generation having injecting voltage over and above 66 kV since there exists only the usage of Transmission Network of the Transmission licensee TANTRANSCO, and not the Distribution Network of Distribution licensee TANGEDCO at any point of time.

7.6. While so, when the Generator injects the Power at 110 kV and above and the Consumer Draw the Power at 110 kV level and above, there exists only the usage of Transmission Network, and not the Distribution Network. In such cases wheeling charge' itself is not applicable and the wheeling charge will be levied if the injection or drawl voltage is at 33KV or below. Hence when wheeling charges itself is not applicable when the Generator injects the Power at 110 kV and above and the Consumer Draw the Power at 110 kV level and above the question of levying additional surcharge on the charges of wheeling does not arise.

7.7. "Tamil Nadu Electricity Regulatory Commission - Intra State Open Access Regulations 2005" defines Wheeling' under Regulation 2(0) as follows: -

(o). "Wheeling" means the operation whereby the distribution system and associated facilities of a transmission Licensee or distribution Licensee, as the case may be , are used by another person for the conveyance of electricity on payment of charges to be determined under section 62 of the Electricity Act 2003".

7.8. Further Regulations 4 of the "Tamil Nadu Electricity Regulatory Commission - Intra State Open Access Regulations 2005" provides the eligibility for open access and its conditions as follows:

"4. Eligibility for Open Access and conditions to be satisfied

(1) Subject to the provisions of these regulations, the Licensees, generating companies including persons who have established captive generating plants, generation plants and electricity traders shall be eligible for open access to the intra state transmission system of the State Transmission Utility or any transmission Licensee on payment of transmission and other charges as may be determined by the Commission.

(2) Subject to the provisions of these regulations, the Licensees, generating companies including persons who have established a captive generating plant and consumers shall be eligible for open access to Distribution System of a Distribution Licensee on payment of the wheeling charges as may be determined by the Commission”.

Hence from the above it is clear that captive generating plants, generation plants and electricity traders shall be eligible for open access to the intra state transmission system of TANTRANSCO (state transmission utility) on payment of transmission and other charges as determined by this Commission. Similarly, generating companies including persons who have established a captive generating plant and consumers shall be eligible for open access to Distribution System of a Distribution Licensee on payment of the wheeling charges as may be determined by the Commission. Wheeling charges become payable when the CGPs or open access consumers avail open access using the distribution network of the distribution licensee only.

7.9. Further, Regulation 9(1) of the 'Tamil Nadu Electricity Regulatory Commission - Intra State Open Access Regulations 2005" provides the charges for open access payable by open access customers as follows:

"9. Charges for open access

The following charges as applicable are payable by the open access customer.

(1) Transmission charge or wheeling charge

(a) Transmission charges payable to State Transmission Utility / Transmission Licensee and wheeling charges payable to Distribution Licensee, by an open access customer shall be determined by the Commission. Wheeling charges shall be determined on the basis of same principles as laid down for intra state transmission charges.”

From the above it clear that transmission charges as fixed by this Commission are payable to the State Transmission Utility i.e., TANTRANSCO for utilising the transmission network and wheeling charge are payable by open access consumers to the Distribution Licensee TAGNEDCO for utilising the distribution system. In case of Open Access Consumers having drawal voltage over and above 66KV, who source electricity from Third Party Power Generation having injecting voltage over and above 66 kV only transmission charges are payable since there exists only the usage of Transmission Network of the Transmission licensee TANTRANSCO, and not the Distribution Network of Distribution licensee TANGEDCO at any point of time.

7.10. Further Regulation 9(3) of the 'Tamil Nadu Electricity Regulatory Commission - Intra State Open Access Regulations 2005 provides the determination of additional surcharge as follows:-

"(3) Additional Surcharge

(a) An open access customer, receiving supply of electricity from a person other than the distribution Licensee of his area of supply, shall pay to the distribution Licensee an additional surcharge on the charges of wheeling, in addition to wheeling charges and surcharge, to meet out the fixed cost of such distribution Licensee arising out of his obligation to supply as provided under sub-section (4) of section 42 of the Act; This additional surcharge shall become applicable only if the obligation of the Licensee in terms of power purchase commitments has been and continues to be stranded"

From the above Regulation 9(3) it is clear that additional surcharges is payable by an open access customer to the distribution licensee an additional surcharge on the charges of wheeling in addition to the wheeling charges. In the present case the Open Access Consumers having drawal voltage over and above 66KV, who source electricity from Third Party Power Generation having injecting voltage over and above 66 kV only transmission charges are payable since there exists only the usage of Transmission Network of the Transmission licensee TANTRANSCO, and not the Distribution Network of Distribution licensee TANGEDCO at any point of time. Hence payment of wheeling charges does not arise and consequently levy of additional surcharge on the charges of wheeling in the present case does not arise i.e., usage of Transmission Network of the Transmission licensee TANTRANSCO and not the Distribution Network of Distribution licensee TANGEDCO at any point of time.

7.11. Based on various orders issued by this Commission from time to time and taking cue from such orders and from the past experience, this Commission decided to repeal the said Tamil Nadu Electricity Regulatory Commission (Intra-State Open Access) Regulations, 2005 and notified Tamil Nadu Electricity Regulatory Commission (Grid connectivity and Intra-State Open Access) Regulations, 2014 which defines 'Wheeling' under Regulation 2(X) as follows: -

(x) "Wheeling" means the operation whereby the distribution system and associated facilities of a transmission Licensee or distribution Licensee, as the case may be, are used by another person for the conveyance of electricity on payment of charges to be determined under section 62 of the Act.

7.12. Further the Tamil Nadu Electricity Regulatory Commission (Grid connectivity and Intra-State Open Access) Regulations, 2014 provides the eligibility for open access and its conditions as follows:

9. Eligibility for Open Access and conditions to be satisfied. -

(1) Subject to the provisions of these Regulations, the licensees, generating companies, captive generating plants and consumers shall be eligible for open access to the intra-State transmission system of the State Transmission Utility or any transmission licensee on payment of transmission and other charges as may be determined by the Commission from time to time.

(2) Subject to the provisions of these Regulations, the licensees, generating stations, captive generating plants and consumers shall be eligible for open access to distribution system of a distribution licensee on payment of the wheeling and other charges as may be determined by the Commission from time to time.

Hence from the above it is clear that captive generating plants, generation plants and electricity traders shall be eligible for open access to the intra state transmission system of TANTRANSCO (state transmission utility) on payment of transmission and other charges as determined by this Commission. Similarly, generating companies including persons who have established a captive generating plant and consumers shall be eligible for open access to Distribution System of a Distribution Licensee on payment of the wheeling charges as may be determined by the Commission. Wheeling charges become payable when the CGPs or open access consumers avail open access using the distribution network of the distribution licensee only.

7.13. Further, Regulation 20 of the Tamil Nadu Electricity Regulatory Commission (Grid connectivity and Intra-State Open Access) Regulations, 2014 provides the charges for open access payable by open access customers as follows:

"OPEN ACCESS CHARGES

20. Transmission Charges. -

Open Access customer using transmission system shall pay the charges as stated hereunder:

(2) For use of intra-State transmission system. -

(a) By Long-Term, Medium-Term and Short-Term Open Access Customers.

Existing Long-Term Open Access and Medium-Term Open Access customers (including existing distribution licensees and generating companies) shall share

*the Annual Transmission Charges (ATC) of the State Transmission Utility or transmission licensee, as determined by the Commission in the ARR for the relevant year, in the ratio of their allotted capacities. Transmission charges payable by other Long-Term Open Access, Medium-Term Open Access and Short Term Open Access customers to the STU or Transmission Licensee shall be determined as under:
Provided further that transmission charges for Short-Term open access shall be payable on the basis of capacity reserved for such customer."*

From the above the Existing Long-Term Open Access and Medium-Term Open Access customers (including existing distribution licensees and generating companies) shall share the Annual Transmission Charges (ATC) of the State Transmission Utility or transmission licensee, as determined by the Commission in the ARR for the relevant year, in the ratio of their allotted capacities and transmission charges for Short-Term open access shall be payable on the basis of capacity reserved for such customer. It is clear that transmission charges as fixed by the Commission are payable to the State Transmission Utility i.e., TANTRANSCO for utilizing the transmission network.

7.14. Further, Regulation 22 of the Tamil Nadu Electricity Regulatory Commission (Grid connectivity and Intra-State Open Access) Regulations, 2014 provides the wheeling charges payable to the Distribution licensee for utilizing the distribution network:-

"22. Wheeling Charges –

(a) Wheeling charges payable to Distribution Licensee, by an open access customer shall be as determined by the Commission;"

From the above, it is clear that generating companies including persons who have established a captive generating plant and consumers shall be eligible for open access to Distribution System of a Distribution Licensee on payment of the wheeling

charges as may be determined by the Commission. Wheeling charges become payable when the CGPs or open access consumers avail open access using the distribution network of the distribution licensee only.

7.15. In line with Regulation 22 of the Tamil Nadu Electricity Regulatory Commission (Grid connectivity and Intra-State Open Access) Regulations, 2014 has determined wheeling charges at Rs.0.21paise vide its order dated 11.08.2017 in Tariff Order No.1 of 2017 for availing open access using the distribution network on TANGEDCO. Similarly on line with Regulation 20 of the Tamil Nadu Electricity Regulatory Commission (Grid connectivity and Intra-State Open Access) Regulations, 2014 this Commission has determined Rs.3037/- per MW / per day as transmission charges vide order dated 11.08.2017 in Tariff Order No.2 of 2017.

7.16. Further, Regulation 24 of the Tamil Nadu Electricity Regulatory Commission (Grid Connectivity and Intra-State Open Access) Regulations, 2014 provides the determination of additional surcharge as follows:-

24. Additional Surcharge. -

(1) An open access customer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge on the charges of wheeling, in addition to wheeling charges and cross-subsidy surcharge, to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under subsection (4) of section 42 of the Act.

From the above Regulation 24 it is clear that additional surcharges is payable by an open access customer to the distribution licensee an additional surcharge on the charges of wheeling in addition to the wheeling charges. In the present case the Open Access Consumers having drawal voltage over and above 66KV, who source electricity from Third Party Power Generation having injecting voltage over and above

66 kV only transmission charges are payable since there exists only the usage of Transmission Network of the Transmission licensee TANTRANSCO, and not the Distribution Network of Distribution licensee TANGEDCO at any point of time. Hence payment of wheeling charges does not arise and consequently levy of additional surcharge on the charges of wheeling in the present case does not arise i.e., usage of Transmission Network of the Transmission licensee TANTRANSCO and not the Distribution Network of Distribution licensee TANGEDCO at any point of time.

7.17. Neither Section 42(4) of the Act nor the Tamil Nadu Electricity Regulatory Commission (Grid connectivity and Intra-State Open Access) Regulations, 2014 provides for levy of additional surcharge the Open Access Consumers having drawal voltage over and above 66KV, who source electricity from Third Party Power Generation having injecting voltage over and above 66 kV only transmission charges are payable since there exists only the usage of Transmission Network of the Transmission licensee TANTRANSCO, and not the Distribution Network of Distribution licensee TANGEDCO at any point of time. Regulations 24 (3) of the Tamil Nadu Electricity Regulatory Commission (Grid connectivity and Intra-State Open Access) Regulations, 2014 provides as follows:-

(3) The distribution licensee shall submit to the Commission on six monthly basis, a detailed calculation statement of fixed cost which the licensee is incurring towards his obligation to supply. The Commission shall scrutinize the statement of calculation of fixed cost submitted by the distribution licensee and obtain objections, if any, and determine the amount of additional surcharge:

7.18. Based on the Regulation 24(3) the Distribution licensee has filed approached this Commission vide M.P.No.18 of 2020 seeking determination of Additional Surcharge payable by open access consumers availing power under open access using the distribution network of the distribution licensee (TANGEDCO) in line with

section 42(4) of the Electricity Act, 2003 and Regulation 24 of the TNERC (Grid Connectivity and Intra-State Open Access) Regulations, 2014. TANGEDCO have never sought for levy additional surcharge on the OA customer not utilising the Distribution Network of TANGEDCO i.e., the Open Access Consumers having drawal voltage over and above 66KV and who source electricity from Third Party Power Generation having injecting voltage over and above 66 kV using purely the transmission network only.

7.19. The Commission may allow this Petition filed by the Petitioner by clarifying that additional surcharge on wheeling charges in order of this Commission in M.P.No.18/2020 dated 15.04.2021 are not applicable to the Open Access Consumers having drawal voltage over and above 66KV, who source electricity from Third Party Power Generation having injecting voltage over and above 66 kV, in view of the provisions of the Electricity Act, 2003 and the Regulations.

8. Findings of the Commission:-

8.1. The petitioner, M/s.R.S.Yarns and Power Pvt Ltd., is an Intra-State Trading Licensee. The present petition has been filed seeking clarification as to whether the Additional Surcharge approved by the Commission in Order dated 15.04.2021 in M.P.18 of 2020 is applicable to the Open Access consumers having drawal voltage over and above 66 KV, who source electricity from Third Party Power Generation having injection voltage over and above 66 KV or not, under the provisions of the Electricity Act, 2003.

8.2. The petitioner has stated that the applicant is not a party to the proceedings, but is aggrieved by the Order of the Commission in M.P.18 of 2020 to the extent of applicability of the Order to the Open Access consumers who comes under the Transmission Network category, who source the electricity from the Third Party Generators who are injecting the electricity at 110 KV and above Voltage level.

8.3. In the Miscellaneous Petition No.18 of 2020, Commission determined the Additional Surcharge based on the provisions under Section 42(4) of the Electricity Act 2003 and Regulation 24 of the TNERC's Grid Connectivity and Intra State Open Access Regulations 2014, as below –

Electricity Act 2003

"(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"

TNERC's Grid Connectivity and Intra State Open Access Regulations 2014

24. Additional Surcharge:–

(1) An open access customer, receiving supply of electricity from a person other than the distribution licensee of his area of supply, shall pay to the distribution licensee an additional surcharge on the charges of wheeling, in addition to wheeling charges and cross-subsidy surcharge, to meet out the fixed cost of such distribution licensee arising out of his obligation to supply as provided under subsection (4) of section 42 of the Act.

8.4. In the instant case, the petitioner has stated that under Section 42 (4) of the Electricity Act 2003, the Additional Surcharge on the charges of wheeling shall be applicable to the Open Access consumers having the drawal voltage over and above 66 kV. The wheeling charges are not applicable to the Open Access consumers having drawal voltage over and above 66 kV; when the wheeling charges are not applicable to OA consumers having drawal voltage over and above 66 kV, the Third party Power generators having injection voltage over and above 66 kV, the Additional Surcharge on wheeling charges are also not applicable. The petitioner sought clarification to the extent of this question of applicability of ASC on those consumers who connected directly in Transmission system of the Licensee. The wheeling charges have to be collected for the energy injected into the Distribution network; in the present case of the petitioner, the injection and drawal is in 110 KV voltage level & above purely coming under the Transmission network and not under the network of 33 kV Voltage level coming under the Distribution network. While so, the question of levying additional surcharge on the charges of wheeling does not arise.

8.5. The Respondent has stated that the Distribution licensee is supplying power to all category of consumers in all voltage levels. The Distribution licensee is bound to maintain the Back up supply for the open access consumers irrespective of voltage levels.

8.6. As specified under the National Tariff Policy,

"8.5.4 The additional surcharge for obligation to supply as per section 42(4) of the Act should become applicable only if it is conclusively demonstrated that the obligation of a licensee, in terms of existing power purchase commitments, has been and continues to be stranded, or there is an unavoidable obligation

*and incidence to bear fixed costs consequent to such a contract. **The fixed costs related to network assets would be recovered through wheeling charges.***

8.5.6 In case of outages of generator supplying to a consumer on open access, standby arrangements should be provided by the licensee on the payment of tariff for temporary connection to that consumer category as specified by the Appropriate Commission. ”

In case of outages of generator, the Distribution licensee shall have to provide the standby arrangements to the Open Access consumer. Therefore, the respondent prayed that all consumers availing power other than Distribution licensee has to pay Additional Surcharge irrespective of the voltage level.

8.7. Further, the Respondent has referred the case of SESA Sterlite Vs OERC in C.A.5479 of 2013, in which the Hon'ble Supreme Court of India held that the Additional Surcharge may be levied to meet the fixed cost of the Distribution licensee arising out of this obligation to supply. The stranded capacity charge is common for the consumers who are availing power under Open Access through the network of TANGEDCO and TANTRANSCO irrespective of their voltage level.

8.8. From the submission of both the parties, we observe as follows:-

8.8.1. As stipulated under Section 42(4), a consumer or class of consumers who obtained a HT / EHT Service connection from the Distribution licensee, is allowed to purchase power from any person other than the Distribution licensee and such consumer is liable to pay an additional surcharge to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

8.8.2. National Tariff Policy lays down the purpose of levy of Additional surcharge. The Additional Surcharge is levied to recover such fixed cost incurred by the Distribution Licensee for its obligation to supply under Section 42(4) of the Electricity Act 2003, while its existing power purchase commitments has been and continues to be stranded.

8.9. Having considered the rival contentions, the short question which has come up for consideration is when wheeling charges are not applicable to OA consumers having drawal voltage over and above 66 and the said category of consumers sourcing the power through transmission system independent of the distribution lines, whether the additional surcharge on wheeling is payable?

8.10. In our view, the petitioner has fallen in error in seeking to carve out a distinction between the OA consumers in terms of payment of Additional Surcharge. Too much reliance has been placed on the question of wheeling charges to challenge the Additional Surcharge. It may be true that the Act under section 42 (4) states in express language that Additional surcharge is payable on wheeling charges. But in our firm understanding, the issue cannot be viewed narrowly without appreciating the issue in a larger perspective. A conjoint reading of section 2 (76) which defines wheeling to include the facilities of transmission licensee and regulation 24 of the TNERC Grid Connectivity and ISOA Regulations, 2014 would make it amply clear that the purposes for which the wheeling charges are levied and the additional surcharge are levied are different.

8.11. The mere fact that the language in section 42 (4) postulates levy of Additional surcharge as the charges on wheeling would not altogether denude the right of the Distribution Licensee to levy Additional Surcharge on those consumers who are not wheeling but only transmitting.

8.12. If section 42 (4) is read in conjunction with section 2 (76) and regulation 24, the case of the petitioner, in our view, does not stand a chance. Further, the purpose of wheeling and Additional surcharge being entirely different, they cannot be interlinked to make out a case solely on the basis of section 42 (4) and arrive at a conclusion that the very levy of Additional surcharge survives on the concept of wheeling. The purpose of Additional surcharge has to be understood. It has nothing to do with the purpose of wheeling i.e. utilization to meet the requirements of cross subsidy. It has the object of recovery of fixed cost arising out of obligation to supply. It is not the case of the petitioner that there is no obligation at all to supply on the part of the Distribution Licensee even when power is drawn above at 66 kv level. The obligation still exists and only for the said purpose, the mechanism of standby arrangement is existing. Needless to say that standby arrangement also entails fixed cost and hence, allowing the present prayer would amount to treating a class of consumers i.e. over and above 66 KV in preference to those below 66 KV in the matter of availing standby arrangements at free of cost.

8.13. It is not the case of the petitioner that Regulation 24 (1) is in excess of powers conferred by section 42 (4) and hence, section 24 (1) having become part of the statute, the consequential levy on the strength of the same cannot be called in question without challenge to the very regulation itself. Further, it is doubtful whether

such challenge would be sustainable in view of the fact that the said regulation draws spirit from para 8.5.4 of National Tariff Policy which provides for levy of Additional surcharge in case of stranded capacity and distinguishes the purpose of wheeling and additional surcharge.

8.14. At this juncture, we also have to recapitulate the observation of the Commission in Order of M.P.18 of 2020 -

"8.15. The Commission is of the considered view that, unless fixed costs due to stranded capacity are recovered from OA consumers, this burden would be unjustly loaded onto other Consumers of Distribution Licensee. The Commission believes it would be unfair and unwarranted to pass such burden of fixed cost recovery of such stranded cost to other consumers through tariff hike.

8.16. Under Section 42(4) of the Electricity Act 2003, the Additional surcharge shall be levied to meet the fixed cost incurred by the distribution licensee arising out of his obligation to supply. The Additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded. Under Regulation 24(2) of Grid connectivity and Intra state open access Regulations, the distribution licensee is obligated to prove the stranded capacity. Therefore, in extract, to justify the claim of Additional Surcharge, the petitioner has to provide the (i) Fixed capacity charges incurred by the petitioner towards the available capacity and (ii) the quantum of continuously stranded capacity of the petitioner."

8.15. As discussed above, if the fixed cost incurred by the Distribution licensee towards its obligated Power purchase is found to be stranded due to option of the Open Access consumer to purchase power from a person other than the distribution

licensee, there is a compelling need to recover such cost from the OA consumer concerned. Under this circumstance, an OA consumer who draws power above 33 kV voltage level alone cannot wriggle out of its obligation to pay the fixed cost in the form of Additional surcharge.

8.16. Above all, under section 86 (4) of the Electricity Act, the Commission shall be guided by the National Electricity Policy and National Tariff Policy and hence, we are of the view that the Regulation 24 (1) satisfies the test of statutory validity as well. It is all the more important to observe here that the petitioner has not come up with a defence that there is no case of stranded capacity concerning the consumers over and above 66 KV and the case of the petitioner also fails on factual count. In the result, we have to conclude that consumers over and above 66 KV cannot seek exclusion or exemption from payment of Additional surcharge. In the result, the petition is dismissed.

(Sd.....)
(K.Venkatasamy)
Member (Legal)

(Sd.....)
(M.Chandrasekar)
Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission