Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.108 OF 2011
AND
I.A. No.178 OF 2011

Dated:19th March, 2012

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the Matter Of

1. The Chairman
   Tamil Nadu Electricity Board
   (Now Tamil Nadu Generation and Distribution Corporation Ltd)
   144, Anna Salai
   Chennai-600 002

2. The Chief Engineer/Private Power Projects
   (Now Planning and Resource Centre)
   Tamil Nadu Electricity Board
   (Now Tamil Nadu Generation and Distribution Corporation Ltd)
   144, Anna Salai
   Chennai-600 002

…….. Appellant(s)

Versus

1. Sree Rengaraaj Power India (P) Ltd
   Plot No.MMI (Part-I)
   SIPCOT Industrial Growth Centre
   Perundurai-638 052
   Erode District,
   Tamilnadu
2. Tamil Nadu Electricity Regulatory Commission
   TIDCO Office Building,
   No.19A, Rukmini Lakshmipathy Salai
   Egmore, Chennai-600 008

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…… Respondent(s)

Counsel for the Appellant(s) :Mr. S. Vallinayagam

Counsel for the Respondent(s) :Mrs. N Shoba,
Mr. Sriram J. Thalapathy
Mr. V. Adhimoolam

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. The Tamil Nadu Electricity Board, through its Chief Engineer and Chairman, has filed this Appeal as against the impugned order passed by the Tamil Nadu State Commission dated 31.1.2011 granting the relief in favour of M/S. Sree Rengaraaj Power India (P) Ltd, the first Respondent herein. The short facts are as under:

   (i) M/S. Sree Rengaraaj Power India (P) Ltd (Respondent Company) is having a captive power generating plant with a capacity of 8 MW at Perundurai, Erode District, Tamilnadu. The Respondent Company was incorporated on 8.5.2003 with the object of generating electrical power by conventional and non conventional methods.

   (ii) The Appellant Board had issued approval for wheeling of power through its letter dated 12.12.2005 from 8 MW generator to their three sister concerns.

(iii) After the grant of approval for wheeling of 8 MW of power, the Respondent Company got another approval from the Appellant for the parallel operation of 8 MW DG sets through its letter dated 21.12.2005.

(iv) On 24.5.2007, the energy wheeling agreement was executed between the Appellant and the Respondent Company for a period of 03 years.

(v) The Respondent Company has been wheeling energy to its sister concerns since November, 2007. On 14.11.2009, the Respondent Company reported to the Appellant that even though it had the approval for wheeling of 8 MW power, the Company was not able to generate the said power and as the Respondent Company would be able to wheel only 6 MW of power, it requested the Appellant to reduce the approval for wheeling from 8 MW Power to 6 MW power.

(vi) However, the Appellant through its reply letter dated 17.12.2009, directed the Respondent Company to obtain the prior approval for the same from the State Regulatory Commission under the provisions of Intra State Open Access Regulations, 2005.

(vii) Accordingly, the Respondent Company filed a Petition before the State Commission in DRP No.3 of 2010

praying for the direction to the Tamil Nadu Electricity Board to revise the energy wheeling agreement from 8 MW power to 6 MW power and to reduce the wheeling and transmission charges to the extent of 6 MW of power wheeled.

(viii) The State Commission passed the final order after hearing the parties on 31.1.2011 granting the relief to the Respondent by treating the Respondent Company as Short Term Open Access Customer after rejecting the objection raised by the Tamil Nadu Electricity Board that the Respondent Company was a Long Term Open Access Customer.

(ix) Aggrieved over this, the present Appeal has been filed.

2. The Learned Counsel for the Appellant has challenged the impugned order on the following grounds:

(i) The State Commission wrongly held that the Respondent Company is Short Term Open Access Customer. The Energy Wheeling Agreement entered into between the Appellant and Respondent for three years cannot be held to be short term open access as it is contrary to Note-1 of clause 6 of ISOA Regulations (Intra State Open Access Regulations), 2005.

(ii) The State Commission was not right in declaring that the Respondent Company was a short term open access customer when the Respondent Company itself filed a Petition before the State Commission under Clause 12 (h) of the ISOA Regulations which deals with the Long Term Open Access Customers.

(iii) The State Commission has no jurisdiction to decide the application under Clause 13 (h) of ISOA Regulations, 2005 which deals with Short Term Open Access Customers.

(iv) At any rate, the State Commission was not justified in not awarding any compensation to the Appellant Board while granting the relief to the Respondent Company.

3. The crux of the submission of the Appellant is that the State Commission ought to have treated the Respondent Company as a Long Term Open Access Customer as per Note-1 of Clause 6 and as such the order impugned treating the Respondent Company as a Short Term Open Access Customer by invoking Clause 13 (h) of the ISOA Regulations, 2005 is wrong.

4. We have heard the Learned Counsel for both the Appellant and the Respondent Company and carefully considered their submissions.

5. Let us deal with the grounds raised by the Appellant one by one.

6. Clause 6 of the Intra State Open Access Regulation, 2005 provides for classification of customers as Short Term Open Access Customers and Long Term Open Access Customers.

7. As per Clause 6(i), a customer availing intra State Open Access for a period of one year or less shall be short term customer.

8. As per Clause 6 (ii), a customer availing intra State Open Access for a period of five years or more is a Long Term Open Access Customer.

9. As such this provision creates two types of open access customers namely Short Term Customers as well as the Long Term Customers. In other words, the Short Term Open Access Customer is one who avails himself of the intra State Open Access for a period of one year or less. The Long Term Open Access Customer is one who avails himself intra State Open Access for a period of five years or more. There is note-1 below the Regulations-6 which provides that the Open Access applicants intending to be such for a period of less than five years shall be considered under Short Term Open Access only when it is executed at a time for a period not exceeding one year. So, in between the two customers, as mentioned in the

above proviso, there is no other sub clause for one who enters into a intra State Wheeling Agreement for a period of more than one year and less than five years.

10. According to the Appellant, the proviso of clause 6(ii) should be read to mean that only when the Agreement entered into between the parties at a time for a period not exceeding one year, it should be treated as a Short Term Open Access and when it is executed at a time for a period exceeding one year shall be treated as Long Term Open Access Customer and as such the Agreement in question i.e. for 3 years entered into at a time must be treated as Long Term Agreement. This interpretation is wrong.

11. As quoted above, the clause 6(i) clearly provides that the Short Term Open Access Customer is availing intra State Open access for a period of one year or less. Similarly, Clause 6 (ii) would clearly define that a customer availing intra State Open Access for a period of five years or more is a Long Term Open Access Customer.

12. Thus, the reading of clause 6 in entirety would make it abundantly clear that any customer who would be availing intra State Open Access for a period of more than one year or less than five years shall be a Short Term Open Access Customer.

This point has been dealt with and decided by the State Commission in the impugned order which is as follows:

> "*5.4 Therefore, any customer who avails Open Access for less than five years has to be treated as a short term Open Access Customer. The Petitioner will, therefore, have to be treated as a short term Open Access customer and compensation has to be determined with reference to Clause 13 (h), which fastens liability on a customer, only if reserved capacity remains idle. In the case of the Petitioner, it is not disputed by the TNEB that the cost of the interconnection lines was borne by the Petitioner. Further, the Petitioner has been assessed to demand charges for the entire sanctioned demand. Therefore, the question of compensating the TNEB does not apply in the instant case.*
>
> *6.* ***Direction***
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> *In view of the findings of the Commission in para-5 above, the Petitioner has to be treated as a short term Open Access customer as per the Intra State Open Access Regulations, 2005 of TNERC for the period of the agreement from May, 2007 to May, 2010. The relief claimed by the Petitioner is limited to recovery of transmission and wheeling charges for 6 MW as against 8 MW from 14.11.2009. The relief is granted".*

13. As pointed out by the Learned Counsel for the Respondent Company, the very same issue had already been raised before this Tribunal and this Tribunal in Appeal No.113 and 115/2010, has decided the issue as against the Appellant by giving appropriate interpretation of clause 6(i), 6(ii) and the Note as well as 12 (h) and 13(h) of the Regulations.

14. Let us now refer to the discussions made by this Tribunal in the other matter namely Appeal No.113 and 115 of 2010 dated 01.03.2011 which is as under:

> *"20. Anatomized, this provision creates two types of open access customers, namely, short term and long term. The short term open access customer is he who avails himself or itself of intra state open access for a period of one year or less. When this period comes to the extent of five years or more, then that customer is called a long term intra state open access customer. In between the two customers, there is no other sub Clause for one who enters into an intra state wheeling agreement for a period of more than one year and less than five years. There is Note 1 below the Regulation 6 which provides that the open access applicants intending to be such for a period of less than five years and more than a year shall be considered under short term open access only (emphasis ours) and shall be allowed at time for a period not exceeding one year. It is not in dispute that in both the cases agreement was for a period of three years and the provision in Note 1, if applied, both the agreements would come under a short term intra state open access wheeling agreement. The argument of the learned counsel for the Appellant that if it was the intention of the Respondent No.1 to enter into a short term agreement for a period of one year or less, then obviously the first Respondent would not have made deposit of Rs. 50,000/- towards wheeling charges; and more importantly the Respondent No.1 itself did not seek for any relief under Clause 13 (h); on the contrary it adhered to Clauses (f) & (h) of Clause 12 of the agreement. We are unable to accept the submission. When the Regulation itself makes it clear that the agreements in question come under the category of intra state short term open access agreement, then it is*

immaterial what the parties had intended for. The law settled is that where the agreement contradicts the law or is at variance with the latter, it is the latter that has to prevail and all disputes have to be adjudicated upon in terms of the law so declared. There can be no quarrel to the legal proposition that statutory rules and regulations have the force of law; consequently, the agreements which are at variance with the delegated legislation are unenforceable. Therefore, non-invoking of Cause 6 of the agreement or Clause 13 (h) of the agreement by the Respondent No.1 or deposit of Rs. 50,000/- in each of the two is of no consequence. It was the submission of the Appellant that for a short term customer it was not necessary for the first Respondent to go to the Commission as SLDC was competent enough for the purpose. This is not a material consideration for us. With reference to sub Clauses (c) and (e) of Clause 12 of the Regulations, 2005 it is submitted that because it was a long term agreement the modalities in details were worked out, namely, capacity needed, point of injection, point of drawal, duration of availing open access etc. etc and the duty was cast on the nodal agencies to issue necessary guidelines and to intimate the applicant whether the application should be allowed or not. Further, strengthening of the system was essential before approval of the intra state open access wheeling agreement and all these modalities are not required in case an applicant wants to be a short term open access customer. Since these procedures were adopted in terms of Clause 12 which culminates in Clause (h), it is obvious that it was a long term open access agreement. To our mind, this is begging the question. If the law does not require of the nodal agency to examine the strength of the system and go through the details of the procedure because of the applicant coming under the law as a short term open access customer, then it cannot be said that merely because the procedures dealt with in Clause 12 were

gone through, the applicant would be as styled as long term open access customer as it will be contrary to the position of law. Learned counsel for the Appellant too much harps on sub Clause (h) of Clause 12 and compares it with sub Clause (h) of Clause 13 which we reproduced hereunder:

"Clause 12 (h) of the Intra State open access regulation reads as follows:

> *"A long term open customer shall not relinquish or transfer his rights and obligations specified in the open access agreement without prior approval of the commission. The relinquishment or transfer of rights and obligations shall be subject to payment of compensation as may be determined by the Commission."*

The Clause 13 (h) of the Intra State Open access regulation reads as follows:

> *"A short term open access customer who has surrendered the reserved capacity or whose reserved capacity has been reduced or cancelled shall bear the full transmission or distribution charges as the case may be and the scheduling and system operating charges based on the original reserved capacity till such time it is not utilized by the utility or allotted to any other open access customer and limited to the period for which a capacity was reserved."*

21. If a customer is a short term open access customer as the first Respondent is, then, willy nilly, sub-Clause (h) of Clause 13 of the agreement has to be invoked. The party or the Tribunal cannot alter the situation of the law. It is not for the Tribunal to comment that the law is vague or

unjust. It must not comment what the law should be. It is unable to say that the intention of the parties is so clear that the law has to take a back seat. …….

22. Accordingly, we do not find any material infirmity in the orders complained of. The Respondent No.2 upon examination of the agreements vis-a-vis the Regulations correctly held that Clause 13 of the Regulations would apply to the Respondent No.1 in terms of the provision contained in Clause 6 thereof."

15. The ratio decided as above, would squarely apply to this case also.

16. The Learned Counsel for the Appellant would submit that the Commission has no jurisdiction to decide the application under Clause 13 (h) of ISOA Regulations, 2005.

17. According to the Appellant, the jurisdiction to reduce the reserved capacity of a Short Term Open Access Customer when such a Short Term Open Access Customer under utilizes the reserved capacity under Clause 13 (h) vests with the State Load Dispatch Centre only and not with the State Commission. This contention does not deserve acceptance.

18. There are Regulations framed by the State Commission which empowers the Commission to invoke the inherent powers of the Commission to make such orders as may be necessary to meet the ends of justice. They also provide that the Regulations already available shall not bar the State

Commission from adopting any other procedure which is at variance with any of the provisions of these Regulations and if the State Commission, in view of the reasons to be recorded, deems it necessary to pass appropriate orders by adopting the different procedure, it can pass suitable orders. The said inherent powers have been conferred with the State Commission under Clause 24 of the Regulation. Let us quote the same:

"25. Savings

(1) Nothing contained in these Regulations shall invalidate the Commission's powers to exempt any Licensee or customer or person engaged in generation or a person whose premises are situated within the area of supply of a Distribution Licensee from any or all of the conditions for availing open access, whether before or after the notification of these Regulations:

Provided that the Commission shall, as far as practicable, give reasonable opportunity to any interested or affected party to make representations before granting such exemption

(2) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary to meet the ends of justice or to prevent abuses of the process of the Commission.

(3) Nothing in these Regulations shall bar the Commission from adopting in conformity with the provisions of the Act a procedure, which is at

variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.

(4) Nothing in these Regulations shall, expressly or impliedly, bar the Commission dealing with any matter or exercising any power or function under the Act for which no Regulations have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit".

19. These Regulations through the saving Clause would empower the State Commission to pass appropriate orders by invoking the procedure at variance with any of the provisions of the Regulations or even in the absence of the relevant Regulations having been framed.

20. Therefore, the State Commission has correctly concluded that the Respondent Company was a Short Term Open Access Customer by correctly interpreting the Clause 6(i) and 6(ii) of the Regulations and granted the relief to it by giving valid reasons, instead of directing the Respondent Company to approach State Load Dispatch Centre under Clause 13 (h).

21. The Learned Counsel for the Appellant is aggrieved over the failure to award the compensation to the Appellant Board while granting the relief to the Respondent Company. This contention also is untenable as in the instant case, the State

Commission has given reasons as to why there cannot be any order for compensation.

22. The State Commission while rejecting the claim of the Appellant regarding the compensation, has made the following observation which is as follows:

> *"5.4….The Petitioner will, therefore, have to be treated as a short term open access customer and compensation has to be determined with reference to clause 13 (h), which fastens liability on a customer, only if reserved capacity remains idle. In the case of the petitioner, it is not disputed by the TNEB that the cost of the interconnection lines was borne by the petitioner. Further, the petitioner has been assessed to demand charges for the entire sanctioned demand. Therefore, the question of compensating the TNEB does not apply in the instant case".*

23. In view of the above reasons given by the State Commission in the impugned order and in the light of the fact that when the reserved capacity was not provided by the Appellant to the Respondent Company exclusively, the question of compensation does not arise. As such there is no infirmity in the impugned order.

24. **Summary of Our Findings**:

(i) The Respondent No.1 having entered into an Energy Wheeling Agreement with the Appellant for a period of 3 years has to be treated as the Short Term Open Access Customer in terms of the Intra State Open Access Regulations, 2005 in spite of it having deposited the registration fee and agreement fee applicable to Long Term Open Access Customers at the time of seeking the Open Access.

(ii) The request of the Respondent No.1 for reducing the reserved capacity of wheeling has to be governed by Clause 13(h) of the Intra-State Open Access Regulation applicable to Short Term Open Access customers.

(iii) The State Commission has correctly utilised its inherent powers to decide the matter regarding reduction in reserved capacity of the Respondent No.1.

(iv) There is no infirmity in finding of the State Commission that no compensation is payable to the Appellant for reduction in reserve capacity by the Respondent No.1.

25. In view of our above findings, we do not find any merit in the Appeal. Consequently, the Appeal is dismissed. However, there is no order as to costs.

Pronounced in Open Court on 19th March, 2012.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:19th Mar, 2012

√Reportable/~~Not Reportable~~