

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 3 OF 2014**

**Dated: 1<sup>st</sup> July, 2014**

**Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

**IN THE MATTER OF**

Shree Cement Limited,  
Bangur Nagar Post Box No. 33,  
Beawar-305901, Rajasthan

.... Appellant/Petitioner

***VERSUS***

1. Rajasthan Electricity Regulatory Commission  
Vidyut Viniyamak Bhawan, Sahakar Marg,  
Near State Motor Garage,  
Jaipur-302 005

2. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.,  
Vidyut Bhawan, Jyoti Nagar,  
Janpath, Jaipur-302001  
Rajasthan

.... Respondents

Counsel for the Appellant(s) ... Mr. M.G. Ramachandran  
Ms. Swagatika Sahoo  
Ms. Anushree Bardhan  
Ms. Poorva Saigal

Counsel for the Respondent(s) ... Mr. C.K. Rai for R-1  
Mr. Pradeep Misra  
Mr. Suraj Singh for R-2

## **JUDGMENT**

### **PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**

1. This Appeal has been filed by M/s Shree Cement Ltd. (SCL), Appellant-Petitioner under Section 111 of the Electricity Act, 2003 (in short, **'The Act'**) against the impugned order, dated 29.10.2013, passed by the Rajasthan Electricity Regulatory Commission (in short, the **'State Commission'**) in Petition No. 329/2012, for adjudication of dispute under Section 86(1)(f) of the Act, and for direction to Rajasthan Rajya Vidyut Prasaran Nigam Ltd.-Respondent No.2 for adjustment/refund of excess intra-state transmission charges collected by the Respondent No.2 towards transmission of power by the petitioner from its Captive Power Plants for the period 1.4.2011 to 26.12.2011.

2. The said petition has been dismissed by the State Commission by the impugned order, dated 29.10.2013 on the ground that it has been the conscious decision of the State Commission not to adjust transmission charges for short term open access transmissions from retrospective date, despite the fact that the charges prior to final determination were provisional. The State Commission has taken this decision after considering the CERC Regulations and also the nature of short term transaction, which also includes transactions through power exchange, which gets finalized on daily basis.

3. The CERC Regulations also envisage that short term open excess charges should not be subject to retrospective adjustment and CERC Regulations do not envisage any such restriction in respect of long term open access transactions. The State Commission has also observed that short term open access users also include power exchange users where transaction is in the nature of stock exchange, which gets completed on a daily basis as mentioned by the Respondent No.2 in its response.

4. By the impugned order, the State Commission has clearly held that tariff orders cannot be reviewed or modified at this stage and petition under Section 86(1)(f) of the Act, has no force and accordingly, disallowed the adjustment of the extra transmission charges paid by the Appellant-petitioner to the Respondent No.2, pertaining to the inter-state sale of power through bilateral contracts and through collective transactions in Power Exchange from the Captive Power Plants of the Appellant-petitioner at Beawar & Ras for the period 1.4.2011 to 26.12.2011 and also other periods as per the provisional order dated 31.3.2011 and the actual charges payable as per the final transmission charges applicable for the year 2011-12 determined by the State Commission vide its order, dated 23.12.2011.

5. The Appellant-Petitioner, M/s Shree Cement Ltd., is a Captive Power Plant owner, Respondent No.1 is the State Electricity Regulatory Commission and the Respondent No.2 is the Distribution Licensee.

6. The matter in dispute relates to the adjustment required to be given for the excess transmission charges collected by the Respondent No.2, based on the provisional tariff order, passed by the State Commission after determination of final tariff order.

7. The relevant facts for deciding this Appeal are as under:

- (a) that M/s Shree Cement Ltd. is the Appellant-Petitioner herein and is engaged in manufacturing of cement and has captive power plant at Beawar and Ras. The Appellant-petitioner is selling power on inter-state basis through bilateral contracts as well as through the power exchange. It has supplied power on inter-state basis from 1.4.2011 to 26.12.2011 from its Captive Power Plant (CPP) which is connected to Respondent No.2/Distribution Licensee's network at 220 kV voltage level.

- (b) that the Appellant-petitioner filed a petition for adjudication of dispute with Rajasthan Rajya Vidyut Prasaran Nigam Ltd., Respondent No.2 herein, under Section 86(1)(f) of the Act, regarding adjustment/refund of excess intra-state transmission charges collected by the respondent/Distribution Licensee towards transmission of power by the petitioner from its Captive Power Plants for the period 1.4.2011 to 26.12.2011.
- (c) that the Respondent No.2 filed a petition before the State Commission, being Petition No. 250/2011, for determination of tariff for FY 2011-12.
- (d) that the State Commission has passed a provisional order, dated 31.3.2011, and allowed transmission tariff and transmission charge for open access consumers and power exchange transaction on a provisional basis to the extent of 50% of the tariff sought in the petition filed by Respondent No. 2 and SLDC charges per month to the extent of 80% of charge claimed in the petition filed by Respondent No 2. The State Commission further directed that the transmission tariff and SLDC charges would be adjusted when the same is finalized for the FY 2011-12. The relevant extract of the order, dated 31.3.2011. The relevant extract of the provisional tariff order, dated 31.3.2011 for FY 2011-12, in Petition No.250/2011, is as under:-

*"5. The Commission observes that the petitioned Transmission Tariff, with true-up, is more than double of what was allowed for the FY 2010-11. This would require detailed scrutiny for such an abnormal increase. The Commission, therefore, considers it appropriate to allow transmission tariff and transmission charges for open access consumers and power exchange transactions on a provisional basis to the extent of 50% of the tariff sought in the petition and the SLDC charges per month are allowed to the extent of 80% of charges claimed in the petition as under, which shall be valid upto 30th June 2011:*

.....

*6. The transmission tariff and SLDC charges shall be subject to adjustment when the same are finalized for the FY 2011-12."*

- (e) that the State Commission, vide provisional tariff order, dated 31.3.2011, allowed transmission charges and SLDC charges on provisional basis and making it explicitly clear that the transmission tariff shall be subject to adjustment when the same are finalized for the year 2011-12.
- (f) that in pursuance of provisional tariff order, dated 31.3.2011, the Respondent No.2-Distribution Licensee, charged the transmission charges for the State transmission network, as per the specified provisional tariff till 26.12.2011.
- (g) that, thereafter, the State Commission vide final tariff order, dated 23.12.2011, determined /approved transmission charges finally. The relevant para of which, final tariff order, dated 23.12.2011, is reproduced, as under:
- "216. Commission vide order dated 30.05.2011 had specified transmission tariff and SLDC Charges for FY 2011-12 on provisional basis subject to adjustment when the transmission tariff and SLDC charges are determined. The net revenue surplus/shortfall sustained by RVPN shall be adjusted in next three months from the date of this order."*
- (h) that despite the specific directions contained in the order, dated 23.12.2011, the Respondent No.2-Distribution Licensee, did not provide any adjustment to the Appellant. The Appellant, vide its letter dated 8.2.2012, requested the Respondent No.2 for the adjustment of transmission charges on inter-state transmission amounting to Rs.6289074/-.
- (i) that when the request of the Appellant-petitioner was not considered, the Appellant filed the impugned petition, being petition no. 329/2012 before the State Commission seeking adjudication of the dispute as mentioned above. The State Commission by the impugned order, dated 29.10.2013, as detailed above, has dismissed the petition of the Appellant-petitioner, observing that a holistic consideration of the clear principle laid down in MYT order, dated 1.8.2009 from the

methodology indicated in FY 2010-11, as well as in FY 2011-12 in respect of adjustment for short term open access charges, it clearly emerges that tariff order does not envisage retrospective adjustment in respect of short term open access transmission charges.

- (j) that after the determination of final tariff, vide order, dated 23.12.2011 of the State Commission, the Respondent No.2-Distribution Licensee, adjusted the transmission charges on 2.2.2012 paid for intra-state open access by the Appellant but did not do so for interstate power exchange transactions.
- (k) that, then on 8.2.2012, the Appellant requested the Respondent No.2 for adjustment of transmission charges on inter-state transmission amounting to Rs.6289074/-. It was on 2.3.2012 when the Appellant again requested the Respondent No.2 for refund of the excess transmission charges on inter-state transmission.
- (l) that the Respondent No.2, on 4.5.2012, communicated that 'the matter has been examined and it is observed that retrospective revision of transmission charges for short term bilateral open access transmission and collective power exchange transactions are not permissible as per RERC order, dated 23.12.2011' (Final Tariff Order).
- (m) that the Appellant filed petition no.329/2012 before the State commission for adjudication of dispute under Section 86(1)(f) of the Act, and for direction to Respondent No. 2 to pay the excess amount charged, which petition has been dismissed by the State Commission by the impugned order, dated 29.10.2013, which is under challenge before this Appellate Tribunal in this Appeal.

8. The following contentions were made on behalf of the Appellant-petitioner before the State Commission:

- (a) that in the final tariff order, dated 23.12.2011, the State Commission had directed for adjustment of revenue surplus/short fall sustained by the Respondent No.2 for next three months from the date of the order.
- (b) that Regulation 16(3) of CERC (Open Access in Inter-State Transmission) Regulations, 2008, provides as under:

*(3) The intra-State entities shall pay the transmission charges for use of the State network as fixed by the respective State Commission in addition to the charges specified under clauses (1) and (2):*

*Provided that in case the State Commission has not determined the transmission charges, the charges for use of respective State network shall be payable at the rate of Rs.80/MWh for the electricity transmitted:*

*Provided further that non-fixation of the transmission charges by the State Commission for use of the State network shall not be a ground for refusal of short-term open access:*

*Provided also that the transmission charges payable for use of the State network shall be conveyed to the Regional Load Despatch Centre concerned who shall display these rates on its web site:*

*Provided also that the transmission charges payable for use of the State network shall not be revised retrospectively."*

- (c) that the above Regulation makes it clear that the transmission charges to be paid by the intra-state entities for use of State Transmission system would be as fixed by the respective State Commission and the transmission charges once determined cannot be revised retrospectively. Any tariff determined on an ad-hoc basis and adjusted thereafter does not mean a revision of tariff retrospectively within the meaning of the last proviso to Regulation 16(3) of CERC (Open Access in inter-State Transmission) Regulations, 2008. The Appellant-petitioner is not seeking retrospective revision/application of the transmission charges, but it has only prayed for refund of transmission charges collected by the Respondent No.2, which

are in excess of the transmission charges which were actually determined for the relevant period.

- (d) that the well settled principle is that giving adjustment between the provisional and final tariff is not a retrospective levy as held in case of M/s GD Ferro Alloys (P) Ltd vs Delhi Electricity Supply Undertaking [AIR 1997 Delhi 17], Delhi Cloth Mills Limited vs Rajasthan State Electricity Board [AIR 1984 Rajasthan 131] and Chhattisgarh Power Distribution Company Ltd vs Chhattisgarh Biomass Energy Developers Association vide judgment, dated 8.2.2011, in Appeal no. 164/2010 of this Appellate Tribunal.
- (e) that the provisional transmission charges were allowed vide provisional tariff order, dated 31.3.2011, however, the final transmission charges were determined by the State Commission for the same period i.e. FY 2011-12 vide its final tariff order, dated 23.12.2011.
- (f) that the provisional tariff order, dated 31.3.2011, making it explicitly clear that the transmission tariff shall be subject to adjustment when the same are finalized for the year 2011-12. Hence, the determination of tariff by the State Commission vide final tariff order, dated 23.12.2011, is not a case of revision of tariff with retrospective effect.
- (g) that the Respondent No.2 had provided adjustment on transmission charges for intra-state open access which is quite arbitrary on part of the Respondent No.2 to provide adjustment on one transaction and denying the same on the other.
- (h) that the Respondent No.2 wants to confuse the entire issue by selectively referring to the MYT order, dated 1.8.2009 which order itself speaks about the adjustment of charges after determination of final tariff, prospective effect referred to in the

order is completely different from adjusting the final tariff against the provisional tariff.

- (i) that any dispute on the issue of transmission charges being under Section 86(1)(a) & (c) of Electricity Act, 2003 relating to inter-state network has to be adjudicated under Section 86(1)(f) of the Act.

9. **Per-contra**, the following contentions were made on behalf of the Respondent No.2 - Distribution Licensee before the State Commission:

- (a) that the Appellant-petitioner has not filed any supporting evidence regarding selling power on inter-state basis from 1.4.2011 to 26.12.2011 from its CPP located at Beawar and Ras.
- (b) that as per clause 13.1.4 of the CERC approved procedure for scheduling of Short Term Open Access transactions, the transmission charges for the use of the State network shall be in Rs/MWh, as determined by the respective State Commission and the same shall be intimated to RLDCs by concerned STU. Accordingly, the Respondent No.2-Distribution Licensee had sent and faxed the State Commission's tariff orders to NRLDC and India Energy Exchange.
- (c) that CERC has notified CERC (Open Access in Inter-State Transmission) Regulations, 2008, which are very much in existence and the same are applicable in case of inter-state Short Term Open Access transactions, as also admitted by the Appellant-petitioner. In the last proviso to Regulation 16(3) of the said Regulations, it is clearly mentioned that the transmission charges payable for use of the State network shall not be revised retrospectively.

- (d) that the State Commission at para 217 of its order, dated 23.12.2011, vide which transmission tariff for FY 2011-12 was approved noted that the other issues already decided in MYT order, dated 1.8.2009, shall continue to remain in force. The State Commission at para 4.19.8 of the order, dated 1.8.2009, observed as under:

*"4.19.8 The transmission charges as determined by the Commission under this Order for short term bilateral open access transactions and collective open access transactions through power exchange shall have prospective effect i.e. shall be applicable from the date of issuance of this Order."*

The Commission's order, dated 1.8.2009, is valid for the whole MYT period i.e. from FY 2010 to 2014.

- (e) that in the instant case, it is retrospective revision because in the Regulation 16(3) of CERC (Open Access in inter-State Transmission) Regulations, 2008, there is no proviso which specifies revision in case of finalization of tariff. Similarly, there is no exclusion in Regulation 16(3) which permits revision in case of finalization of tariff. In view of absence of any such provision/exclusion, the Regulation 16(3) stops from revision with retrospective effect.
- (f) that power exchange transactions and other short term transactions are of the nature of per day basis transactions, similar to stock exchange transactions, which are transacted on daily basis. Such types of transactions are completed on the same day and cannot be reopened later.

10. The learned State Commission, after considering the rival submissions of the parties and while passing the impugned order dated 29.10.2013, has observed as under:

*27. It could be seen that users of transmission system were put in three categories in the said order based on the nature of the use and it was specifically mentioned that the provisional tariff would be subject to adjustment when tariff is finalized in respect of only two categories that is transmission tariff charged on monthly basis and SLDC charges, leaving aside short term open access customers from the purview of adjustment. It may*

be noted that order uses the term transmission tariff for charges to be levied on monthly basis whereas words transmission charges have been used for short term open access customer.

28. The tariff order for the said period was finalized by order dated 16.9.2010 and in para 6 and 7 of the said order the issue of adjustment of provisional tariff was dealt with as under:

'6. The Commission vide order dated 31.3.2010 had determined the applicable transmission tariff and SLDC charges for FY 11 on provisional basis subject to adjustment when the transmission tariff and SLDC charges are determined. The net revenue shortfall sustained by RVPNL shall be adjusted in next four months from the date of issue of this order.

7. The other issues already decided in MYT order dated 1.8.2009 shall continue to remain in force.'

.....

33. It could be seen that apart from the rates being different, the only difference in the above quoted table of provisional order for FY 11-12 with FY 10-11 is that short term open access users have been further split into two categories, one being the power exchange users and the second being the other short term open access users and the provisional tariff for these two categories have been designated in paise/kWh and in Rs/kWh/day, as the case may be."

11. We have heard Mr. M. G. Ramachandran, the learned counsel for the Appellant-Petitioner and Mr. C.K. Rai & Mr. Pradeep Misra, the learned counsel for the Respondents. We have deeply gone through the evidence and other material available on record including the impugned order and written arguments filed by the rival parties.

12. The only **issue** arising for our consideration is **whether transmission charges in respect of State Network used by the Appellant for interstate transmission of power under short term open access, can be revised after the final tariff has been determined?**

13. **The following contentions have been raised on behalf of the Appellant-Petitioner:**

- (a) that the State Commission erred in not giving adjustments required to be given for the excess transmission charges collected by the Respondent No.2/Distribution Licensee, based

on the provisional tariff order passed by the State Commission after the determination of final tariff by the order of the State Commission.

- (b) that the State Commission has wrongly disallowed the adjustment of extra transmission charges paid by the Appellant to the Respondent No.2/Distribution Licensee holding that a holistic consideration of the clear principle laid down in MYT order, dated 1.8.2009, from the methodology indicated in FY 2010-11, as well as in FY 2011-12 in respect of adjustment for short term open access charges, it clearly emerges that tariff order does not envisage retrospective adjustment in respect of short term open access transmission charges because short term open access users also include power exchange users, where transaction is in the nature of stock exchange, which gets completed on a daily basis and further last proviso to Regulation 16(3) of CERC (Open Access in inter-State Transmission) Regulations, 2008, also envisages that short term open access charges shall not be subject to retrospective adjustment.
- (c) that the impugned order, passed by the State Commission, is patently erroneous and ex-facie illegal for the following reasons:
- (i) that the adjustment of provisional tariff to final tariff and refund of excess amount collected under the provisional tariff to the concerned persons, such as the Appellant in the present case, cannot be said to be retrospective tariff application or redetermination.
- (ii) that in the earlier provisional tariff order, dated 31.3.2011, the State Commission had itself directed for such adjustment when the final order is passed and after the passing of final tariff order, dated 23.12.2011, now, the same needs to be given effect to because it is the

implementation of the provisional order of the State Commission, which does not amount to any retrospective application.

- (iii) that the adjustment between the provisional and final determined tariff, does not tantamount to re-determination within the scope of Regulation 16 of the CERC (Open Access in inter-State Transmission) Regulations, 2008. The fixation of provisional tariff with stipulation that the same shall be adjusted in the final tariff, is an accommodation shown to Respondent No.2/Distribution Licensee by giving an interim order in terms of Section 94 of the 2003 Act and cannot be said to be a determination of tariff under Section 62 of the Act.
- (iv) that the State Commission's interpretation of Regulation 16 would result into an anomaly namely – that there is no sanctity to the fixation of provisional tariff and the same being arbitrary and capricious namely the tariff being decided without considering the revenue requirements of the licensee. Where a licensee has been given higher provisional tariff initially, it would recover higher unintended amount than requisite tariff and where the licensee is given a lower amount of provisional tariff he will suffer loss. This can never be the intention of the Act or the Regulations.
- (v) that the rejection of the Appellant's claim, by the State Commission, is contrary to the direction contained in the final tariff order, dated 23.12.2011, which specifically provides for *“The net revenue surplus/shortfall sustained by RVPN shall be adjusted in next three months from the date of this order.”*

- (vi) that the Multi-Year Tariff order, dated 1.8.2009, for the period 2010-14, does not prohibit the adjustment in respect of short term open access transmission charges collected provisionally. The order, dated 1.8.2009, in fact provides for the adjustment of charges after determination of final tariff.
- (vii) that there is no distinction between 'Tariff' and 'Charges' and the said words are used interchangeably in various Regulations, orders etc including the State Commission. The State Commission itself has considered the tariff and charges interchangeably for a specific category in its provisional and final orders for the same tariff period. At para 5 of the provisional tariff order, dated 31.3.2011, the State commission for short term open access and exchange transactions, has used the nomenclature of 'Tariff'. The same has been the trend in previous tariff orders also.
- (viii) that the distinction made by the State Commission between intra-state and inter-state open access for giving adjustment is wrong.
- (ix) that Regulation 103 of the RERC (Terms & Conditions of Tariff) Regulations, itself speaks about allocation of transmission charges stating that the transmission system users shall share the total transmission cost in such proportion as the transmission capacity rights of each transmission system users bears to the total transmission capacity rights allocate in the intra-state transmission system. Thus, the transmission charges determined, have to be uniformly adjusted for the users of the system, be it short term or long term. Excessive recovery over and above the determined tariff is neither envisaged in the Act nor in the Regulations.

- (d) the main grievance of the Appellant, who has captive power plant at Beawar & Ras is that after the determination of the final tariff by the State Commission's order, dated 23.12.2011, Respondent No.2/Distribution Licensee, had adjusted the transmission charges on 2.2.2012, paid for intra-state open access by the Appellant, but the Respondent No.2/Distribution Licensee did not do so for the inter-state power exchange transactions. According to the Appellant, the State Commission has committed illegality in not adjusting the transmission charges for short term open access transactions from retrospective date despite the fact that the charges prior to the final determination were provisional.

14. **Per-contra**, Mr. Pradeep Misra, the learned counsel for the Respondent No.2, has filed a short written submission and submitted:

- (a) that the claim made by the Appellant is contrary to the CERC (Open Access in Inter-State Transmission)(Amendment) Regulations, 2009 and the said claim has rightly been rejected in the impugned order of the State Commission.
- (b) that the short term open access and sale of power exchange are completed on day to day basis and no prejudice has been caused to Appellant, hence this Appeal is not maintainable.
- (c) that as per CERC (Open Access in Inter-State Transmission) (Amendment) Regulations, 2009, the dispute raised by the Appellant before the State Commission was not maintainable. The CERC Regulations clearly prohibit revision of short term open access charges and the dispute was not arbitrable by the State Commission.
- (d) that the power exchange transactions and other short term transactions are in the nature of per day basis transactions,

similar to stock exchange transactions, which are transacted on daily basis. Such types of transactions are completed on the same day and cannot be reopened later.

- (e) that the State Commission, vide tariff order, dated 31.3.2010, allowed transmission charges for short term open access customer as 30 paise/kWh. Further, the State Commission, vide tariff order, dated 16.9.2010, allowed transmission tariff for collective power exchange transactions as 27 paise/kWh. Thus, previously also transmission charges, from retrospective effect, were not considered.
- (f) that the transmission charges paid by the Appellant for using State Transmission network for inter-state transmission power under short term open access, as per the provisional rate determined by the State Commission, cannot be revised for the following reasons:
  - (i) that the CERC has framed CERC (Open Access in Inter-State Transmission) Regulations, 2008, which were notified on 25.1.2008, and applicable to the energy transfer schedules commencing on or after 1.4.2008, for use of transmission lines or associated facilities with such lines on Inter-State transmission system. Regulation 16 of the said Regulations, 2008 provides that transmission charges would be payable as per the rate specified therein. Under Sub-Regulation 3, it is further provided that Inter-State entities shall additionally pay transmission charges for use of State network as determined by the respective State Commission. It is further provided that transmission charges shall not be revised with retrospective effect.
  - (ii) that the CERC again, vide notification, dated 20.5.2009, amended the said Open Access Regulations, 2008, which

will be applicable for short term open access, received Nodal Agency on or after 15.6.2009. Thus, the amended Regulation makes it clear that transmission charges paid by the Appellant for use of transmission network for Inter-State transmission, under short term open access, is not revisable.

- (iii) that the CERC, vide notification, dated 20.5.2009, in order to amend the CERC (Open Access in Inter-State Transmission) Regulations, 2008, has published the new Regulations called '*CERC (Open Access in Inter-State Transmission)(Amendment) Regulations, 2009*'. By the 2009 Amendment, Regulation 16 of the 2008 Regulations, has been amended, the last proviso to Regulation 16(3), as amended, provides as under:

*"Provided also that the transmission charges payable for use of the State network shall not be revised retrospectively."*

- (iv) that the **Redressal Mechanism** by making amendment of Regulation 16, has been provided as follows:-

*"Redressal Mechanism*

*26. All disputes arising under these regulations shall be decided by the Commission based on an application made by the person aggrieved."*

15. We have deeply considered and pondered over the rival submissions made by the parties. The Appellant-Petitioner, as we have mentioned above, filed Petition No. 329/2012, for adjudication of dispute under Section 86(1)(f) of the Act, and also for seeking direction to the Respondent No.2/Distribution Licensee, for adjustment/refund of excess intra-state transmission charges collected by the Respondent No.2 towards transmission of power by the petitioner from its Captive Power Plants for the period 1.4.2011 to 26.12.2011. The said petition has been dismissed by the State Commission by the impugned order, dated 29.10.2013, after considering different aspects of the matter on the ground that it has been

the conscious decision of the State Commission not to adjust transmission charges for short term open access transmissions from retrospective date, despite the fact that the charges, prior to final determination, were provisional. The learned State Commission has taken the said view after considering the CERC (Open Access in Inter-State Transmission) Regulations, 2008, including Amendment in May, 2009 and the nature of short term transaction, which also includes transactions that took place between the Appellant-petitioner and the Respondent No.2/Distribution Licensee, which also included transactions through power exchange, which gets finalized on daily basis. It is admittedly a case of transmission charges where the Appellant-petitioner is seeking adjustment of refund of access intra-state transmission charges collected by the Respondent No.2/Distribution Licensee for short term open access transmission transaction by the Appellant-Petitioner from its CPP for the aforesaid period.

16. After going through the matter in depth, we find that the said CERC (Open Access in Inter-State Transmission) Regulations, 2008, particularly, the last proviso to Regulation 16(3), prohibit retrospective adjustment or application of short term open access transmission charges whereas, the said regulations do not envisage any such restriction in respect of long term open access transactions. We may note that the short term open access users also include power exchange users where transaction is in the nature of stock exchange, which gets completed on a daily basis.

17. The learned State Commission while passing the impugned order, clearly mentioned that tariff orders cannot be revised or modified at this stage in a petition like the present one under Section 86(1)(f) of the Electricity Act, 2003. Thus, the State Commission, by the impugned order, disallowed the adjustment of the extra transmission charges paid by the Appellant-petitioner to the Respondent No.2/distribution licensee, for short term open access transactions through bilateral contracts and through collective transactions in Power Exchange from the Captive Power Plants of

the Appellant-petitioner at Beawar & Ras for the period 1.4.2011 to 26.12.2011. The Appellant-petitioner, has himself admitted that he is selling power on inter-state basis through bilateral contracts as well as through the power exchange. He has supplied power on inter-state basis from 1.4.2011 to 26.12.2011 from its Captive Power Plant (CPP) which is connected to Respondent No.2/Distribution Licensee's network at 220 kV voltage level.

18. A perusal of Section 86(1)(f) of the Electricity Act, 2003, which deals with functions of the State Commission, authorizes or empowers the State Commission to adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration. Mr. Pradeep Misra, the learned counsel for the Respondent No.2/distribution licensee, has vehemently argued that the claim made by the Appellant is contrary to CERC (Open Access in Inter-State Transmission)(Amendment) Regulations, 2009, has rightly been rejected in the impugned order by the State Commission because short term open access and sale of power exchange are completed on day to day basis and no prejudice has been caused to Appellant-Petitioner. Mr. Misra has rightly pointed out that as per CERC (Open Access in Inter-State Transmission)(Amendment) Regulations, 2009, the dispute raised by the Appellant before the State Commission, was not maintainable because these regulations clearly prohibit revision of short term open access charges in the light of last proviso to Regulation 16(3) and the said dispute was not arbitrable by the State Commission.

19. We find ourselves in agreement with the contentions or submissions raised by Mr. Pradeep Misra, on behalf of the Respondent No.2/Distribution Licensee, and also observe that the power exchange transactions and other short term transactions are of the nature of per day basis transactions, similar to stock exchange transactions, which are transacted on daily basis. Such types of transactions are completed on the same day and cannot be reopened later. In view of Regulation 16(3) of CERC (Open Access in Inter-State Transmission)(Amendment) Regulations,

2009, it has clearly provided that intra-State entities shall pay the transmission charges for use of the State network as determined by the State Commission and the said transmission charges shall not be revised retrospectively. Further, Regulation 16 of the CERC (Open Access in Inter-State Transmission) Regulations, 2008, further provides that transmission charges would be payable as per the rate specified therein. The CERC (Open Access in Inter-State Transmission) Regulations, 2008, as amended vide notification, dated 20.5.2009, will be applicable for short term open access, and as a result of the amended Regulation 16, as made in May, 2009, the transmission charges paid by the Appellant-petitioner for use of transmission network for Inter-State transmission, under short term open access, are not revisable. This amended Regulation 16(3) clearly mentions that the transmission charges payable for use of the State network shall not be revised retrospectively. The Regulation 26 further provides for a redressal mechanism for the said purpose.

20. We do not agree to the contention raised on behalf of the Appellant-Petitioner that the State Commission erred in not giving adjustments to the Appellant-petitioner for the excess transmission charges collected by the Respondent No.2/Distribution Licensee, based on the provisional tariff order passed by the State Commission after the determination of final tariff by the order of the State Commission. We further do not agree with the contention of the Appellant-petitioner that on the determination of final tariff, the Appellant-petitioner is entitled to readjustment for the transmission charges paid by it to the Respondent No.2/distribution licensee on the basis of provisional tariff. The CERC Regulations clearly prohibit revision of transmission charges payable for use of the State network retrospectively.

21. We are further unable to accept the Appellant's contention that the adjustment of provisional tariff to final tariff and refund of excess amount collected under the provisional tariff to the concerned persons, such as the Appellant in the present case, cannot be said to be retrospective tariff

application or redetermination. The Appellant-petitioner is not merely entitled to refund or readjustment of so called open excess intra-state charges collected by the Respondent No.2/distribution licensee towards transmission of power by the Appellant-petitioner from its CPPs for the aforesaid period and the words mentioned in the final tariff order dated 23.12.2011 passed by the State Commission that “*The net revenue surplus/shortfall sustained by RVPN shall be adjusted in next three months from the date of this order*”, do not entitle the Appellant-petitioner to any relief in the present Appeal.

22. We have deeply considered and studied the case law cited on behalf of the Appellant-petitioner.

22.1 In M/s G.D. Ferro Alloys (P) Ltd vs Delhi Electricity Supply Undertaking reported in AIR 1998 Delhi 17, the Hon’ble High Court of Delhi held that *consequential enhancement in energy charges on account of fuel adjustment charges cannot be said to be retrospective*. The Hon’ble Delhi High Court was not dealing with the matter relating to short term open access transactions, which are in the nature of daily transactions equal to stock exchange. Hence, this case law cited, is of no help to the Appellant-petitioner.

22.2 The next case law cited by the Appellant-petitioner is Delhi Cloth and General Mills Co. Limited vs. Rajasthan State Electricity Board, reported in AIR 1984 Rajasthan 131, in which matter, the Hon’ble Rajasthan High Court held that *Bills issued on fixation of fuel surcharge on provisional rate, if any, delay is caused in working out any final rate, the same cannot be held to be illegal*. In the reported case, the Hon’ble High Court was dealing with a matter relating to fixation of fuel surcharge and levy of additional surcharge after working out final rates where question of estoppel was involved. Thus, the facts, in the reported case, are quite different from the facts of the matter in hand before us, and the same cannot enure to the benefit of the Appellant-petitioner.

22.3 The last case law cited on behalf of the Appellant-petitioner is Chhattisgarh State Power Distribution Company Ltd. vs Chhattisgarh Biomass Energy Developers Association, passed by this Appellate Tribunal, vide judgment, dated 8.2.2011 in Appeal No. 164 of 2010, in which judgment, this Appellate Tribunal held that *generating plant is entitled to recover the fuel cost incurred for generation of power from its generating plant.* This Appellate Tribunal also held in the said judgment that *the Commission's analysis of material and data justified a revision of the tariff on account of increase in fuel cost, much before the financial year 2009-10 commenced. The price of biomass that has been fixed by the Commission is actually the price decided by the CERC. This is a factor uncontrollable, accordingly, the generator is entitled to revision of tariff with effect from commencement of financial year 2009-10.*

23. We may again reiterate that this Appellate Tribunal, while deciding the aforesaid case, was not dealing with transmission charges for short term open access. In the present case, the short term open access transmission charges were provisionally fixed subject to adjustment by the final tariff which we have mentioned in detail above.

24. The State Commission, vide its provisional tariff order, dated 31.3.2011 had allowed the provisional tariff for FY 2011-12. The State Commission at para 6 of the tariff order, dated 31.3.2011, had noted that transmission tariff and SLDC charges shall be subject to adjustment when the same are finalized for FY 2011-12. The provisional tariff order had mentioned about the adjustment of transmission tariff and SLDC charges only. This order had not allowed adjustment in case of transmission charges for Short Term Open Access customers and transmission charges for power exchange transactions.

25. The power exchange and NRLDC transfer transmission charges to the Respondent No.2 – Distribution Licensee who has no role except that it receives credits from Exchange and NRLDC, therefore, Respondent No.2 prayed that if the Appellant-petitioner has any claims, he should directly approach Exchange and NRLDC for his claims and Respondent No.2-Distribution Licensee has nothing to do with his payments since Distribution Licensee himself is at the receiving end

26. In view of the above, we agree to all the findings and conclusions arrived at by the learned State Commission in the impugned order and we approve the said findings of the State Commission. We do not find any force in any of the submissions made on behalf of the Appellant-petitioner. The Appeal is without force and liable to be dismissed.

27. **SUMMARY OF OUR FINDINGS:**

27.1 The learned State Commission has not committed any illegality while passing the impugned order and holding that tariff order cannot be reviewed or modified at this stage and petition under Section 86(1)(f) of the Electricity Act, 2003, has no force and the State Commission has rightly disallowed the adjustment of the extra transmission charges paid by the Appellant-petitioner to the Respondent No.2-distribution licensee, pertaining to the inter-state sale of power through bilateral contracts and through collective transactions in power exchange from its CPP on short term open access basis. The learned State Commission has rightly refused to adjust the transmission charges for short term open access transactions from retrospective date, despite the fact that the said charges were provisional.

27.2 The CERC (Open Access in Inter-State Transmission) Regulations, 2008, as amended in 2009, particularly, Regulation 16(3), clearly envisage that short term open excess charges shall not be subject to

retrospective adjustment and CERC Regulations do not envisage any such restriction in respect of long term open access transactions. The short term open access users also include power exchange users where transaction is in the nature of stock exchange, which gets completed on a daily basis and cannot be subsequently opened.

27.3 The Respondent No.2/Distribution Licensee has rightly adjusted the transmission charges on 2.2.2012, paid for intra-state open access by the Appellant. The Respondent No.2/Distribution Licensee has rightly not adjusted or refunded so called extra transmission charges for inter-state power exchange transactions.

27.4 The State Commission has rightly rejected or dismissed the Appellant's petition being Petition No. 329/2012, filed under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute and for direction to Respondent No.2/distribution licensee to pay excess amount charged.

27.5 The State Commission, vide its provisional order, dated 31.3.2011, had allowed the provisional tariff for FY 2011-12, in para 6, clearly mentioned that transmission tariff and SLDC charges shall be subject to adjustment when the same are finalized for FY 2011-12. The provisional tariff order had mentioned about the adjustment of transmission tariff and SLDC charges only and the provisional tariff order had not allowed adjustment in case of transmission charges for Short Term Open Access customers and transmission charges for power exchange transactions.

27.6 We observe that in Regulation 16(3) of the CERC (Open Access in Inter-State Transmission) Regulations, 2008 as amended in May, 2009, there is no proviso which specifies revision in case of finalization of tariff. Similarly, there is no exclusion in Regulation 16(3) thereof, which would permit revision in case of finalization of

tariff. In view of absence of any such provision/exclusion, the Regulation 16(3) stops from revision with retrospective effect.

27.7 We further observe that the transmission charges in respect of State Network, used by the Appellant-petitioner, for interstate transmission of power under short term open access, cannot be revised after the determination of final tariff.

28. Consequently, the instant Appeal, being devoid of merits, is dismissed and the impugned order, dated 29.10.2013, passed by the Rajasthan Electricity Regulatory Commission is hereby affirmed. No order as to costs.

**PRONOUNCED IN THE OPEN COURT ON THIS 1<sup>ST</sup> DAY OF JULY, 2014.**

**(Justice Surendra Kumar)  
Judicial Member**

**(Rakesh Nath)  
Technical Member**

√ **REPORTABLE/NON-REPORTABLE**

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