

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. 32 of 2021

M/s. Birla carbon India Pvt.Ltd,
(Formerly-SKI carbon Black (India) Pvt Ltd,)
K-16Phase II SIPCOT, Gummidipoondi,
Thiruvallur-Dist. Pin- 601201

.... Petitioner
(Thiru.Rahul Balaji
Advocate for Petitioner)

Vs

1. The Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)
Rep by its Chairman and Managing Director
144, Anna Salai
Chennai-600 002
2. The Chief Engineer,
Tamil Nadu Transmission Corporation (TANTRANSCO)
144, Anna Salai
Chennai-600 002.

.... Respondents
(Thiru. M. Gopinathan
Standing Counsel for TANGEDCO
Thiru. V. Anil Kumar,
Advocate for TANTRANSCO)

Dates of hearing : 31-08-2021; 14-09-2021; 28-09-2021;
26-10-2021 and 16-11-2021.

Date of order : 08-02-2022

The M.P.No.32 of 2021 came up for final hearing on 16-11-2021. The Commission upon perusal of the petition and connected records and after hearing the submissions of the Petitioner and the Respondents hereby makes the following order.

ORDER

1. Prayer of the Petitioner in M.PNo. 32 of 2021:-

The prayer of the Petitioner in this M.P.No.32 of 2021 is to issue appropriate directions to the Respondent to levy Additional Surcharge as fixed on Open Access pursuant to orders passed by the Commission in its Order dated 15.04.2021 in M.P.No.18 of 2020 on the units equivalent to the actual quantum of energy in units drawn and consumed as stipulated in Regulation 24(4) of the TNERC Intra State Open Access Regulations, 2014

2. Facts of the Case:

The petition has been filed by the Petitioner for adherence of the provisions of the TNERC Intra State Open Access Regulations which requires open Access consumers to be billed for additional surcharge on per unit basis on the actual energy drawn during the month through open access, whereas, the Respondents after initially correctly invoicing on such basis have changed the manner of invoicing to the 'energy units scheduled' on an incorrect understanding of the orders passed by the Commission. Thus, the Petitioner had filed the instant petition praying the Commission to exercise its Regulatory power and issue appropriate directions to the Respondent to levy Additional Surcharge as fixed on Open Access pursuant to orders passed by

the Commission in its Order dated 15.04.2021 in M.P. No. 18 of 2020 on the units equivalent to the *actual quantum of energy in units drawn and consumed* as stipulated in Regulation 24(4) of the TNERC Intra State Open Access Regulations, 2014.

3. Contentions of the Petitioner:

3.1. The Petitioner is a company registered under the Companies Act, 2013 and is inter alia, engaged in the generation of electricity and utilizes the surplus power generated and its captive generating plant for consumption to consumers in exercise of its right to open access. Petitioner has been selling power so generated to various third party consumers under various Open Access Agreements and has been duly remitting the charges so payable to the Respondents TANGEDCO and TANTRANSCO.

3.2. The instant petition has been filed due to the non-adherence by the Respondents to the provisions of the TNERC Intra State Open Access Regulations which requires open Access consumers to be billed for additional surcharge on per unit basis on the actual energy drawn during the month through open access, whereas, the Respondents after initially correctly invoicing on such basis have changed the manner of Invoicing to the 'energy units scheduled' on an incorrect understanding of the orders passed by the Commission. M.P. 18 of 2020 was filed by TANGEDCO under Regulation 24 of the OA Regulations seeking to levy additional surcharge on the basis of their claim that open access consumers by procuring electricity from sources other than the licensee have caused its generation capacity, which has been built based on past and future demands, to be rendered stranded and consequently seeking for fixation of additional

surcharge.

The petition under Regulation 24(2) reads 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.*

(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.

(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:

Provided that any additional surcharge so determined by the Commission shall be applicable only to the new open access customers.

(4) Additional surcharge determined on per unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access:

Provided that such additional surcharges shall not be levied in case distribution access is provided to a person who has established a captive generation plant for carrying the electricity from such plant to the destination of his own use".

3.3. This Commission was pleased to permit various industry associations and representative bodies to implead themselves in TANGEDCO's petition in the interest

of doing complete justice. After a thorough hearing, this Commission was passed an order permitting the levy of additional surcharge at the rate of Rs.0.70 per kWhr. The relevant extract of the final order passed is as follows:

"8.22. Applicability of Additional Surcharge:

In view of the above observations, the Commission decides that –

- *The Additional Surcharge as determined under the Table-3 above is applicable to the consumers who purchase the power through Third party Sale and power exchanges (viz., IEX, PXI, etc.,)*
- *The Open Access consumers shall pay the Additional Surcharge at the rate of Re.0.70 per kWh on the quantum of the electricity scheduled by them.*
- *The additional surcharge of Re.0.70 per kWh is collectable by the petitioner TANGEDCO from 16.04.2021 to 30th September 2021.*

3.4. Any order passed by the Commission must be in consonance with the Electricity Act, 2003 ("EA, 2003") and any delegated legislation framed there under including the OA Regulations.

3.5. The Supreme Court of India, in the case of *PTC India v Central Electricity Regulatory Commission* (2010) 4 5CC 603 had an occasion to set out in what manner the powers of the Central Commission under Section 79 of the EA, 2003 is circumscribed by delegated legislation passed under the EA, 2003. It must be noted that such a finding also applies to the powers exercised by the Commission under Section 86 of the EA, 2003 in as much as the State Commission and the Central Commission are both creatures of the Electricity Act, 2003 and performing quasi-judicial, administrative and rulemaking functions over a specifically enumerated list of subjects. Relevant extracts from the said judgment is as follows:

"As stated above, the 2003 Act has been enacted in furtherance of the policy

envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the GridCode, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178. To regulate is an exercise which is different from making of the regulations.

....

However, if there is a regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such regulation. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178.

However, if a regulation is made under Section 178, then, in than event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfill the objects of the 2003 Act.

.....

The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of "general application", a Regulation

stands on a higher pedestal vis-à-vis an Order (decision) of CERC in the sense that an Order has to be in conformity with the regulations.”

3.6. Therefore, it is incumbent on all parties including the petitioner, the licensees as also the Commission to ensure that orders passed by it are read and applied in conformity with the Regulations framed. However, in the instant case, the Order dated 15.04.2021 has utilized the words 'quantum of electricity scheduled by them' as the measure which is in stark contrast to the OA Regulations and applying such methodology there is a detrimental and prejudicial impact on the industry as a whole.

3.7. If at all, an inadvertent error has crept into the final order passed as extracted above. There is a difference between the scheduled energy and the actual energy drawn by a consumer, as there is a significant amount of energy that is lost in the form of transmission and distribution losses, line loss etc. as also for other reasons resulting in a mismatch.

3.8. Illustratively, the following scenario may be considered:

- A generator contracts to sell a quantum of 2MW (this translates to 1548264 units) to a third party open access consumer. This is the scheduled demand of a consumer. The actual energy drawn by the consumer is 1487727 units, because of energy loss that occurs during transmission and distribution. (Difference in units – 60,537)
- Further, often times the generator is also unable to inject 100% of the contracted quantum due to technical reasons that would include transmission and distribution issues, grid situation, voltage etc. thereby reducing the quantum of energy consumed by the third party open access

consumer.

- If additional surcharge is levied on the contracted and scheduled quantum as opposed to the actual energy drawn by an open access consumer, consumers are mulcted with heavy charges which does not find any grounding in law. It is submitted that in view of the above, TANGEDCO has started levying additional surcharge on third party consumers of the petitioner generator on the contracted and scheduled quantum in units as opposed to the actual energy drawn, which is not stipulated by the OA Regulations. Petitioner is attaching sample bills of some of the Petitioner's consumers for the month of May 2021 along with this petition. Naturally, such amount not constituting energy consumed by such consumers, the petitioner has to bear the costs as its contract, which is in accordance with regulations would only allow recovery of units consumed.

3.9. A bare reading of Regulation 24(4) makes it amply clear that additional surcharge ought to be levied only on the actual energy drawn by an open access consumer. In view of the same, Petitioner's contracts with its consumers are predicated on this settled law.

3.10. TANGEDCO has suddenly adopted this new approach to the levy of additional surcharge by taking advantage of the words in paragraph 8.22 of the Commission's order dated 15.04.2021 in M.P.No. 18 of 2020 ignoring the regulations which binds them. Further, such a computation methodology runs in complete contravention to the express wordings of the OA Regulations.

3.11. It is settled law that when the words of a statute or rule are clear, there can be no room for any purposive interpretation or two ways of interpreting the same and the statute has to be followed as is. In the instant case, the Regulation 24(4) is clear in its language and there can be no two ways of interpreting the same.

3.12. The Petitioner therefore issued a letter dated 17.06.2021 seeking for an appropriate change in the billing and provided all details and also the legal position. However the respondents have continued to act contrary to the regulations leaving the petitioner with no option than to approach this Commission.

3.13.If this new approach of the TANGEDCO is left unchecked, several generators and third party open access consumers will be mulcted with heavy charges on a monthly basis which finds no authority in law. It is therefore, emergent that this Commission issues appropriate billing directions in exercise of its regulatory power and clarifies the manner of levy of additional surcharge fixed is to be charged on units consumed.

4. Contentions of the First Respondent :-

4.1. The open access consumers are liable to pay Additional Surcharge as per the following legal provisions.

a) Section 40 of Electricity Act 2003 describes the duties of Transmission Licensee related to Open Access as follows:

“(c) to provide non-discriminatory open access to its transmission system for use by-

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:

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

Provided also that the manner of payment and utilisation of the surcharge shall 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.

- b) The Section 42 (2) of the Electricity Act 2003 describes the duties of distribution licensee related to open access as follows:

“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:”

- c) Further, Section 42 (4) of the 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 Regulation 24 of TNERC(Grid connectivity and Intra-State Open Access) Regulations, 2014, provides following provisions, which deal with ‘Additional Surcharge’

“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.

(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: Provided that any additional surcharge so determined by the Commission shall be applicable only to the new open access customers.

(4) Additional surcharge determined on per unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access:

Provided that such additional surcharges shall not be levied in case distribution access is provided to a person who has established a captive generation plant for carrying the electricity from such plant to the destination of his own use.

4.3. A petition was filed before the Commission as per the provisions in the Regulation 24 of the TNERC Grid Connectivity and Intra State Open Access Regulations 2014 and admitted as M.P.No.18 of 2020.

4.4. TANGEDCO considered OA Energy consumption for arriving additional Surcharge instead of OA scheduled energy, since Cross subsidy is also being collected for the units consumed from Open Access. It is further submitted that apportionment of cost should be for actual utilisation only.

4.5. The following stakeholders raised the objections regarding above methodology.

- Indian Electricity Exchange Limited (No.IEX/RA/108/20-21 27th Jan., 2021) in its objection has stated as follows:

2.7.) 3. Inadvertent errors in the revised computations of ASC of Rs. 1.23/kWh: a) Notwithstanding the fallacies and deficiencies in the claim itself, the computation of revised claim of Rs.1.23/kWh suffers from few anomalies, as mentioned below for such items:

S.N 28-OA scheduled energy corresponding to OA allowed (avg.) of 469.84 MW should be considered.

- Tamil Nadu Spinning Mills' Association (Date: 28.01.2021) in its objection has stated as follows:

Inadvertent errors in the revised computations of ASC of Rs.1.23/kWh:

73. Notwithstanding the fallacies and deficiencies in the claim itself, the computation of revised claim of Rs.1.23/kWh suffers from few anomalies, as mentioned below for such items:

iii. S.N 28-OA scheduled energy corresponding to OA allowed (avg.) of 469.84 MW should be considered.

- Tamil Nadu Electricity Consumers' Association in its objection has stated as follows:

73. Notwithstanding the fallacies and deficiencies in the claim itself, the computation of revised claim of Rs. 1.23/kWh suffers from few anomalies, as mentioned below for such items:

iii. S.N 28- OA scheduled energy corresponding to OA allowed (avg.) of 469.84 MW should be considered.

4.6. After considering the views and suggestion the Commission passed the order in M.P.No.18 of 2020 dated 15.04.2021 as follows.

“8.22. Applicability of Additional Surcharge: *In view of the above observations, the Commission decides that –*

- ✓ *The Additional Surcharge as determined under the Table-3 above is applicable to the consumers who purchase the power through Third party Sale and power exchanges (viz., IEX, PXI, etc.,)*
- ✓ ***The Open Access consumers shall pay the Additional Surcharge at the rate of Re.0.70 per kWh on the quantum of the electricity scheduled by them.***
- ✓ *The additional surcharge of Re.0.70 per kWh is collectable by the petitioner TANGEDCO from 16.4.2021 to 30th September 2021.”*

4.7. TANGEDCO is following the order without any deviations and has billed the Additional Surcharge for the Scheduled Energy only.

4.8. The Hon'ble Gujarat Electricity Regulatory Commission in its order dated 12.03.2014 in the Petition No.1302 of 2013, for determination of additional surcharge in para 11 is as follows.

*"In view of above observations, we decide that the present petition succeeds. The petitioner is eligible to recover the additional surcharge as per the provisions of the Electricity Act, 2003, National Electricity Policy, Tariff Policy and GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011. The Additional Surcharge determined based on the data for period April, 2013 to September, 2013 of the petitioner works out to Rs. 0.42 per kWh. The additional surcharge of Rs 0.42 per kWh shall be applicable to the consumers of the co-petitioner, viz. MGVCL, UGVCL, PGVCL and DGVCL, who avail power through open access from any source other than their respective DISCOMs and for the open access transaction commencing from 1st April, 2014 to 30th September, 2014. **The Additional Surcharge shall be levied on the quantum of electricity scheduled by such consumers.**"*

4.9. In view of the above reasons it is humbly prayed to dismiss the petition and thus render Justice.

5. Rejoinder filed by the Petitioner:

5.1. The Petitioner seeks to set forth the method in which the additional surcharge and cross subsidy surcharges are calculated by TANGEDCO for a consumer procuring energy from IEX or for a generator for supply to IEX, for ease of understanding. As per the interstate deviation settlement mechanism, energy scheduled by any consumer for procurement from IEX or energy scheduled to sell the energy to IEX by a generator is taken into energy accounting by SLDC in final settlement. This scheduling of power procurement happens every day, by bidding in the IEX DAM market (Day Ahead Market) for less than or equal to the approved quantum by SLDC as decided by the

consumer on that day. Assuming the consumer has SLDC approved quantum of 5MW to procure from IEX, the consumer can procure any quantum as it requires on every 15 minutes slots but only to the extent of the maximum approved quantum of 5MW. Based on the trend of previous day market rate, bidding can be done as desired by consumer. Thereafter, IEX in turn collects energy charges to 100% of quantum bid in the exchange platform. The balance energy of that particular slot (15 minutes) of the day is then supplied by TANGEDCO and billed accordingly. The Petitioner provides herein below an illustration:

5.2. Let consumer of TANGEDCO be 'A' with approved quantum by SLDC as 5MW. The consumer 'A' can schedule in IEX as it decides based on the slot price. Hypothetically, a consumer can schedule 3 MW in Slot 1 to 10, 4MW in slot 11 to 30, 0MW on slot 31 to 50, 5MW in slot 51 to 96. In this scenario, IEX allocates the scheduled power to the consumer as per the bid quantum in IEX and collect the energy charges from the consumer.

Slots	Scheduled energy in MW	Total Energy in Units or KWh for accounting
Slot 1 to 10	3 MW	7500 (equal to $(3000/4)*10$)
Slot 11 to 30	4 MW	20000 (equal to $(4000/4)*20$)
Slot 31 to 50	0 MW	0 (equal to $(0/4)*20$)
Slot 51 to 96	5 MW	57500 (equal to $(5000/4)*46$)

5.3. From the above table, it is clear that the consumer 'A' decided to procure only 85000 units for the day from IEX instead of SLDC approved and allowed maximum quantum of 120000 units. In this scenario, the consumer pays energy charges to IEX only for 85000 units plus losses and not for 120000 units plus losses. The difference in energy between approved quantum of 120000 units of the day and 85000 units of the procured energy from IEX is 35000 units. In fact, TANGEDCO then supplies these balance units of 35000 units for the same day and accounts the energy charges in the bill. This is the manner in which scheduling happens every day for the entire month. The Petitioner states that while TANGEDCO is allowed to bill the balance units of the day (consumed) in monthly CC bill as per the Tariff Order and Open Access Regulations which is done in actual units in spite of scheduled and procured energy less than the SLDC approved quantum for every day by consumer 'A', however, TANGEDCO levies the additional surcharge on the approved quantum of 5 MW plus losses irrespective of the fact that the actual energy bought by consumer 'A' is less than the scheduled energy. This means TANGEDCO charges additional surcharge and cross subsidy surcharges to consumer 'A' for SLDC approved quantum of 5MW in the following manner:

SLDC approved quantum to consumer 'A'	: 5 MW
SLDC approved quantum to consumer 'A' with losses	: 5.1198MW(= $5/(1-2.34\%)$ losses@2.34% at state periphery)
Scheduled energy as per SLDC approved quantum with losses	:122875 units (=5.1198*24*1000 for 1 day)

Actual energy scheduled and procured by consumer 'A' for 1 day	:87036 units = $(=85000/(1-2.34\%))$ with losses against procured energy of 85000 units.
TANGEDCO levy Additional surcharge for scheduled energy	:Rs.86012 $(122875*0.70, 70$ paisa per unit)
TANGEDCO levy Cross subsidy surcharge for actual energy	:Rs.141950 $(85000*1.67, Rs.1.67$ per unit)

In extreme cases, if losses are to be considered while levying additional surcharge on actual bought energy, the levy of additional surcharge should be –

TANGEDCO levy Additional surcharge for actual energy : Rs.60926
 $(85000/(1-2.34\%))*0.70,$
70 paisa per unit)

If losses are not to be considered while levying additional surcharge on actual bought energy, the levy of additional surcharge should be –

TANGEDCO levy Additional surcharge for actual energy : Rs.59500
 $((85000*0.70), 70$ paisa per unit)

5.4. From the above, it can be seen that TANGEDCO gains undue advantage of levying additional surcharge of Rs.26513 $(86012-59500)$ per day by charging the consumer 'A' with energy charges for balance quantum units not scheduled in IEX i.e., 35000 units $(120000-85000)$ which burdens both the consumer and the generator. But at the same TANGEDCO is levying the cross-subsidiary charges for only 85000 units

and not for 120000 units in line with TNERC Open Access Regulation. This discrimination while levying additional surcharge is without any valid reason and further, is in complete contravention of the express provisions of the Open Access Regulations.

5.5. The Petitioner states that, as explained in the above example the same methodology is being followed for the energy generated by the Petitioner as well. The Petitioner under the PPA is generating 16MW to its consumer, M/s Hyundai Motors India Ltd. The energy accounting is done by SLDC on the actual energy supplied by the Petitioner to M/s Hyundai Motors. The method in which TANGEDCO levies additional surcharge for one particular month is illustrated in actual herein below.

Details of Energy supplied to Hyundai Motors by BirlaCarbon in August 2021:

SLDC approved and contracted quantum to Hyundai Motors	: 16MW
SLDC approved and contracted quantum with losses to M/s HyundaiMotors	: 16.383MW
Total Units if BCI supplied 100% to Hyundai Motors	: 11904000 units (=16000*24*31 units)
Actual Supplied units to Hyundai by Birla carbon:	10848820 units
Shortfall or short supply to 100% quantum of 16 MW To Hyundai by Birla Carbon	: 1055180 units
TANGEDCO has levied additional surcharge for units Considering losses too	: 12189228 units (=16000*24*31/(1- 2.34%) units)
Additional surcharge levied to M/s.Hyundai by TANGEDCO:	Rs.8532459 (=12189228*0.70, 70 paisa per unit)
TANGEDCO would have levied for actual energy supplied then With losses extremely	: Rs.7776136 (=(10848820/(1- 2.34%))*0.70, 70 paisa per unit)

Additional Surcharge levied to M/s.Hyundai by TANGEDCO
on short supply units : Rs.756323
(=8532459-7776136)

5.6. From the above, it can be seen that TANGEDCO has supplied the short supply units of 1055180 in furtherance of the supply by the Petitioner to Hyundai Motor India Ltd. and charged the energy charges as per Tariff Order and Open Access Regulation in the August 2021 Current Consumption (CC) bill, and gained Rs.7,56,323/- as additional revenue from the short supply units by burdening the customer and generator. The Petitioner states that the same is against the interest of national economy in promoting open access. At the same time, it is pertinent to note that the Cross Subsidy charges are levied from Hyundai Motor India Ltd. on the actual units supplied to Hyundai Motor India Ltd. by the Petitioner and not on the scheduled energy. Hence, there is a clear discrimination in the methodologies of levying these surcharges and therefore, the same must be rectified.

5.7. The Petitioner seeks to point out that the Hon'ble Punjab Electricity Regulatory Commission in its Order dated 26.08.2020 in Petition No.6 of 2020 has categorically held as follows:

“Accordingly, the Commission determines the applicable Additional Surcharge for the period 01-04-2020 to 30-09-2020 as Rs.1.145 per kWh (Detailed in Annexure-A). This Additional Surcharge shall be leviable on the consumers situated within the area of supply of PSPCL, on the actual open access power brought by them from sources other than PSPCL, subject to the condition that the contracted capacity of PSPCL continues to remain stranded during the period. Further, this order shall have an overriding effect on the Commission’s Order dated 20-03-2020.”

5.8. Further, the Hon'ble Delhi Electricity Regulatory Commission has also held the same in its Order dated 01.06.2017 in the matter of: Determination of Open Access Charges and related matters:

'23 Additional Surcharge:

(3) Additional surcharge determined on Per Unit basis shall be payable, by the Open Access consumer on actual energy drawn through Open Access, limited to a maximum of scheduled Open Access energy during that time block:

Provided that such additional surcharges shall not be levied in case Open Access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use."

5.9. The Respondent does not deny that Regulation 24(4) of the TNERC (Grid Connectivity and Intra-State Open Access) Regulations, 2014 categorically provides that "Additional surcharge determined on per unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access." In fact, the same has been relied upon by the Respondent TANGEDCO in their counter.

5.10. The contents of reproductions of the Electricity Act, 2003 and TNERC Grid Connectivity and Intra State Open Access Regulations, 2014 and are matters of record and merit on response from the Petitioner.

5.11. The objections given by the said associations cannot change the fact that the Regulations themselves provide a clear methodology of levy the surcharge. The

TANGEDCO cannot take a stand that no objection was received from the said Associations regarding the methodology.

5.12. The TANGEDCO has misinterpreted the Order of this Commission in a way that is in complete contravention of the express mandates of Regulation 24 reproduced hereinabove. The Petitioner also stated that when there are any doubts in respect of an Order of the Commission as against the Electricity Act and the Regulations framed thereunder, the Act and the Regulations always take priority and the Order must be interpreted in conformity of the Act and the Regulations. The same has been affirmed by the Hon'ble Supreme Court of India, in the case of *PTC India v. Central Electricity Regulatory Commission (2010) 4 SCC 603*:

“The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of “general application”, a Regulation stands on a higher pedestal vis—vis an Order (decision) of CERC in the sense that an Order has to be in conformity with the regulations.”

6. Written Submissions of the Petitioner:

6.1. The TANGEDCO filed a petition, M.P.No.18 of 2020, under Regulation 24 of the Open Access Regulations seeking to levy additional surcharge on the basis of their claim that open access consumers by procuring electricity from sources other than the licensee have caused its generation capacity, which has been built based on past and future demands, to be rendered stranded and consequently seeking for fixation of additional surcharge. TANGEDCO, in their petition and additional affidavit have categorically stated that they have considered the Open Access energy

consumption for arriving additional surcharge instead of OA scheduled energy, Since Cross subsidy is also being collected for the units consumed from Open Access, the apportionment of cost should be for actual utilization only. Thus, it is evident that TANGEDCO filed the said petition seeking for fixation of additional surcharge based on actual utilization of units.

6.2. Regulation 24 of the Open Access Regulations is reproduced hereunder for ready reference.

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.

(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:

Provided that any additional surcharge so determined by the Commission shall be applicable only to the new open access customers.

(4) Additional surcharge determined on per unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access:

Provided that such additional surcharges shall not be levied in case

distribution access is provided to a person who has established a captive generation plant for carrying the electricity from such plant to the destination of his own use.

6.3. The petition filed by TANGEDCO came to be ordered by this Commission.

The following is the operative portion of this Order:

In view of the above observations, the Commission decides that –

- *The Additional surcharge as determined under the Table-3 above is applicable to the consumers who purchase the power through Third Party Sale and Power exchanges (viz., IEX, PXI, etc.,)*
- *The Open Access consumers shall pay the Additional Surcharge at the rate of Re.0.70 per kWh on the quantum of the electricity scheduled by them.*
- *The additional surcharge of Re.0.70 per kWh is collectable by the Petitioner TANGEDCO from 16.04.2021 to 30th September 2021.”*

6.4. Any order passed by the Commission must be in consonance with the Electricity Act, 2003 (EA, 2003") and any delegated legislation framed thereunder including the Open Access Regulations. Pertinently, the Hon'ble Supreme Court of India, in *PTC India v. Central Electricity Regulatory Commission (2010) 4 SCC 603* had an occasion to set out in what manner the powers of the Central Commission under Section 79 of the EA, 2003 is circumscribed by delegated legislation passed under the EA, 2003. It must be noted that such a finding also applies to the powers exercised by the Commission under Section 86 of the EA, 2003 in as much as the State Commission and the Central Commission are both creatures of the Electricity Act, 2003 and performing quasi-judicial, administrative and rulemaking functions over a specifically enumerated list of subjects. Relevant extracts from the said judgment are as follows:

"As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licenses, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc.. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable, Measures under Section 79(1), therefore have got to be in conformity with the regulations under Section 178. To regulate is an exercise which is different from making of the regulations.

.....

However, if there is a regulation under Section 178 in that regard then the Order levying fees under Section 79(1)(g) has to be in consonance with such regulation.

Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178. One must keep in mind the dichotomy between the power to make a regulation under Section 178 on one hand and the various enumerated areas in Section 79(1) in which the Central Commission is mandated to take such measures as it deems fit to fulfill the objects of the 2003 Act.

...

The above two citations have been given by us only to demonstrate that under the 2003 Act, applying the test of "general application" a Regulation stands on a higher pedestal vis-vis an Order (decision) of

CERC in the sense that an Order has to be in conformity with regulations.”

6.5. Therefore, it is incumbent on all parties including the petitioner, the licensees as also the Commission to ensure that orders passed by it are read and applied in conformity with the Regulations framed. However, in the instant case, the Order dated 15.04.2021 has utilized the words 'quantum of electricity scheduled by them' as the measure which is in stark contrast to the Open Access Regulations and by applying such methodology, there is a detrimental and prejudicial impact on the industry as a whole.

6.6. It is settled law that when words of a statute or rule are clear, there can be no room for any purposive interpretation or two ways of interpreting the same and the statute has to be followed as is. In the instant case, the Regulation 24(4) is clear in its language and there can be no two ways of interpreting the same.

6.7. It is evident that, if at all, the final order passed has not reflected the Regulations which are binding as extracted above, It is submitted there is a difference between the scheduled energy and the actual energy drawn by a consumer, as there is a significant amount of energy that is lost in the form of transmission and distribution losses, line loss etc. as also for other reasons resulting in a mismatch.

6.8. A bare reading of Regulation 24(4) makes it amply clear that additional surcharge ought to be levied only on the actual energy drawn by an open access consumer. In view of the same, Petitioner's contracts with its consumers are predicated on this settled law. It is submitted that the TANGEDCO, after the order of

the Commission, has suddenly adopted this new approach to the levy of additional surcharge by taking advantage of the words in paragraph 8.22 of the Commission's Order dated 15.04.2021 in M.P.No.18 of 2020 ignoring the regulations which binds them. Further, such a computation methodology runs in complete contravention to the express wordings of the OA Regulations.

6.9. As an illustration, the methodology being followed by TANGEDCC to levy additional surcharge is set out in actual hereunder. The Petitioner under the PPA is generating 16MW to its consumer, M/s Hyundai Motors India Ltd. The energy accounting is done by SLDC on the actual energy supplied by the Petitioner to M/s Hyundai Motors.

Details of Energy supplied to M/s Hyundai Motors by Birla Carbon in August 2021:

SLDC approved and contracted quantum to M/s Hyundai Motors: 16MW

SLDC approved and contracted quantum with losses to

M/s Hyundai Motors : 16.383MW

Total Units if BCI supplied 100% to M/s Hyundai :11904000 units

(=16000*24*31 units)

Actual Supplied units to M/s Hyundai by Birla carbon : 10848820 units

Shortfall or short supply to 100% quantum of 16MW to

M/s Hyundai by Birla Carbon: 1055180 units

TANGEDOC has levied additional surcharge for units considering

losses too :12189228 units

(16000*24*31/(1 -2.34%) units)

Additional Surcharge levied to M/s Hyundai by TANGEDCO :Rs.8532459

(=12189228*0.70, 70 paisa per unit)TANGEDCO would have levied for actual

energy supplied evenwith losses extremely :Rs.7776136

(=(10848820/(1-2.34%))*0.70,70 paisa per unit)

Additional Surcharge levied to M/s.Hyundai by TANGEDCOon

short supply units :Rs.756323

6.10. TANGEDCO has supplied the short supply units of 1055180 in furtherance of the supply by the Petitioner to M/s.Hyundai Motors and charged the energy charges as per Tariff Order and Open Access Regulation in the August 2021 Current Consumption (CC) bill, and gained Rs.7,56,323 /- as additional revenue from the short supply units by burdening the customer and generator. It is submitted that the same is against the interest of national economy in promoting open access. At the same time, it is pertinent to note that the Cross Subsidy charges are levied from M/s.Hyundai on the actual units supplied to M/s. Hyundai by the Petitioner and not on the scheduled energy. Hence, there is a clear discrimination in the methodologies of levying these surcharges and therefore, the same must be rectified.

6.11. If this new approach of the TANGEDCO if left unchecked, several generators and third party open access consumers will be mulcted with heavy charges on a monthly basis which finds no authority in law, It is therefore emergent that the Commission issues appropriate billing directions in exercise of its regulatory power and clarifies the manner of levy of additional surcharge fixed is to be charged on the actual units consumed and not on the units scheduled. Further, even though the

petitioner is a generator, it has obtained open access approvals and supplies energy to third parties. As such, it is critical that the Commission clarifies the issue, especially since it is evident from the actual illustration hereinabove that the petitioner's consumers are directly affected.

6.12. The Petitioner seeks to point out that the Hon'ble Punjab Electricity Regulatory Commission in its Order dated 26.08.2020 in Petition No.6 of 2020 has categorically held as follows:

"Accordingly, the Commission determines the applicable Additional Surcharge for the period 01.04.2020 to 30.09.2020 as Rs.1.145 per kWh (Detailed in Annexure-A). This Additional Surcharge shall be leviable on the consumers situated within the area of supply of PSPCL, on the actual open access power brought by them from sources other than PSPCL, subject to the condition that the contracted capacity of PSPCL continues to remain stranded during the period. Further, this Order shall have an overriding effect on the Commission's Order dated 20.03.2020."

6.13. Further, the Delhi Electricity Regulatory Commission has also held the same in its Order dated 01.06.2017 in the matter of: Determination of Open Access Charges and related matters:

"2.3 Additional Surcharge:

...

(3) Additional surcharge determined on Per Unit basis shall be payable, by the Open Access consumer on actual energy drawn through Open Access, limited to a maximum of scheduled Open Access energy during that time block:

Provided that such additional surcharges shall not be levied in case Open Access is provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use."

6.14. Even the Gujarat Open Access Regulations provide for levy of additional surcharge on actual utilization only. Regulation 25 of the Terms and conditions of

Intra State Open Access Regulations, 2011 issued by the Gujarat Electricity Regulatory Commission (GERC) states as thus,

"25. Additional Surcharge

(4) Additional surcharge determined on Per Unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access:

Provided that such additional surcharges shall not be levied in case distribution access is Provided to a person who has established a captive generation plant for carrying the electricity to the destination of his own use."

Therefore reliance on the Gujarat order would be misplaced as the Gujarat Commission has acted contrary to their own Regulations. Any order as per settled law has to be in consonance to the Regulations which is subordinate legislation.

6.15. Therefore, applying the principle in PTC India v. Central Electricity Regulatory Commission (2010) 4 SCC 603, Order dated 12-03-2014 in Petition No. 1302 of 2013 must be read in conformity with the EA, 2003 and the OA regulations issued by the GERO for levy of additional surcharge and as such, reliance placed on the said order dated 12.03.2014 has no merit.

6.16. For all the above-mentioned reasons the Commission may allow the instant petition as prayed for and issue appropriate directions for reworking the Additional Surcharge in terms of the Regulations and forthwith refund any additional charges collected.

7. Written submission of the Respondent No.1:-

7.1. The additional surcharge being levied, as per the Regulation 24 of TNERC (Grid connectivity and Intra-State Open Access) Regulations, in which 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.

7.2. M/s Birla carbon is a generator and TANGEDCO has not billed any additional surcharge as mentioned by the Petitioner. Therefore the petitioner is not liable to pay additional surcharge to TANGEDCO. Hence the petitioner's claim is false and has to be dismissed.

7.3. In the Additional affidavit filed by TANGEDCO on 24.12.2020 in para 6 it is mentioned as follows:

"It is submitted that TANGEDCO considered OA Energy consumption for arriving additional Surcharge instead of OA scheduled energy, since Cross subsidy is also being collected for the units consumed from Open Access. It is further submitted that apportionment of cost should be for actual utilisation only."

7.4. The major stake holders raised the objections regarding above methodology.

- Indian Electricity Exchange Limited (No.IEX/RA/108/20-21 27th Jan., 2021) in its objection has stated as follows:-
 - a) Notwithstanding the fallacies and deficiencies in the claim itself, the computation of revised claim of Rs.1.23/kWh suffers from few anomalies, as mentioned below for such items:

S.N 28-OA scheduled energy corresponding to OA allowed (avg.) of 469.84 MW should be considered.

- Tamil Nadu Spinning Mills' Association (Date: 28.01.2021) in its objection and Tamil Nadu Electricity Consumers' Association in its objection has stated the same objection.

7.5. After considering the views and suggestion the Commission passed the order in M.P.No.18 of 2020 dated 15.04.2021 as follows.

"8.22. Applicability of Additional Surcharge: In view of the above observations, the Commission decides that –

- ✓ *The Open Access consumers shall pay the Additional Surcharge at the rate of Re.0.70 per kWh on the quantum of the electricity scheduled by them. "*

7.6. The TANGEDCO is following the order without any deviations and has billed the Additional Surcharge for the Scheduled Energy only. The additional surcharge was arrived based on Gujarat ERC model and the same analogy was followed.

7.7. The Hon'ble Gujarat Electricity Regulatory Commission in its order dated 12.03.2014 in the Petition No.1302 of 2013, for determination of additional surcharge in para 11 is as follows.

"In view of above observations, we decide that the present petition succeeds. The petitioner is eligible to recover the additional surcharge as per the provisions of the Electricity Act, 2003, National Electricity Policy, Tariff Policy and GERC (Terms and Conditions of Intra-State Open Access) Regulations, 2011. The Additional Surcharge determined based on the data for period April, 2013 to September, 2013 of the petitioner works out to Rs.0.42 per kWh. The additional surcharge of Rs.0.42 per kWh shall be

applicable to the consumers of the co-petitioner, viz. MGVCL, UGVCL, PGVCL and DGVCL, who avail power through open access from any source other than their respective DISCOMs and for the open access transaction commencing from 1st April, 2014 to 30th September, 2014. The Additional Surcharge shall be levied on the quantum of electricity scheduled by such consumers.”

7.8. In view of the above reasons it is humbly prayed to dismiss the petition and thus render Justice.

8. Findings of the Commission:-

8.1. The petitioner is engaged in the business of the generation of Electricity. The power so generated is sold to various Third party consumers and the surplus power generated in its Captive generating plant is consumed under OA agreement. The prayer of the petitioner in this petition is to direct the TANGEDCO to levy the Additional surcharge on Open Access pursuant to orders passed by the Commission in its Order dated 15.04.2021 in M.P.No.18 of 2020 on the units equivalent to the actual quantum of energy drawn and consumed only.

8.2. The petitioner has stated that it has executed Short-Term Open access Agreement with the following consumers under the arrangement of Third party sale.

Sl. No.	Company Name	HT SC No.	Contracted Quantum
1	M/s. Hyundai Motors India Ltd	099094110277	16 MW
2	M/s. Renault Nissan Automotive India Pvt. Ltd.	099094110759	7 MW
3	M/s. Wipro Ltd.	099094010742	2 MW

4	M/s. Bannari Amman Spinning Ltd., Erode	049094260219	0.6 MW
5	M/s. Bannari Amman Spinning Ltd., Coimbatore Metro	039094350340	0.8 MW
6	M/s. Shiva Mills Ltd.	059094500084	1 MW
7	M/s. Shiva Tex Yarn Ltd., (Unit-II)	039094350351	1.5 MW
8	M/s. Bannari Amman Spinning Ltd., Unit-I Dindigul	059094500171	1 MW
9	M/s. Bannari Amman Spinning Ltd., Unit-II Dindigul	059094500279	4 MW

In adherence of the TNERC's Intra State Open Access Regulations, the Open Access consumers under this arrangement are bound to pay the Cross subsidy surcharge as well as Additional Surcharge. But this petition has been filed due to non-adherence to such provisions by the Respondents which requires OA consumers to be billed for additional surcharge on per Unit basis on the actual energy drawn during the month, whereas the Respondents after initially correctly invoicing on such basis have changed the manner of invoicing to the 'Energy units scheduled' on an incorrect understanding of the Orders.

8.3. The Petitioner argues that with reference to the Regulation 24(4) i.e., "(4) *Additional surcharge determined on per unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access* ", the levy of Additional surcharge shall be on the quantum of electricity actually adjusted by them in conformity with the Regulations, but not on the energy scheduled by them; and it is also contrary to the statutory provisions of the Commission.

8.4. In this connection, the Petitioner has elaborated the levy of Additional surcharge by the TANGEDCO in one of its 3rd party consumer as below:

Details of Energy supplied to Hyundai Motors by Birla Carbon in August 2021:

SLDC approved and contracted quantum to Hyundai Motors :	16 MW
SLDC approved and contracted quantum with losses to M/s.Hyundai Motors :	16.383 MW
Total Units if BCI supplied 100% to Hyundai Motors :	1,19,04,000 Units (=16000*24*31 units)
Actual supplied units to Hyundai by Birla carbon :	1,08,48,820 units
Shortfall or short supply to 100% quantum of 16 MW to Hyundai by Birla Carbon :	10,55,180 units
TANGEDCO has levied additional surcharge for units Considering losses too :	1,21,89,228 units (16000*24*31/(1-2.34%))
Additional surcharge levied to M/s.Hyundai by TANGEDCO :	Rs.85,32,459 (1,21,89,228*0.70, 70 paise per unit)
TANGEDCO would have levied for actual energy supplied even with losses extremely :	77,76,136 (=(1,08,48,820/(1-2.34%))*0.70, 70 paise per unit)

Extra Additional surcharge levied to M/s.Hyundai by TANGEDCO : Rs.7,56,323
(Rs.85,32,459-Rs.77,76,136)

From the above, the petitioner made allegation that the Respondent gained additional revenue of Rs.7,56,323. Thus the difference in Additional surcharge arises due to difference between the scheduled energy and the actual energy drawn by a consumer, as there is a significant amount of energy that is lost in the form of Transmission and Distribution losses, line loss etc.,

8.5. Before going into the prayer of the petitioner, the fundamentals adopted by the Commission in determination of Additional Surcharge shall have to be seen. It would be relevant to state that, in the petition M.P.18 of 2020 wherein the TANGEDCO has sought to fix the Additional surcharge, it was sought to approve and fix the Additional surcharge at the rate of Rs.1.40 per Unit. TANGEDCO has stated that the Fixed cost per unit sold to consumers (including OA consumption) is Rs.2.35 per Unit, but the Respondent is recovering the Demand charges only to the extent of Rs.0.95 per Unit, resulting in the gap of recovery of Fixed cost of Rs.1.40 / unit. Based on this calculation, TANGEDCO sought to fix Rs.1.40 per unit as Additional surcharge payable by OA consumers. The Commission was not satisfied with this method of calculation for arriving at the Additional surcharge since the method does not take into account the block-wise consumption under OA purchase of power. Hence the Commission directed the Respondent to file the revised calculation of Additional surcharge following the Gujarat model of computation. Under this method, TANGEDCO prayed to fix the Additional surcharge at Rs.1.23 per unit.

On filing of the affidavit, Commission called for stakeholders comments. Taking into account of all the stakeholders' comments and the Fixed cost details, OA quantum details furnished by the TANGEDCO, the Commission determined in its Order of M.P.18 of 2020 dated 15.04.2021 the Additional Surcharge at Re.0.85 per unit which is limited to Re.0.70 per unit to be collected by the TANGEDCO on the energy scheduled by the consumer.

8.6. It is a fact that when an Open Access consumer prefer power purchase from a generator other than the Distribution Licensee, certain quantum of power is scheduled by such OA consumer through SLDC without availing power from the Distribution Licensee, and as result, the Discom/SLDC has to back down its scheduling to the equivalent extent of power for which incurring of fixed cost is unavoidable. The actual consumption at the consumer end may be lesser or higher than the power scheduled, but the quantum of backing down always depends on the scheduled capacity of the OA consumer. The rationale behind the levy of Additional surcharge is to compensate the unrecovered Fixed cost arising out for the obligation to supply. It has been well explained in the earlier Order of Additional surcharge determination by the Commission.

8.7. In the proceeding of M.P.18 of 2020, the Distribution licensee was sought to file the petition adopting the Gujarat model of Additional surcharge calculation. The TANGEDCO furnished all the details following the same method and also furnished the OA quantum under "OA scheduled energy" for determination of Additional Surcharge. The same was taken by the Commission for computation of Surcharge. Since, it is a well established method of calculation, this Commission accepted the same in toto.

8.8. Though the above method being followed in Gujarat has been adopted by this Commission, the present petition on hand of M/s.Birla Carbon India Private Limited has raised a question whether the Additional surcharge should be levied on the “Approved quantum” or “Actually drawn/consumed”.

The petitioner has sought to contend that the order of the Commission dated 15-11-2021 passed in M.P. No. 18 of 2020 directing the calculation of Additional Surcharge on the quantum of energy scheduled by the Open Access consumers is against Commission’s own regulation No. 24 (4) of TNERC Intra-State Open Access Regulations, 2014 and that in view of the ratio laid down in PTC India Vs. CERC (2010) 4 SCC 603, the regulation would prevail over the orders passed by a State Commission and hence, the Additional Surcharge has to be determined on the basis of units drawn as stipulated under the said Regulation 24 (4). The petitioner has also cited the decision of Punjab and Delhi Electricity Regulatory which provide for determination of Additional Surcharge on the basis of units drawn and also has argued that even the Gujarat Regulations provide only for determination of Additional Surcharge on the actual energy drawn and hence, the decision of GERC relied upon in the impugned order is misplaced. Per contra, the respondents have placed reliance on the order dated 12-03-2014 of GERC in Petition No.1302/2013 for sustaining its case. In the backdrop of the above contention, the crucial issue which arises for conclusion whether the orders in M.P. No. 18 of 2020 providing for calculation of Addition Surcharge on the quantum scheduled is erroneous and as against Regulation 24 (4) of the TNERC Open Access Regulation. However, the point which has been missed out both sides during the course of arguments is the block-wise scheduling of energy in respect of Open Access.

While entire calculation of additional surcharge is arrived on the basis of 15 minutes block wise energy allocated by the SLDC in the petitioner's case, the scheduling is neither made by the petitioner nor insisted by the Respondent.

In such context, the applicability of scheduled power for collection of Additional Surcharges does not arise. The order in M.P. No.18 of 2020 cannot read in between lines to bring in a system i.e. scheduling which is not present in the transaction between the petitioner and the respondent.

8.9. The calculation of Additional surcharge for the month of August 2021 in respect of Hyundai Motors case, clearly shows that the Respondent has levied the additional surcharge on the "Approved quantum". The "Approved quantum", "Scheduled quantum" and "Actually adjusted quantum" cannot be same forever. The Approved quantum is the capacity upto which an OA consumer can purchase to a maximum level through this agreement, whereas the scheduled quantum is the quantity of power scheduled ahead during every block by such OA consumer. The adjusted quantum is the quantum of power adjusted against the consumption of the consumer which purely depends on its industrial consumption. The respondent has no "Scheduled quantum" in respect of the petitioner's case to confer the authority levy the additional surcharge on the entire approved quantum and the entire levy is based on the allocation done in 15 minutes block. Hence, we decide that the Additional surcharge levied on the "Approved quantum" is not correct.

8.10. Taking into account of all the above circumstances and facts, we are of the well considered view that the Additional surcharge shall be levied on the quantum of OA

power actually drawn only as stipulated in Regulation 24(4) of the TNERC Intra-State Open Access Regulations 2014.

Ordered accordingly.

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission