

**BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION AT
PANCHKULA**

Case No. HERC/Petition No.38 of 2022

Date of Hearing : 19.01.2023

Date of Order : 09.02.2023

Petition under section 86 (1) (b) of the Electricity Act, 2003 read with Section 9(2), Section 39(d), Section 40, Section 42(2), Section 49 and Regulations 18 & 19 of Haryana Electricity Regulatory Commission (Rooftop Solar Grid Interactive Systems Based on Net Metering/Gross Metering), Regulations, 2021.

Petitioner:

M/s. NGK Spark Plugs (India) Pvt Ltd through Mamoru Musasa Managing Director, 502 JMD Pacific Square, 32nd Milestone, Sector 15, NH8, Gurgaon-122001

Respondents:

1. The Managing Director, Dakshin Haryana Bijli Vitran Nigam, Vidyut Nagar, Hisar
2. Managing Director, Haryana Vidyut Prasaran Nigam Limited (HVPNL), Shakti Bhavan, Sector 6, Panchkula
3. The Director General, Directorate of Renewable Energy, Akshay Urja Bhawan, Sector 17, Panchkula, Haryana

Present

On behalf of the Petitioner

Shri Arvind Rudra, Advocate

On behalf of the Respondent (s)

1. Ms. Sonia Madan, Advocate for respondent-R1
2. Shri Aaditya Grover, Advocate for respondent-R3

QUORUM

Shri R.K. Pachnanda, Chairman

Shri Naresh Sardana, Member

ORDER

1. Brief Background of the case:

The present petition has been filed by M/s. NGK Spark Plugs (India) Pvt Ltd for seeking relaxation in regulation (3.5) of HERC, Net metering Regulation, 2021 to the effect that open access shall be allowed to the consumers having net metering connection vide which a person or an entity cannot exercise the option of open access along with net metering owing to abnormal conditions created after the order passed by the Commission for Air Quality Management, Govt of India (CAQM) and time constraints in following such directions.

2. Brief submission of the petitioner is as under:

- 2.1 That the petitioner is a registered consumer with DHBVN with Account Number 358170202000 and an automotive ancillary unit manufacturing Spark Plugs and Oxygen Sensors, based at Industrial Area, Bawal, Dist. Rewari, Haryana. It provides employment to 421 people, at the production plant. It is having a connected load of 1001 KW from the public electricity supply company DHBVN and has recently also installed solar power to the tune of 574 KW by investing a capital of appx. 2.5 Crores and dedicating an area measuring 5740 Square meters in total plot area of 26,634 Square Meters.
- 2.2 That the petitioner draws power from its captive Diesel Engine Power Generating (DG) Sets of capacity 1,875 KVA for which it had invested an amount of appx. 1.5 Crores in the event of a power supply break down apart from using its solar infrastructure during day time.
- 2.3 That the petitioner's power consumption pattern changes in the light of changing demand and supply dynamics and it becomes extremely important at times to sell excess power produced during its lean functioning phase and draw uninterrupted power during peak phase. During the year 2021, the power usage was minimum 320 KW and Maximum 525 KW, which clearly establishes the need to give back power to the feeder as in case of 320KW power usage a surplus of 254 KW remains for four hours, but it reduces to almost nil during those four hours in scenario of maximum consumption. Hence, it is not possible for NGK to commit 100% of 574 KW solar power in PPA also as this will again divest NGK of Net Metering facility.
- 2.4 That a restriction has been imposed on the use of DG Sets based on HSD

fuel (which most of the industries have been using till now) as per direction number 54 dated 8 February 2022 of CAQM, and also direction number 64, dated 2 June 2022 specifying permissible fuels which does not include HSD which the petitioner is presently using for DG Sets. The petitioner is therefore stressed to look out for alternative sources of power in the event of a power shut downs so that it continuously runs its manufacturing facility to avoid any losses. This requires an investment of Rs.2.5 Crore Approx. and furthermore, there is a problem with instant availability of such infrastructure. There is a lead time of sixteen to eighteen weeks for procurement of such Gensets due to increased demand.

2.5 That the petitioner is under the effect of extraordinary changes which require urgent intervention. Though the first step has already been executed by the petitioner in the form of installation of solar energy unit generating 574KW. The nature of solar power being such that it generates power for a very short time of about four hours per day during availability of optimum sunlight. The need for the backup still remains a pressing one.

2.6 That the petitioner while analysing the trends of power outages as per the following data concludes that the alternative source of energy is quite urgent for the uninterrupted functioning of the factory in case of a power shut down scenario from the DHBVN.

Month	June 21	July 21	Aug 21	Sep 21	Oct 21	Nov 21
Cut hrs.	6	3.83	4.8	0.5	2	0
Month	Dec 21	Jan 22	Feb 22	Mar 22	April 22	May22
Cut hrs.	0	0	2	0	70	20

This further establishes the claims of the petitioner looking at shut downs in April which went up to 70 Hours and May was again at 20 hours. That this also establishes a need for open access for the petitioner.

2.7 That the petitioner exercises the facility of Net Metering from DHBVN and has generated 361,894 KWh (units) to the grid till date which already amounts to Appx. 1809470 ltr. saving of fossil fuel thus reduction of carbon foot prints.

2.8 That the petitioner also intends to exercise the option of open access for which it is being stopped by regulation (3.5) of Haryana Electricity Regulatory Commission (Rooftop Solar Grid Interactive Systems Based on Net Metering/Gross Metering), Regulations, 2021, dated 19 July, 2021 which states as under:

"3.5. The facility of Net metering shall not be available to the consumer

drawing power under Open Access mechanism.”

2.9 That the petitioner hereby submits that a disparity or an unfair disadvantage has been created due to the present orders of the Commission for Air Quality Management especially direction number 54. This being a penal provision needs to be taken care of by providing relief to the industries in NCR by enabling them access to an un-interrupted power supply. This unequal ground has come into existence due to the orders which are applicable to only NCR and requires a positive intervention of this Commission which if done timely can in the form of allowing both Net Metering and Open Access as a relief under abnormal conditions prevailing after the directions issued by CAQM i.e. direction number 54, dated 8 Feb.2022 is as follows:

“The Commission further directs that for other sectors and services, selective use of alternate power (other than electricity supply through DISCOMS) through generating sets would be permitted/ regulated, even for the period of ban under the GRAP, as detailed below: ...

d) All other categories of Diesel Generator sets, other than listed above, under no circumstances, shall be permitted to operate during the periods of ban imposed under the GRAP, except for emergency services as detailed out in (l) above or with the specific approval of the Commission in special cases.

III) To facilitate effective implementation of the above noted directions of the Commission, the respective power distribution companies and agencies responsible in the NCR shall provide un-interrupted power supply, particularly during the winter months, so as to facilitate mitigating adverse air quality owing to a large-scale use of alternative power generating systems.

IV) The above directions shall take effect in strict force w.e.f. 01.10.2022.

VI) Noncompliance of this Directions may lead to sealing of DG sets and /or sealing of establishments using DG sets, imposing and levying of environmental compensation charges etc. as well as penal action under the relevant laws.”

Further direction No. 64, dated 2 June, 2022 states as under:

“S. No 2 (i) These shall completely switch over to PNG or biomass fuels' latest by 30.09.2022 (for industries in areas in NCR where PNG infrastructure/supply is available) and by 31.12.2022 (for industries in areas in NCR where PNG infrastructure /supply is not available), failing which such industries shall be closed down and not permitted to schedule their operations”.

2.10 That the total power which NGK got from DHVBN in the year 2021-22 was 1,974,371 KWH and the power produced using its own means by NGK during the same period was 4,392 KWH. Accordingly, the petitioner has filed the present petition with the following prayer:

(a) Admit the present urgent petition as the time stipulated of implementation of CAQM stipulation is 30 September 2022 and relax the conditional open access permission requirement in the light of present

CAQM orders for National Capital Region (NCR) whereby a person or an entity cannot exercise the option of open access of power if Net Metering is opted by that person or entity.

- (b) Provide relief in the form of Net metering to minimize carbon footprint, conserve energy and allow open access along with the net metering owing to the abnormal condition created owing to stipulations of CAQM and the time constraint in following CAQM directions.
- (c) Condone any inadvertent omissions or errors and permit the petitioner to modify or alter this petition and allow additional submissions as may be required to seek justice from this Hon'ble Commission.
- (d) Pass such order(s) as the Hon'ble Commission may deem fit in the circumstances and facts of the present Petition.

3. DHBVN, the Respondent in the present matter has filed its reply dated 01.12.2022, has submitted as under:

- 3.1 That the present petition has been filed for seeking such amendment in the Net Metering Regulations, 2021 which has been specifically dealt with and rejected at the time of framing of the regulations. A petition seeking alleged deviation in Regulation 3.5 of Net Metering Regulations, 2021 is thus, effectually a petition for amendment in the Regulations, which is legally impermissible. The Petitioner has sought relaxation of the regulations, which if allowed to the Petitioner will bring with it a multiplicity of such petitions by different stakeholders. No provision of the regulations permits amendment in regulations in favour of a single stakeholder. Hence, the present Petition is untenable.
- 3.2 That it is well-settled law that the power to frame Regulations cannot be made a subject matter of the hearing, as in the case of other petitions and proceedings before the Commission where under one of the parties files a petition, the other party is called upon to answer the contentions raised therein and the Commission takes the view under the adjudicatory powers.
- 3.3 That the Regulations framed by this Hon'ble Commission are based on an exhaustive study and discussions inviting comments from all stakeholders. Therefore, any amendment/ relaxation in the Regulations sought to be made should also be based on a similar comprehensive study wherein various implications/ repercussions that could arise on account of proposed amendment/relaxation have been examined beforehand. Thus, there is no basis with the Hon'ble Commission for affecting any

amendments/relaxations in the HERC Regulations, and that too on the request of a single stakeholder.

- 3.4 That the Hon'ble Commission in its order dated 26.06.2019 (in *Petition no. 13 of 2018*) filed by *Haryana Chamber of Commerce and Industries, Panipat* while rejecting the request regarding relaxations/amendment of Regulations held as under –

“The *Petitioner* has primarily raised a challenge to *ibid* Regulations under the garb of seeking relaxation thereto. **Any such exercise cannot be undertaken by the Commission in an adjudicatory framework. The same is more in the nature of exercising legislative function of the Commission as the Regulations framed by it are in the nature of subordinate (delegated) legislation.** Hence, ordinarily relaxation in the Regulations cannot be considered on a Petition filed by the Petitioner comprising particular category of consumers.”
(Emphasis Supplied)

- 3.5 That Hon'ble APTEL in *Madhya Pradesh Power Generation Company Ltd. v. Madhya Pradesh Electricity Regulatory Commission (Madhya Pradesh Power Generation Company) 2011ELR (APTEL)1041*, has observed that the regulations framed by the State Commission or the Central Commission partake the character of subordinate or delegated legislations having the force of law and held that it has no jurisdiction to examine the validity of the regulations. The validity of the regulations can be only challenged by seeking judicial review thereof. It was argued that the Appellant therein was not challenging the regulations, nor was asking for amendment of the regulations. The Appellant was only asking for a direction to modify the norms in the exercise of the Commission's power to relax or to remove difficulties or to apply inherent power, which was rejected, the Hon'ble APTEL observed that relaxation of norms which was prayed for is possible only when the notified regulation is again notified by bringing about an amendment thereof. The Hon'ble APTEL further observed that when it asks the State Commission to amend its regulations it virtually implies that the regulations framed by it are deficient and that would amount to exercising powers of judicial review which it does not possess as stated by the Constitutional Bench in the case of *PTC India Ltd v. CERC 2010 (4) SCC 603*. It was further observed that if it asks the State Commission to exercise the power of removal of difficulty or to relax norms or to exercise inherent power, it would be giving directions indirectly which it cannot give directly. The Hon'ble APTEL reiterated that if it gives direction to the State Commission to amend the regulations, it would be required to observe that the norms set out in the

regulations are unjust or improper or illegal and hence amendment is necessary. That would mean it would have to undertake a judicial review of the regulations which it cannot do. Applying the analogy of the well-settled position of law stated above, the present case of the Petitioner is liable to be dismissed as untenable.

- 3.6 That regulation (3.5) of the Net Metering Regulations, 2021, has been incorporated by the Commission with specific reasoning which is categorically spelled out in the order dated 17.12.2018 in Petition no. 37 of 2017 in the matter of framing of HERC (Rooftop Solar Grid Interactive Systems Based on Net Metering) Regulations, 2019, and while dealing with the request of the stakeholders for permitting open access facility along with Net metering, the Hon'ble Commission held as under –

“Comments by UHBVNL

As per the existing Net Metering Regulations, the facility of net metering is not available for open access consumers. This provision, however, has been omitted in the draft Net Metering Regulations, 2018 which means that now a consumer getting power through open access can also install RTSS under net metering. This is not in order. In this context it is submitted that under net metering, the consumer is already getting power from two sources i.e. rooftop solar and from the utility. In case open access consumer is allowed facility of net metering, he will be getting power from three sources and the accounting for energy shall become very complex. Further, the open access consumer is already getting cheaper power through the facility of open access for self-consumption. As there is a cap on the cumulative capacity of RTSS that can be allowed to the eligible consumers, let the facility of RTSS under net metering be used by other consumers to get cheaper power for self-consumption. Therefore, the provision as was there in the existing Regulations should be retained. A clause as under should be added as clause 3.7 and the existing clause 3.7 and 3.8 in the draft Regulations be numbered accordingly: -

For open access consumers, the facility of net metering shall not be available”

Commission's Observations

The Distribution Licensees have submitted that under net metering, the consumer is already getting power from two sources i.e. rooftop solar and from the utility. In case open access consumer is allowed facility of net metering, he will be getting power from three sources and the accounting for energy shall become very complex. Further, the open access consumer is already getting cheaper power through the facility of open access for self-consumption. As there is a cap on the cumulative capacity of Roof Top Solar System that can be allowed to the eligible consumers, the facility of net metering be used by other consumers to get cheaper power for self-consumption.

Accordingly, the Commission has decided to retain its earlier provision indicated in the Haryana Electricity Regulatory Commission (Rooftop Solar Grid Interactive System Based on Net Metering) Regulations 2014 for Open Access consumers and is of the view that Net Metering facility shall not be allowed to them during the Control Period till FY 2021-22. (Emphasis Supplied)

- 3.7 Further, the issue with respect to modification as sought for in the present petition in regulation (3.5) of Net Metering Regulations, 2021 is liable to be rejected at the threshold because this issue been adjudicated in the Order dated 10.07.2020 (Petition no. 35 of 2019) wherein the Commission has already conclusively decided the issue of relaxation in regulation (3.5) to the effect that open access facility may be permitted for net metering consumers as sought to be raised by the Petitioner herein.
- 3.8 Further, Maharashtra State Electricity Regulatory Commission (MSERC) *vide Order dated 12.06.2018 in Case No. 163 of 2017 rejected the petition of Cleanmax Enviro Energy Solutions Pvt Limited*, seeking clarification on the net metering arrangement for Open Access consumer, specifying that **“Net metering and open access are two different sets of arrangements for different eligible consumers and its regulatory framework has also been provided by the two different regulations. If these two arrangements are mixed up, then there are various issues related to grid security, accounting, billing, settlement, etc.** The Commission held that net metering regulations have been made for “below 1 MW” and open access for “1 MW and above” and these cannot be availed simultaneously by the same consumer.
- 3.9 That the facilities for net metering and open access are distinct special facility and if certain consumers are permitted to take advantage of both facilities, the consequent losses owing to same will have to be consumed by Discoms which will get passed on to the consumers at large. The Electricity Act, 2003 does not permit or further fulfilling the interest of few consumers at the cost of other consumers at large. Under net metering, the consumer is already getting power from two sources i.e. rooftop solar and from the utility. In the event such a consumer is permitted to procure power through open access as well, he will be getting power from three sources and the accounting for energy shall become very complex. Further, an open access consumer gets cheaper power through the facility of open access for self-consumption.

Through net metering facility as well, the consumer has the advantage of injecting surplus cheaper power at the cost of the prevailing tariff. Both benefits are meant to benefit the consumers for availing of separate special facilities. Therefore, open access drawl shall not be permitted to consumers availing the net metering facility.

3.10 Furthermore, the following grounds alleged by the petitioner for seeking relaxation in regulation (3.5) are frivolous, bereft of any merit, and not worthy of any consideration:

- a) that restriction has been imposed on use of DG sets based on HSD fuel in view of the directions issued under Section 12 of the Commission for Air Quality Management in National Capital Region and Adjoining Areas Act, 2021 dated 08.02.2022;
- b) that the outage of generating station, the State of Haryana will experience power deficit

The above ground taken by the petitioner are mis-projected and meritless, as is elaborated hereunder: -

3.11 That the directions given by CAQM regarding the use of HSD fuel by the industries for DG sets in the NCR had been under active consideration by the Hon'ble Apex Court, National Green Tribunal as well as the CAQM for a long time. The directions disallowing use of such fuel have been passed in the national interest after giving a sufficiently good time to the industries to make alternative arrangements. The Hon'ble Supreme Court in its Order dated 03.12.2021 in the matter "*Aditya Dubey & Anr. Vs Union of India & Ors.*" sought a proposal to be submitted to switch over all the industries to PNG/ cleaner fuels in a time-bound manner. Pursuant to the Hon'ble Supreme Court's directions in the above-referred matter dated 10.12.2021 directing the CAQM to examine requests of various industries and organizations about relaxation of conditions imposed by virtue of Hon'ble Supreme Court's Orders or by the Directions/ Orders of the Commission, Direction No. 49 was issued in respect of industries in NCR which have still not shifted to PNG / cleaner fuels, restricting the operations of such industries for 5 days in a week. Further, Directions No. 53 dated 04.02.2022 were issued wherein it was directed that such industries located in the NCR, where gas infrastructure and supply is available, shall under all circumstances completely switch over to PNG or biomass fuels, latest by

30.09.2022. Such directions were reiterated in Direction no. 62 dated 17.03.2022 and various subsequent Orders. Thus, a period of more than 6 months was given to all the industries to make alternative arrangements. It has been contended by the Petitioner in the present petition that the arrangement of alternate fuel DG set will entail additional expenditure and may take a lead time of 18 months. The restrictions, as projected, have not been imposed suddenly. The negligence to take suitable action in requisite time or financial difficulty is certainly no ground to seek a relaxation of the Regulations. Further, CAQM has recently ordered Direction no. 68 dated 14.09.2022 permitting certain relaxations in the use of DG sets to take care of production / technical exigencies owing to regular power supply failures. In view of the foregoing, the ground alleged by the Petitioner seeking relaxation of Regulation 3.5 is baseless and not worthy of any consideration.

3.12 That for the Outage of Generating station for Haryana State, it is provided that the data/figures/information relied upon by the Petitioner for contending that there is a power deficit in the State of Haryana fails to represent the correct position of power supply and demand in the State as on today. The State of Haryana has been working constantly to ensure the availability of sufficient and reliable power in the State of Haryana. Despite there being defaults of generators disrupting power supply in certain Long-term PPA, the State of Haryana has made effective alternative arrangements to ensure adequate power supply in the State. With the current arrangements, there may not be any deficit in the upcoming winter months. Thus, the apprehension of the Petitioner as regards power failures in upcoming months is a baseless ground for seeking relaxation in the Regulations which instead has adverse consequences for the consumers at large.

In view of the foregoing, the present petition is untenable and liable to be dismissed.

4. The petitioner has filed its Rejoinder dated 27.12.2022 and has submitted as under:

4.1 That the averment of the respondent shall not be considered in the light of relaxation being sought due to change in law event by the petitioner as arose due to ban of use of DG Sets vide CAQM Direction number on 54 and hence no previous petition can be termed as equivalent to this as the circumstances are new and the context never existed before. The CAQM was formed as late

as on August, 2021. The petitioner seeks the relief as permissible under Chapter VIII, regulation (18) of Haryana Electricity Regulatory Commission (Rooftop Solar Grid Interactive Systems Based on Net Metering/Gross Metering), Regulations, 2021. The petitioner has been forced to seek relief due to inability of DHBVN to supply uninterrupted power for which it has been directed/advised as per Direction Number 54 at II (C) of CAQM which states "To facilitate effective implementation of the above noted directions of the Commission, the respective power distribution companies and agencies responsible in the NCR shall provide un-interrupted power supply, particularly during the winter months, so as to facilitate mitigating adverse air quality owing to a large-scale use of alternative power generating systems". These directions are only applicable to NCR region and not to the whole of the Haryana and hence the replication of the relief by the whole Haryana has to be ruled out. This is further submitted that the relief though sought by the single petitioner does not in any way reflect that the other Industries in the region are not affected by the CAQM direction, rather this petition in itself represents larger public interest in the form the if the DG sets are operated even by clean fuel these are bound to emit gasses which can be avoided by supply of power by any alternative source in case of power outage on the part of DHBVN.

- 4.2 That the provision of Open Access with Net metering will serve the purpose of not only promoting use of solar power but also avoid all the emission which will emanate due to the use of generating sets in case the supply from the alternate sources in case of power cut by DHBVN is restricted by not providing the open access. The relief under this regulation is mentioned under regulation(18) of Net Metering Regulations 2021 also adjudicated in a similar manner vide *Glycols Limited vs Uttarakhand Electricity vide Judgment dated 1 October, 2014 in Appeal Nos. 112, 130 and 136 of 2014 wherein Hon'ble APTEL observed that the Co-generation based Captive Power Plant/Captive user cannot be fastened with renewable purchase obligation as provided under UERC (Compliance of RPO) Regulations, 2010, as subsequently, amended by UERC (Compliance of RPO) (First Amendment) Regulations, 2013. The judgment, dated 26.4.2010 of this Appellate Tribunal in Appeal No. 57 of 2009 in the case of Century Rayon vs. MERC, whereby the provisions of Section 86(1)(e) of the Electricity Act, 2003 were interpreted and in compliance of which the learned State Commission has amended the Page (24) Judgment in Appeal Nos.112, 130 and 136 of 2014 definition 'Obligated*

entity' as was then existing in UERC (Compliance of RPO) Regulations, 2010 by UERC (Compliance of RPO) (First Amendment) Regulations, 2013, shall be held to be applicable from the date of the judgment itself. Though, in compliance of the said judgment, dated 26.4.2010, the Regulations were amended in the year 2013 by the State Commission. It was a fit case where the State Commission should have exercised its power to relax according to its own Regulations in order to give effect to the judgment, dated 26.4.2010, passed by this Appellate Tribunal in Appeal No. 57 of 2009, in the case of Century Rayon vs. MERC in letter and spirit, in order to give relief to the Co-generation based Captive Power Plants/Captive users entitled to it.

Further even the Central Electricity Regulatory Act also provides as under:
“Section 15 in The Central Electricity Regulatory Commission (Terms and Conditions for Recognition and Issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010”

“15 Power to relax. -The Commission may by general or special order, for reasons to be recorded in writing, and after giving an opportunity of hearing to the parties likely to be affected relax any of the provisions of these regulations on its own motion or on an application made before it by an interested person.”

Hence the contention of the respondent non- admission of this petition do not stand good.

- 4.3 That the provision of relief in the regulations is a well settled practice and is manifested by Judgement dated 03 Nov. 2020, in the matter of M/s Adani Power (Mundra) Limited & others. This is a temporary relaxation being sought which can be for a shorter period say two years and no amendment is being asked for by the petitioner. Also it is recognized that the Regulations were framed by this Hon'ble Commission are based on an exhaustive study and discussions inviting comments from all stakeholders but due to the then existing contexts. Because of directions of CAQM have changed the context which never existed earlier and thus in the present condition the context has changed for NCR as these are special circumstances where a few stipulations regarding use of DG sets got amended and hence this created a distress for the petitioner thus the petitioner was forced to seek relaxations only due to the newly promulgated regulations of CAQM. The reduction of air pollution is the sole purpose for which the CAQM has been formed in Delhi and this becomes the prime duty of all the stakeholders to support this effort for the existence of human life which has been guaranteed by Article 21 of Indian

Constitution. Hence, the petitioner seeks the intervention of the Hon'ble Commission for provision of relief in the larger interest of society and necessitated due to change of law.

- 4.4 That the petition is result of change in the current conditions for NCR as late as on 8 February 2022 Vide direction number 54 of CAQM, hence the contention of the respondent shall not be considered as provision of relief is a well-established practice of the Commission and various courts.

Ref: Judgement of India Glycols Limited vs. Uttarakhand Electricity Regulatory Commission (UERC) dated 01 Oct., 2014.

Also, the validity of the regulation is in no way being challenged by the petitioner. The petitioner is under distress which has been inflicted on the petitioner only by the action of DHBVN which fails to supply uninterrupted power. It the onus on the DHBVN which is a public power supply company in this area to supply uninterrupted power as per the direction no. 54 of CAQM. Had the mandate of the CAQM been adhered to, the petitioner would have never felt the need to seek this relief. At no point has petitioner asked for modification of norms, it is the relaxation which is being sought that too for a smaller demographic area consisting of NCR region which is to be considered that it is solely due to the act of DHBVN being non-committal on supply of uninterrupted supply of power and change in the regulations necessitated by air pollution that the said relaxation is being sought. The non-use of generators both of dual fuel and single CNG fossil fuel will result in saving of fuel and pollution. Whereas in case of provision of open access this will certainly help the entire area to avoid air pollution.

Hence, the spirit of the regulation lies in being relevant in the present context and if the change of context defeats this purpose of referring old judgements, which cannot be referred to as this context in new and never existed before. Accordingly, the contention of respondent shall not be entertained.

- 4.5 That the RTSS is a measure used by the petitioner to reduce its energy foot prints dependent on non -renewable resources, which is a pressing need for the NCR region, which also needs to be taken into account that the solar power is available at its peak only for four hours/day and this is a source generated in-house by the petitioner. That way it should not be considered as an external resource being tapped by the petitioner and hence for all the matters the external source being harnessed or used by the petitioner for electricity supply remains one. The alternative source which will be tapped

by the petitioner using open access will be tapped only if there is a power failure at the end of DHBVN. Hence these contentions of sources used by the petitioner should not be considered in the light of the facts that the compulsion to use alternative source through open access arises only if DHBVN fails to do its duty of uninterrupted power supply.

- 4.6 That the adjudication of the petition for relief under regulation (3.5) of Net Metering Regulations, 2021 has already been done as indicated by the respondent but that was done in the earlier context. In this case and in the present context requirement is of urgent intervention to control pollution and supply uninterrupted electricity on the part of DHBVN. The non-supply and non-provision of alternative green source of energy as being contended by the respondent will certainly result in increased air pollution. As such, this contention of the respondent shall not be considered.
- 4.7 The contention raised by the responded regarding not providing the benefit of open access to the petitioner, it is submitted that the Electricity Act of 2003 itself speaks the following:

“40. It shall be the duty of a transmission licensee - (a) to build, maintain and operate an efficient, coordinated and economical inter-State transmission system or intra-State transmission 24 Other business of Transmission Licensee economical inter-State transmission system or intra-State transmission Centre and the State Load Dispatch Centre as the may be;. (c) to provide non-discriminatory open access to its transmission system for use by- (i) any licensee or generating company on payment of the transmission charges; or (ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission.”

Hence in light of above, it is submitted that the non-discriminatory open access should be provided to the petitioner.

- 4.8 That even though the validity of dis-allowing open access facility to net metering consumers has been adjudicated at times by this Hon'ble Commission, it is however, to be noted that Electricity Act itself advocates the provision of non-discriminatory open access which the DHBVN by creating preconditions is hampering .Further the contention of the defendant does not become valid on the grounds that the sources of electricity to be

used will remain maximum two at one time and the need to use a source alternative to the one of DHBVN will arise only if the power supply of DHBVN fails or to say that in case there is inefficiency at the part of DHBVN. Hence it is prayed by the petitioner that the petitioner should not be penalized or divested of a bon-fide facility due to laxity on the part of DHBVN and contentions of the respondents should not be considered. Also, the grounds taken by the petitioner are valid as per the following:

- a) The CAQM was formed as late as on August 2021
- b) The direction barring use of DG sets by CAQM was given on Dated 8 February 2022 vide direction number 54, which amounts to change of law.
- c) There is no written commitment by DHBVN to supply uninterrupted power despite its claim that it does not have any power deficit now.

4.9 Further in the Hon'ble Tribunal Judgment dated 3 November, 2020 in A.NO.168 of 2019 titled "*Uttar Haryana Bijli Vitran Nigam Vs Adani Power (Mundra) Limited & Ors*" also the provision of the relief due to change in law is held valid and the same is hereby being sought under the instant petition.

4.10 The issue highlighted by the respondent speaks volumes in itself, whereby the entire focus of all the direction is on air pollution control and the respondent is taking a contrary stand by not allowing the use of clean energy by discouraging use of Gensets by a simple remedy of allowing open access to net metering consumers. The contention of the respondent stating that enough time has been provided to take actions is denied. It is not a matter of only money it is also a matter of availability of proven technology and effectiveness of existing solutions also which creates an urgent need to delay any purchase decisions. This is substantiated by the fact that an order has come as late as on 16 December 2022 amending CAQM earlier order in the light of absence of authenticated performance measures available by installation of Retrofitted Emission Control Devices on DG sets up to 800 KW which the petitioner is having at its factory in Bawal. Also the CAQM has Direction no. 68 dated 14.09.2022 permitting certain relaxations in the use of DG sets to take care of production / technical exigencies owing to regular power supply failures is applicable to DG sets above 800 KW and hence is not applicable to the petitioner. This is submitted that this para no 14 of the respondent shall not stand good in the light of above and be not considered.

4.11 That the statement of the respondent is "With the current arrangements that there may not be any deficit in the upcoming winter months. Thus, the

apprehension of the petitioner as regards power failures in upcoming months is a baseless ground for seeking relaxation in the Regulations which instead has adverse consequences for the consumers at large” The respondent is not committing on the guarantee to supply uninterrupted which is the root cause of petitioner seeking relief. Mere stating the probability of uninterrupted power supply will not create immunity for petitioner in the case of being forced to use DG sets during power break downs. Further the respondent talks about winters and no mention of the following summer period is being considered and has therefore prayed that the petitioner be allowed both net metering and open access considering the holistic approach of air pollution control which is pressing need for NCR region along with direction to the respondent to guarantee of uninterrupted power supply failing which the petitioner is exposed to penal provisions of the CAQM directions and lastly that the all the penal provisions and the costs of infrastructure needed to be installed by the petitioner in the event of non-provision of uninterrupted power by DHBVN be borne by the respondent.

5. Proceedings:

- 5.1 The case initially came for hearing before the Commission on 09.11.2022, as scheduled, in the court room of the Commission.
- 5.2 The counsel for the petitioner reiterated the contents of the petition in brief and prayer made thereunder. Ms. Sonia Madan, counsel for the respondent-DHBVN requested for an adjournment as she has been engaged recently in this matter and sought two weeks’ time to file the reply. Acceding to her request, the Commission granted two weeks’ time to the DHBVN to file the reply with an advance copy to the petitioner. Further, the petitioner may file rejoinder, if any, within a week thereafter.

6. Commission’s order:

- 6.1 The case was finally heard on 19.01.2023, as scheduled, in the court room of the Commission.
- 6.2 At the out-set, the counsel for the petitioner submitted that they have filed the rejoinder in the matter and submitted that presently they are exercising the facility of Net Metering from DHBVN and also intend to exercise the option of Open Access, to fulfil their electricity needs as the power supply by the DHBVN is not uninterrupted and operation of DG set is restricted in NCR in view of the directions of the Commission for Air Quality Management (CAQM) formed by Ministry of Environment, Forest and Climate Change, GoI, passed vide order

dated 8 February, 2022 order dated 2nd June, 2022. He also submitted that net metering and open access will not only serve the purpose of promoting use of solar power but will also help in avoiding environmental pollution caused due to operation of DG set in case of short supply/ power cut by DHBVN. Further regulation (18) of Net-metering Regulation, 2021 provides for relaxation in the regulations and cited judgment dated 01.10.2014 in the matter of Glycol limited Vs UERC passed by Hon'ble APTEL in support of his arguments.

- 6.3 Per contra Ms. Sonia Madan, counsel of the respondent-DHBVN submitted that the petitioner through ibid petition is indirectly seeking amendment in the Regulations, which is legally impermissible, as no provision of the Act/Regulations permits amendment in regulations in favour of individual stakeholder. Hence, the present petition is untenable on this ground only. Further, the grounds taken by petitioner regarding directions of Air Quality Management in National Capital Region and Adjoining Areas and shortage of power supply by DHBVN for seeking relaxation in regulation (3.5) are frivolous, bereft of any merit, and not worthy of any consideration as the DISCOMs have sufficient arrangement/long term PPAs beside having short term arrangement to full fill any eventuality need of electricity of all the consumers under distribution area of licensee.
- 6.4 Sh. Aaditya Grover, counsel appearing on behalf of the HAREDA submitted that the facilities of net metering and open access are distinct special facilities available under a different set of regulations of the Commission which cannot be clubbed together. Further, if individual consumers are permitted to take advantage of both facilities, the consequent losses owing to same will get passed to other consumers at large and the Electricity Act, 2003 does not permit to fulfil the interest of individual consumers at the cost of other consumers. Therefore, the instant petition is untenable as per the Commission's regulations in vogue.
- 6.5 Upon hearing the parties and after careful perusal of the records made available on the case file, the Commission observes that on the similar issue raised by the Haryana Chamber of Commerce and Industries, Panipat in petition no. PRO- 13 of 2018, the Commission vide order dated 26.06.2019 had rejected the said request and inter alia observed as under:

“The Petitioner has primarily raised a challenge to ibid Regulations under the garb of seeking relaxation thereto. Any such exercise cannot be undertaken by the Commission in an adjudicatory framework. The same is more in the nature of exercising legislative function of the Commission as the

Regulations framed by it are in the nature of sub-ordinate (delegated) legislation. Hence, ordinarily relaxation in the Regulations cannot be considered on a Petition filed by the Petitioner comprising particular category of consumers.”

Further, the judgment of Hon’ble APTEL in Madhya Pradesh Power Generation Company Ltd. v. Madhya Pradesh Electricity Regulatory Commission (Madhya Pradesh Power Generation Company) 2011, (APTEL) 1041 made it clear that the regulations framed by the State Commission or the Central Commission contribute the character of subordinate or delegated legislations having the force of law and held that it has no jurisdiction to examine the validity of the regulations. The validity of the regulations can only be challenged by seeking judicial review thereof.

Further the Hon’ble APTEL observed that when it asks the State Commission to amend its regulations it virtually implies that the regulations framed by it are deficient and that would amount to exercising powers of judicial review which it does not possess as stated by the Constitutional Bench of Hon’ble Supreme Court in the case of PTC India Ltd Vs CERC 2010 (4) SCC 603. It was further observed that if it asks the State Commission to exercise the power of removal of difficulty or to relax norms or to exercise inherent power, it would be giving directions indirectly which it cannot give directly. The Hon’ble APTEL reiterated that if it gives direction to the State Commission to amend the regulations, it would be required to observe that the norms set out in the regulations are unjust or improper or illegal and hence amendment is necessary. That mean it would have to undertake a judicial review of the regulations which it cannot do. Applying the analogy of the well-settled position of law stated above, the present case of the petitioner is liable to be dismissed as untenable.

6.6 Additionally, the regulation (3.5) of the Net Metering Regulations, 2021 has been incorporated in the regulation with specific reasoning and also categorically spelled out in the order dated 17.12.2018 (PRO 37 of 2017) while framing of Net metering Regulation, 2019 which was subsequently repealed through Net Metering Regulations, 2021. Also, the relevant issue has already been adjudicated by this Commission vide Order dated 10.07.2020 (in PRO 35 of 2019) titled as *Shree Cement v UHBVN and Anr.*, wherein the Commission has rightly observed as under:

“The Distribution Licensees have submitted that under net metering, the consumer is already getting power from two sources i.e. rooftop solar and

from the utility. In case open access consumer is allowed facility of net metering, he will be getting power from three sources and the accounting for energy shall become very complex. Further, the open access consumer is already getting cheaper power through the facility of open access for self-consumption. As there is a cap on the cumulative capacity of Roof Top Solar System that can be allowed to the eligible consumers, the facility of net metering be used by other consumers to get cheaper power for self-consumption.”

Further, the Commission observes that under the existing Regulations of 2021, the consumer has liberty to choose among the facility of Net Metering or Gross Metering and as the consumer herein has exercised the option of net metering under the regulations, as per regulation (3.5) he cannot be allowed to exercise the facility of open access simultaneously.

6.7 Accordingly, request of the petitioner for allowing open access in addition of opting for net metering is being devoid of merit in view of regulations as explained above and is rejected.

6.8 For the above reasons, the petition is disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 09.02.2023.

Date: 09/02/2023

(Naresh Sardana)

(R.K. Pachnanda)

Place: Panchkula

Member

Chairman