

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the Matter of:

Suo-moto proceedings initiated by the Commission on the representation of M/s India Glycols Ltd. regarding illegal demand of Cross Subsidy from Medium Term Open Access (MTOA) consumers by UPCL.

And

In the matter of

1. M/s India Glycols Ltd., A-1, Industrial Area Bazpur Road, Kashipur.
.....Respondent No. 1
2. M/s Hindustan National Glass Ltd. Malviya Nagar, Virbhadra Rishikesh.
.....Respondent No. 2
3. M/s Ester India Ltd. Sohan Nagar, Charubeta, Khatima, U.S. Nagar.
.....Respondent No. 3
4. Uttarakhand Power Corporation Limited (UPCL).
.....Respondent No. 4

Coram

Shri Subhash Kumar Chairman

Date of Order: 12th April, 2018

ORDER

This Order relates to the representation filed by M/s India Glycols Ltd. (hereinafter referred to as "Respondent No. 1") vide letter No. IGL/DDN/RSY/2018 dated 02.02.2018 regarding illegal demand of Cross Subsidy from Medium Term Open Access (MTOA) consumers by UPCL (hereinafter referred to as Respondent No. 4 or UPCL).

Background

2. The Respondent No.1, a Medium term Open Access consumer, has submitted that UPCL vide its letter No. 339 dated 29.01.2018 had charged Rs. 33, 42,186/- on account of Cross Subsidy Surcharge payable for the month of December 2017.
3. The Respondent No. 1 has taken recourse to Regulation 22 of UERC (Terms & Conditions of Intra State Open Access) Regulations, 2015 henceforth referred to as Open Access Regulations which stipulates that:

“22. Cross subsidy surcharge

(1) Embedded open access consumer, in addition to transmission and/or wheeling charges, shall pay cross subsidy surcharge determined by the Commission. Cross subsidy surcharge determined on Per Unit basis shall be payable, each month, by such consumer based on the actual energy drawn during the month through open access. The amount of surcharge shall be paid to the distribution licensee.

Provided that no cross subsidy surcharge shall be levied on energy drawn by such consumers, through open access, during the period of power cut imposed by the distribution licensee.

Provided further that such surcharge shall not be levied on long term/medium term such open access consumer and a person who has established a captive generation plant for carrying the electricity to the destination of his own use.

Provided also that in case power supply position or the load of such consumers, seeking open access, changes substantially, the Commission may review the Cross Subsidy Surcharge as and when required.

(2) The cross subsidy surcharge for such short term open access consumers shall be determined in accordance with the following formula:

Surcharge formula:

$$S = T - C$$

Where,

S is the cross subsidy surcharge;

T is the retail tariff payable by the relevant category of such consumers;

C is the average cost of supply of distribution licensee.”

4. The Respondent No. 1 submitted that in accordance to the aforesaid Regulations the cross subsidy surcharge is not payable by it on the power purchased through Medium term Open Access and the insistence of UPCL to pay such charges is in gross violations of aforesaid Regulation 22 of Open Access Regulations.

5. The Commission vide its letter No. 1740 dated 07.02.2018 sent a copy of the aforesaid letter of Respondent No. 1 to UPCL for their comments.
6. UPCL vide its letter No. 660 /UPCL/UERC/IGL-CSS dated 16.02.2018 submitted their comments.
7. Taking cognizance of the same, the Commission decided to initiate suo-moto proceeding in the matter and fixed a hearing on 13.03.2018 summoning other MTOA consumers, i.e. M/s Hindustan National Glass Ltd., Virbhadra, Rishikesh and M/s Ester India Ltd., Khatima, U.S. Nagar to appear before it on the stipulated date and time.
8. On the request of the Respondent No. 4, i.e. UPCL, the Commission rescheduled the hearing to 03.04.2018. The hearing was held on the scheduled date and time.
9. UPCL stated that Respondent No. 1 being a consumer of UPCL cannot forward its complaint directly to the Commission and should have followed the standard procedure of bringing the matter before CGRF for redressal of its complaint.
10. UPCL asserted that the claim of Respondent No. 1, that the second proviso to Regulation 22(1) exempts the Long term/Medium term consumers from paying cross subsidy charge on the power purchased through Open Access is not tenable and should be rejected. UPCL stated that word "such" used in the second proviso of Regulation 22(1) shows that the proviso pertains to Long term/Medium term Open Access consumer and a person who has established a Captive Generating Plant and does not mean that the surcharge does not apply to Long term or Medium term Open Access consumers because such interpretation would be directly in confrontation with the main provision of the Regulation. The Respondent No. 4 further stated that had the legislature intended to exclude long-term and Medium term Open Access from the applicability of Cross Subsidy Surcharge then the main Regulation would have dealt with only Short term Open Access consumer and there would have been no need to lay down a proviso to the principal Regulations.
11. UPCL further submitted that Regulation 22(2) of Open Access Regulations also incorporates word "such" before Short term Open Access underlying that the

formula pertains to the category of those Short term Open Access consumers who take power from their captive generating plant and as the Short term Open Access cannot be for more than a month and therefore no captive generation plant can be established for self usage through Short term Open Access.

12. The Respondent No. 4 further stated that since the basic principal of Cross Subsidy is to compensate the Distribution licensee in case any of its consumers takes electricity from a third party, therefore, the question of categorizing the consumer as Long term/Medium term/Short term for the purpose of applicability of surcharge would be totally irrelevant and will frustrate the very purpose of the Act and Regulations.
13. The Respondent No. 1 submitted that the contention of UPCL that the Commission has no jurisdiction to decide on the consumer dispute is totally misplaced. Since the instant matter relates to the interpretation of the relevant provisions of the Regulations, therefore the Commission has the jurisdiction to decide the matter.
14. Respondent No. 1 further submitted that under Section 42(2) of the Electricity Act,2003 Open Access is granted subject to conditions (including on cross-subsidies) as specified by the Commission. There is no prohibition on the conditions to be imposed on procurement of power through Open Access including on the aspect of cross-subsidy. The only prohibition is that Commission cannot by way of Regulations provide for payment of cross-subsidy surcharge by the captive consumers, as this would be contrary to the Electricity Act. However, it is always open to the Commission to provide any other exemptions by way of Regulations.
15. The Respondent No. 1 contended that it is not appropriate for UPCL to raise any issue on the Regulations or indirectly seek to challenge the Regulations. If UPCL has to challenge the Regulations then this not the right forum to do so.

Commission's Views

16. UPCL has contended that Respondent No. 1, i.e. M/s India Glycols Ltd., should have approached CGRF for redressal of its complaint and that the Commission has no jurisdiction to decide the matter. In this regard it is pertinent to quote

relevant para of the Judgment of the Hon'ble Supreme Court dated 14.08.2007 in the matter of Maharashtra Electricity Regulatory Commission Vs. Reliance Energy Ltd. & Ors. wherein the Hon'ble Court had held as under:

"16. When the Commission received a spate of complaints from consumers against its licensees/distribution companies that they are arbitrarily issuing supplementary/amended bills and charging excess amounts for supply of electricity, it felt persuaded to invoke its general power to supervise the licensees/distribution companies and in that connection issued notice dated 3.8.2004. There can be no manner of doubt that the Commission has full power to pull up any of its licensee or distribution company to see that the rules and regulations laid down by the Commission are properly complied with. After all, it is the duty of the Commission under Sections 45(5), 55(2), 57, 62, 86, 128, 129, 181 and other provisions of the Act to ensure that the public is not harassed."

(Emphasis added)

Further, the Hon'ble APTEL in Appeal No. 36 of 2011 dated 28.07.2011 in the matter of Maharashtra State Electricity Distribution Company Limited vs. Maharashtra Electricity Regulatory Commission and Ors. had held that:

"The dispute relating to the Open Access would be dealt only by the Commission as the Act clearly provides that the Commission must ensure fulfillment of the mandate to provide such Open Access which would include issuing directions to grant Open Access which has rightly been given in the impugned order. This, jurisdiction vested with the Commission cannot be usurped or taken away by the Consumer Grievance Redressal Forum. In other words, the Consumer Grievance Redressal Forum established by the Distribution Licensee will have no jurisdiction to entertain or decide a dispute where the statutory mandate to provide Open Access has been violated by the Distribution Licensee. Therefore, the dispute in question can be resolved by the State Commission alone and not by the Consumer Grievance Forum. ..."

In light of the above judgments, the contention of UPCL challenging Commission's jurisdiction in the present matter is not tenable and is rejected.

17. The Commission in the various provisos to the Regulation 22(1) of Open Access Regulations has made it amply clear that cross subsidy surcharge shall not be payable:

- (a) On energy drawn by Embedded Open access consumers, through Open Access, during the period of power cut imposed by the distribution licensee.
- (b) By Long term/Medium term Embedded Open Access consumers.
- (c) By a person who has established a captive generation plant for carrying the electricity to the destination of his own use.

Notwithstanding the above, the submission of UPCL that by using the word "such" in the second provision to Regulation 22(1) of the Open Access Regulations it is suggested that only those Long term/Medium term Open Access consumers who have established a captive generation plant for carrying the electricity to the destination of their own use are the ones who are exempted from paying cross subsidy surcharge and the rest are liable to pay such surcharge, is not acceptable. The Commission would like to clarify that, since Regulation 22(1) of Open Access Regulations begins with **"Embedded open access Consumer, in addition to transmission and/or wheeling Charges....."** and the entire Regulation 22(1) applies only to the specific category of Open Access Customers namely "Embedded Open Access Consumers", therefore, it is unequivocal that the word "such" used in the second proviso to the said Regulation refers to only "Embedded Open Access Consumers". Further, the second proviso refers to the exclusion from levy of Cross-subsidy Surcharge which clearly provides that the Cross-subsidy Surcharge shall not be levied on the Long term/Medium term embedded consumers and also on a captive generating plant. Therefore, in the light of the above clarification, the plain reading of the said second proviso makes it amply clear that all those Embedded Open Access Consumers who have opted for either Long term access or Medium term Open Access shall not be liable to pay cross subsidy surcharge.

Besides these embedded Long term and Medium term Open Access consumers, those persons who have established a captive generation plant for carrying the

electricity to the destination of own use shall also not be required to pay any cross subsidy charges as provided in the Regulations.

18. The intention of the Commission not to levy cross subsidy surcharge on Long term or Medium term Open Access consumers is also clear from Regulation 22(2) of Open Access Regulations where formula for determining cross subsidy surcharge has specifically been framed only for Short term Embedded Open Access consumers suggesting that Long term/Medium Embedded Open Access consumers are not required to pay cross subsidy surcharge on the energy drawn through Open Access as no mechanism for calculating Cross-subsidy Surcharge for LTOA/MTOA has been specified.
19. Further the contention of Respondent No. 4 that since cross subsidy surcharge is like compensation for the loss suffered by the distribution licensee on account of its subsidizing consumers procuring electricity from a third party and, therefore, categorizing the consumers as Long term/Medium term/Short term Open Access Consumers for the purpose of applicability of surcharges would be irrelevant. The Commission feels that UPCL by challenging the categorizing of Open Access consumers as Long term/Medium term/Short term for the purpose of applicability of cross subsidy surcharge is challenging the Regulations framed by the Commission under the Act. The Commission, therefore, feels that this is not the right forum to challenge the Regulations framed by the Commission under the Act.
20. Notwithstanding the above, it would be relevant to point out that the Open Access Regulations were notified after previous publications wherein all the stakeholders including UPCL were heard before the same were finalized, however, UPCL never agitated on this issue earlier. The intention of the Commission in excluding the Long term/Medium term Open Access Consumers from the levy of cross subsidy surcharge was to promote the open access more so in light of the fact that UPCL was in continuous shortage of power. However, the supply position has changed since then. Further, in light of the judicial pronouncements relied upon by UPCL, the Commission directs its staff to get the issue of levy of cross-subsidy surcharge on Long term/Medium term Open Access Consumers examined and, if required,

initiate appropriate measures to frame an appropriate draft amendment to Open Access Regulations, 2015 for inviting comments from all the stakeholders. Meanwhile, the Commission is of the view that the existing Long term/Medium term Open Access Consumers who had opted for open access would have worked out the economics and viability of cost of power, sourced through open access, without factoring in the levy of cross subsidy surcharge. Hence, these open access consumers at this stage cannot be burdened by levy of cross subsidy surcharge which was then not applicable as per the Regulations.

21. In the light of the above, Respondent No. 4 (UPCL) is hereby directed to refund the amount recovered by it against cross subsidy surcharge to the Respondents and other concerned Long term/Medium term Open Access consumers by adjustments in next three monthly bills starting from May, 2018 and submit a compliance report in this regard.

Ordered accordingly.

(Subhash Kumar)
Chairman