



ASSAM ELECTRICITY REGULATORY COMMISSION

FILE NO. AERC. 631/2017

Petition No.:12/2017 & IA No 2/2017

ORDER SHEET

15.09.2017

Before the Assam Electricity Regulatory Commission
ASEB Campus, Dwarandhar,
G. S. Road, Sixth Mile, Guwahati – 781 022

R. K. Dispo Products ----- Petitioner
Assam Power Distribution Company limited (APDCL) ----- Respondent
Ecotech Papers ---- Pro-forma Respondent

In the matter of

Petition No. 12 of 2017 filed by R.K.Dispo Products under Section 42 of the Electricity Act'2003 and Regulation 20 of AERC (Terms & Conditions for Open Access) Regulations, 2005 against Letter dated 19.06.2017 issued by APDCL and IA No 2 of 2017.

CORAM

Shri Naba Kr. Das Chairperson
Shri Dipak Chakravarty, Member
Shri Subhash Ch Das, Member

ORDER

1. M/S R.K.Dispo Products has filed a Petition (Petition No. 12 of 2017) under Section 42 of the Electricity Act'2003 and Regulation 20 of AERC (Terms & Conditions for Open Access) Regulations, 2005 against Letter dated 19.06.2017 issued by APDCL. The salient submissions of the Petitioner were:
 - i. The Petitioner was purchasing power to the tune of 500 kW from the Pro-forma Respondent (Ecotech Papers Ltd) through a dedicated distribution line since 18.10.2015, after receiving concurrence from APDCL (vide Letter dated 18.08.2015).
 - ii. The Petitioner was paying the Wheeling Charge and Cross Subsidy Surcharge to APDCL since 18.10.2015.
 - iii. On 19.06.2017, APDCL issued a letter withdrawing the concurrence Letter dated 18.08.2015. APDCL cited the following as reason for the withdrawal:
 - a. The sale & purchase of power from Ecotech Papers Ltd to R K Dispo Products Lts was allowed as a special case though there was no rule for allowing Open Access to consumer having connected load less than 1 MW
 - b. However, the special case is being cited as precedent for seeking Open Access to consumers with connected load less than 1 MW by some other consumers as well, in violation to the existing framework.
 - iv. The Petitioner stated that. AERC (Terms and Conditions for Open Access) Regulations 2005 (hereinafter referred as AERC OA Regulations, 2005). nowhere restrict the flow of power below 1 MW. The Petitioner referred to Regulation 4.5 of the AERC OA Regulations, 2005 and stated that as per the said Regulation Open Access can be allowed to consumer receiving supply of less than 3 MW also.
 - v. The Petitioner prayed for setting aside the Letter dated 19.06.2017 issued by APDCL and allow the existing sale & purchase arrangement in consonance with the letter dated 18.08.2015 of APDCL.
2. The Commission sought comments of the Respondent (APDCL) vide Letter

dated 03.07.2017. Further, vide notice dated 07.07.2017, the Commission scheduled hearing on the matter on 19.07.2017.

3. Thereafter, on 10.07.2017, the Petitioner filed an Interlocutory Petition (IA 02 of 2017) and intimated that APDCL has disconnected the line connecting Ecotech Papers Ltd and R K Dispo Products on 29.06.2017. The Petitioner requested the Commission to grant interim order for re-connection of the supply of power from Ecotech Papers Ltd to R K Dispo Products subject to final result of the petition.
4. On 17.07.2017, the Respondent (APDCL) made its submission on the Petition. The salient submissions made by the Respondent are:
 - a. The arrangement between the Petitioner and Pro-forma Respondent was in deviation to the existing rules and regulations, therefore, vide letter dated 19.06.2017 the letter dated 18.08.2015 was withdrawn.
 - b. There is no merit for admission of the instant petition and likely to be rejected.
5. As scheduled, the 1st Hearing on the matter was held on 19.07.2017. After hearing the parties, based on the grounds as recorded in the daily order dated 19.07.2017, the Commission directed the Respondent to restore the connection between the Proforma Respondent and the Petitioner, till the Commission passes the final order on the matter. The Commission also directed the following:
 - a. The Respondent is to submit its para-wise comment on the Petition and Interlocutory Application on or before 26.07.2017.
 - b. The Petitioner may submit its comments on the submissions of Respondent on or before 01.08.2017.
6. As per direction of the Commission, the Respondent made its submission on 29.07.2017, the salient submissions made by APDCL are:
 - a. The Petitioner didn't take approval of Govt. of Assam or AERC for availing Open Access.
 - b. The Petitioner was allowed Open Access as a special case.
 - c. As per the AERC Amendment to OA Regulation dated 31.12.2005, Open Access is allowed to consumer with connected load of 1 MW and above only. Thereby, the Petitioner is not an Open Access consumer.
 - d. APDCL referred to Section 9 of the Electricity Act'2003 and submitted that, the pro-forma respondent is a Captive Generator and a captive generator may supply electricity to a licensee or open access consumers only. In the present case, the Petitioner is not eligible for grant of open access.
 - e. APDCL prayed that the Petition may be rejected because the arrangement is not in line with any Regulation of the Commission.
 - f. APDCL also intimated that, the interim order dated 19.07.2017 regarding restoration of the connection between the Proforma Respondent and the Petitioner has been implemented immediately.
7. The Petitioner made a rejoinder submission on 11.08.2017, in reply to the submission made by APDCL, the salient submissions are:
 - a. The basic principle of Law is that what is not prohibited is permitted. The Petitioner referred to APTEL Judgment related to Chhattisgarh State Power Distribution Co Ltd vs Aryan Coal Benefications Pvt. Ltd. in this regard.
 - b. There is no restriction in the Amended Regulation as well and the said Regulation does not provide any prohibition for allowing Open Access below 1 MW.
 - c. The Electricity Act'2003 does not contain any prohibition related to grant of Open Access.
8. In the meanwhile, vide notice dated 10.08.2017, the Commission scheduled next Hearing on the matter on 21.08.2017.
9. As scheduled, the 2nd Hearing on the matter was held on 21.08.2017. After Hearing the parties, the Commission issued the following directions:
 - a. The Respondent may make any additional submission related to the case on or before 28.08.2017.
 - b. The Petitioner may submit its comments on the submissions of Respondent on or before 01.09.2017.
10. The Respondent made its additional submission on 28.08.2017. The salient submissions made are:
 - a. As per the Electricity Act'2003, the Commission is required to introduce Open Access in phased manner and subject to certain conditions that are specified vide Regulations. The

- Respondent relied upon Section 42 (2) & 42 (3) of the Electricity Act'2003 in this regard.
- b. Further, referring to Section 42 (4) of the Electricity Act'2003, the Respondent submitted that grant of open access is the sole prerogative of the Commission.
 - c. There is no statutory right granted to consumers to avail open access de hors/irrespective of:
 - i. The State Commission introducing open access under section 42 (2)
 - ii. Notification of Regulations under section 42 (2)
 - iii. Grant of permission to consumers or class of consumers under section 42 (3)
11. Thereafter, the Petitioner submitted its response to the submissions made by APDCL. The Petitioner mainly re-iterated the submissions already made and rejected the claims of APDCL that Open Access cannot be allowed to consumers with connected load less than 1 MW. The salient submissions made are:
- a. There is no prohibition either in the Act and the Open Access Regulations to give open access to consumer less than 1 MW. The Commission can decide the matter by passing an order as well.
 - b. The 5th proviso of the Section 42 of the Electricity Act'2003 only states that Regulatory Commission should frame Regulations to confer open access atleast on consumers having load of 1 MW and above. This provision is an enabling provision and cannot be read to mean that open access cannot be granted to consumers having load of less than 1 MW.
 - c. By the Open Access Amendment Regulation, the Commission has only specified the start date for giving open access to consumers above certain thresholds. However, this does not mean open access cannot be granted to consumer with connected load below 1 MW.
 - d. The Petitioner stated that, an open access consumer having connected load of more than 1 MW may actually transact for less than 1 MW also. In such cases if APDCL has disallowed the transaction, then only, in the present case should open access not be allowed.

Analysis and Decision

12. After scrutiny of all the submissions made by Petitioner and Respondent, it is understood that the Petitioner is an existing consumer of the Respondent (APDCL) and is also buying additional power from the pro-forma respondent under the present set of arrangement which is the subject matter of this petition. Now with regard to the arrangement of power sale/purchase between the Petitioner and the Pro-forma respondent, the Commission has observed that a decision need to be taken on the following aspects before taking a decision:
- a. Whether Open Access is prohibited to consumers having connected load of less than 1 MW in the Electricity Act'2003?
 - b. Whether Open Access is prohibited to consumers having connected load of less than 1 MW in the present set of Regulations?
13. To address the first question relevant provisions of the Electricity Act'2003 are:
- a. Section 42 (2) of the Electricity Act'2003 specified the terms related to introduction of Open Access and other relevant terms

*“(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 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.”
 - b. The Section 42 (3) of the Electricity Act'2003 provides further provisions related to non discriminatory open access.

“(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”

On plain reading of the above provisions of the Electricity Act'2003, the following points are observed:

- i. The Commission is required to introduce in such phases and subject to such conditions that may be specified.
- ii. The Commission should not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003, 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 1MW.
- iii. According to the above provision, the Distribution Licensee is required to provide non-discriminatory open access in accordance with regulations made by the State Commission.

This means the Electricity Act'2003 has made it mandatory to allow Open Access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds 1MW after January'2009. Further, the Electricity Act'2003 has not prohibited open access for consumers with connected load below 1 MW. However, **the Electricity Act'2003 has empowered the Commission to specify the phases and conditions related to open access. Therefore, the ultimate power to decide whether open access is allowable to consumer with connected load less than 1 MW in the State of Assam lies with the State Commission.**

14. Now, coming to the second question as to "whether Open Access is prohibited to consumers having connected load of less than 1 MW in the present set of Regulations?", the provisions specified in the AERC OA Regulations, 2005 and its amendment need to be looked into.

a. The Regulation 4 of the AERC OA Regulations, 2005 provides the provisions related to eligibility for open access and conditions to be met:

"4. Eligibility for Open Access and Conditions to be met

4.1 Subject to the provisions of these regulations, open access customers shall be eligible for open access to the intra state transmission system operated by the State Transmission Utility (STU) or any transmission or distribution system operated by transmission licensees or distribution licensees.

4.2 Such open access shall be available for use by an open access customer on payment of such charges as may be determined by the Commission in accordance with the Terms and Conditions of Tariffs Regulations framed for that purpose.

4.3 Subject to Operational Constraints and other relevant factors, open access shall be allowed in the following phases:

<i>Phase</i>	<i>Criteria</i>	<i>Start Date</i>
<i>Phase-I</i>	<i>Consumers with a Connected Load of 10 MW and above</i>	<i>1 April, 2006</i>
<i>Phase-II</i>	<i>Consumers with a Connected Load of 7.5 MW and above</i>	<i>1 April, 2007</i>
<i>Phase-III</i>	<i>Consumers with a Connected Load of 3 MW and above</i>	<i>1 April, 2008</i>

4.4 Based on the experience of commencement and operation of open access with consumers with a connected load of 10 MW and above, the Commission may revise the schedule for allowing open access in subsequent phases.

4.5 The Commission will allow open access to consumers with a connected load less than 3MW connected load after 1.04 2008 and at such time and in phases as the Commission may consider feasible having regard to operational constraints, the level of cross subsidies between consumers and the costs and benefits that may be realized.

Provided that Commission will only grant open access to consumers below 3MW when in its opinion the benefits to the consumers outweigh the costs."

b. Thereafter, vide Amendment notification dated 31.12.200'5, the Regulation 4.3 of the AERC OA Regulations, 2005 was amended to the following:

4.3 Subject to Operational Constraints and other relevant factors, open access shall be allowed in the following phases:

<i>Phase</i>	<i>Criteria</i>	<i>Start Date</i>
<i>Phase-I</i>	<i>Consumers with a Connected Load of 10 MW and above</i>	<i>1 April, 2006</i>

<i>Phase-II</i>	<i>Consumers with a Connected Load of 7.5 MW and above</i>	<i>1 April, 2007</i>
<i>Phase-III</i>	<i>Consumers with a Connected Load of 3 MW and above</i>	<i>1 April, 2008</i>
<i>Phase-IV</i>	<i>Consumers with a Connected Load of 1 MW and above</i>	<i>31 December, 2008</i>

On plain reading of the above provisions of the Electricity Act'2003, the following points are observed:

- i. The Regulation 4 of the AERC OA Regulations, 2005 is a limiting provision and specifies the phases and criteria for introduction of Open Access.
- ii. After the Phase-IV, the Commission has not specified any start date for next phase of open access.
- iii. As per the present set of Regulations, Open Access is allowed to consumers with a connected load of 1 MW & above.

This means, **as per the present set of Regulations, open access is allowable to consumers with a connected load of 1 MW & above only. The open access to consumers with a connected load of less than 1 MW can be allowed only when the Commission allows the same vide Regulation or special order.** It may further be noted that, considering the present status of the APDCL system, the Commission does not consider it suitable to allow Open Access to consumers with a connected load of less than 1 MW.

Based on the above observations, the Commission decides that the present set of arrangement of power sale between the Petitioner (R. K. Dispo Products) and the Pro-forma Respondent (Ecotech Papers) is not as per prevailing sets of Regulations and hence the same need to be discontinued. APDCL is accordingly directed to take necessary steps and simultaneously ensure availability of power to the existing consumer i.e. M/S R K Dispo Products (the Petitioner) through its Distribution Network, as per the prevailing Regulations.

Further, it is observed that APDCL has not followed the Regulations framed by the Commission in the present case. The action of APDCL to allow purchase of power from Ecotech Papers (the Pro-forma Respondent) by M/S R K Dispo Products (the Petitioner) vide its letter dated 18.08.2015 was violative of the AERC OA Regulations, 2005 The Commission takes a strong note of the issue and APDCL is hereby directed to strictly follow the Regulations framed by the Commission in all future activities.

The matter has attained Finality and this Order is the Final Order with regard to the Petition No.12/2017 & the IA No 2/2017.

With the above decisions and directions, the Petition No.12/2017 & the IA No 2/2017 are hereby dismissed.

Sd/-
(Subhash Ch Das)
Member
AERC

Sd/-
(Dipak Chakravarty)
Member
AERC

Sd/-
(Naba Kumar Das)
Chairperson
AERC