

**HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS NO. 33-36, SECTOR – 4, PANCHKULA – 134113, HARYANA**

Case No. HERC/PRO-7 of 2011

Date of Hearing: 25.05.2011

Date of order: 04.07.2011

IN THE MATTER OF:

Petition dated 7th April, 2011 filed by M/s JSL, Hisar, petition dated 17th May, 2011 filed by M/s Star Wire (India) Limited, Delhi and petition dated 24th May, 2011 filed by M/s DCM Textiles, Hisar for setting aside sales circulars No. D-14 / 2010 dated 30th November, 2010 and D-7 / 2011 dated 14th March, 2011, relating to levy of cross-subsidy surcharge on open access consumers, issued by the DHBVNL.

VERSUS

Dakshin Haryana Bijli Vitran Nigam Limited, Hisar

Present

Shri R.P. Jindal, Executive Director JSL	Petitioner
Shri R.K. Jain, Advisor JSL	Petitioner
Shri Hari Om Attri, Advocate DCM Textiles, Hisar	Petitioner
Shri R.K. Kaul, Director (Op), DHBVNL	Respondent
Shri P.C. Gupta, CE/Commercial, DHBVNL	Respondent

Quorum

Shri Bhaskar Chatterjee, Chairman
Shri Rohtash Dahiya, Member
Shri Ram Pal, Member

ORDER

1.0 Background of the Case

1.1 As per HERC (Terms & Conditions for open Access for Intra- State Transmission & Distribution system) Regulations, 2005, a consumer availing open access to the Transmission/ Distribution system shall, in addition to transmission & wheeling charges, also pay cross- subsidy surcharge as may be worked out/ determined by the Commission. Regulation 33 of the HERC (Terms & Conditions for determination of wheeling tariff and Distribution & Retail Supply Tariff) Regulations, 2008 also provides that cross- subsidy surcharge shall be payable by all intra-state open access customers except for Captive Power Producers carrying electricity to the destination of their own use.

The Govt. of Haryana, however, in order to encourage open access in the state to mitigate power shortage, had earlier decided to waive off levy of cross- subsidy surcharge from April 2007 to September, 2007 & again from January, 2008 to March, 2010. In 2010-11 also, the State Govt. decided to continue with the waiver upto 3/2011.

The Commission, in its order dated 04.12.2009 on the ARR & Distribution and Retail Supply Tariff for FY 2009-10, had determined cross subsidy surcharge for different categories of open access consumers as the difference between the average cost of supply and applicable tariff for respective categories. But due to waiver on levy of cross –subsidy surcharge by the state Govt., as indicated above, the same was not levied by the licensees.

In FY 2010-11, since the distribution licensees failed to submit requisite data relating to voltage wise cost of service and also in view of waiver of levy of cross- subsidy surcharge by the State Govt. upto 3/2011, the Commission did not determine/ quantify the cross-subsidy surcharge for different categories of open access consumers in the ARR/ Tariff Order for FY 2010-11.

1.2 However, the State Govt. on a proposal submitted by HVPNL, decided to withdraw the waiver on levy of cross- subsidy surcharge w.e.f 01.11.2010 as per the approval given on 29.11.2010 on the file. Consequent to the withdrawal of waiver by the Government, the respondent requested the Commission vide letter dated 28th

December, 2010 to quantify the cross subsidy surcharge for FY 2010-11. It was also intimated by the respondent in the said letter that distribution licensees, in view of withdrawal of waiver on levy of cross subsidy surcharge by the Govt., have started the levy of cross subsidy surcharge @ 72 paise on the open access consumers as per the last notified charges by the Commission in the ARR/ Tariff order dated 04.12.2009. The respondent, accordingly, issued sales circular No. D-14 / 2010 dated 30th November, 2010 levying cross subsidy surcharge at the rates as approved by the Commission for FY 2009-10 with immediate effect. Through another circular No. D-7 / 2011 dated 14th March, 2011 the respondent further clarified that the cross- subsidy surcharge be levied w.e.f 01.11.2010 instead of 'with immediate effect'.

1.3 Aggrieved by the above action of the respondent, the petitioners filed petitions before the Commission requesting the Commission to set aside the said sales circulars of DHBVNL and direct them to refund the amount of cross subsidy surcharge already charged through monthly electricity bills from November 2010 till date with an interest of 24% per annum. It was also prayed in the petition to grant interim injunction to restrain the respondent from disconnecting the electricity supply to the petitioner till a final decision is taken by the Commission on their petitions.

2.0 In order to have the benefit of the views of all the parties, the Commission decided to fix a hearing on 25h May 2011. Accordingly notice was issued to the parties vide No. HERC / PRO – 7 of 2011 / 476-77 dated 11th May, 2011. The hearing was held on the scheduled date.

Mr. R.K. Jain, appearing on behalf of M/s JSL Limited and M/s Star Wire (India)Limited briefed the Commission about the facts of the case and reiterated the relief sought in terms of quashing the sales circulars issued by the DHBVNL and consequential refund of the cross subsidy already charged along with interest. The representatives of DCM Textiles endorsed the submissions made by Shri R.K. Jain. Shri P.C. Gupta, CE/Commercial, DHBVNL submitted that they would go by the order of the Commission.

3.0 The Commission has reviewed the entire case and has carefully examined the documents submitted and the submissions made by the parties. The Commission's findings and order are as given below.

3.1 Breach of agreement

3.1.1 The petitioner submitted in the hearing that the State Government, in the beginning of FY 2010-11, had promised to waive levy of cross subsidy surcharge for the entire year. Keeping in view the assurance given by the State Government, the petitioner had planned to procure power well in advance for FY 2010-11. But unilateral withdrawal of waiver to levy of cross subsidy surcharge by the state Government in November 2010 has suddenly upset their plans thereby increasing their transaction cost of power purchase. The petitioner has termed it as breach of promise on the part of the Government.

3.1.2 The Commission had clarified in the hearing itself that the matter regarding breach of agreement was between the petitioner and the State Government. As the loss of any revenue to the utilities on account of waiver on levy of cross subsidy surcharge, as estimated by the Commission, has to be compensated by the State Government, the Commission feels that it is the prerogative of the State Government to decide whether the waiver on levy of cross – subsidy surcharge is to be continued or not as also the period upto which such waiver would continue. **Since the State Government was not a party before the Commission, the Commission did not consider it appropriate to pass any comment on this issue.**

3.2 Levy of cross subsidy surcharge

3.2.1 The petitioner submitted that as per provisions of section 42 of the Act and the provision of the open access regulations notified by the Commission, cross subsidy surcharge can be levied at the rates as may be determined by the Commission. Accordingly the Commission determined the cross subsidy surcharge for the FYs 2008-09 and 2009-10 despite the distribution licensees not making available the requisite data. Due to shortage of power in the State and for encouraging import of power from

outside the State through open access, the State Government has been waiving levy of cross subsidy surcharge since 2007. Keeping in view the waiver on levy of cross subsidy surcharge by the State Government and non submission of requisite cost data by the distribution licensees, the Commission did not determine / quantify consumer category wise cross subsidy surcharge for FY 2010-11.

3.2.2. Further, the petitioner submitted that on the request of the power utilities the State Government withdrew the waiver as per approval given on 29th November, 2011 w.e.f 01.11.2010. HVPNL vide letter dated 30th November, 2011 informed the distribution licensees i.e. UHBVNL and DHBVNL that State Government has decided to impose cross- subsidy surcharge and additional surcharge on open access consumers with immediate effect. HVPNL further mentioned in the above letter that since cross subsidy surcharge for FY 2010-11 had not been determined by the Commission in its order dated 13th September, 2010, it has been decided to impose cross subsidy surcharge and additional surcharge at the rates notified by the HERC in the ARR/ Tariff order dated 4th December 2009 for FY 2009-10 till such time these rates are modified by the Commission. It was also intimated to the Discoms that a reference was being made to HERC separately and Discoms were also requested to file formal petition alongwith supporting data at the earliest for determination of cross subsidy surcharge / additional surcharge by the Commission. The distribution licensees were also requested by HVPNL to issue necessary notifications for levy of cross subsidy surcharge immediately.

3.2.3 The respondent vide letter dated 28th December, 2011 brought to the notice of the Commission that the State Government has decided to levy cross subsidy surcharge on open access consumers with immediate effect and informed that, consequently, they have started levying cross subsidy surcharge @ 72 paise per unit on the open access HT consumers. The respondent vide this letter further requested the Commission to quantify the cross subsidy surcharge for FY 2010-11.

3.2.4 The Commission vide letter dated 2nd February, 2011, in response to the respondent's letter dated 28.12.2010, conveyed its decision to the distribution licensees and the State Government that cross subsidy surcharge may be levied on the open

access consumers at the rates determined in its order dated 04.12.2009 on the ARR / Distribution & Retail Supply Tariff for FY 2009-10 w.e.f. the date of withdrawal of the waiver by the State Government.

3.2.5 The petitioner has submitted that it is the State Electricity Regulatory Commission who only can quantify and direct the licensees to levy cross subsidy surcharge as per the provisions of the Act. However, in the present case, HVPNL on its own decided to levy the cross subsidy surcharge at the rates applicable for FY 2009-10. In compliance of the decision of HVPNL, respondent issued sales circular No. D-14 / 2010 dated 30th November, 2010 for levying cross-subsidy surcharge with immediate effect. The respondent has also issued bills for levying of cross subsidy surcharge w.e.f. 1st November, 2010. The petitioner took up the matter with the respondent regarding levy of cross subsidy surcharge without prior approval of the Commission. However, the petitioner, as stated, could not get any relief from the respondent. Subsequently the respondent issued another sales circular D-7 / 2011 dated 14th March, 2011 clarifying that the cross subsidy surcharge shall be levied w.e.f. 1st November, 2010 instead of 30th November, 2011. The petitioner objected to levying of cross subsidy surcharge retrospectively by the respondent and submitted that it should have been levied (if at all) prospectively from the date of the approval of the Commission.

3.2.6 The petitioner has further submitted that due to unilateral withdrawal of waiver by the State Government and levy of cross- subsidy surcharge retrospectively by the respondent the petitioner has suffered huge financial losses as the tariff paid by them after accounting for cross subsidy surcharge for the electricity purchased by them through open access has become costlier than the tariff applicable for the supply of power by the respondent, thereby defeating the very purpose of purchasing comparatively less expensive power through open access. In reply to a query from the Commission during the hearing as to whether the petitioners are purchasing power through open access on long term basis or otherwise, the petitioners informed that they purchase power through open access on day ahead basis from the power exchanges.

3.2.7 The petitioner has also submitted that HVPNL and the respondent have violated the directive of the Commission that no sale circular having financial implication shall be issued without prior approval of the Commission. Consequently the petitioner has requested that the respondent may be directed to withdraw the above mentioned sales circulars issued without obtaining prior approval of the Commission.

3.3. Reply given by the respondent

The respondent has submitted that the action has been taken by them in view of the approval given by the State Government. The cross subsidy surcharge was proposed to be levied w.e.f. 1st November, 2010 in the note submitted to the State Government by HVPNL and the same was approved by the Govt. on 29th November, 2010. Therefore, the cross subsidy has been rightly levied from 1st November, 2011. On the issue of notification of sales circulars without prior approval of the Commission, the respondent has submitted that Commission has also, subsequently, given approval of the same vide letter dated 2nd February, 2011. Regarding submission of requisite data, the respondent has submitted that expression of interest has been invited for determination of voltage wise cost of service and the report would be submitted to the Commission as and when finalized.

3.4 Decision of the Commission

a) Issuance of sales circulars without approval of the Commission

It has been contended by the petitioners that despite clear directions having been given by the Commission that no sales circular, having any financial implication, should be issued by distribution licensees without prior approval of the Hon'ble Commission, the respondents, UHBVNL /DHBVNL have issued sales circulars dated 30.11.2010 & dated 14.03.2011 introducing levy of cross subsidy surcharge without any order/ prior approval of the Commission and accordingly the said circulars are liable to be set aside.

The Commission has examined all the relevant documents on the subject after hearing the parties. It is an admitted fact that the rates of cross subsidy surcharge were determined by the Commission in the ARR/ Tariff Order dated 04.12.2009 for

Distribution & Retail supply business for FY 2009-10. As the fresh rates for cross subsidy surcharge for 2010-11 were not determined by the Commission in view of waiver on cross subsidy surcharge by the State Govt. & also non- submission of requisite data by the licensees, the rates of cross subsidy surcharge as determined in the ARR/ Tariff Order dated 04.12.2009 continued to remain applicable in 2010-11 in the absence of any order to the contrary. Thus, after withdrawal of the waiver on levy of cross subsidy surcharge by the State Govt. in November, 2010, the cross subsidy surcharge at these rates became automatically leviable. This becomes evident from the ARR order of the Commission for the year 2010-11. The Commission, therefore, feels that prior approval of the Commission was not required for issuance of the sales circulars dated 30.11.2010 & dated 14.03.2011 by the Distribution Licensees to levy cross subsidy surcharge at the rates that stood approved by the Commission in ARR/ Tariff Order dated 04.12.2009. The respondent simultaneously had also approached the Commission vide their letter dated 28.12.2010 in continuation to their earlier letter dated 03.11.2010 for determining fresh rates of cross subsidy surcharge for 2010-11. The Commission, however, keeping in view that ARR/ Tariff Order for 2010-11 had already been issued and no tariff or part of tariff may ordinarily be amended more frequently than once in a year, informed the Distribution Licensees vide its letter no. 3503-04/HERC/Cross Subsidy/DH/2011 dated 02.02.2011 that it is not inclined to affect any changes in the tariff at the very end of the financial year and the Distribution Licensees may levy cross subsidy surcharge as determined by the Commission in its order dated 4.12.2009 in the matter of ARR & Tariff for Distribution & Retail Supply Business for FY 2009-10 w.e.f the date of withdrawal of the waiver on levy of cross subsidy surcharge by the State Government. This endorses the action taken by the Utilities and the Commission does not find any fault in this action. The Commission, therefore, holds that the action of the Respondent in issuing sales circulars dated 30.11.2010 and dated 14.03.2011 to levy cross subsidy surcharge at the rates approved by the Commission in the ARR/ Tariff Order dated 04.12.2009, after withdrawal of waiver on cross subsidy surcharge by the State Government, is in order. The sequence of events in this case clearly proves that the action of the licensees is not unilateral and is fully in conformity with the tone and substance of the Commission's order on the subject. Hence, on this

issue the Commission does not agree with the argument of the Id. Counsel of the petitioners and their plea on this account is hereby rejected.

b) Financial loss to the petitioner and levy of cross subsidy surcharge

The submission of the petitioner that they have suffered huge financial losses due to retrospective introduction of cross subsidy surcharge has been examined by the Commission. The Commission agrees that had the petitioners entered into long term power purchase agreements they could have suffered financial losses because of sudden change of policy by the Govt. in the mid-stream. However, as admitted by the petitioners in the hearing, they have been purchasing power from the power exchange on a day ahead basis. The Commission is of the considered view that on receipt of first bill dated 8th December, 2010 for recovery of cross –subsidy surcharge, the petitioner had an opportunity to review the economics of buying power from power exchange through open access viz-a viz from the Discoms thereby avoiding consequential financial losses, if any. The Commission, therefore, is not convinced by the submission of the petitioners that they have suffered huge financial losses due to retrospective levy of cross – subsidy surcharge/sudden changes in the government policy.

Regarding the submission of the petitioners that the cross- subsidy surcharge should not have been levied retrospectively by the respondent and that if at all it was to be levied, it should have been levied prospectively from the date of approval by the Commission, it is clarified that, the tariff rates & other charges approved by the Commission while passing order for approval of the ARR of the licensees, continue to be applicable unless these are superseded/ amended by fresh order of the Commission. In the instant case the rates of cross- subsidy surcharge for different categories of open access consumers were determined by the Commission in the ARR / Tariff order dated 04.12.2009 for Distribution and Retail Supply Business for FY 2009-10. In the FY 2010-11, the Commission did not determine/ quantify the rates of cross-subsidy surcharge in view of the waiver on levy of cross subsidy surcharge by the State Govt. and also because the requisite data was not furnished by the licensees. Thus the rates of cross subsidy surcharge as determined in the ARR/ Tariff Order dated

04.12.2009 continued to remain applicable in FY 2010-11 as well as already stated. The cross subsidy surcharge was, however, not being levied by the licensees on account of waiver by the State Govt. and also because any revenue loss to the licensees on this account was to be compensated by the State Govt. But once the State Govt. decided to withdraw the waiver, the cross subsidy surcharge became automatically leviable from the date of withdrawal of waiver by the State Govt. at the rates approved by the Commission in the ARR/Tariff Order dated 04.12.2009 for FY 2009-10. Thus the levy of cross subsidy surcharge at the rates approved by the Commission in the Order dated 04.12.2009 w.e.f. date of withdrawal of waiver by the State Govt. is in order and the order dated 02.02.2011 of the Commission, approving the levy of cross subsidy surcharge from the date of withdrawal of waiver by the State Govt., is perfectly legal and justified.

The question now arises as to what should be taken as date of withdrawal of waiver by the State Govt? In this context, the Commission after study of the relevant correspondence/notes with the different offices in the Govt., the photo copies of which are available in the case file, finds that in the proposal sent to the State Govt. by HVPNL, it was suggested that waiver on levy of cross- subsidy surcharge should be withdrawn w.e.f 01.11.2010. The proposal was approved as such by the State Govt. on 29.11.2010 on file. The Commission feels that it may not be fair to the open access consumers to levy cross subsidy surcharge w.e.f 01.11.2010 when the approval for withdrawal of waiver was accorded by the State Govt. on 29.11.2010. However, once the UHBVNL/ DHBVNL issued sales circular on 30.11.2010 intimating that waiver on levy of cross subsidy surcharge had been withdrawn by the State Govt. and that cross subsidy surcharge at the rates approved by the Commission in the ARR/ Tariff Order dated 04.12.2009 would be leviable with immediate effect, the affected open access consumers should have taken note of the same and review / plan their open access transactions accordingly. The Commission, therefore, after carefully examining the issue in totality and considering the submissions / counter submissions made before it or submitted in writing by the parties, is of the considered view that the cross subsidy surcharge should be levied w.e.f 30.11.2010, in view of approval accorded by the State Govt. on 29.11.2010 to withdraw the waiver, at the rates approved by the Commission

in the ARR/ Tariff Order dated 04.12.2009 for Distribution and Retail Supply Business for FY 2009-10. **Consequently, the Commission in partial review of its order dated 2.2.2011, in order to do justice to all the stakeholders, directs DHBVNL & UHBVNL to levy cross subsidy surcharge at the rates determined in FY 2009-10 w.e.f 30.11.2010 onwards and adjust recovery, if any already made on this account for the period prior to 30.11.2010 from the petitioners and from the other open access consumers, in their electricity bills of subsequent months. In case of open access consumers who have not so far paid cross subsidy surcharge, the payment of arrears of cross subsidy surcharge may be allowed in four monthly equated installments. Needless to say that as per the Commission's ARR order of Discoms dated 27th May,2011, the rates of cross subsidy surcharge have been modified which shall come into force w.e.f 01.06.2011. The same rates would be applicable for all the open access consumers from 1st June, 2011 onwards.**

The Commission disposes of the matter accordingly.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 4th July, 2011.

Dated: - 04.07.2011

Place: - Panchkula

(Ram Pal)
Member

(Rohtash Dahiya)
Member

(Bhaskar Chatterjee)
Chairman