

Rajasthan Electricity Regulatory Commission

Petition No. RERC-1808/2020

Petition filed under Section 86 (1) (f) of the Electricity Act, 2003 for adjudication of disputes regarding unlawful recovery of wheeling charges by Discom.

Coram:

Shri B. N. Sharma,	Chairman
Shri S. C. Dinkar,	Member
Shri Prithvi Raj,	Member

Petitioner : M/s Dhursar Solar Power Pvt. Ltd.

Respondents : 1. Jodhpur Vidyut Vitran Nigam Ltd. (JdVVNL)
2. Rajasthan Rajaya Vidyut Prasaran Nigam Ltd.(RVPNL)
3. State Load Despatch Centre (SLDC)

Date of hearings : 15.12.2020, 13.07.2021

Present : 1. Sh. Buddy Ranganadhan Advocate for Petitioners
2. Sh. Bipin Gupta Advocate for JdVVNL
3. Sh. Ribhu Dutta, Advocate for RVPNL and SLDC

Order Date:

03.08.2021

ORDER

1. Petitioners, M/s Dhursar Solar Power Pvt. Ltd. has filed this petition on 10.09.2020 under Section 86 (1) (f) of the Electricity Act, 2003 for adjudication of disputes regarding unlawful recovery of wheeling charges by Jodhpur Discom.
2. Notices were issued to Respondents on 10.09.2020 to file reply to the petition. Respondent Jodhpur Vidyut Vitran Nigam Ltd. (JdVVNL) filed reply

on 01.02.2021 and RVPNL & SLDC filed their joint reply on 17.12.2020. Petitioner filed rejoinder to the replies on 11.06.2021.

3. The matter was heard finally on 13.07.2021. Sh. Buddy Ranganadhan, Advocate appeared for Petitioners, Sh. Bipin Gupta, Advocate appeared for Respondent JdVVNL and Sh. Ribhu Dutta, Advocate appeared for RVPNL & SLDC.
4. Petitioners in petition, rejoinder and during hearing submitted as under:
 - 4.1. Petitioner is a Generating Company and has set up a 40 MW Solar PV Project at Dhursar, Distt. Jaisalmer, Rajasthan. The Petitioner has a long term Energy Purchase Agreement (EPA) of 25 years with the Adani Electricity Mumbai Limited (AEML), which is a Distribution Licensee in suburban areas of Mumbai.
 - 4.2. The Solar Plant is connected to the Rajasthan State Transmission network at Dechu Sub-station through 31 KMs long 220 kV dedicated transmission line. The metering is done at Dechu 220 kV sub-station.
 - 4.3. For evacuating power to meet its obligation under the aforesaid EPA, the Petitioner has signed long term open access (LTOA) agreement with RVPNL, which is a State Transmission Utility (STU) and another Long Term Access (LTA) agreement with Power Grid Corporation of India Ltd., (PGCIL) on 30.03.2012 and 23.03.2012 respectively.
 - 4.4. Respondent Discom issued a letter dated 10.10.2019, demanding wheeling charges from the Petitioner at the rate of Rs 0.01/kWh on the basis of Open Access capacity contracted.
 - 4.5. Petitioner objected to the claim of the Discom by writing a letter dated 11.11.2019, stating that Petitioner is not using any distribution network of JdVVNL for supplying power from its PV plant to its power procurer. Because Petitioner's plant is connected to the Rajasthan State Transmission

network at Dechu Sub-station through 31 KMs long 220 kV dedicated transmission line, this dedicated 220 KV line was built and is owned and operated by Petitioner. The metering is done at Dechu 220 kV sub-station. The Lines emanating from Dechu 220 kV sub-station are of RVPNL. Since the Petitioner is injecting 33 MW power at RVPN's 220 KV Dechu GSS through a 220 KV dedicated line connecting the Petitioner's switchyard and RVPN's substation, there is no question of the Petitioner utilizing the distribution network of JdVVNL, in law or on fact. Accordingly, there is no question of payment of wheeling charges as unlawfully claimed by Respondent Discom.

4.6. However, since wheeling charges have been billed to the Petitioner generating company since its commissioning on 28.03.2012, the same had to be paid in good faith and under protest and compulsion by the Petitioner till November, 2017. Accordingly, the Petitioner has sought refund of the wheeling charges already paid. However, despite the protest raised by the Petitioner, the Respondent Discom raised bill dated 14.11.2019 claiming Wheeling charges. In continuation to its letter dated 11.11.2019, the Petitioner, by its letter dated 06.02.2020, 16.03.2020, and 25.06.2020 sought withdrawal of billing for wheeling charges, and refund of wheeling charges recovered from the Petitioner, with interest.

4.7. Petitioner submitted that as per Section 2(76) of the Electricity Act, 2003 'Wheeling' means the operation whereby the distribution system and associated facilities of a transmission licensee or distribution licensee, as the case may be are used by another person for the conveyance of electricity on payment of charges to be determined under Section 62. However, factually no part of the distribution system of JdVVNL is being used by Petitioner for supplying power from its solar plant to its procurer. Thus, there is no question of paying any Wheeling charges.

- 4.8. Petitioner is using only transmission network for evacuating power from its PV plant, therefore Petitioner is liable to pay transmission charges and transmission losses only as per the Clause 38 (a) of RERC (Terms and Conditions for Determination of Tariff for Renewable Energy Sources-Wind and Solar Energy) Regulations 2014. Accordingly, the transmission charges and transmission losses are being paid to RVPNL. Whereas wheeling charges and losses are applicable only in cases where distribution network is used as per Clause 38 (b) & 38 (c) of RERC (Terms and Conditions for Determination of Tariff for Renewable Energy Sources-Wind and Solar Energy) Regulations 2014. Therefore, wheeling charges and losses are not payable by Petitioner, as distribution network is not used for evacuating power. Hence, the wheeling charges claimed by Discom from Petitioner towards 33 MW Long term Open Access granted to Petitioner are incorrect and hence need to be withdrawn with immediate effect.
- 4.9. Further it is submitted that in the matter of Steel Furnace Association of India vs Punjab State Electricity Regulatory Commission (Appeal No.245, 176, 237 and 191 of 2012), relying upon Kalyani Steels Ltd vs Karnataka Power transmission Corporation Ltd., 2007 ELR(APTEL) 985, the Hon'ble APTEL has held that the liability to pay wheeling charges arises only when the distribution system of the distribution licensee is used not when the consumer uses its dedicated lines of its own.
- 4.10. Further it is submitted that the impugned bills are also contrary to the RERC (Terms and Conditions for Determination of Tariff for Renewable Energy Sources - Wind and Solar Energy) Regulations, 2014. RERC (Rajasthan Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2019. RERC (Terms and Conditions for Open Access) Regulations, 2016. Respondent Discom unlawfully claiming of wheeling charges to cover services which have not been rendered by Respondent.

4.11. The Petitioner is connected at the EHT level where the instance of claiming wheeling charge for usage of EHT system by the Distribution Licensee arises only if there is any Service being provided by the Distribution Licensee to the Petitioner. However, there is no service that is being provided by the Distribution Licensee to the Petitioner, as there is no Energy Meter installed by the Distribution Licensee in the premises of the Petitioner or on the Dechu GSS end of the dedicated transmission line of the Petitioner through which power is injected into the grid by the Petitioner. Accordingly there is no incidence for its associated services such as metering system, testing, calibration, operation & maintenance, meter readings, billing, revenue collection, telecommunication and customer service etc., which is applicable only where the consumer of the Distribution Licensee uses the distribution system for availing Open Access, which is not the case here.

4.12. Since commissioning of the solar power plant Petitioner has been billed for wheeling charges by Respondent JdVVNL, from 01.04.2012 to 24.02.2016 @ 1 paisa / kWh on scheduled energy. After that from 25.02.2016 onwards @ 1 paisa / kWh on Open Access contracted capacity of 33 MW considering 100% capacity utilization factor (i.e. 24 hours injection of 33 MW Solar power for all days).

4.13. The Respondent Discom is claiming and recovering wheeling charges from the Petitioner unlawfully. Firstly, the Respondent Discom, Distribution Licensee, cannot in law levy, impose and recover wheeling charges or service charges, if on facts, the distribution system/network is not used for wheeling of power. Secondly, the Respondent Discom cannot even levy any kind of service charge on the Petitioner which is an EHT customer, as in law, the Petitioner generating company is not a consumer within the meaning of Section 2(15) of the Electricity Act, 2003. The law does not envisage a situation where the Distribution Licensee, the Respondent Discom is trying to seek a benefit of its own misinterpretation. If the

interpretation given by the Respondent Distribution Licensee is accepted, then in the instant case the Distribution Licensee would make money by not having its distribution system used at all. The Distribution Licensee's right to claim and recover wheeling charges is dependent upon its distribution system being used. Without fulfillment of this condition, no corresponding benefits can be claimed by the Distribution Licensee.

4.14. Further as per Commission's order dated 19.09.2006 in Petition No.84/2006, 85/2006 and 86/2006 wheeling charge at the rate of 1 p/kwh could be charged by Discom from EHT Consumers for the services provided by them. The Commission had noted that the customer service costs as calculated by the Petitioner in the aforesaid case were practically zero for EHV consumers. However, the Commission continued its earlier decision rendered in the order dated 21.02.2005 in Petition No. RERC/40/2004 for allowing the discom to charge wheeling charge @ 1 p/KWH from EHT Consumer towards the services provided by the discoms.

4.15. In the Commission's order dated 13.12.2016 in Petition No.604/2016, 848/2016 and 868/2016, the Commission clarified that the wheeling charges as determined in its earlier order dated 21.02.2005 and 19.09.2006, are in accordance with the RERC Tariff Regulations, 2004. The said Regulations provide that while determining wheeling charges, the total electricity wheeled on the licensee's distribution system, including its own shall be taken into account. However, as submitted above, the Petitioner does not use the distribution system of the Respondent Discom and hence, the question of levying wheeling charges does not arise.

4.16. The Respondent Discom has unlawfully claimed Wheeling Charges aggregating to Rs 1, 77, 73, 222 /- from April 2012 to July 2020. Out of the said amount, the Petitioner has already paid wheeling charges of Rs 1,74,75,622 /- from April 2012 to June 2020, which is refundable to the Petitioner.

4.17. In rejoinder Petitioner submitted that the provisions of the Civil Procedure Code (CPC) are not applicable to the proceedings before this Commission. Without prejudice, provisions of Order 2 Rule 2 are not applicable when the causes of action are distinct. The present Petition has been filed challenging illegal demands made by the Respondent towards wheeling charges which is entirely a separate cause of action from the one raised in the Petition earlier filed by the Petitioner. The grounds raised by the Petitioner in Petition No. 1125/2017 have no bearing with the facts of the present Petition. Hon'ble APTEL in appeal no. 51/2014 (M/s Salasar Steel & Power Ltd v. Chhatisgarh State Load Despatch Centre and Anr) held that the Electricity Act by itself is a complete Code under which the disputes are resolved between the parties. Even though there are some provisions in the Electricity Act by which Civil Court powers have been conferred on the State Commission to deal with some aspects under some sections of the Electricity Act, it is not mandatory for the State Commission to follow all the procedures contained in various provisions of the CPC. Therefore the procedure contemplated in the CPC is not binding on the State Commission while exercising powers under the Electricity Act.

4.18. Respondent has erroneously raised the issue of the claims being barred by limitation. The Respondent upon incorrect interpretation of law and being in a dominant position cannot unjustly enrich itself by recovering wheeling charges from the Petitioner which are otherwise not payable and are without any legal basis.

4.19. The Salmond principles have widely been accepted by the courts. In case of Assistant Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Limited (2008) 14 SCC 171) the Supreme Court held that:

"35. In our judgment, it is also well settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the court to pronounce a "new rule" but to maintain and expound the

"old one". In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.

36. *Salmond in his well known work states:*

"[T]he theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are res judicatae or accounts that have been settled in the meantime."

(emphasis supplied)

37. *It is no doubt true that after a historic decision in Golak Nath v. State of Punjab 1967 2 SCR 762 this Court has accepted the doctrine of "prospective overruling". It is based on the philosophy:*

"The past cannot always be erased by a new judicial declaration."

It may, however, be stated that this is an exception to the general rule of the doctrine of precedent.

38. *Rectification of an order stems from the fundamental principle that justice is above all. It is exercised to remove the error and to disturb the finality."*

4.20. Further it is submitted that the Respondent has misunderstood the provisions of Long Term Open Access Agreement ('LTOA'). Because provisions of Article 2.2 refers to Transmission Charges for use of transmission system

payable to the STU and not the distribution licensee as stated by the Respondent. Respondent is mixing two issues; first issue is of Drawl of energy when solar plant is not running during night hours and second issue is of claim of wheeling charges for injection of power by solar plant for supply through LTOA.

4.21. Respondent Discom is claiming and collecting charges for drawal of power by the Petitioner during the period when solar plant is not generating, based on the Regulation 38 (2) of RERC (RE Tariff) Regulations 2014, at tariff for temporary supply applicable to HT Industrial consumer (tariff category HT-5) on daily basis. It may be noted that the tariff determined by the Commissions for retail supply of energy is inclusive of wheeling charges and hence there is no question of claiming separate wheeling charges on energy drawn from the grid.

4.22. It is stated that even Respondent Discom is not claiming separate wheeling charges on the energy drawn by the Petitioner. On the other hand Respondent Discom is wrongfully demanding and recovering the Wheeling charges on the LTOA capacity of 33 MW which is not at all applicable to the Petitioner as no distribution network is being used by the Petitioner for the injection of power through Open Access.

4.23. In view of above submissions, Petitioners prayed that-

(a) Quash and set aside the impugned bills issued by Respondent Discom from 01.04.2012 till date, insofar as it claims wheeling charges.

(b) Issue directions injuncting the Respondent Discom from raising any further bills claiming wheeling charges on the Petitioner.

(c) Direct the Respondent Discom to refund the wheeling charges recovered in cash or through adjustment along with interest at bank rate, in accordance with Section 62(6) of the 2003 Act.

5. Respondent Jodhpur Discom in its reply has submitted that:

5.1. Respondent submitted that wheeling charges are being levied since 01.04.2012 as would be evident from the prayer itself, if the charges would have been unlawful as stated by the Petitioner then the same Petitioner had filed a petition No.1125/2017 challenging the validity of the levy of UI charges, levy of incorrect MDI, levy of incorrect reactive charges appeal of which is pending in Hon'ble APTEL. In the said petition, the Petitioner could have claimed about the prayers prayed in the present petition but have not claimed the prayers /claims in the said petition and therefore, in view of provisions of order 2 Rule 2 CPC which is as under:-.

"2. Suit to include the whole claim. –

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim. - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs. - A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation. - For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action."

The Petitioner is not entitled to claim the relief which was available to the Petitioner at the time of filing the earlier petition now the prayer is time barred and does not fall within the limitation period therefore on sole this count, the present petition seeking quashing of bills since 01.04.2012 is liable to be rejected.

- 5.2. Further it is submitted that as per long term Open Access agreement dated 30.03.2012, head 2.2. charges for Open Access, the Petitioner is under obligation to pay the charges to the Distribution licensees for drawl therefore, the wheeling charges are levied. Since the Petitioner is drawing energy and is being billed by the answering respondent, it cannot be said that the Petitioner is not utilizing the system of the answering Respondent. Once, a person is drawing energy from a distribution licensee and is being billed whether through 11 kv, 33 KV, 132 KV, 220 KV line he will be deemed to have been connected to the distribution system of distribution licensee.
- 5.3. Even drawl of the Petitioner could be seen from the fact that the energy charges have been levied from the Petitioner which has not been challenged by the Petitioner and therefore, once there is drawl from distribution system, the Petitioner cannot avoid wheeling charges. Thus since the Petitioner being Open Access customer wheeling charges are being levied on the Petitioner and therefore, contention of the Petitioner that wheeling charges could not be levied is itself contrary to the long term Open Access agreement.
- 5.4. It is therefore humbly prayed that reply to the petition may kindly be taken on record and petition filed by the Petitioner being time barred as well as hit by the provisions of Order 2 Rule 2 of CPC may kindly be rejected.
6. Respondents RVPNL and SLDC in their joint reply have submitted that:
- 6.1. It is submitted that Petitioner entered into an agreement for Long Term Open Access with the answering Respondent on 30.03.2012. As per the said agreement the answering Respondent levy charges as per Clause 2 of the agreement, which are transmission charges (levied by RVPN) and scheduling and system operation charges (levied by SLDC). Apart from these no other charges are levied by the answering Respondents and there is no dispute regarding the said charges in the present petition.

6.2. In present petition, Petitioner has sought relief from only Respondent Discom and there is no relief sought qua the answering Respondents. It is, therefore, most humbly prayed that this reply may be taken on record and the petition may be dismissed qua the answering Respondents and the name of the answering Respondents may be deleted from the array of Respondents, with costs throughout.

Commission's view

7. Commission has considered the submissions, reply rejoinders and oral arguments made on behalf of the Petitioner and Respondents.
8. Petitioner's main contention is that since the Petitioner is not using any distribution network of JdVVNL for supplying power from its PV plant to its power procurer, Respondent Discom cannot recover wheeling charges from the Petitioner. These charges are otherwise also not payable because Petitioner's plant is connected to the State Transmission network at Dechu Sub-station through 31 KMs long 220 kV dedicated transmission line, this dedicated 220 KV line was built and is owned and operated by Petitioner. The levy of wheeling charges is also contrary to Section 2(76) of the Electricity Act, 2003, RERC Regulations, 2014, 2016 & 2019.
9. Per contra Respondent Discom submitted that as per long term Open Access agreement, the Petitioner is under obligation to pay the wheeling charges to the Distribution licensees. Since the Petitioner is also drawing energy and is being billed by the answering Respondent, it cannot be said that the Petitioner is not utilizing the distribution system of the Respondent. Once, a person is drawing energy from a distribution licensee and is being billed whether through 11 kv, 33 KV, 132 KV, 220 KV line, he will be deemed to have been connected to the distribution system of distribution licensee.
10. Further Respondent Discom contended that wheeling charges are being levied since 01.04.2012, if the charges are unlawful then the Petitioner

should have claimed about the unlawful recovery of the wheeling charges in the earlier petition filed by Petitioner. Since Petitioner didn't claim earlier, in view of provisions of order 2 Rule 2 of CPC the Petitioner is not entitled to claim the relief which was available to the Petitioner at the time of filing the earlier petition. Therefore, on this sole count, the present petition seeking quashing of bills since 01.04.2012 is liable to be rejected.

11. Commission observes that the only issue raised in the petition is about recovery of wheeling charges from Petitioner who is directly connected to Transmission system. Commission vide its order dated 21.02.2005 in petition no. 40/2004 filed by JVVNL, has decided first time the wheeling charges, the relevant part of order reads as under:

“25. The distribution network comprises of wires, transformers, sub stations and other infrastructure facilities. The Commission, in its Open Access Regulations, has elaborated that wheeling charge is a general term and inter alia comprises of its components, namely, conveyance of electricity on wires (i.e. on lines and transformers) and of providing facilities and services, like metering system, their testing, calibration, operation & maintenance, meter readings, billing, revenue collection, telecommunication and consumer service.(emphasis added)....

41. Considering the details of network cost given at Annexure-1, voltage wise wheeling charges per unit of energy drawn are determined as under:

S.No.	Lowest level of voltage of network used	Rate of wheeling charge
1.	EHT	Rs.0.01/unit
2.	HT – 33kV	Rs.0.25/unit
3.	HT – 11kV	Rs.0.28/unit
4.	LT	Rs.0.77/unit

12. Further Commission decided same wheeling charges for EHT consumers through it's order dated 19.09.2006 which reads as under:-

*“28..... It again allows the Discoms to charge wheeling charge @ 1 p/kwh from EHT consumers towards the services provided by them. However, as wheeling charges for 33kv, 11kv & LT are inclusive of customer service cost, no separate charge towards customer service for the consumers at 33kv, 11kv & LT voltage level is required to be specified.”
(emphasis added)*

13. Commission on the similar issue regarding applicability of wheeling losses for consumer connected at EHV sub-station, in petition no. 509/15 filed by M/s NEI Ltd. in its order dated 24.11.2015 and in petition no. 560/15 filed by M/s. R. M. Mittal Steels Pvt. Ltd. in its order dated 29.01.2016 has held that wheeling losses are applicable to consumers also connected to EHV grid.
14. In the view of aforesaid orders of Commission, the demand raised by the Respondent for Wheeling charges to the Petitioner is valid and legal.
15. Accordingly, petition is dismissed with no order as to cost.

(Prithvi Raj)
Member

(S. C. Dinkar)
Member

(Dr. B.N. Sharma)
Chairman