



CAPTIVE POWER PRODUCERS ASSOCIATION (Regi

Rgd.U/sec. 25 of CA 1956 & Cer.IT 12AA CIN: U91990MH2003GAP141611) GSTIN:27AACCC2900Q1ZK

Secretariat Office

TECHNOCRAFT INDUSTRIES (INDIA)LTD

"Opus Centre" MIDC, Marol Andheri (East) Mumbai 400093

Contact:Dr.S.L.Patil,Executive Director & Secretary 9833041468 drpatil.india@gmail.com

Vikas Patangia

PRESIDENT

+91 9821119011

Date: 23/01/2020

To,

Secretary

Central Electricity Regulatory Commission

Chanderlok Building,36, Janpath,

New Delhi

Sub: Suggestion & Comments on CERC (Sharing of inter-state Transmission Charges and Losses) Regulations, 2019.

Ref: Public Notice for Inviting Comments CERC (Sharing of inter-state Transmission Charges and Losses) Regulations, 2019.

Dear Sir,

We take this opportunity to introduce us as Captive power producer association registered under section 25 now amended as Section 8 of Amended Company Act.2013 and MCA has categorised CPPA as "PUBLIC" as per the provisions under the act and it has all India jurisdiction

With reference to CERC Public Notice for submission of Comments & Suggestions on CERC (Sharing of inter-state Transmission Charges and Losses) Regulations, 2019. this letter attached herewith.

We are giving our submissions for your kind consideration against the draft CERC (Sharing of inter-state Transmission Charges and Losses) Regulations, 2019. Taking the same on records and informing us on deliberations needing any clarification which we are ready to offer.

Thanking you

Yours truly

For Captive Power Producer Association

Dr.S.L.Patil

Secretary & Authorised Person

COMMENTS ON DRAFT CERC (SHARING OF INTER-STATE TRANSMISSION CHARGES AND LOSSES) REGULATION, 2019

1. The present comments/ suggestions to the Draft Sharing Regulations, 2019 (hereinafter "Draft Regulations") are being advanced on behalf of Captive Power Producers Association (CPPA), is an association actively taking up issues for safeguarding the interests of Power Producing industries. The members of IS come from cross section of industries mainly chemicals, paper, textile, iron-steel, cement, aluminum and many more. The said members also avail open access for the purpose of sourcing their power to the end users or captive users, as the case may be.
2. Further, these comments/ suggestions are limited to the omission of the provision for netting-off, or setting-off, the medium-term open access (MTOA) charges with long-term access (LTA) charges, when MTOA is availed, while LTA is also operationalized, in a particular target region.
3. In this context, reference be made to the following extract of the existing CERC Sharing Regulations, 2010 (hereinafter "Regulations, 2010"):

"4. Amendment to Clause (5) to Regulation 11 of the Principal Regulations:

Second proviso to clause (5) of Regulation 11 of the Principal Regulations shall be substituted as under:

Provided further that the quantum of Medium Term Open Access to any region availed during a month by a DIC having Long Term Access to a target region without identified beneficiaries shall be adjusted against the Long-term Access of such DIC limited to the granted quantum of Long Term Access."

[Underlines Supplied]

The aforesaid proviso which envisaged netting off/setting off mechanism was added to the Sharing Regulations 2010, vide the fifth amendment dated 14.12.2017.

4. It is submitted that the "Statement of Reasons" (hereinafter "SOR") for carrying out the aforesaid fifth amendment, provided the following:

"7. Amendments related to offset provided for charges paid under MTOA/ STOA by LTA Customer

7.1 Second proviso to clause (5) of Regulation 11 of the Principal Regulations was proposed to be substituted as under:

Provided further that while billing transmission charges for next month, the quantum of Medium-term Open Access to any region shall be adjusted against the quantum of Long-term Access to the target region without identified beneficiaries limited up to quantum of Long Term Access."

7.2 The Commission had given the following rationale while proposing the above amendment:

5. The Regulations provides that a DIC with LTA to target region shall be given offset for STOA/MTOA to any region. However, it is required that more clarity is required in the same to clarify following.

(1) The offset shall be provided for the quantum only. A DIC may be paying an injection POC rate under LTA to target region which may be different from POC rates paid by it under STOA/MTOA. A DIC shall be provided offset in the LTA bill of next month for the quantum for which it has already paid under MTOA/ STOA in previous month.

(2) Such an offset shall be provided only if DIC which is paying charges for LTA under target region does STOA/ MTOA which effectively implies it has paid both for LTA and MTOA/ STOA. In case a DIC (or a trader on its behalf) has not sought STOA/MTOA and has not paid charges towards MTOA/STOA it shall not be given offset for same. Offset is to be provided only to entity which is paying charges for the same quantum twice."

7.4 Analysis and decision:

...

7.4.3 We do not agree to suggestion of ESSAR Power, JITPL and SEL that offset should be on Rupee terms. The concept of offset has been introduced to make sure an entity is not billed

twice for the same quantum of power. An MTOA transaction is with identified beneficiary for which Withdrawal PoC rates shall be applicable. A DIC with LTA to target region should be liable to pay Withdrawal charges in case it agrees into firm contract for part/full of its power with a firm beneficiary subject to terms of its contract with beneficiary related to liability of the charge. Hence for such a transaction LTA quantum to be billed should reduce by the quantum for which firm contract has been entered into. Hence offset shall be on quantum only.

7.4.4 Accordingly, Second proviso to clause (5) of Regulation 11 of the Principal Regulations shall be substituted as under:

"Provided further that the quantum of Medium Term Open Access to any region availed during a month by a DIC having Long Term Access to a target region without identified beneficiaries shall be adjusted against the Long-term Access of such DIC limited to the granted quantum of Long Term Access."

[Underlines supplied]

5. It is abundantly clear from a reading of the SOR set-out hereinabove that the basic principle behind providing netting/setting off the MTOA charges with LTA charges, in a particular target region, is that an open access customer should not be subjected to double charging of transmission charges, for the same quantum of power. This principle is based upon the settled commercial principle that an entity cannot be charged twice for the same service. Further, the rationale behind the

netting/ setting off mechanism, is to avoid double levying of transmission charges, for the same quantum of power availed under LTA and MTOA/ STOA as the same would result in double jeopardy, which is against commercial principles in the sector and market. Further assistance in this regard can be drawn from the ratio decidendi of enunciated by the Hon'ble Supreme Court of India in the case of *Mahaveer Kumar Jain v. Commissioner of Income Tax, Jaipur (2018) 6 SCC 527*, wherein it has held that in the case of charging statutes, where double charging is contemplated, the same should find specific existence in such statute enacted by the Parliament and in the absence of the same, double charging is prohibited as the same would amount to double jeopardy. The relevant extract of the said judgment at para 20 is setout hereinbelow:

"20. In the above backdrop, it would be appropriate to refer to the decision of this Court in Laxmipat Singhania v. CIT at ITR p. 294 wherein this Court has observed that: (AIR p. 503, para 7)

"7...It is a fundamental rule of law of taxation that, unless otherwise expressly provided, income cannot be taxed twice."

21. Further, in a decision of this Court in Mahaveer Kumar Jain Bros. v. Union of India, it has been held as under: (SC pp 315-16, para 6)

"6. It is not disputed that there can be double taxation if the legislature has distinctly enacted it. It is only when there are general words of taxation and they have to be interpreted, they cannot be so interpreted as to tax the subject twice over to the same tax....if any double

taxation is involved, the legislature itself has, in express words, sanctioned it. It is not open to anyone thereafter to invoke the general principles that the subject cannot be taxed twice over."

[Underlines Supplied]

6. That, this Hon'ble Commission, under its regulatory powers envisaged as per Section 79(1)(c) of the Electricity Act, 2003, regulates inter-state transmission of electricity. Further, the tariff for transmission system (which is called as transmission charges) is determined by this Hon'ble Commission under Section 62 of the Electricity Act, 2003. Further, the said determination of tariff is to be undertaken in accordance with the tariff principles provided under Section 61 of the said Act. For ready reference, Section 61 of the Electricity Act, 2003, is setout hereinbelow:

"61. Tariff regulations – *The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the

resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi-year tariff principles;

[(g)that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;]

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

[Underlines Supplied]

7. From the aforesaid provision, the following vital principles can be culled out:

- a) The principles and methodologies prescribed by this Hon'ble Commission, are guiding factors for all the State Commissions in the country;
 - b) The determination of tariff, including for transmission of electricity, has to be based on "commercial principles".
8. It is therefore submitted that the second proviso to Clause 5 of Regulation 11 of the Regulations 2010 was based upon the "commercial principle" that there should not be double charging of tariff for transmission, qua the same quantum of power in the same region. It is submitted that a commercial principle if based on sound logic, cannot change subsequently.

Under the ambit of the Electricity Act, 2003, there is no provision which allows a transmission licensee to collect double transmission charges for the same quantum of power in the same region. The transmission business, as contemplated under the above Act, is based on the principle of the transmission licensee being a revenue neutral entity. Further, Sections 38, 39, 40 and 42 of the Electricity Act, 2003, qua open access, provide that such access has to be "non-discriminatory", meaning thereby that there cannot be any occasion whereby an open access customer is charged transmission/ wheeling charges twice for the same quantum of power.

9. That, under the Draft Regulations proposed by this Hon'ble Commission, particularly Regulation 13(3), it has now been envisaged that no transmission charges shall be levied for inter-state transmission system in respect of short-term open access transactions. However, the STOA customer shall be subjected to deviation charges, if any. The said Regulation has been introduced since the transmission network is built on the basis of LTA applicants, and that the charges for the said network ought to be recovered through LTA charges, and MTOA charges.
10. From the above, it is evident that the Draft Regulations provide for LTA charges, as well as STOA charges which are exempted. However, there is no provision which addresses a situation wherein an LTA customer, after the LTA is operationalized in a particular target region, is utilizing MTOA for the said region.

With respect to the above omission in the Draft Regulations, there is neither any reasoning nor any rationale, which has been provided in the SOR or otherwise. Therefore, the conceivable intent behind such an omission is that there may not exist a case, in the inter-state transmission system, whereby an LTA customer utilizes MTOA, and not LTA, in a particular target region. This is especially after this Hon'ble Commission amended the definitions of "short-term", "medium-term" and "long-term" open access, vide the 6th amendment to the CERC (Grant of Connectivity, Long Term Access and Medium-term Open Access in inter-state

Transmission and related matters) Regulations, 2009. Further, vide the said amendment, this Hon'ble Commission had introduced Regulation 15B in the CERC (Grant of Connectivity, Long Term Access and Medium-term Open Access in interstate Transmission and related matters) Regulations, 2009, whereby an entity with a power purchase agreement exceeding one year can utilize the LTA granted in the same target region.

11. The aforesaid amendments result in migration of an MTOA customer to LTA the moment such LTA is operationalized, meaning thereby that there is no simultaneous usage of MTOA when LTA is also granted for the same region. In this context, further reference be made to clause 2 of Regulation 15B introduced vide the 6th amendment to the CERC Connectivity Regulations, 2009, whereby it was provided that for the aforesaid migration, i.e. from MTOA to LTA, no MTOA relinquishment charges would be levied.

The above completely obviated the need to schedule power under MTOA, when LTA for the same region is granted. It is, perhaps, for this region that the Draft Regulations do not provide for setting/ netting off MTOA charges with LTA charges for the same target region.

12. However, before issuing the final regulation, this Hon'ble Commission ought to appreciate the fact that its regulations, under Section 61(a), have a substantial impact on the policies, principles and methodologies prescribed by the

various State Commissions across India. It is further stated that, it may happen that there may be a situation which does not happen inter-state transmission, however, the same does not mean that the said situation will not happen in intra-state transmission.

Therefore, a Regulation of this Hon'ble Commission which is based on sound commercial principle, need not be tweaked or amended or repealed as the same may entail a ripple effect on the regulations promulgated by the various State Commissions.

13. It is in the above context, that reference be made to Regulation 21 of the Gujarat Electricity Regulatory Commission (Terms & Conditions for Intra-State Open Access) Regulations, 2011, which is reproduced hereinbelow:

"21. Transmission Charges

Open Access customer using transmission system shall pay the charges as stated hereunder:

For use of inter-State transmission system:

As specified by the Central Commission from time to time.

For use of intra-State transmission system:

- (i) *By Long-Term and Medium-Term Open Access Customers:*

The Total Transmission Cost (TTC) as determined by the Commission in the Annual Transmission Tariff Order of the STU shall be shared by all long-term and medium-term open access customers on monthly basis (including existing Distribution Licensees) in the ratio of their allotted capacities, in accordance with the following formula."

[Underlines Supplied]

From the above regulation of the Ld. GERC, it is evident that no setoff/ net-off is provided when an LTA customer schedules power under MTOA. In the state of Gujarat, there are no separate regions, as are there in the ISTS, and that when an LTA is granted, the same is qua the entire state network.

14. On account of the aforesaid regulation of the Ld. GERC, an entity/ generator, which is granted an LTA may not be in a position to utilize the said LTA on account of the fact that the consumers/ beneficiaries require power under medium-term or short-term contracts. For sourcing of power to such consumers, the entity/ generator avails MTOA in the state of Gujarat.

As a result, the aforesaid entity has to pay MTOA charges to the Gujarat STU (Gujarat Energy Transmission Company Limited). However, it is pertinent to state that the said entity is also subjected to bear LTA charges on account of the long-term open access granted by GETCO. This results in the entity being subjected to pay LTA charges, as well as MTOA charges, at the same time for the same quantum of power. There is a double recovery for GETCO on account of the above.

15. It is pertinent to mention herein that a large number of Intra-State consumers, including the members of the Association herein, have approached the respective State Commissions, for inclusion of the existing Regulations of this Hon'ble Commission qua offset of MTOA and STOA charges, against the LTA charges. However,, the omission of the provision for setting/ netting off MTOA charges with LTA charges in the same target region, in the draft regulations, gives an impression that such setting off is not a commercial principle anymore. The same will not only adversely affect the aforesaid pending litigation, but will discourage the Ld. GERC from providing any such mechanism towards netting/ setting off MTOA charges with LTA in the same region, thereby adversely affecting the open access customers in the state of Gujarat.

In this context, it is submitted that a petition, being Petition No. 1672 of 2017, is pending before the Ld. GERC seeking various amendments to the open access regulations, including the aforesaid issue of setting/ netting off. The said petition has been filed by an association, namely Indian Captive Power Producers Association (ICPPA).

16. As such, the removal of the prevailing off-setting mechanism from the Draft Sharing Regulations, 2019 will saddle the open access consumers with transmission charges of the untied LTA capacity, which will leave no incentive/ benefit with the said open access consumer, and as such, will be left with no

option, but to relinquish its untied LTA capacity. It is to be appreciated that the issue pertaining to the relinquishment of LTA, has already raised a lot of noise in the power sector. Infact, number of appeals have been filed before the Hon'ble Appellate Tribunal for Electricity, against the order dated 08.03.2019 passed by this Hon'ble Commission in Petition No. 92/MP/2015, wherein a methodology for determination of stranded capacity was determined. The same is pending adjudication.

17. It further needs to be appreciated there are many power generators in the country who still have untied LTA capacity, which has not been relinquished so far, due to the availability of off-setting mechanism. However, if such a mechanism is rendered obsolete viz-a-viz., the present draft Sharing Regulations, 2019, then the same would have a serious impact in the open access market, thereby leading to a considerable financial crisis to the generating companies, including the captive generating companies. This Hon'ble Commission, being a sector regulator, has to take into account such existing modalities, and safeguard the interest of such generating companies, and captive generating companies.
18. Therefore, this Hon'ble Commission has to consider, and take into account, the fact that the regulations of the Hon'ble Commission have a precedential bearing upon the State Commissions in states across the country, and the regulatory environment existing therein. Simply because there may not

be a case in the ISTS network with respect to an LTA customer utilizing MTOA in the same target region after the operationalization of such LTA, the same should not be the reason for doing away/ removing the provision qua setting off MTOA charges with LTA.

This Hon'ble Commission ought to consider that there may be such a case where the aforesaid set off may be required in the InSTS network. Hence, Indian Captive Power Producers Association, through the present comments/ suggestions, requests this Hon'ble Commission to kindly address the aforesaid issue by providing a provision for setting off/ netting off MTOA charges with LTA in the same target region.

Regards,

Captive Power Producers Association