

Staff Paper on APTEL judgement dated 01.08.2014 in Appeal No.38 of 2013 against Commission's Order dated 08.08.2012 in Petition No. 65 of 2011-Regarding amendment in Punjab State Electricity Regulatory Commission (Terms and Conditions for Intra-state Open Access) Regulations, 2011

Steel Furnace Association of India filed a petition (No. 65 of 2011) before the Commission praying for the direction that cross subsidy surcharge should not be levied by the distribution licensee, Punjab State Power Corporation Limited (PSPCL), on the petitioner when the petitioner purchased power under open access from outside when PSPCL was not able to supply power to the petitioner due to the power cuts imposed by PSPCL. The Commission vide its Order dated 08.08.2012 rejected the prayer of Steel Furnace Association of India holding that the petitioner is liable to pay cross subsidy surcharge when the petitioner buys power under open access during the period when the power is not supplied by PSPCL due to power cuts.

Steel Furnace Association of India filed an appeal (Appeal No. 38 of 2013) before the Hon'ble Appellate Tribunal for Electricity against the Order of the Commission dated 08.08.2012. The Hon'ble Appellate Tribunal for Electricity vide its Order dated 01.08.2014 has allowed the Appeal filed by Steel Furnace Association of India and has set aside the Order of the Commission dated 08.08.2012. In the operative part of the judgement under para 44 '**Summary of our findings**', the Hon'ble Appellate Tribunal for Electricity has observed as under:

- "i) This Tribunal in a number of judgements has held that cross subsidy surcharge is a compensatory charge and the logic behind the provision for cross subsidy is that but for the open access, the consumer would have taken electric supply from the Distribution Licensee and in the result the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy for certain other categories of consumers, which are subsidized.*
- ii) Hon'ble Supreme Court in the matter of Sesa Sterlite Ltd. has held that Cross Subsidy Surcharge ("CSS") is payable by the consumer when it decides not to take supply from the Distribution Licensee but takes from other sources. CSS is a compensation to the Distribution Licensee in view*

of the fact that but for the Open Access the consumer would pay tariff applicable for supply which would include an element of cross subsidy. Such cross subsidy surcharge has to be paid as determined by the State Commission even if the line of the Distribution Licensee is not used by the open access consumer.

- iii) In the present case the members of the Appellant Association have not opted for open access voluntarily but have been forced to procure power through open access from the short term market as a result of failure of the Distribution Licensee to meet its obligation to supply and due to imposition of restriction/power cuts on them. When the Distribution Licensee has failed to procure adequate power to meet its obligation and the consumers have been forced to procure power on their own through open access there cannot be the question of any loss to the Distribution Licensee and levy of cross subsidy surcharge for the same.*
- (iv) If the consumers do not procure power from the market through open access under conditions of power cuts and shut down their plants, no energy will be consumed by them and no charges will be collected by the Distribution Licensee for the period of power cut and hence no cross subsidy would be available from the charges of such subsidising consumers to the subsidized consumers. Therefore, if during the period of power restriction/power cuts, the consumer procures power from the market to continue its production instead of closing it down, no financial loss will be caused to the Distribution Licensee. Hence no compensation in the form of cross subsidy surcharge is leviable.*
- (v) When the members of the Appellant are able to procure power form short term market it indicates a situation where the power is available in the market for meeting the demand of these consumers. The same power could have been procured by the Distribution Licensee from the short term market to meet its obligation to supply to the consumers and avoiding imposition of power restriction/power cuts on them. If the consumers who have procured power in open access from short term market are asked to pay cross subsidy surcharge on such drawal of power to the Distribution Licensee, it would result in rewarding Distribution Licensee for failure to*

meet its obligation to supply power to its consumers and penalizing consumers for no fault of theirs. In other words it will be beneficial for the Distribution Licensee to impose power cuts on the consumers and recover the Cross Subsidy charge without carrying its duty assigned under Electricity Act to meet the full demand of the consumers by making arrangements to procure adequate power.

- (vi) Imposition of cross subsidy surcharge when the consumers have been forced to procure power through open access due to power restrictions/cuts imposed by the Distribution Licensee is in contravention to objectives and the provisions of the Act, National Electricity Policy and Tariff Policy and the dictum laid down by this Tribunal and Hon'ble Supreme Court which provides that the Cross Subsidy Surcharge is a compensatory charge. It strikes at the basic objective of the Electricity Act to encourage open access to promote competition.*
- (vii) Accordingly, we direct the State Commission to pass consequential orders that no cross subsidy charge would be levied on power available with consumers through open access to the extent of restrictions/power cuts imposed by the Distribution Licensee. This finding given in this judgement has to be construed as judgement in rem and this will be applicable to all open access consumers."*

The Hon'ble Appellate Tribunal for Electricity has directed the Commission to pass consequential orders to the effect that no cross subsidy charge would be levied on power available with consumers through open access to the extent of restrictions/power cuts imposed by the distribution licensee, which would be applicable to all open access consumers.

In view of the directions issued by the Hon'ble Appellate Tribunal for Electricity vide its Order dated 01.08.2014, an amendment is proposed by adding a proviso to clause 26(1) in the Punjab State Electricity Regulatory Commission (Terms and Conditions for Intra-state Open Access) Regulations, 2011. The existing and proposed provisions are as under: -

Regulation No.	Existing provision	Proposed provision
26 (1)	<p>Cross subsidy surcharge</p> <p>1) If open access facility is availed of by a subsidising consumer of a distribution licensee of the State, then such consumer, in addition to transmission and/or wheeling charges, shall pay cross subsidy surcharge determined by the Commission. Cross subsidy surcharge determined on Per Unit basis shall be payable, on monthly basis, by the open access consumers based on the actual energy drawn during the month through open access.</p> <p>Provided that such surcharge shall not be leviable to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.</p>	<p>Cross subsidy surcharge</p> <p>1) If open access facility is availed of by a subsidising consumer of a distribution licensee of the State, then such consumer, in addition to transmission and/or wheeling charges, shall pay cross subsidy surcharge determined by the Commission. Cross subsidy surcharge determined on Per Unit basis shall be payable, on monthly basis, by the open access consumers based on the actual energy drawn during the month through open access.</p> <p>Provided that such surcharge shall not be leviable to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.</p> <p>Provided further that such surcharge shall not be leviable on power available with consumer(s) through open access to the extent of regulatory measures imposed due to shortage of power, other than peak load hour restrictions put by the distribution licensee, on the consumer(s) through advance notification.</p>