

## **RAJASTHAN ELECTRICITY REGULATORY COMMISSION JAIPUR**

**Petition No. RERC-548/15**

Petition filed for determination of Additional Surcharge under Section 42 (4) of the Electricity Act, 2003.

### **Coram:**

**Shri Vishvanath Hiremath, Chairman**  
**Shri Vinod Pandya, Member**  
**Shri Raghuvendra Singh, Member**

Petitioners :

1. Jaipur Vidyut Vitran Nigam Ltd. (JVVNL)
2. Ajmer Vidyut Vitran Nigam Ltd. (AVVNL)
3. Jodhpur Vidyut Vitran Nigam Ltd. (JdVVNL)

Date of hearings : 15.07.2015, 13.08.2015, 03.09.2015, 08.10.2015, 29.10.2015,  
03.03.2016, 01.04.2016 & 21.04.2016

Present :

1. Sh. Bipin Gupta, Advocate for Discoms
2. Sh. Anand K Ganeshan, Advocate for Raj. Steel Chamber, DCM Sriram, HZL, IEX, etc.
3. Sh. R.K. Jain, Advocate for Bhiwadi Industries
4. Sh. Vagish K Singh, Advocate for Binani Cement
5. Sh. Amarjit Singh, Sr. GM, SCL
6. Sh. D.S. Agarwal for Rudraksh Energy
7. Sh. L.K. Narwani, Dy. GM, J K Laxmi Cement Ltd.

**Order Date :**

**12.05.2016**

### **ORDER**

1. The three distribution companies, namely, Jaipur Vidyut Vitran Nigam Ltd. (JVVNL), Ajmer Vidyut Vitran Nigam Ltd. (AVVNL) and Jodhpur Vidyut Vitran Nigam Ltd. (JdVVNL) (herein after referred to as Discoms or Petitioners),

collectively had filed this petition for determination of Additional Surcharge under Section 42 (4) and 39 (2)(d) of the Electricity Act, 2003 (in short the Act) read with regulation 4(2) and 16 of RERC (Terms and Conditions for Open Access) Regulations, 2004 (in short OA Regulations, 2004).

2. The Discoms in their petition mainly contended as under:

- (a) Under the universal supply obligation, Petitioners are obligated to supply power to the consumers. Considering the sales, as approved by the Commission, the Petitioners have to make long term Power Purchase Agreements (PPAs) with the generators and transmission licensees so as to ensure the supply of power keeping in view the annual increase in the load envisaged. While contracting energy through long term PPAs, the Petitioners have to bear certain financial obligations and therefore have to bear the minimal/fixed cost even when there is no off take of energy through such sources.
- (b) Whenever any consumer opts for open access and takes intermittent supply through open access, the Petitioners have to continue to pay fixed charges to their contracted generating stations. However, Petitioners are not able to sufficiently recover such fixed cost obligation from the open access consumers. The cost recovered from fixed tariff schedule is less than the cost incurred by the Petitioners while supplying energy which leads to the situation where the Petitioners are saddled with the stranded cost on account of the universal supply obligation of the Discoms.
- (c) Short term open access consumers generally procure energy from collective market or power exchanges due to which there has been considerable variation in schedule and actual energy drawal of these consumers. These consumers reschedule their energy drawal on the basis of their daily load requirement. Such anomaly in energy drawal makes it difficult for the Discoms to forecast their energy requirement for the following day.

- (d) Open Access consumer has a choice to reschedule his energy drawal based on the daily energy requirement. However, Petitioners, irrespective of the drawl pattern of the Open Access consumers, are required under universal service obligation to keep their entire generation and transmission capacity available for the consumers as and when the same is required by such consumers. Due to such meticulous modus operandi opted by Open Access consumers, forecasting of energy requirement from the generating stations becomes difficult for the Petitioners.
- (e) Considering the number of Open Access consumers and the fluctuation of their open access energy drawal, the computation of stranded cost incurred by the Petitioner due to the universal supply obligation would be very difficult on case to case basis.
- (f) Computation of Additional Surcharge on case to case basis is very difficult and time consuming and would not be conducive for the power market. Hence, the Additional Surcharges should be generic in nature. Further, due to the seasonal load, there are changes in energy requirement during each season. This fact should also be accounted for during the computation of Additional Surcharge. Therefore, Petitioners' request for determination of Additional Surcharge should be allowed on the yearly basis.
- (g) Gujarat Electricity Regulatory Commission, vide its order dated 12.03.2014 issued for Determination of Additional Surcharge, has clarified the applicability of Additional Surcharge on the new open access consumers. The Commission reinstated its position that the open access is granted to a consumer for a fixed period of time and the same is allowed only when a fresh application is submitted by the consumers. Moreover, as consumers can also alter the quantum and period of open access, the consumer applying for open access should be treated as new open access consumer.

- (h) In view of above, Petitioners requested that any embedded consumer/open access consumer who has applied for the grant of the Open Access (inclusive of LTOA, MTOA & STOA) would be considered as "the consumer intending to avail open access" and the Additional Surcharge for the applicable period as determined by the Commission should be leviable on such consumers.
- (i) Based on the station wise back down data and energy drawal schedule of Open Access consumers for the last quarter of FY 2014-15, Discoms have calculated the Additional Surcharge using the following methodology:-
- (i) The quantum of power surrendered from individual power plants on a daily basis for every month starting from January 2015 to March 2015 has been considered.
  - (ii) The quantum of power that has been drawn via Open Access by the consumers on daily basis has been considered.
  - (iii) Since the quantum of power surrendered every day is not from a specific power plant, and fixed cost associated with every power plant is different, the Petitioners have calculated an effective per unit fixed cost for every month.
  - (iv) This fixed cost has been considered for calculating the amount of total fixed charges that the Petitioners have paid because of the total stranded power in that particular month owing to corresponding open access for that month.
  - (v) In other words, the proportion in which individual power plant units have been backed down due to the surrendering of power for the entire month, in the same proportion, the fixed costs for the individual power plant units have been taken to give a total effective per unit fixed cost for that month.

- (vi) The effective per unit fixed cost obtained as above is multiplied to the quantum of stranded power (in MUs) of that month that has been taken to be surrendered because of consumers opting open access and not scheduling power from the Discoms.
- (vii) In order to ensure that only such power surrendered is taken for calculating Additional Surcharge which corresponds to power stranded because of open access consumers only, the lower of the amount of the open access power in "Round the clock" and that surrendered every day is taken as the amount for the stranded power for the day due to open access.
- (viii) Summary of the total Additional Surcharge For FY 14-15 as submitted by the Petitioners is summarized as under:

Sr. No.	Month	Power Surrendered by Nigams during the month (MU)	Effective Fixed Cost applied (Rs./kWh)	Open Access Power Quantum (MU)	Open Access Additional Surcharge (Rs. Cr.)
1	Jan-15	429.75	1.33	405.40	53.80
2	Feb-15	436.09	1.37	384.78	51.06
3	Mar-15	484.67	1.57	469.52	62.31
Total				1259.69	167.16
Applicable Additional Surcharge (Rs/kWh)				1.33	

- (ix) In view of above submission, Additional Surcharge w.e.f. 01.01.2015 has been computed as Rs. 1.33 / kWh.

3. In the facts and circumstances mentioned above, Petitioners prayed as under:
- By invoking the power conferred under Section 42(4) of the Electricity Act, 2003 read with Regulation 91 of RERC (Terms and Conditions for Determination of Tariff), 2014 and Regulations 4(2), 16 and 25(4) of RERC (Terms and Conditions for Open Access) Regulations, 2004 amended upto

30.03.2007 admit the petition seeking determination of Additional Surcharge w.e.f. 01.01.2015.

b. Approve the methodology proposed by the Rajasthan Discoms which is on the same line as allowed by the respective State Electricity Regulatory Commissions for the distribution utilities of the neighboring States.

4. The matter was listed on 15.07.2015, 13.08.2015, 03.09.2015 and 08.10.2015 on admissibility of the petition. Sh. Bipin Gupta, Advocate appeared for Discoms and sought time to furnish the information/data in support of the petition.

5. Accordingly, Discoms submitted additional information in the matter on 15.10.2015. Discoms vide their additional information submitted the calculation of month wise Additional Surcharge for FY 2014-15 and proposed the average Additional Surcharge for FY 2014-15 as Rs. 1.39/unit.

6. The matter was again heard on 29.10.2015. Sh. Bipin Gupta, Advocate appeared for Discoms. After hearing preliminary submissions, Commission directed to publish notice to proceed further.

7. Accordingly, Public notices with salient features of the petition, inviting objections/comments/suggestions from persons desirous of submitting the same, were published in the following newspapers on the dates shown against each and the petitions were also placed on the websites of the Commission and Discoms:

Sr. No.	Name of News Paper	Date
(i)	Rajasthan Patrika	01.12.2015
(ii)	Danik Nav Jyoti	01.12.2015
(iii)	Times of India	02.12.2015

8. In all, comments/suggestions from 41 persons were received on the petition. A List of persons/organizations who filed their comments/suggestions on the petition is placed at Annexure-1 of this order.

9. The Commission forwarded these suggestions/comments to the Discoms for furnishing the reply. Discoms have sent their replies to them under intimation to the Commission on 15.02.2016.

10. Stakeholders in their comments/suggestions mainly raised the following issues:

- (i) Petitioners have sought determination of generic Additional Surcharge on the basis of the methodology proposed whereas regulation 16 (2) of RERC (Terms and Conditions for Open Access) Regulations, 2004 provides that Commission has to determine the Additional Surcharge on case to case basis on an application submitted by Discoms. Further, Regulation 130 of RERC (Terms and Conditions for Determination of Tariff) Regulations, 2009 also provides that Additional Surcharge shall be determined on case to case basis. Thus, present application is contrary to the provisions of OA Regulations, 2004 and Tariff Regulations, 2009.
- (ii) Rajasthan is a power deficit State and the claim that generation capacity is being backed down/stranded due to Open Access is flawed. Further, Petitioner has consistently been procuring power in short term market through tendering process which inter-alia depicts that the Petitioners are aware of power shortage well in advance. In this circumstance, the question of there being stranded cost and the need to determine Additional Surcharge does not arise.
- (iii) Petitioners claimed that power is being backed down because the consumers are taking power through open access whereas the real reason for backing down is that the Petitioners are able to procure cheaper power from short term sources to such an extent that even the variable cost of the generators being backed down is more than the total cost of the short term purchase.

- (iv) As per Regulations, capacity allowed to Open Access consumers is limited to its sanctioned contract demand of the consumer. Further, even if the open access consumers do not take any power from Petitioners, they pay demand charges based on the contract demand. Hence there is no case to levy Additional Surcharge on the ground of stranded capacity.
- (v) Actual amount of fixed charges recovered from retail tariff has not been considered while calculating the Additional Surcharge. Open Access consumers are also paying cross subsidy surcharge which also has fixed component of tariff, therefore, Additional Surcharge should not be levied. Since Open Access consumers are already paying demand charge, transmission and wheeling charges, therefore, levy of Additional Surcharge is not justified. Further, impact of the Open Assess consumers has not been shown separately.
- (vi) Additional surcharge needs to be reduced by the fixed charges paid by the consumer during open access. Methodology should, therefore, account for adjustment of fixed cost paid under tariff.
- (vii) Surrender of power from generating station due to drawal by Open Assess consumers ought to be verified by SLDC for each block.
- (viii) When the Discoms are not in a position to supply power to all the consumers, then there is no question of stranded cost. In fact, by covering the power deficit, the Open Access consumers are helping the Discoms therefore, no Additional Surcharge be levied. Stranded cost should be with respect to power purchase already tied up and which is unable to be utilized in view of consumers opting for open access.
- (ix) Levy of Additional Surcharge will curtail competition and would thus defeat the objective of competition as envisaged under the Electricity Act, 2003.



- (x) Methodology adopted for calculation of Additional Surcharge is not in line with the provisions made under the Electricity Act, 2003.
- (xi) The MW capacity as well as Plant Load Factor of generating station has not been taken into account in the proposal of Discoms for levy of Additional Surcharge.
- (xii) The calculation of Discoms is based on the assumption that whatever power has been surrendered by Discoms is only on account of drawal of open access power which is misleading.
- (xiii) Data/information that has been submitted by the Petitioner is inadequate on the basis of which no conclusion can be made.
- (xiv) Renewal energy projects, for the reason that they are exempted from Cross Subsidy Surcharge while selling power through open access, should also be exempted from Additional Surcharge. Additional Surcharge should also not be levied on captive power users for self consumption. Additional Surcharge should not be levied on medium and long term Open Access consumers.
- (xv) Petitioners sought retrospective effect of proposed generic Additional Surcharge whereas Regulations do not have any provision for generic Additional Surcharge. Therefore, it cannot be enforced from a date prior to the effective date of amendment.
- (xvi) Hon'ble Supreme Court in the case of SESA Sterlite Vs OERC & Ors (2014) 8 SCC 444 laid down that Additional Surcharge has a compensatory nature and is for compensation to the distribution licensee for the stranded costs. However, if no loss is being suffered by the distribution licensee, there cannot be any question of granting compensation to them.

11. In reply to the issues raised by the Stakeholders, Discoms have submitted as under:

- (i) Petition has been filed under provisions of Section 42 of the Electricity Act, 2003 read with Regulation 91 of the RERC (Terms and Condition of Determination of Tariff) Regulations, 2014 and Regulation 4 (2), 16, 25 (4) and 30 of OA Regulations, 2004 which gives ample power to State Commission to determine Additional Surcharge. However, OA Regulations, 2004 have now been repealed and new Regulation by name of RERC (Terms and Condition for Open Access) Regulations, 2016 (in short OA Regulations, 2016) have come into force which also gives power to this Commission to determinate the Additional Surcharge on generic basis.
- (ii) Fixed charges provided in retail tariff are different from fixed charges component of energy charges. Fixed charge under retail tariff is on account of cost incurred to maintain and to distribute energy to different category of consumers. However, for calculation of stranded cost for the purpose of Additional Surcharge , the component of fixed charges in power purchase are to be considered and therefore there is no question of subtracting the fixed charges recovered from retail tariff while calculating Additional Surcharge. Further, Cross Subsidy Surcharge is totally different from Additional Surcharge under Section 42 of Electricity Act and Open Access consumers have to pay both types of charges. For calculating the Additional Surcharge, only the open access surrendered power has been considered and not the power surrendered for any other reason.
- (iii) For the calculation of Additional Surcharge, it is considered that the Discoms have surrendered the power for the reason that open access users have availed power through different sources instead of Discoms. Though Discoms had entered into long term power purchase agreement

with generators, looking to the supply obligation of Discoms towards open access consumers, therefore, open access consumers are under obligation to make payment to the Discoms in the form of Additional Surcharge as provided under Section 42 of the Electricity Act and thus up to the extent of open access consumption by open access consumers, the surrendered power is stranded cost and therefore the data provided by the Discoms is correct.

- (iv) Long term agreements with generators are being entered into looking to the existing consumers and taking into consideration some percentage increase in the consumption. It is only for calculating the energy requirement and on that basis long term agreements are entered with generators. If consumers on one hand force supply obligation on the Discoms and on the other hand also opt out to purchase electricity from other sources through open access, then as per Section 42 of the Electricity Act, such consumers are liable to pay Additional Surcharge. Such consumers cannot challenge levying of Additional Surcharge on the count that there is deficit of energy. In broad application, the open access consumers is liable to pay Additional Surcharge for the stranded cost which is nothing but the fixed cost paid to the generators on the energy. Once the energy surrendered by the Discoms up to the extent of open access consumers opting out to purchase from other source, it has to be treated as energy surrendered and therefore, there is no help of open access consumers rather they create difficulty in distribution of electricity as open access consumers have been given right to schedule energy as they feel like. The energy can be in deficit due to various reasons but it is the liability of Open Access consumers to pay the Additional Surcharge for the reason of their opting to purchase electricity from any sources other than distribution companies and therefore up to

the extent of their option to purchase from other sources, they are liable to pay Additional Surcharge.

(v) The methodology adopted for calculation of Additional Surcharge is strictly in accordance with Electricity Act, 2003.

(vi) Additional Surcharge is levied on open access consumers only and thus there cannot be any difference between a person effecting self consumption through CPP under open access or a RE generator as all the open access consumers are to be dealt equally. Further, medium term as well as long term open access consumers cannot be made a separate class for the purpose of Additional Surcharge as it would amount to discrimination and therefore Additional Surcharge is applicable on every open access consumers.

12. The matter was listed for hearing on 03.03.2016. Sh. Bipin Gupta, Advocate for Discoms requested to grant time to file amended petition in view of new OA Regulations, 2016. Commission granted time to file the same.

13. Discoms have filed an Interlocutory Application (IA) on 21.03.2016 praying for determination of Additional Surcharge as per the OA Regulations, 2016.

14. The matter was finally heard on 01.04.2016 and 21.04.2016. Sh. Bipin Gupta, Advocate appearing for Discoms submitted that the Discoms have filed an amendment application to the petition already filed based on OA Regulations, 2016 which may pleased be allowed. Further, he addressed arguments on the claim for Additional Surcharge relying on averments made in the petition.

15. Sh. Suresh Agarwal for NEI Ltd., Sh. Amarjit Singh for Shree Cement Ltd., Sh. V.K. Gupta for Jindal Saw Mill & Rajasthan Textile Mills Association and Sh. D.S. Agarwal for Rudraksh Energy appeared and made their submissions. Sh. Anand K Ganesan, Advocate appeared for Rajasthan Steel Chamber, DCM

Shriram, Hindustan Zinc and Open Access Users Association and Sh. R. K. Jain, Consultant appeared for Bhiwadi Industries and made their submissions.

16. The Commission directed Discoms to furnish the information/data required as pointed out during hearing within two weeks and allowed further one week time to Objectors for filing the reply if any to the information/data provided by the Discoms.

17. Accordingly, Discoms on 04.05.2016 submitted the block wise back down data of generating stations in MW from January, 2015 to March, 2015.

18. Further, the Commission vide its letter dt. 06.05.2016, sought the following information from Discoms for calculating the Additional Surcharge :

(i) Block wise and power station wise quantum of power surrendered in MW during FY 2015-16.

(ii) Block wise quantum of Open Access in MW for FY 2015-16.

(iii) Station wise Fixed Cost actually paid for power purchased for FY 2015-16.

(iv) Based on the above information, calculation of Additional Surcharge.

19. Accordingly, the same has been furnished.

### **Commission's view**

20. We have carefully considered the petition, comments/suggestions of the Stakeholders, all relevant documents and oral submissions made by the Petitioners and Stakeholders and the provisions of Electricity Act, 2003 and OA Regulations, 2004 and 2016.

21. In light of the submissions of both the parties on the determination of Additional Surcharge, the following issues have arisen for consideration and decision of the Commission:

- (i) Whether the Discoms are legally entitled to claim Additional Surcharge as per the provisions of Electricity Act, 2003, National Tariff Policy and RERC (Terms and Conditions of Open Access) Regulations, 2016?
- (ii) Whether Additional Surcharge has to be determined on a generic basis or it has to be on case to case basis?
- (iii) Whether Additional Surcharge could be levied on captive power consumer?
- (iv) Whether RE projects selling power through Open Access are not liable to pay Additional Surcharge for the reason that they are exempted from Cross Subsidy Surcharge?
- (v) Whether Additional Surcharge could be allowed from 01.01.2015 as prayed by Discoms or from any other date?
- (vi) What is the Additional Surcharge payable by Open Access consumers to Discoms?

**Regarding issue (i):**

22. It is the case of Discoms that on account of purchase of electricity from open market by Open Access consumers, they have to incur the liability of fixed charges to generators even when it is not able to off take the entire contracted power and hence they are entitled to collect Additional Surcharge as per Section 42 (4) of the Act read with National Tariff Policy from Open Access consumers.

23. Before dealing with the claim, we may refer to the relevant provisions of EA, 2003, Clause 8.5.4 of National Tariff Policy, 2016 and Regulation 17 of OA Regulations, 2016 on which Petitioners have relied upon:

**“Section 42. (Duties of distribution licensee and open access): ---**

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

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

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

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

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

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

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

Clause 8.5.4 of National Tariff Policy, 2016

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

Regulation 17 of OA Regulations, 2016

*"17. Additional Surcharge*

- (1) A consumer availing open access and 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, in addition to wheeling charges 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.*
- (2) The Distribution Licensee whose consumers intend to avail open access shall file a petition to the Commission, along with petition for determination of retail tariff, for determination of the additional surcharge to be levied from open access consumers. The petition shall contain details of quantum of stranded costs and the period over which these remained stranded and would be stranded.*
- (3) The Commission shall scrutinize the statement of calculation of such stranded fixed cost submitted by Distribution Licensee and determine the amount of additional surcharge.*
- (4) The consumers located in the area of supply of a Distribution Licensee but availing open access exclusively on inter-State transmission system shall also pay the additional surcharge as determined under these Regulations."*

24. Hon'ble Supreme Court in case of SESA Sterlite Vs OERC & Ors (2014) 8 SCC 444 held as under:

*"25. The issue of open access surcharge is very crucial and implementation of the provision of open access depends on judicious determination of surcharge by the State Commissions. There are two aspects to the concept of surcharge – one, the cross-subsidy surcharge i.e. the surcharge meant to take care of the requirements of current levels of cross-subsidy, and the other, the additional surcharge to meet the fixed cost of the distribution licensee arising out of his obligation to supply. The presumption normally is that generally the*



*bulk consumers would avail of open access, who also pay at relatively higher rates. As such, their exit would necessarily have adverse effect on the finances of the existing licensee, primarily on two counts – one, on its ability to cross-subsidise the vulnerable sections of society and the other, in terms of recovery of the fixed cost such licensee might have incurred as part of his obligation to supply electricity to that consumer on demand (stranded costs). The mechanism of surcharge is meant to compensate the licensee for both these aspects.(emphasis supplied)*

25. Considering the statutory provisions and the Hon'ble Supreme Court decision referred to above there is no scope to dispute the entitlement of Discoms for Additional Surcharge if it is demonstrated that on account of Open Access consumers sourcing power from other sources, Discoms are left with stranded capacity for which they are liable to pay the fixed charges under the Power Purchase Agreements. Even the Objectors do not seriously dispute this, as their case is that Petitioners are suffering with stranded capacity due to various other reasons also.

26. In light of the above, the first issue is answered in affirmative holding that Discoms are entitled to claim Additional Surcharge.

**Regarding issue (ii):**

27. It has been argued by Open Access consumers that the claim of Petitioner Discoms for determination of a uniform Additional Surcharge on generic basis is not tenable. According to them the Additional Surcharge shall be determined on case to case basis taking into account the quantum of power each Open Access consumer is getting.

28. In reply, it is submitted by Discoms that determination of Additional Surcharge was contemplated on case to case basis under old OA Regulations, 2004. Since these Regulations have now been replaced by new Regulations of 2016, the Additional Surcharge may be determined on generic basis. In support, Petitioners quoted regulation 17 of OA Regulations, 2016 which is already extracted above.

29. Considering the submission of both the parties, Commission is of the view that as per Regulation 17 of OA Regulations, 2016, Additional Surcharge has to be determined on generic basis and not case to case basis. Determination of Additional Surcharge on case to case basis would also not be practicable considering that the cost incurred by Discoms for providing Open Access will not be consumer specific. All the cost incurred to meet Universal Supply Obligation, purchase of power, etc. are common only. Similarly, the fixed cost of stranded capacity is not specific to any particular plant.

30. Accordingly, the issue is answered as above.

**Regarding issue (iii):**

31. It is submitted on behalf of M/s Shree Cement Ltd. that as per Section 42(4) of the Electricity Act, 2003, Additional surcharge can be levied only on consumer who receives supply from a person other than the distribution licensee of his area of supply as and when permitted by RERC. Captive power plant supply power to its consumer as per permission granted by statute. It further submitted that many of the State Regulatory Commissions have exempted Captive Open Access consumers from the levy of Additional Surcharge in their respective Regulations and therefore this Commission also may not levy Additional Surcharge on them.

32. M/s Shree Cement Ltd. has also submitted that Section 9 (2) of the Electricity Act, 2003, confers certain rights to a captive generating plant with respect to Open Access. The right to Open Access from a captive generating plant to the destination of its use has been bestowed under Section 9(2) of the Act which comes into the force from 10.06.2003 and not from the powers of the Commission to permit Open Access under Section 42 of the Act.

33. The Commission has looked into Section 9 (2) of the Electricity Act, 2003. In the Commission's opinion, Section 9 (2) only gives a right to captive generating plant of Open Access for the purpose of carrying electricity from the

generating plant to destination of its use but it does not deal with any other issue. Commission has also looked into Section 9 (1) of the Act. The second proviso to 9 (1) specifically states that the electricity generated from captive generating plant may be supplied to any consumer subject to Regulations made under Section 42 (2) of the Act. The captive consumers in the Commission's view do fall under this proviso and therefore are subject to the Regulations made under Section 42 (2) of the Electricity Act, 2003. The Commission is determining the Additional Surcharge under Section 42 (2) and Regulations made thereunder and therefore the Additional Surcharge does apply to captive consumers also.

34. Accordingly, the issue is answered in the affirmative that Additional Surcharge is leviable on captive power consumers.

**Regarding issue (iv):**

35. Indian Wind Energy Association in its submissions has submitted that Additional Surcharge shall not be applicable in case of Wind based Open Access transactions in the similar lines of exemption of cross subsidy surcharge accorded for Wind based Open Access transactions under the RERC (Terms and Conditions for Determination of Tariff for RE sources- Wind and Solar Energy) Regulations, 2014.

36. In the Commission's view, Surcharge and Additional Surcharge are two different levies and compensate separate losses suffered by licensees who have a Universal Supply Obligation. If the intention of Regulations was to exempt RE Power from levy of Additional Surcharge, the same could have been specifically dealt with in the Regulations. Fourth proviso of Section 42 (2) significantly refers only to Cross Subsidy Surcharge and not Additional Surcharge which is dealt under 42 (4).

37. As stated above, Cross Subsidy Surcharge and Additional Surcharge are two different levies and are liable to be paid independently. Merely because RE power Open Access users do not pay Cross Subsidy Surcharge, they cannot claim exemption from Additional Surcharge. Because of RE Open Access consumers also, Discoms suffer stranded capacity. Therefore, the Commission holds that Additional Surcharge is payable by RE Power Open Access consumers also.

38. Accordingly, this issue is answered.

**Regarding issue (v):**

39. Discoms in their petition have prayed for determination of the Additional Surcharge w.e.f. 01.01.2015 initially under the provisions of OA Regulations, 2004. Petitioner, thereafter filed an IA submitting that since now the OA Regulations, 2004 have been replaced by OA Regulations, 2016 therefore petition may be considered as per new Regulations.

40. The Commission observes that Petitioners in their petition sought Additional Surcharge w.e.f. 01.01.2015 as per OA Regulations, 2004 based on the data of FY 2014-15. OA Regulations, 2004 contemplated the determination of Additional Surcharge on case to case basis. Discoms in their petition had expressed their difficulties to determine the Additional Surcharge on case to case basis. Earlier, the Commission, vide its order dt. 23.1.2014 also, had held that determination of generic Additional Surcharge is in conflict with the OA Regulations, 2004 and cannot be proceeded with.

41. Commission observed that the OA Regulations, 2016 which provide for determination of Additional Surcharge on generic basis came into force only on 25.02.2016. Therefore, Discoms cannot seek determination of Additional Surcharge under them from any date anterior to the date from which they came into force. The claim for Additional Surcharge from 01.01.2015, therefore cannot be accepted.

42. Accordingly, this issue is answered.

**Regarding issue (v):**

43. It is submitted by Petitioner that they are entitled for Additional Surcharge of Rs. 1.39/unit based on the data produced in support of same along with petition. The details of calculation of Rs. 1.39/unit as Additional Surcharge is as below:

Sr. No.	Month	Power surrendered by the Nigams during the month	Effective Fixed Cost	Open Access Power Quantum	Open Access Additional Surcharge
		(MU)	(Rs./unit)	(MU)	(Rs. Crs.)
1	Apr-14	150.73	1.49	176.10	26.28
2	May-14	184.91	1.53	211.03	32.20
3	Jun-14	144.62	1.54	157.98	24.36
4	Jul-14	136.15	1.23	200.13	24.69
5	Aug-14	140.38	1.58	143.62	22.66
6	Sep-14	147.35	1.53	124.41	19.02
7	Oct-14	149.92	1.18	152.90	17.99
8	Nov-14	232.91	1.52	316.54	48.13
9	Dec-14	398.06	1.41	287.08	40.35
10	Jan-15	429.75	1.56	347.73	54.37
11	Feb-15	436.09	1.84	323.36	59.36
12	Mar-15	484.67	0.75	462.48	34.70
Total				2903.37	404.11
Applicable Additional Surcharge (Rs./kWh)				1.39	

44. Contesting the claim of the Petitioners, it is submitted by Open Access consumers that the claim of Petitioners is not correct and valid. It is submitted that Petitioners have not established that they are suffering from stranded capacity. On the contrary they are regulating the supply and are not meeting the entire demand of State. Further, it is submitted that Petitioners have purchased RTC power from time to time from generators and also from Power Exchange. According to them, when there is shortage of electricity in the State, there cannot be any stranded capacity for which they are paying fixed charges.

45. It is also submitted by Open Access consumers that even though they purchase electricity through Open Access, they are paying fixed charges for the electricity contracted. Further, under the OA Regulations, Open Access is limited to the contracted demand. For these reasons, question of the stranded capacity of Discoms on their account will also not arise and hence no Additional Surcharge shall be collected from them.
46. Commission has considered the submissions made by both sides keeping in view the data furnished by Discoms and material furnished by Open Access consumers.
47. There cannot be any dispute that Petitioner Discoms under Section 43 of the Act have Universal Supply Obligation towards all the State consumers be it industrial or others. For this purpose, Discoms have entered into long term PPAs with Generating Companies which inter-alia provide for payment of the minimum fixed charges payable irrespective of the fact whether Discoms are able to off take the entire power available over the plant load factor. When some of the consumers opt for purchase of power from persons other than Discoms, even then Discoms have to pay for the fixed cost to Generators as per PPAs. From the data produced on account of purchase of power by the Open Access consumers other than the distribution licensee, the Commission finds that there is stranded capacity for which Discoms have to pay fixed charges under the Power Purchase Agreements. Accordingly, Petitioner Discoms have to be compensated for the stranded capacity.
48. It is the contention put forth by Open Access consumers that since Open Access is restricted to contract demand and they are paying fixed charges for contract demand therefore, the Petitioners cannot suffer from any stranded capacity hence the levy of Additional Surcharge on them is not tenable. The fixed charges paid to Discoms by Open Access consumers mainly cover the fixed cost of Discoms and not the full fixed cost of power purchase.

49. Hon'ble APTEL in Appeal no. 269 of 2014, filed by Open Access Users Association, on 28.4.2016 has upheld the levy of Additional Surcharge. While doing so Hon'ble APTEL has accepted the findings of the HERC which is reproduced as below:

*"The Commission observes that the distribution licenses, based on the data provided by them for the period April 2013 to March 2014, have been able to conclusively prove, backed with calculations, that their long term power purchase commitments do get stranded most of the times when power is drawn by embedded open access consumers from other sources and the Discoms have to bear the fixed cost of such stranded power which ultimately get passed on to other consumers. They have worked out the cost of such stranded power and based on that has worked out the additional surcharge as 97 paise/unit for FY 2013-14. The Commission further observes that it would not be fair if the cost incurred by distribution licensees for the power purchase commitments stranded on account of power drawn by open access consumers from other sources is passed on to other consumers as that would amount to cross subsidising of the open access consumers by other consumers. It would also be fair to assume that, as the number of open access consumers and power drawn through open access is increasing every year, the additional surcharge worked on similar basis for FY 2014-15 would not work out less than as has been worked out by UHBVNL for FY 2013-14."*

50. In the petition, Petitioner Discoms have worked out Rs. 1.39/unit of Additional Surcharge based on the data of FY 2014-15. This in Commission's view cannot be accepted. The claim of generic basis may be considered only after new Regulations have come into force, i.e., for FY 2016-17. Therefore, in Commission's view base data has to be of FY 2015-16 and not FY 2014-15.

51. Commission has obtained the data of FY 2015-16 in order to decide what shall be Additional Surcharge leviable. As per the Petitioner's claim based on data of FY 15-16, the Additional Surcharge comes to Rs. 1.24/unit in place of Rs. 1.39/unit. The methodology followed by Discoms for collecting the data for computation of additional surcharge has been detailed below:

- (i) The quantum of power surrendered from individual power plants for each of the 96 time blocks of each day of every month for FY 2015-16 (till January,

16), has been considered. Only power surrendered or backed-down as per the instructions of the Petitioner has been considered.

(ii) The quantum of power drawn via Open Access for each of the 96 time blocks for each day of every month for FY 2015-16(till Jan,16) has been considered. Only Net Open Access quantum has been considered, i.e., after reducing any purchase of power from exchange by the Discoms.

(iii) The power surrendered from Unit 1 and Unit 2 of both KTPS and STPS has not been considered while computing the back-down of power. These stations were boxed up till March 2016, i.e., no power was being purchased from these units because of high variable cost. Further, RTC Power purchased during this period was to replace power surrendered from these stations and not because of shortage of tied-up power as stated by the Stakeholders.

52. Based on the above, the following data has been submitted by the Discoms:

Month	Back down aggregated over each time block (MW) (1)	Average back down per time block (MW) (2)	Open Access aggregated over each time block (MW) (3)	Average Open Access per time block (MW) (4)	Back down due to Open Access aggregated over each time block (MW) (5)
April-15	1983550	689	1844498	640	1250329
May-15	1675389	563	2178668	732	1285105
June-15	1785963	620	1507767	524	967407
July-15	2714839	912	1574995	529	1197830
Aug-15	2744666	922	1888859	635	1382740
Sept-15	1537079	534	1386676	481	852790
Oct-15	2031070	682	1780201	598	1235777
Nov-15	1628829	566	1640309	570	1021094
Dec-15	1699538	571	1941528	652	1200769
Jan-16	1502241	505	1710079	575	1013801
Total	19303164	656	17453580	594	11407643

Column 1 & 3 represent sum of back-down and open access respectively for each time block of each day of the month in MW

For Column 5, lower of back-down and open access has been considered for each time block separately.



53. The Discoms have calculated the amount of Additional Surcharge to be levied in the FY 2016-17 based on the following methodology:

- (i) The lower of the back-down quantum and open access quantum has been considered as power surrendered due to open access for each of the 96 time blocks so that power stranded because of open access consumers is taken.
- (ii) Since the quantum of power surrendered every day is not from a specific power plant, and fixed cost associated with every power plant is different, the Petitioners have calculated an effective per unit fixed cost for every month by calculating weighted average fixed cost per unit based on the actual charges paid to generating station against fixed charges and the quantum of energy drawn from each station for every month.
- (iii) To work out a total effective per unit fixed cost for a month, the fixed costs for the individual power plant units have been taken in the same proportion as the proportion in which individual power plant units have contributed to the surrendering of power for the entire month.
- (iv) This fixed cost has been considered for calculating the amount of total fixed charges that the petitioner has paid because of the total stranded power in that particular month owing to corresponding open access for that month.
- (v) To compute additional surcharge recoverable for each month, the effective per unit fixed cost obtained as explained above is multiplied to the quantum of stranded power (in MUs) of that month which has been considered to be surrendered because of consumers opting for open access.
- (vi) To compute per unit additional surcharge to be levied on open access consumers, it has been assumed that the Open Access scenario will remain to be the same in FY 2016-17. Therefore, the total additional surcharge

recoverable for the FY 2015-16 (up to Jan,16) computed above has been spread over the total open access quantum for the FY 2015-16 (up to Jan,16) to arrive at Additional Surcharge of Rs. 1.24 per unit.

54. Based on above, claim of Additional Surcharge based on data of FY 2015-16 is as below:

Month	Total Back down (MU)	Open Access (MU)	Back down due to Open Access (MU)	Effective Fixed Cost	Additional Surcharge
	MU	MU	MU	Rs./kWh	Rs. Cr.
	A = MW/4000	B = MW/4000	C = Min (A,B) for each time block	D (Weighted Average fixed cost per unit)	E = C * D
April-15	496	461	313	2.69	84.12
May-15	419	545	321	1.97	63.39
June-15	446	377	242	1.56	37.63
July-15	679	394	299	2.49	74.70
Aug-15	686	472	346	2.17	75.06
Sept-15	384	347	213	1.38	29.42
Oct-15	508	445	309	1.46	45.00
Nov-15	407	410	255	1.65	42.06
Dec-15	425	485	300	1.81	54.27
Jan-16	376	428	253	1.32	33.54
Total	4826	4363	2852		539
Additional Surcharge Recoverable per unit considering same open access scenario for the next year (Rs./kWh) (Total Additional Surcharge / Total Open Access*10)					1.24

55. The Commission observes that the Discoms, while calculating the Additional Surcharge, have considered the block wise lower of the quantum of power surrendered and quantum of Open Access in MW during FY 2015-16. The Commission also observes that substantial stranded capacity is on account of Open Access and there are sufficient reasons for levying Additional surcharge, otherwise the entire liability due to stranded capacity would be loaded in the retail tariff of general consumers who all are not beneficiaries of Open Access.

56. The Commission has closely looked into the calculation provided by Discoms in order to arrive at what could be the reasonable Additional Surcharge. In the

Commission's view the Additional Surcharge worked out cannot be wholly allowed to be passed on considering the fact that no Additional Surcharge was allowed all these years and levying of entire Additional Surcharge calculated above may affect the Open Access consumers adversely.

57. The Commission has to keep interest of Open Access consumers also in mind. It shall strike a balance between the two interests. Therefore, the Commission determines the Additional Surcharge at Rs. 1.00/unit which shall meet the cost of stranded capacity of the Discoms on account of Open Access.

58. In view of above discussion, Commission determines Additional Surcharge at Rs. 1.00/unit. This shall be levied and collected w.e.f. 1<sup>st</sup> May, 2016 from all Open Access consumers till next order on this issue.

(Raghuvendra Singh)  
Member

(Vinod Pandya)  
Member

(Vishvanath Hiremath)  
Chairman

**Annex-1****List of Stakeholders**

1	Bhiwadi Industries	22	PHD Chamber
2	Jai Bajrang Steel	23	IEX ( Indian Energy Exchange)
3	The Rajasthan Textile Mills Association	24	Sh. Shanti Prasad
4	Wonder Cement Ltd.	25	Hindustan Zinc Ltd.
5	Rajasthan Steel Chamber	26	Synergy Steels Ltd.
6	Open Access users Association	27	Swaraj Suiting Pvt. Ltd.
7	BSL Ltd.	28	Fashion Suitings Pvt. Ltd. (RCM)
8	DCM Shriram Ltd.	29	Shriram Rayons
9	Inani Marble & Granites	30	Balkrishna Industries Ltd.
10	Star Cotspin Ltd.	31	Ahlcon Parenterals (India) Ltd.
11	Sona Processors (India) Ltd.	32	Modern Woollens
12	Indian Wind Energy Association	33	Golcha Associated Soapstone
13	Rudraksh Energy	34	SRM Spinners Limited
14	Independent Power Producers Association of India	35	Binani Cement Ltd.
15	Jindal Saw Ltd.	36	Hindustan Copper Limited
16	Lords Chloro Alkali Ltd.	37	J K Lakshmi Cement Ltd.
17	Shree Cement Ltd.	38	Sunloc
18	Janki Corp. Ltd.	39	A. K. Spintex Limited
19	Maha Mayay Steels	40	The Oberoi
20	Swastika Suiting Limited	41	JPL Industries Ltd.
21	National Engineering Industries Ltd.		