



**COMPETITION COMMISSION OF INDIA**  
**Case No. 91 of 2014**

**In Re:**

**Open Access Users Association  
Through its  
Secretary**

**At:**

**A-49, Second Floor  
Sector-8, Dwarka  
New Delhi-110077**

**Informant**

**And**

- 1. Tata Power Delhi Distribution Limited  
NDPL House, Hudson Lines, Kingsway Camp  
Delhi-110009** **Opposite Party No. 1**
- 2. BSES Rajdhani Power Limited  
BSES Bhawan, Nehru Place  
New Delhi-110019** **Opposite Party No. 2**
- 3. BSES Yamuna Power Limited  
Shakti Kiran Building, Karkardooma  
Delhi-110032** **Opposite Party No. 3**
- 4. Punjab State Power Corporation Limited  
PSEB Head Office, The Mall  
Patiala-147001** **Opposite Party No. 4**
- 5. Uttar Haryana Bijli Vitran Nigam Limited  
Vidyut Sadan, Plot No.: C 16, Sector-6  
Panchkula, Haryana** **Opposite Party No. 5**
- 6. Dakshin Haryana Bijli Vitran Nigam Limited  
Vidyut Sadan, Vidyut Nagar  
Hisar-125005, Haryana** **Opposite Party No. 6**



**7. Himachal Pradesh State Electricity Board Limited  
Kumar House, Vidyut Bhawan  
Shimla-171004**

**Opposite Party No. 7**

**CORAM**

**Mr. Ashok Chawla  
Chairperson**

**Mr. S. L. Bunker  
Member**

**Mr. Sudhir Mital  
Member**

**Mr. Augustine Peter  
Member**

**Mr. U. C. Nahta  
Member**

**Appearances:** Shri Matrugupta Mishra and Shri Jaiydeep Bhambhani, Advocates for the Informant alongwith Shri Jayant Deo, President of the Informant and Shri Navjeet Singh, Vice-President of the Informant.

**Order under Section 26(2) of the Competition Act, 2002**

1. The present information has been filed by Open Access Users Association through its Secretary Shri Amit Ailawadi ('the Informant') under section 19(1)(a) of the Competition Act, 2002 ('the Act') against Tata Power Delhi Distribution Limited ("OP-1"), BSES Rajdhani Power Limited ("OP-2"), BSES Yamuna Power Limited ("OP-3"), Punjab State Power Corporation Limited ("OP-4") Uttar Haryana Bijli Vitran Nigam Limited ("OP-5"), Dakshin Haryana Bijli Vitran Nigam Limited ("OP-6"), Himachal Pradesh State Electricity Board Limited ("OP- 7"), alleging



*inter alia* abuse of dominant position by the Opposite Parties in contravention of the provisions of section 4 of the Act.

2. Facts, as gathered from the information, may be briefly noted.
3. As per the Information, the Electricity Act, 2003 enables eligible consumers to have non-discriminatory Open Access to the network of a Licensee (except that of a local authority engaged in the business of distribution of electricity before the appointed date) on payment of applicable charges. The Electricity Act, 2003 and National Electricity Policy formulated thereunder, mandate the State Electricity Regulatory Commissions to frame the terms and conditions and timeframe for introduction of Open Access in a State.
4. It is alleged that the Opposite Parties have imposed unfair and discriminatory conditions and the respective State Regulatory Commissions have continuously increased the charges for Open Access which has resulted in denial of market access to the members of the Informant, creation of entry barriers, foreclosure of competition and limited consumer choice in the market.
5. The Informant submits that the Opposite Parties, being the only distribution licensees in their respective States, enjoy a position of strength in the market. It is alleged that the Opposite Parties have unduly influenced and made unreasonable suggestions to their respective Commissions in order to increase various charges for Open Access like Cross-Subsidy charges, Wheeling Charges *etc.* In addition to the continuous increase in Open Access charges, the tariff for power has also been continuously increased by the respective State Electricity Regulatory Commissions based on the recommendations of the Opposite Parties. Furthermore, it is alleged by the Informant that the purpose of such act was to overcome the inefficiencies in operations of the distribution



licensees, prevent competition and to ensure that the consumers do not have the choice of taking supply of electricity through Open Access and particularly over the power exchange.

6. It is further submitted that as per section 42 of the Electricity Act, 2003, the Open Access consumer shall be liable to pay Cross-Subsidy. However, proviso to Section 42 provides that the Cross-Subsidy shall be progressively reduced. According to the Informant, the State Electricity Regulatory Commissions have failed to not only reduce the Cross-Subsidy but have instead been continuously increasing the Cross-Subsidy. The continuous increase in the Cross-Subsidy surcharge has allegedly affected the competition in the respective State power sectors due to the huge increase in Open Access charges, the consumers have been constantly prevented from utilizing the feature of Open Access and thereby cheaper power. It is stated that the Opposite Parties are the ultimate beneficiaries and thereby gaining undue advantage.
7. Based on the above, the Informant has prayed, *inter alia*, to institute an inquiry against the Opposite Parties and pass an order directing the Director General (DG) to carry out an investigation into the violation of section 4 of the Act.
8. The Commission heard the arguments advanced by the counsel appearing for the Informant on 15.01.2015 and on request of the counsel also directed him to file additional information. Subsequently, when the matter was listed for consideration before the Commission, it was noticed by the Commission that the Informant had failed to file the additional information. Further, on perusal of the material available on record, the Commission observed that in light of the allegations made by the Informant in the information which were essentially directed against the named State Electricity Regulatory Commissions, it was decided to make a reference to the respective State Electricity Regulatory Commissions



*i.e.* (1) Haryana Electricity Regulatory Commission (HERC), (2) Punjab State Electricity Regulatory Commission (PSERC), (3) Delhi Electricity Regulatory Commission (DERC) and (4) Himachal Pradesh Electricity Regulatory Commission (HPERC) on the central issue agitated by the Informant *i.e.* increase in Open Access charges resulting into denial of market access, creation of entry barriers, foreclosure of competition and limiting consumer choice in the market. Later, the Commission has received the replies/ opinions from the respective State Electricity Regulatory Commissions and the same shall be referred to appropriately in the order.

9. The Commission has perused the material available on record besides hearing the counsel for the Informant.
10. At the outset, the Commission observes that there is no overlap in the jurisdictions exercisable by the Commission and the State Electricity Regulatory Commissions. It is noted that the mandate of the Commission is to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India. Sectoral regulators have necessary technical expertise to determine access, maintain standard, ensure safety and determine tariff. The set rule of game *i.e.* entry conditions, technical details, tariff, safety standards and have direct control on prices, quantity and quality. Thus, sectoral regulators focus on the dynamics of specific sectors, whereas the Commission has a holistic approach and focuses on functioning of the markets by way of increasing efficiency through competition. In fact, the roles played by the Commission and the sectoral regulators are complementary and supplementary to each other as they share the common objective of obtaining maximum benefit for the consumers.



11. In the aforesaid jurisdictional backdrop, the grievance made by the Informant in the present case may be examined. As noted earlier, the gravamen of the information essentially centres around the increase in Open Access charges effected by the respective State Electricity Regulatory Commissions of Delhi, Punjab, Haryana and Himachal Pradesh resulting into alleged denial of market access, creation of entry barriers, foreclosure of competition and limiting consumer choice in the market.
12. To appreciate the issue, the Commission deems it appropriate to make a reference to the relevant provision of the Electricity Act, 2003 and the rules and regulations made thereunder.
13. As per section 2(47) of Electricity Act, 2003, 'Open Access' means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission. Section 42(2) of the Electricity Act provides that the Open Access charges will be determined by the respective State Commissions. Section 86 [86(1)(a)] which deals with the functions of State Commission provides that the State Commission shall determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State but where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers.
14. The Commission has also perused the response filed by the respective State Regulatory Commissions and a brief summary of the responses may be noticed.



15. It has been submitted on behalf of HERC that in accordance with the various provisions of the Electricity Act, 2003 and the Regulations framed thereunder, it determines the tariff and other charges for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, and wheeling charges & surcharge thereon for the open access category of consumers within the State. It denied the suggestion of the Informant that Discoms of the State influence the decision of HERC. Further, it was pointed out that under section 110 of the Electricity Act, 2003, Appellate Tribunal for Electricity (APTEL) has been established and any person aggrieved by an order made by the Appropriate Commission can prefer an appeal before it. A further appeal is also provided to the Hon'ble Supreme Court of India. Detailed justifications for levying various charges have also been elaborated in the response.
16. PSERC in its response pointed out that it notified the Punjab State Electricity Regulatory Commission (Terms and Conditions for intra-State Open Access) Regulations, 2011. It was further informed that the *vires* of the Regulations can only be challenged before the constitutional courts. In fact, it was brought on record that these Regulations were challenged before the Hon'ble Punjab and Haryana High Court through Civil Writ Petition No. 20562 of 2012, which is stated to be pending. It has been further intimated that the same Informant filed an appeal before the Hon'ble APTEL against the Tariff Order dated 16.07.2012 on the similar grounds as have been contained in the instant information before the Commission. It has been mentioned that the said appeal was decided in favour of the appellant, yet on further appeal by the Punjab State Power Corporation, the same was admitted by the Hon'ble Supreme Court of India and the judgment of Hon'ble APTEL was stayed. As the matter is *sub judice*, it was prayed that the maintainability of the very information needs to be examined by the Commission.



17. Opinion was also given by DERC and it was pointed out that various charges of open access consumer have been levied as per the provisions of the Electricity Act, 2003 and the National Tariff Policy. It was denied that the Discoms are in a position to influence State Commissions in determination of tariff and it was argued that the State Commissions are autonomous bodies set up under the Electricity Act, 2003 and the tariff is determined as per the provisions of the statute, policy and applicable regulations after following the due procedure.
18. HPERC also gave its opinion denying and disputing the allegations made by the Informant. It was pointed out that the distribution function is a regulated activity and there are multifarious checks and balances thereon. The State Commission fixes the open access charges in a transparent manner by following well-reasoned methodologies and the allegation in this regard are ill-founded. The tariff fixed by the State Commission is subject to review by the Appellate Authority and, as such, question of misuse of power by the State Commission or any undue benefit to the Discoms simply does not arise.
19. On a careful perusal of the scheme of the Electricity Act, 2003 and the regulatory architecture provided thereunder, it is abundantly clear that the charges for Open Access are to be decided by the respective State Commissions and any issue in regard thereto would be dealt by the concerned State Electricity Regulator and the Appellate Authority in terms of the statutory architecture governing the regulation of open access and determination of the relevant tariffs. The issue highlighted by the Informant in the present case is essentially related to the regulatory functions discharged by the State Regulatory Commissions in respect of fixation of tariffs. No competition issue is involved in the factual matrix disclosed in the information.





सत्यमेव जयते



20. In view of the above, the Commission is of view that no case is made out against the Opposite Parties for contravention of the provisions of section 4 of the Act and the information is ordered to be closed forthwith in terms of the provisions contained in section 26 (2) of the Act.
21. The Secretary is directed to inform the parties accordingly.

**Sd/-**  
**(Ashok Chawla)**  
**Chairperson**

**Sd/-**  
**(S. L. Bunker)**  
**Member**

**Sd/-**  
**(Sudhir Mital)**  
**Member**

**Sd/-**  
**(Augustine Peter)**  
**Member**

**Sd/-**  
**(U. C. Nahta)**  
**Member**

**New Delhi**  
**Date: 29/09/2015**