

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 241 of 2014

Dated: the 29th May, 2015

**Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER**

In the Matter of:

**M/s. Classic Citi Investments Pvt Ltd.,
262, Bund Garden Road,
Pune-411 001**

..... Appellant/Petitioner

Versus

**1. Maharashtra Electricity Regulatory Commission
World Trade Centre No.1,
13th Floor, Cuffe Parade, Colaba
Mumbai-400 001**

**2. Maharashtra State Electricity Distribution Company Limited
5th Floor, Prakashgad,
Bandra (East)
Mumbai-400 051
New Delhi-110062**

...Respondent(s)

**Counsel for the Appellant(s) : Mr. Anand K Ganesan
Ms. Swapna Seshadri
Ms. Mandakini Ghosh**

**Counsel for the Respondent(s): Mr. Buddy A Ranganadhan for R-1
Mrs. Deepa Chavan
Mr. Kiran Gandhi
Ms. Ramni Taneja for R-2 (MSEDCL)**

J U D G M E N T

PER HON'BLE MR.T MUNIKRISHNAIAH, TECHNICAL MEMBER

1. The present Appeal has been filed u/s 111 of the Electricity Act, 2003 against the Order dated 7.8.2014 passed by the Maharashtra Electricity Regulatory Commission (hereinafter called as the State Commission) in Petition No.80 of 2013 whereby the State Commission has interpreted its earlier order dated 5.3.2010 in case No.71 of 2009 and held that 2% Voltage Surcharge will also be leviable on the units purchased through Open Access.
2. The Appellant M/s. Classic City Investments Private Limited (CCIPL), is a Private Company registered under the provisions of the Companies Act, 1956 and having its registered office at 262, Bund Garden Road, Pune-411001.
3. The Respondent No.1 is Maharashtra Electricity Regulatory Commission is the Regulatory Commission constituted under the provisions of the Electricity Regulatory Commissions Act, 1998 and presently functioning under the provisions of the Electricity Act, 2003.
4. The Respondent No.2, Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as the Distribution Company) is the Distribution Licensee maintaining the Distribution System and supplying power to the consumers at large in the State of Maharashtra.
5. The short facts are as under:

- 5.1 The Appellant, CCIPL is a consumer of MSEDCL with its installations having connected load and contracted demand of 4968 kva and 4400 kVA respectively.
- 5.2 It is presently connected at 22 kV level and not on 33 kV level as required under Regulations 5.3 of the Standard of Performance Regulations (hereinafter called 'SOP' Regulations).
- 5.3 The Respondent MSEDCL filed case No.71 of 2009 seeking for levy of Voltage Surcharge to consumers who are supplied power at lower than prescribed voltage as per SOP Regulations.
- 5.4 Having heard the parties and after considering the materials placed on record, the Commission passed an order dated 5.3.2010 as follows:

“17. At the same time, it cannot be denied that the distribution losses, including transmission losses, will increase on account of supply to consumers at voltages lower than that specified in the SoP Regulations. Accordingly, till such time as the detailed technical study is undertaken and the Commission approves the levy of Voltage Surcharge based on detailed deliberations in this regard, the Commission approves MSEDCL's request for interim relief seeking permission to levy Voltage Surcharge of 2% additional units to be billed, for supply to the consumers at voltages lower than that specified in the SoP Regulations. It is clarified that this Voltage Surcharge shall apply from the date of issue of this Order, till such time as the Commission issues further orders.”

- 5.5 On 10.5.2010 vide Ref.No.CO.Ord.Cell/Wind/15021 dated 10.5.2010, MSEDCL permitted Open Access to Appellant as per MERC Distribution Open Access Regulations for the period from April, 2010 to March, 2011 to wheel the power from the Wind Power Project of M/s. Ajanta Limited, Vankaswada, Distt-Satara by the Appellant.

- 5.6** On 25.8.2011 MSEDCL vide Ref No.CP/Wind/No.26134 dated 25.8.2011 permitted Open Access permission to the Appellant from 1.4.2011 to 31.3.2012 duly following the procedures laid down in the State Commission's Open Access Regulations.
- 5.7** The Appellant found some time in December, 2011 that the Distribution Company is also charging 2% voltage surcharge on the units of power wheeled by the Appellant through Open Access. The Appellant by the letter dated 21.1.2012 requested the Distribution Company to refund the excess amount of voltage surcharge levied towards Open Access transactions. The Appellant did not receive any response from the Distribution Company.
- 5.8** On 20.1.2012, the Appellant wrote a letter to the SE(O&M) of MSEDCL, regarding levying of 2% Voltage Surcharge other than wheeling and transmission charges and wheeling loss of 9% (as it is connected to 22 kv Grid) and transmission loss of 4.85% as per Open Access Rules. Appellant protested for levy of Voltage Surcharges of 2% addition units to be billed towards low voltage surcharge.
- 5.9** The Appellant wrote several letters to the Distribution Company including the letters dated 9.10.2012, 1.11.2012 and on 27.1.2013 towards levying 2% additional charges on Open Access Transactions on account of Voltage Surcharge for supplying power at lower than prescribed Voltage as per SoP and finally a legal notice dated 23.3.2013 calling upon MSEDCL to refund Rs.40,24,178.40 on account of excess collection of additional surcharge for the energy consumed from the Appellant from April, 2010 to Feb, 2013 excluding the refund of electricity duty, tariff on sale of

electricity, fuel and other cost adjusted and other applicable charges which were levied thereon. However, the Appellant did not receive any response.

- 5.10** On 28.5.2013, the Appellant filed case No.80 of 2013 before the State Commission praying for the refund of excess voltage surcharge levied by the Distribution Company on the Appellant for the units of power purchased through the Open Access and also prayed not to collect Voltage Surcharge during the pendency of the Petition.
- 5.11** On 4.6.2013, the office of the State Commission issued a letter to the Appellant asking the Appellant to justify as to how the State Commission has the jurisdiction to deal with the Petition and also clarify whether the Appellant ought to have approached the Consumers Grievance Redressal Forum.
- 5.12** On 13.6.2013, the Appellant filed a Memo clarifying the position to the State Commission.
- 5.13** On 1.7.2013, the State Commission issued a notice fixing the admissibility herein case No.80 of 2013 on 26.7.2013.
- 5.14** On 26.7.2013, the Respondent MSEDCL filed a reply Affidavit against case No.80 of 2013 before the Maharashtra Electricity Regulatory Commission.
- 5.15** The Appellant filed a Rejoinder clarifying the aspect that the Petition does not raise any billing dispute and the issue to be decided is whether a Open Access consumer is liable to pay voltage surcharge or not.
- 5.16** On 6.8.2013, the State Commission heard the matter and directed the Distribution Company to submit to the State Commission within one

month a plan of action for compliance of Regulations 5.3 of the SOP Regulations.

- 5.17** On 12.9.2013, the Distribution Company filed an additional reply stating that there is no proposal of establishing any 33 KV network in the development of infrastructure in the Pune City area for the next five years.
- 5.18** The State Commission further heard the matter on 9.10.2013 and directed the Appellant to implead State Transmission Utility (STU) and the Maharashtra State Electricity Transmission Company Limited as parties.
- 5.19** The Appellant duly impleaded the above parties to the Petition and served copies of the same on the new Respondents. The Appellant followed all these procedures only upon the specific direction of the State Commission.
- 5.20** After the hearing on 26.2.2014 wherein the State Commission directed the Appellant to file an additional submission on the applicability of voltage surcharge, the Appellant filed an additional submission on 25.3.2014 making its detailed submissions.
- 5.21** The State Commission has passed the Impugned Order on 7.8.2014 inter alia holding as under:

Commission's Analysis and Rulings:

10. The Commission notes that CCIPL's original prayer was restricted to the refund of Voltage Surcharge levied by MSEDCL on the power obtained through Open Access, which was contended to be outside and not in accordance with the dispensation provided by the Commission in its Order dated 5 March, 2010 in Case No. 71 of 2009 to MSEDCL when supplying power at voltages lower than specified in the SoP Regulations. MSEDCL has objected to any such relief by the Commission on the ground that is not the appropriate forum, and that the Petitioner should approach the CGRF as

mandated under the Commission's Regulations for the redressal of consumer grievances. However, during the proceedings and considering the issues brought out, CCIPL has sought that the Commission clarify its Order in Case No. 71 of 2009 to the extent of the applicability of Voltage Surcharge on energy wheeled through Open Access, instead of pressing for the reliefs originally prayed for.

11. The issue raised by the Petitioner is not specific and limited to CCIPL, but is also applicable to other such consumers who are connected at a lower voltage level than specified in the SoP Regulations and who have opted for Open Access. Hence, the Commission deems it appropriate to clarify its Order to the extent of the applicability of the Voltage Surcharge .

12. The relevant part of the Commission's Order dated 5 March, 2010 (Case No. 71 of 2009) reads as follows:

“17. At the same time, it cannot be denied that the distribution losses, including transformation losses, will increase on account of supply to consumers at voltages lower than that specified in the SoP Regulations. Accordingly, till such time as the detailed technical study is undertaken and the Commission approves the levy of Voltage Surcharge based on detailed deliberations in this regard, the Commission approves MSEDCL's request for interim relief seeking permission to levy Voltage Surcharge of 2% additional units to be billed, for supply to the consumers at voltages lower than that specified in the SoP Regulations. It is clarified that this Voltage Surcharge shall apply from the date of issue of this Order, till such time as the Commission issues further orders.” (Emphasis added) Order in Case No. 80 of 2013 Page 5

*13. Thus, the the levy of a Voltage Surcharge was intended by the Commission to compensate MSEDCL for the higher losses it would have to bear in such circumstances. **The Open Access consumer availing of power through a third-party seller is using the same infrastructure as is being used for availing of MSEDCL's power.** Thus, the technical losses from connecting at a lower voltage level will arise irrespective of the source of supply, i.e. even when the consumer opts for Open Access and avails of wheeled power at such*

voltage level. Therefore, if a consumer availing supply from MSEDCL at a voltage lower than specified in the SoP Regulations pays a Voltage Surcharge, so must an Open Access consumer availing of power wheeled by MSEDCL at that voltage.

14. In view of the foregoing, the Commission hereby clarifies that the Voltage Surcharge as mandated by the Commission in its Order dated 5 March, 2010 in Case No. 71 of 2009 is also applicable to the energy wheeled for Open Access consumers connected at a voltage level lower than specified in the SoP Regulations”.

5.22 The State Commission has interpreted its earlier order dated 5.3.2010 to justify the illegal levy of 2% voltage surcharge even on units being wheeled to the Appellant through Open Access:

5.23 Aggrieved by the Above findings of the State Commission, the Appellant has filed the present Appeal and prayed for the following relief:

- (a) Allow the Appeal and set aside the order dated 7.8.2014 passed by the State Commission to the extent challenged in the present Appeal.
- (b) Direct the Distribution Company not to levy voltage surcharge of 2% on the units of power purchased through Open Access/Wheeling.
- (c) Direct the Distribution Company to refund the 2% voltage surcharge levied on the Appellant for all the power purchased through Open Access along with interest thereon.
- (d) Award the costs of the litigation to the Appellant.
- (e) Pass such other order(s) and as this Tribunal may deem just and proper.

6 We have heard the arguments of Mr. Anand K Ganesan, Ms. Swapna Seshadri learned Counsel for the Appellant and Mr. Buddy A Ranganadhan and Ms. Ramni Taneja, and learned Counsel for the Respondent 1 and 2 respectively.

7 The following questions would arise for consideration in this Appeal:

(a) **Issue No.1: Whether the State Commission erred in approving the proposal of the Distribution Company MSEDCL towards levying the voltage surcharge in the Impugned Order dated 7.8.2014 to the Appellant for energy wheeled from the Wind Generator?**

(b) **Issue No.2: Whether the Distribution Company, MSEDCL is right in levying the voltage surcharge of 2% on the total units of power consumed by the Appellant including energy wheeled from M/s. Ajanta Ltd, (Venkuswade Distt-Satara (third party seller) utilizing the infra-structure of the distribution company, MSEDCL ?**

8 Since Issue No.1 and Issue No.2 are inter-woven, we will deal with both the issues together.

9 The following are the submissions made by the Appellant on the issues:

9.1 That the State Commission has erred in misinterpreting the provisions of the SOP Regulations as well as the order dated 5.3.2010 in case No.71 of 2009 to levy the voltage surcharge of 2% on the power purchased by the consumers through Open Access.

- 9.2 That the State Commission failed to appreciate that the losses of the Distribution Company increased due to consumers taking supply of power at lower voltages which were not accounted for in the ARR and Tariff of the Distribution Company. Therefore, the additional system losses needed to be accounted for by fixing the low voltage surcharge. However, the State Commission is fixing open access charges on an entirely different basis which includes wheeling charges, cross subsidy surcharge and other incidental charges for the same. Therefore, there can be no question of levying of 2% voltage surcharge in respect of the power purchased through Open Access.
- 9.3 that the State Commission failed to appreciate that the Open Access transactions being undertaken by the Appellant for purchase of power is independent of the power purchased from the Distribution Company. With regard to Open Access Power it is not that the power being delivered for the use of the system of the Distribution Company belongs to the Distribution Company and there is 2% loss being incurred on the power purchased by the Distribution Company.
- 9.4 that the principle beyond the levy of 2% surcharge in the Order dated 5.3.2010 was that there is an additional loss suffered by the Distribution Company due to particular consumer availing supply at lower voltage which leads to revenue shortfall since the same is not accounted for in the ARR and tariff of the Distribution Company. This principle has no application qua on Open Access transactions since the power does not belong in the first place to the Distribution Company as a cost of the element at all.

- 9.5 that the voltage surcharge was approved based on the principle that while transforming energy from 33 KV or higher voltages to lower voltage such as 22 KV in the present case, there is a loss in electricity which results in a loss to the Distribution Licensee in energy terms. In other words, the Distribution Licensee supplied electricity at lower voltage less quantum of electricity is delivered to the consumers as against high voltage levels and this difference between the quantum of energy at higher voltage and the quantum of energy delivered at lower voltage is a loss to the Distribution Licensee supplying electricity for which it does not earn revenue. To compensate for this, the voltage surcharge at the rate of 2% from the additional units to be supplied to the consumers at lower voltages was made applicable by the State Commission. However, in case of open access transactions, the Distribution Licensee does not even own electricity but is only entitled to levy wheeling charges and cross subsidy surcharge/additional surcharge if any applicable in terms of Section 42 of the Electricity Act, 2003. This is specifically provided in the proviso to Section 86 (1) (a) of the Electricity Act, 2003.
- 9.6 that the Appellant is paying the requisite wheeling charges as determined by the State Commission. There is also no issue of cross subsidy surcharge or additional surcharge. In the circumstances, the levy of voltage surcharge on the Open Access transactions is not authorized by the Electricity Act, 2003.
- 9.7 that the Respondent R-2 (MSEDCL) in its reply has failed to meet the basic case that when the R-2 does not own the electricity where the supply is made through Open Access sources, the question of R-2 claiming of loss of energy on such Open Access transactions does arise. The losses in

energy on account of supply at lower voltage will occur only to the owner of the electricity which is not the R-2 in the present case.

- 9.8 that the contentions that the voltage surcharge has been levied due to constraints and supply of energy at voltage is lower than the required level in fact supports the case of the Appellant.
- 9.9 that the principle behind the levy of voltage surcharge has been clearly laid down in the order dated 5.3.2010 passed by the State Commission wherein it has been held that on account of losses and transformation of electricity in losses of energy for which the R-2 is to be compensated in energy terms in the form of voltage surcharge. Applying the very principle when the electricity is not owned by the R-2, the question of R-2 suffering losses in transformation of that electricity from higher voltage to lower voltage does not arise.
- 9.10 that the order dated 5.3.2010 of the State Commission approving the voltage surcharge was a purely adhoc interim measure. Firstly, the R-2 was required to conduct a detailed technical study on how the voltage surcharge is to be calculated. The R-2 has till date not conducted any such study or complied with the directions passed by the State Commission. The R-2 cannot have any undue advantage at the cost of the consumers for the default on the part of the R-2 itself.
- 9.11 that the State Commission in the Order dated 5.3.3010 also specifically pointed that the Distribution licensee was required to ensure that the supply is given only at the specified voltage levels at the earliest and the release of lower voltages shall be only in exceptional circumstances and as an interim measure. However, in the present case, even though four years

have elapsed since the order dated 5.3.2010 was passed by the State Commission, the R-2 has taken no steps whatever for the enhancement of voltage level network to 33 KV.

9.12 That in the Affidavit dated 12.9.2013 filed by R-2 before the State Commission, it has in fact been admitted by the R-2 that there is no proposal to establish a 33 KV level network and the same does not even presently form part of the five year transmission plan for the Pune city area. This was completely contrary to the directions issued by the state Commission in the order dated 5.3.2010. However, it is only the consumers who are suffering for the defaults on the part of the Respondent MSEDCL in not carrying out with the directions issued by the State Commission.

9.13 That in the facts and circumstances mentioned above, it is stated that the contentions and averments of the R-2 in its reply filed are misplaced, wrong and denied. It is reiterated that the Impugned Order passed by the State Commission suffers from infirmities and is liable to be set aside.

10 **Per Contra, the following submissions have been made by R-2 i.e. Maharashtra State Electricity Distribution Company.**

10.1 that the Respondent No.2, MSEDCL genuinely does not desire to release supply at voltages lower than those specified in the SOP Regulations. The transmission and distribution network of the predecessors of the present Respondent No.2, MSEDCL, the erstwhile MSEB has many operational constraints. This is particularly true in cities like Pune, Mumbai etc.,

10.2 that the only issue in the present Appeal which is required to be considered is in view of the clarifications issued vide order dated 7.8.2010 in case No.80 of 2013 which is as follows:

“Is the electric energy supplied under Open Access, to a consumer, so different & distinct from the energy otherwise supplied, so as not to be affected by the factors of operational constraint which get activated due to energy being supplied at lower voltage generally/in all other situations.

This is because as far as the levy of voltage surcharge is concerned, the reasons the rational for the same has been upheld and decided by the Respondent No.1 Commission way back in its order dated March 05, 2010 in case No.71 of 2009. The question of levy of voltage surcharge has therefore, attained finality. The above issue arises in context of the claim made by the Appellant vis-à-vis voltage surcharge being inapplicable for energy received through Open Access”.

10.3 that the issue relates to electrical energy supplied under Open Access it is necessary to discern the ambit of the power of the State Electricity Regulatory Commission in relation to the levy of voltage surcharge as the Appellant has contended that the same is contrary to the provisions of Section 86 (1) (a) and a levy in excess of the levies permissible under Section 42 (2) of the Act.

10.4 that in the instant case, the levy of 2% voltage surcharge for providing supply at voltages below those prescribed under the SoP for electricity purchased from the R-2 MSEDCL vide order dated March 05, 2010 has attained finality.

10.5 that in respect of electricity received from Open Access which passes through the same infrastructure and lower voltage due to the operational constraints if not charge the voltage charge would result in a

discriminatory approach vis-à-vis Open Access Consumers. The 2% voltage surcharge is levied as stated in the order dated 5.3.2010 due to distribution losses including transformation loss which would increase on account of supply to consumers at lower voltage.

- 10.6 that taking into consideration the transformation loss and evolving Voltage Surcharge is within the ambit of Section 42 (2) which is nugatory power which can take into consideration operational constraints. It can prohibit discrimination in respect of transformation costs arising from supply at lower voltage resulting in levy of voltage surcharge between General Consumers and Open Access consumers.
- 10.7 that the Appellant relied on the Open Access permission dated 10.5.2010 specifying certain charges and the voltage surcharge being beyond those specified is not payable by the Appellant to the Respondent No.2, MSEDCL.
- 10.8 that in response to it, it is pointed out that Clause 7 of the said permission dated 10.5.2010 provides for all charges, rates, duties levied by statutory authorities from time to time to be paid by the Appellant.
- 10.9 that the electric energy supplied under Open Access from a third party generator is no different in its physicality than the electricity supplied by incumbent Distribution Licensee. The physics of the electricity remains the same. Its nature does not get altered merely because of the supply being under Open Access.
- 10.10 that once it is discerned and appreciated that the voltage of electricity is physicality and that supply of electricity at lower voltages would result in higher distribution losses including transformation losses, the fact that the

electricity supplied by Distribution Licensee or obtained through Open Access does not alter the situation.

10.11 that the State Commission in its order dated 5.3.3010 in case No.71 of 2009 has rightly held as under:

“17. At the same time, it cannot be denied that the distribution losses, including transformation losses, will increase on account of supply to consumers at voltage lower than that specified in the SoP Regulations. Accordingly, till such time as the detailed technical study is undertaken and the Commission approves the levy of Voltage Surcharge based on detailed deliberations in this regard, the Commission approves MSEDCL’s request for interim relief seeking permission to levy Voltage Surcharge of 2% additional units to be billed, for supply to the consumers at voltages lower than that specified in the SoP Regulations. It is clarified that this Voltage Surcharge shall apply from the date of issue of this order, till such time as the Commission issues further orders.”

10.12 that the State Commission has rightly considered the historical distribution network inherited by the Respondent and taken into consideration the following facts:

- (a) Space constraints for construction of EHV sub station.
- (b) Time required for construction of EHV sub station
- (c) Right of way/way leave/clearance problems
- (d) Non availability of prescribed voltage level infrastructure and evolved the levy of voltage surcharge.

and evolved the voltage surcharge for transformation losses vide order dated 05.3.2010 and clarified it would include electricity supplied through Open Access vide Impugned Order dated

07.8.2014 to balance the transformation loss and Open Access consumers cannot be treated differently resulting in a discrimination vis a vis other consumer.

11 Our Consideration and conclusions on these issues:

11.1 The Appellant is a consumer of the Distribution Licensee, MSEDCL with a connected load of 4968 KVA and Contracted Demand of 4400 KVA. The Distribution Licensee released supply at 22 KV instead of 33 KV as specified in the Standard of Performance Regulations, 2005 according to the connected load of the Appellant.

11.2 The Respondent MSEDCL filed Petition No.71 of 2009 before the State Commission seeking approval for levy of voltage surcharge to the consumers who are supplying power at lower than the prescribed voltage as per SOP Regulations. The State Commission, after going through the submission pronounced the order on 5.3.2010 on the Petition filed by MEDCL in Petition No.71 of 2009. The relevant portion of the order is quoted below:

“14. Having heard the Parties and after considering the material placed on record, the Commission is of the view as under:

15. MSEDCL should ensure that supply is released in accordance with the voltages specified in the SoP Regulations for release of electricity supply connections. However, in certain circumstances as highlighted by MSEDCL and reproduced below, there could be a need to release the supply connection at lower voltages:

- (i) Space constraint for construction of EHV sub-station*
- (ii) Time required for construction of EHV sub-station*
- (iii) Right of way/Way Leave/clearance problems*
- (iv) Non-availability of prescribed voltage level infrastructure*

It is clarified that even in the above instances, the electricity supply may be released at lower voltages only under exceptional circumstances, and that too only as an interim solution, and the distribution licensee has to ensure that the supply is given at the specified voltage at the earliest. It is further clarified that the cost of EHV sub-station and the consumer's inability to afford the EHV sub-station cannot be a ground for releasing supply at lower voltages, as the SoP Regulations do not make any allowances in this regard, and more consumers may claim non-affordability as a ground for release of supply at lower voltages.

16. Further, the Commission is presently in the process of amending the SoP Regulations and one of the amendments being proposed is in the context of the specified voltages depending on the different loads required to be sanctioned. Hence, the applicability of the Voltage Surcharge would depend on the supply voltages specified in the final notified amended SoP Regulations

17. At the same time, it cannot be denied that the distribution losses, including transformation losses, will increase on account of supply to consumers at voltages lower than that specified in the SoP Regulations. Accordingly, till such time as the detailed technical study is undertaken and the Commission approves the levy of Voltage Surcharge based on detailed deliberations in this regard, the Commission approves MSEDCL's request for interim relief seeking permission to levy Voltage Surcharge of 2% additional units to be billed, for supply to the consumers at voltages lower than that specified in the SoP Regulations. It is clarified that this Voltage Surcharge shall apply from the date of issue of this Order, till such time as the Commission issues further order”.

- 11.3 As per approval of the State Commission in the Order dated 5.3.2010, the Distribution Company started levying 2% low voltage surcharge to all the consumers who were connected at lower voltage than specified voltage level. Accordingly, the Respondent Distribution Company raised 2% low voltage surcharge in the bills of the Appellant also.

11.4 Subsequently, the Respondent MSEDCL permitted the Appellant for Open Access permission vide letters No.CO.ORD/CEL/WIND/15021 dated 10.5.2010 and Letter No.CP/Wind/26134 dated 25.8.2011 for the period from April, 2010 to March, 2011 and 01 April, 2011 to 31st March, 2012 respectively as per the MERC Distribution of Open Access Regulations, 2005. The relevant conditions stated in the Open Access permission are quoted below:

“(3) You will have to pay Open Access Charges and Losses (Wheeling Charges, Wheeling Losses, Transmission Charges and Transmission Loss) based on the MERC Orders 20.11.2007, 9.03.2009 and further relevant orders issued from time to time. Further, Wind Developer have to honor the Hon’ble Appellate Tribunal Order dated 6.8.2009, 26.10.2009 issued for the parties i.e. M/s. Enercon (India) Ltd., M/s. Sarjan Realities Ltd & 50 Members of InWEA.

(5) The credit notes shall be released only after payment of applicable Wheeling and Transmission Charges and after deducting applicable losses (Wheeling Loss & Transmission loss) for giving credit adjustment as per MERC order 20.11.2007, 9.03.2009 and applicable MERC Tariff Orders of MSEDCL & MSETCL issued from time to time (TOL No.37228 dated 30.11.2009).

(7) You will have to pay all the dues (Open Access Charges etc., if any) to MSEDCL Field. Also, he will have to pay all the charges / Rates / Duties. If any levied by any statutory Authorities from time to time at his end.

11.5 Now let us examine the Open Access Regulations of the State Commission:

4.2.5 A distribution licensee shall be entitled to recover an additional surcharge of wheeling from a consumer seeking open access under this Regulation in accordance with Regulation 18 of this Regulation.

15.2 The bill for use of distribution system for wheeling of electricity shall be raised by the distribution licensee on the supplier / open access consumer whoever is located in the distribution licensees' area of supply and send separately and clearly indicating the following:

- i) Wheeling charges*
- ii) Cross subsidy surcharge*
- iii) Additional surcharge / charges of wheeling*
- iv) Any other charges, surcharge or any other sum recoverable from a consumer under the Act or any Regulation, orders of the Commission than the Act or under any other law*

16.1 Wheeling Charges:

Open access customer using distribution system shall pay the wheeling or dedicated distribution facility charge as the case may be as under:

- i) Wheeling charges payable to the distribution licensee by the open access customer for usage of their system shall be determined under the MERC (MYT Regulations 2011) as amended from time to time provided that the wheeling charges shall be payable on the basis of actual energy flow at a consumption and provided that the charges payable by a user of a distribution system user under this Regulation may comprise of any combination of fixed / demand charges and variable charges as may be stipulated by Commission from time to time.*
- ii) Provided further where a dedicated system use of open access has been constructed for exclusive use of open access customer the wheeling charges for such dedicated system shall be worked out by distribution licensee for their respective systems and got approved by the Commission.*

18.1 Additional Surcharge:

An Open Access consumer, receiving supply of electricity from a person other than a distribution licensees office area of supply shall pay to the distribution licensee an additional

surcharge on charges of wheeling and cross subsidy surcharge to meet 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.

11.6 Further, the State Commission has approved Wheeling Charges and Wheeling losses for FY 2008-09 as under:

Voltage Level	Wheeling Charges Rs./KW/Month	% Wheeling Loss
i) 33 KV	Rs. 20	6%
ii) 22 kv/11 KV	Rs. 110	9%
iii)L.T Level	Rs. 191	14%
iv)S.H.T 132 KVA	NIL	NIL

11.7 Accordingly, the Appellant is paying Open Access wheeling and transmission charges specified by the Commission and wheeling losses of 9% (as the Appellant is connected at 22 KV level) and transmission losses of 4.85% as per Open Access Rules. Apart from the above levying of 2% low voltage surcharge on the energy wheeled by the distribution licensee MSEDCL is legally not correct.

11.8 Further to contest the action of the distribution licensee, the Appellant filed a Petition No.80 of 2013 on 26.7.2013 and the Commission after hearing the parties pronounced the Impugned Order on 7.8.2014. The relevant part of the order is quoted below:

“12. The relevant part of the Commission’s Order dated 5 March, 2010 (Case No. 71 of 2009) reads as follows:

“17. At the same time, it cannot be denied that the distribution losses, including transformation losses, will increase on account of supply to consumers at voltages lower than that specified in the SoP Regulations. Accordingly, till such time as the detailed technical study is undertaken and the Commission approves the levy of Voltage Surcharge based on detailed deliberations in this regard, the Commission approves MSEDCL's request for interim relief seeking permission to levy Voltage Surcharge of 2% additional units to be billed, for supply to the consumers at voltages lower than that specified in the SoP Regulations. It is clarified that this Voltage Surcharge shall apply from the date of issue of this Order, till such time as the Commission issues further orders.”

13. Thus, the the levy of a Voltage Surcharge was intended by the Commission to compensate MSEDCL for the higher losses it would have to bear in such circumstances. The Open Access consumer availing of power through a third-party seller is using the same infrastructure as is being used for availing of MSEDCL's power. Thus, the technical losses from connecting at a lower voltage level will arise irrespective of the source of supply, i.e. even when the consumer opts for Open Access and avails of wheeled power at such voltage level. Therefore, if a consumer availing supply from MSEDCL at a voltage lower than specified in the SoP Regulations pays a Voltage Surcharge, so must an Open Access consumer availing of power wheeled by MSEDCL at that voltage.

14. In view of the foregoing, the Commission hereby clarifies that the Voltage Surcharge as mandated by the Commission in its Order dated 5 March, 2010 in Case No. 71 of 2009 is also applicable to the energy wheeled for Open Access consumers connected at a voltage level lower than specified in the SoP Regulations”.

11.9 The purpose of voltage surcharge is that when a distribution company owns the electricity and supplies at a voltage below the designated voltage, the additional energy loss does not get compensated and therefore, the 2% voltage surcharge has been fixed as an interim measure. However, in the

case of Open access, the distribution Company is not the owner of the electricity wheeled and only the transmission lines of the distribution company are used for transmitting the power from seller's end (from the Generator) to the premises of the consumer and hence whatever the loss occurred in this process is under the account of the consumer only. Further, the consumer is paying the wheeling charges and losses etc as approved by the State Commission. Again levying 2% low voltage surcharge is not correct.

11.10 Section 42 of the Electricity Act, 2003 regarding Open access is reproduced below:-

“42. Duties of distribution licensee and open access.-

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

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

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

PROVIDED FURTHER that such surcharge shall be utilized to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

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

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

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

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

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

11.11 The Open Access Regulations of the State Commission or the Electricity Act, 2003 do not specify about the payment of low voltage surcharge for the energy wheeled from a third party sales. The SOP Regulations protects the distribution licensee from the consumer who opt for lower voltage against specified voltage mentioned in the SOP Regulations. This

is due to higher T&D losses compared to release the supply at higher voltages where by the load current of the consumer will be reduced at high voltage transmission of power and thereby I²R losses will be minimised. To safeguard the licensee towards higher T&D losses and thereby reduces power purchase cost to be incurred by the licensee which will have a reflect on the tariff of the consumer, the level of voltages are specified in the SOP Regulations. In the instant case, the Appellant has prayed for exemption for energy wheeled from a third party towards low voltage surcharge levied by the distribution licensees as per the interest approved by the Commission.

11.12 Further the distribution licensee started levying 2% voltage surcharge on the Appellant after the approval of the interim relief prayed by the Commission. The State Commission pronounced the order on 5.3.2010. In the order, the State Commission did not mention about the applicability to the Open Access consumers. The State Commission mentioned applicability in the Impugned Order dated 7.8.2014. But, the distribution Company MSEDCL levied the 2% low voltage surcharge for the total units consumed by the Appellant (i.e. energy drawn from the Distribution Licensee plus energy wheeled from the Wind Generator). Hence, the 2% low voltage surcharge claimed on the energy wheeled has to be refunded to the Appellant along with other charges if any.

11.13 Further, in the Impugned Order dated 7.8.2014 it is stated that the cost of EHV sub station and the consumers inability to afford the EHV sub station cannot be the ground for releasing supply at low voltages as the SOP Regulations do not make any allowances in this regard and more consumers may claim non affordability as a ground for release of supply at

lower voltages. Further, the Commission stated that it is presently in the process of amending the SOP Regulations in the context of the specified voltages depending upon the different loads required to be sanctioned. We feel that the State Commission may raise contracted load vs specified voltages levels and accordingly applicability of voltages surcharge etc.,

11.14 In view of the above, we find levying low voltage surcharge on the energy wheeled by the Appellant is not correct and the Respondent MSEDCL has to refund the low voltage surcharge on the energy wheeled and accordingly **the Issue No.1 and 2 are partly allowed in favour of the Appellant.**

11.15 In view of the above discussions, the instant Appeal is liable to be partly allowed with regard to Issue I and II and the Impugned Order is liable to be set aside to the extent mentioned above.

12. **Summary of Our Findings**

12.1 **The Respondent distribution Company released supply at 22 KV instead of at 33 KV as per the SOP Regulations due to the field constrains in establishing the in-frastructure in the vicinity of the Appellant's Industrial area. Further, as per the Interim relief granted by the State Commission in the Order dated 5.3.2010 against Petition No.71 of 2009, started levying 2% low voltage surcharge to all the consumers who are connected at lower voltage against the specified voltage level mentioned in the SOP.**

12.2 **Accordingly, the Distribution Licensee raised 2% voltage surcharge on the total consumption of the Appellant. The Appellant got Open Access permission from the distribution licensee as per the Regulations of the State Commission to purchase power from a Wind Generator. The**

Appellant started consuming power from the distribution licensee and also energy wheeled from the third party. The distribution licensee as per the Order dated 5.3.300 levied the 2% low voltage surcharge on the total units consumed by the Appellant including energy purchased from third party also stating that the consumer is connected at lower voltage than at specified voltage.

- 12.3 The Appellant filed a Petition No.80 of 2013 before the State Commission for refund of excess amount paid by the Appellant towards 2% low voltage surcharge on the energy wheeled on Open Access. The State Commission in the Impugned Order stated that the low voltage surcharge as mandated by the Commission in the Order dated 5.3.3010 and is also applicable to the Open Access consumers connected at voltage level lower than specified in the SOP Regulations.
- 12.4 Aggrieved with this order of the State Commission, the Appellant has filed this Appeal before this Appellate Tribunal.
- 12.5 We hold and order that as per the Open Access Regulations of the State Commission and as per Section 42 of the Electricity Act, 2003, the applicability of levying of 2% low voltage surcharge on the energy wheeled by the Open Access consumers specified in the Impugned Order dated 7.5.2014, is disallowed. The Respondent Distribution Company is directed to refund the 2% low voltage surcharge claimed on the energy wheeled by the Petitioner/Appellant from the Wind Generator under Open Access from April, 2010 to February, 2013.

13. Accordingly, the Appeal is partly allowed and the State Commission is directed to pass consequential orders within three months from the date of receipt of the copy of this judgment.
14. There is no order as to costs.
15. Pronounced in the Open Court on this 29th day of May, 2015.

(T Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

Dated :29th May, 2015

✓ REPORTABLE / ~~NON-REPORTABLE~~