

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

**(Judgment pronounced on 24th Sept.2012 at
Chennai Circuit Bench)**

APPEAL No.40 of 2012

Dated: 24th Sept, 2012

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

In the matter of:

**Kaveri Gas Power Ltd.
5, Raganathan Garden
Anna Nagar,
Chennai – 600 040**

Appellant

Versus

- 1. The Tamil Nadu Electricity Board
800, Anna Salai,
Chennai – 600 002**
- 2. The Superintending Engineer
Nagapattinam Electricity Distribution Circle
The Tamil Nadu Generation and Distribution
Corporation Limited
No.36, Sadayappar East Street
Nagapattinam - 611 001**
- 3. Tamil Nadu Electricity Regulatory Commission
No.19 A Rukmini Lakshmipathy Salai
Egmore, Chennai – 600 008**

Respondents

Counsel for the Appellant (s): Mr. P. Vinod Kumar

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

J U D G M E N T

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

1. The question posed in this Appeal is as follows:-

“Whether the Appellant could be held to be a Long Term Open Access Customer when the term of Energy Wheeling Agreement was merely for the period of three years”?

2. The Kaveri Gas Power Ltd. has filed this Appeal as against the impugned order dated 28.12.2011 passed by the Tamil Nadu Electricity Regulatory Commission (State Commission) holding that the Appellant is a Long Term Open Access Customer.

3. The short facts are as follows:-

(a) The Kaveri Gas Power Ltd.,” the Appellant herein” is a company involved in the business of setting up power plants and generating electricity. The Appellant set up a 6.79 MW natural gas based captive power plant at Maruthur village, Mayiladuthurai Taluk in Tamil Nadu State. The Tamil Nadu Generation and Distribution

- (b) Corporation Ltd.(2nd Respondent) accorded the wheeling approval for the Appellant's plant on 24.5.2006.
- (c) Initially, the Appellant contemplated for setting up a 17.5 MW power plant based on the commitment from Gail (India) Ltd. for supply of 1 lakh SCMD natural gas. However, the quantity of gas supplied by the Gail (India) Ltd. was reduced to 35,000 SCMD. As a result, the size of the plant was reduced to 6.79 MW. Originally the wheeling approval dated 24.5.2006 was accorded by the Tamil Nadu Generation and Distribution Corporation Ltd., (R-2) for a capacity of 17.5 MW. However, the installed capacity of the plant on the date of commercial operation on 9.6.2006 was only 6.79 MW. The wheeling approval dated 24.5.2006 did not specify the term for which the open access was granted to the Appellant.
- (d) At the time of issuing wheeling approval, the Intra-State Open Access Regulation notified on 3.8.2005 and the State Commission's tariff order No.2 dated 15.5.2006 relating to transmission and wheeling charges for open access was in force. However, the Electricity Board(R-1) did not

implement the tariff order and continued to collect wheeling charges by deducting 15% of total energy injected by the generating station into the grid as per the practice prevailing prior to the tariff order dated 15.5.2006.

- (e) On 17.10.2007, the Electricity Board(R-1) informed that they were going to implement the State Commission's Tariff order dated 15.5.2006. As the tariff order provided for transmission and wheeling charges to be computed on the basis of capacity for which wheeling approval was accorded, the Appellant approached the Electricity Board(R-1) to reduce the capacity in wheeling approval.
- (f) The Appellant on 19.10.2007 approached the Electricity Board (R-1) and sought an amendment of the wheeling approval by amending the plant capacity from 17.5 MW to 6.79 MW. But the Electricity Board (R-1) directed the Appellant to approach the State Commission seeking for the said relief. Therefore, the Appellant filed petition in DRP 1 of 2008 before the State Commission seeking for the directions to the 1st Respondent Board to amend the wheeling approval dated

24.5.2006 from the installed capacity of 17.5 MW into 6.79 MW.

- (g) The State Commission, after hearing the parties, gave a direction to the Tamil Nadu Electricity Board (R-1) to reduce the allotted capacity for transmission from 17.5 MW to 6.79 MW. This order was passed on 15.7.2008.
- (h) Thereafter on 4.10.2008, the Energy Wheeling Agreement was entered into between the Appellant and the Electricity Board (R-1) for a period of three years from the date of the execution of the Agreement.
- (i) On 15.2.2011, the Appellant wrote to the Respondent No.1 requesting that as the term of Energy Wheeling Agreement was 3 years, the Appellant should be treated as a short term open access customer.
- (j) On 25.2.2011, the Appellant received notice issued by the Electricity Board calling upon the Appellant to pay an amount of Rs. 34,21,003/- towards Wheeling Charges etc., being purported difference of amount payable by the Appellant for the period from 25.5.2007 during which the

Board(R-1) had collected wheeling charges in kind. Again on 4.3.2011 another notice was issued modifying the earlier notice by demanding Wheeling Charges etc., to the tune of Rs. 1,14,48,424/- instead of Rs.34,21,003/-.

- (k) On receipt of these notices, the Appellant sent a reply letter dated 07.3.2011 putting forth its objections to the demand made by the Respondent contending that the Appellant cannot be treated as a Long Term Open Access Customer as the Agreement was only for 3 years. Despite the reply, there was no response from the Electricity Board (R-1).
- (l) Therefore, the Appellant filed a Petition in DRP No.13 of 2011 before the State Commission challenging the notices issued by the Electricity Board the, Respondent dated 25.2.2011 and 4.3.2011 demanding the Appellant to pay a sum of Rs. 1,14,48,424/- towards the Wheeling, Transmission, Scheduling Charges, etc, and praying for the declaration that it was a Short Term Open Access Customer as well as for the consequential directions. The Electricity Board (R-1), filed a counter before the State Commission

contending that it is entitled to demand the amount of Rs.1,14,48,424/- from the Appellant as the Appellant was a Long Term Open Access Customer.

- (m) After hearing the parties, the State Commission disposed of the petition by the impugned order dated 28.12.2011 holding that the Electricity Board (R-1) is estopped from demanding from the Appellant the amount of Rs.1,14,48,424/- towards the wheeling charges etc. for the period from 25.5.2006 to 22.9.2007 as prayed for by the Appellant. However, the State Commission rejected the prayer of the Appellant for refund of the excess amount collected by the Respondent from the Appellant by holding that the Appellant was to be treated as a Long Term Open Access Customer.
- (n) The present Appeal has been filed by the Appellant as against the said impugned order of the State Commission in so far as it rejected the prayer of the Appellant seeking for the declaration that the Appellant be treated as a Short Term Open Access Customer and consequential directions.

4. The learned Counsel for the Appellant urged the following contentions assailing the impugned order dated 28.12.2011:

(a) The terms of the Inter-State Open Access Regulation defines the Long Term Open Access Customer as the person who has entered into Energy Wheeling Agreement with the Electricity Board for the period of 5 years or more. In the instant case Wheeling Agreement dated 4.10.2008 was only for three years. The Respondents had from October, 2007 collected the transmission, wheeling charges etc., as per the order No.2 of the State Commission at the rate of prescribed for the Long Term Open Access Customers. Since the period from October, 2007 to 4.10.2008, the date on which the agreement was entered into is less than five years, the Appellant ought to have been treated a Short Term Open Access Customer.

(b) Although the period of Energy Wheeling Agreement dated 4.10.2008 was only for a period of three years, the Respondent Board collected the charges applicable to Long Term Open Access Customers. The Respondent Board ought to have collected from the Appellant only the

charges applicable for Short Term Open Access Customers. Since the charges applicable to Long Term Open Access Customers have been collected from the Appellant by treating the Appellant a Long Term Open Access Customer, the excess amount collected have to be refunded to the Appellant.

5. In reply to the above contentions, the Learned Counsel appearing for the Tamil Nadu Electricity Board, the Respondent, has made the following submissions:

- (a) The State Commission in the petition DRP No.1 of 2008 allowed the prayer of the Appellant for amendment of wheeling approval for the plant capacity from 17.5 MW to 6.79 MW by the order dated 15.7.2008. Only after this order, the Appellant company on 4.10.2008, executed Energy Wheeling Agreement. In fact, the Appellant gave an undertaking that they will implement the State Commission Order No. 2 dated 15.5.2006 for the revised capacity of 6.79 MW which was made applicable from 17.10.2007 through its letter dated 5.5.2010. It was clearly admitted in that letter that the Appellant is a Long Term Open Access Customer as the Long Term

Open Access Agreement was in force. This was not disputed by the Appellant till 2011. It did not raise any objection with regard to the status of the company at any point of time. Suddenly in 2011, the Appellant has claimed that the Appellant is a Short Term Open Access Customer on the sole ground that the period of agreement was only for three years. This belated claim cannot be entertained.

- (b) The application for open excess was made by the Appellant and paid the registration fees of Rs. 5000/- and the agreement fees Rs.50000/- on 6.12.2007. These charges would relate to the Long Term Open Access charges. Therefore, the Appellant retained the power evacuation of 17.5 MW as Long Term Open Access Customer only. Even in DRP No.1 of 2008, the Appellant has not raised any objection with regard to the status as the Long Term Open Access Customer. That apart, the Appellant has been availing Open Access facility continuously from 24.5.2006 till date under Long Term Open Access only.
- (c) In fact, the undertaking period is from 24.5.2006 to 03.10.2008 and the agreement period is from

4.10.2008 to 3.10.2011. Thus, the total period works out to five years four months 10 days which is more than five years. Hence the Appellant is liable to pay the amount as a Long Term Open Access Customer as correctly held by the State Commission.

6. In the light of the above rival contentions urged by both parties, the following question as indicated above would arise for consideration:

“Whether the Appellant could be treated as Long Term Open Access Customer, when the Energy Wheeling Agreement entered into between the Appellant and the Tamil Nadu Electricity Board (R-1) is for the period of three years”?

7. Before dealing with the question framed above, lets us now quote the relevant findings given by the State Commission in the impugned order, which is as follows:

“52. Finding of the Commission

52.1 The TNEB accorded approval for wheeling on 25-5-2006 without specifying the period of Open Access. The TNEB prescribed 15% of energy charges in their approval. This was because they did not choose to implement order No.2 dated 15-5-2006 till October 2007. This order of the Commission prescribed the transmission and wheeling charges

both for short term and long term Open Access. Clause (8) of the approval of TNEB dated 25-5-2006 is reproduced below:-

“The wheeling charge billing and adjustments of energy are subject to revision as may be prescribed by the Board / TNERC as the case may be from time to time”

That approval mentions that the rate will be subject to revision by the TNERC. The TNERC prescribed the rates on 15-5-2006 and yet the TNEB did not adopt the rates in their approval dated 25-5-2006. This was because they did not implement the order No.2 dated 15-5-2006 of the Commission till October 2007. Although the TNEB mentioned in their approval that the rates are subject to revision by TNEB/TNERC, yet they did not incorporate the rates in the approval. This was clearly a case of double standard in the sense that they want to have the cake and eat it too.

52.2 As per the order of the Commission in DRP No.1 of 2008 dated 15-7-2008, the TNEB lowered the wheeling approval from 17.5 MW to 6.79 MW by an agreement dated 4-10-2008. The agreement prescribed that its validity would be for three years but it was given retrospective effect from 19-10-2007, the date on which the Petitioner gave application for reduction of wheeling approval to 6.79 MW. The agreement provided that transmission and wheeling charges shall be as per the order of the Commission. The agreement dated 4-10-2008 was valid for a period of three years upto 3-10-2011.

52.3 The original approval of 25-5-2006 of TNEB was for a capacity of 17.5 MW. It was lowered to 6.79 MW

in the agreement dated 4-10-2008. This agreement was valid for a period of three years upto 3-10-2011.

52.4 The relevant question is whether the TNEB's approval and subsequent agreement should be treated as a long term wheeling or short term wheeling. The approval of 17.5 MW was valid from 25-5-2006 to 18-10-2007. The approval for 6.79 MW was valid from 19-10-2007 upto 3-10-2011. The facts of the present case establish that wheeling approval for 17.5 MW was valid from 25-5-2006 to 18-10-2007. Wheeling approval for 6.79 MW was valid from 19-10-2007 upto 3-10-2011. The total period works out to more than five years. Therefore, the Petitioner should be treated as a long term customer and he should be charged at the rate of 15% energy charges for the period from 25-5-2006 to 18-10-2007 as communicated in the approved letter of TNEB and at the rates prescribed by the Commission in order No.2 dated 15-5-2006 for the period from 19-10-2007 to 3-10-2011. The Respondent having chosen to implement Order No.2 dated 15-5-2006 with effect from October 2007 is estopped from levying the charges prescribed by the Commission with effect from 25-5-2006.

DRP 13 of 2011 is ordered accordingly. No order as to cost."

8. The crux of the findings referred to above, is as follows:

- (a) The Tamil Nadu Electricity Board accorded the wheeling approval dated 24.5.2006 without specifying the period of Open Access. This approval mentions that the rate will be subject to

the revision by the State Commission. The State Commission prescribed the rate on 15.5.2006. Yet the Tamil Nadu Electricity Board did not adopt the rates in their approval dated 24.5.2006. The Electricity Board implemented the rates determined by the State Commission's order dated 15.5.2006 only from October,2007.

- (b) The original approval dated 24.5.2006 was for a capacity of 17.5 MW. It was lowered to 6.79 MW as per the agreement dated 4.10.2008. This agreement was valid for a period of three years up to 3.10.2011. The approval of 17.5 MW was valid from 25.5.2006 to 18.10.2007. The approval for 6.79 MW was valid from 19.10.2007 to 3.10.2011. The total period works out to more than five years. Therefore, the Appellant should be treated as a Long Term Open Access Customer.
- (c) However, the Electricity Board, having chosen to implement the order No.2 dated 15.5.2006 passed by the State Commission only with effect from 19th October, 2007, is not entitled to levy the charges prescribed by the State Commission with effect from 25.5.2006 up to 18.10.2007.

9. The above findings would disclose that State Commission having concluded that the Respondent Electricity Board was not entitled for levying the charges prescribed by it for the period from 25.5.2006 to 18.10.2007 has taken into account this period also along with the approval period of 19.10.2007 to 03.10.2011 for 6.79 MW covered by the agreement dated 04.10.2008 and concluded that it is more than five years thereby the Appellant would be treated Long Term Open Access Customer.

10. Thus, while determining the question whether the Appellant was to be treated as a Long Term Open Access Customer or not, the prayers sought by the Appellant Petitioner before the Commission was partly allowed by the State Commission. In other words, the State Commission held that the Electricity Board (R-1) is not entitled to levy the charges as prescribed by the State Commission in the order dated 15.5.2006 with effect from 25.5.2006 up to 18.10.2007 but, the Electricity Board (R-1) is entitled to collect the transmission and other charges as per the Commission's tariff order only for the period from 19.10.2007 to 3.10.2011. Having held so, the State Commission found that the Appellant was to be declared as a Long Term Open Access Customer by computing both the period that is from 25.5.2006 to 18.10.2007 and from 19.10.2007 to 3.10.2011 which works out to be more than five years and accordingly,

he was to be declared as a Long Term Open Access Customer.

11. Before discussing the question as to whether the findings of the State Commission that the Appellant was to be treated as a Long Term Open Access Customer is correct or not, it would be appropriate to recall the relevant facts.
12. The Appellant set-up a 6.79 MW natural gas based captive power plant. The Wheeling Approval for 17.5 MW was accorded to the Appellant's plant by the Electricity Board (R-1) on 24.5.2006. The duration for which the Open Access was granted to the Appellant was not stipulated in the Wheeling Approval. On that date, the installed capacity of the plant was only 6.79 MW. The approval for parallel operation was granted on 18.2.2006. This was also for 6.79 MW. On the date of the issuance of the Wheeling Approval i.e. on 24.5.2006, the Intra-State Open Access Regulation which was notified on 3.8.2005 was in force. The State Commission's tariff order No.2 dated 15.5.2006 relating to the transmission and wheeling charges for availing Open Access was also in force. However, the Electricity Board continued to collect wheeling charges by deducting 15% of total energy fed into the grid by the Plant from the date of commercial operation of the plant as per the practice prevalent prior to the tariff order dated 15.5.2006.

13. On 17.10.2007, the Electricity Board (R-1) informed that a meeting was to be held on 18.10.2007 regarding the implementation of the State Commission's tariff order dated 15.5.2006. It was also informed that on implementation of the tariff order, the transmission wheeling charges was to be computed based upon the capacity of 17.5 MW mentioned in the Wheeling Approval and not on the installed capacity of 6.79 MW. Therefore, the Appellant wrote to the Electricity Board (R-1) on 19.10.2007 requesting for the amendment of the capacity of 17.5 MW into 6.79 MW which is the actual installed capacity. However, the Electricity Board (R-1) directed the Appellant to approach the State Commission for the said amendment.
14. Accordingly, the Appellant filed a Petition in DRP No.1 of 2008, seeking for the said direction to the Respondent Board before the State Commission. On 15.7.2008, the State Commission passed the order directing the Electricity Board to amend the Wheeling Approval with effect from 19.10.2007.
15. Thereupon, on 4.10.2008, an Energy Wheeling Agreement was entered into between the Appellant and the Electricity Board for parallel operation and wheeling 6.79 MW power through the grid. As per this Agreement, the agreement was

to remain in force for a period of three years from the date of its execution i.e. from 4.10.2008.

16. On 15.2.2011, the Appellant wrote to the Electricity Board requesting that the Appellant may be treated as a Short Term Open Access Customer as the term of Energy Wheeling Agreement was only for a period of three years and applicable charges may be collected from the Appellant as a Short Term Open Access Customer. Without responding to that, the Respondent issued a demand notices asking for the Wheeling charges as per the tariff order of the State Commission dated 15.5.2006 for the entire period.
17. Under those circumstances, the Appellant filed DRP No.13 of 2011 challenging the retrospective demand and praying for the refund of excess amount collected by the Respondent Board by wrongly treating the Appellant as a Long Term Open Access Customer. The Appellant asked for the following prayers:
 - (a) To set aside the retrospective demand notices for the period from 25.5.2006 to 22.9.2007;
 - (b) To refund the excess amount collected from the Appellant from October, 2007 to September, 2008 i.e. the period prior to the Energy Wheeling Agreement;

- (c) To refund the excess amount collected from the Appellant from October, 2008 till March, 2011 (the period covered under the Energy Wheeling Agreement);
- (d) To treat the Appellant as a Short Term Customer for the remaining term of the Energy Wheeling Agreement.

18. The State Commission passed the impugned order on 28.12.2011. The State Commission allowed the prayer (a) and held that the Respondent are not entitled for demanding any amounts for the period from 25.5.2006 to 18.10.2007. However, prayers (b) to (d) were rejected by the State Commission on the ground that the Appellant was a Long Term Open Access Customer. While coming to this conclusion, the State Commission included the period prior to Energy Wheeling Agreement (i.e. 25.5.2006 to 3.10.2008) along with Agreement Period and held that both the period works out to more than five years and hence the Appellant is a Long Term Open Access Customer.

19. Taking into consideration the above facts and having regard to the facts and circumstances of this case, we are of the considered opinion that the above findings are not valid and as such the same is liable to be set-aside.

20. The reasons given for our above conclusion are given in the following paragraphs.

21. Admittedly, the Energy Wheeling Agreement was only for the period of three years, that is, from the date of the execution of the Agreement namely 4.10.2008. However, the agreement was given retrospective effect from 19.10.2007. This means that the Agreement was valid upto 3.10.2011 that is for three years. The State Commission has correctly concluded that the Respondent Board is estopped from collecting transmission and other charges as per its tariff order dated 15.5.2006 upto 18.10.2007. Having held so, the State Commission cannot extend the term of Energy Wheeling Agreement dated 4.10.2008 by including the period prior to the execution of Energy Wheeling Agreement which was covered by the Wheeling Approval dated 24.5.2006. In fact, the Energy Wheeling Agreement had not included the period prior to the execution of the Wheeling Agreement. There is no dispute in the fact that there is a clear averment in the Wheeling Agreement dated 4.10.2008 that the period of the Agreement commences from the date of execution of the Energy Wheeling Agreement.

22. The State Commission has come to the conclusion that since the total period of the wheeling is more than five years, the Appellant ought to be treated as a Long Term Open

Access Customer. It is noticed that Inter-state Open Access Regulation requires an Energy Wheeling Agreement to be executed specifying the term of the Agreement. In the absence of any Agreement for the period prior to 4.10.2008, the said prior period which is independent of the period of Energy Wheeling Agreement cannot be clubbed with the period under the Energy Wheeling Agreement. In other words, the period prior to the execution of Energy Wheeling Agreement cannot be taken into account while calculating the period for determining the question whether the Appellant is a Long Term Open Access Customer or not particularly when the Energy Wheeling Agreement which expressly provide that the Agreement is valid for a period of three years from the date of execution of the Agreement.

23. As rightly pointed out by the Learned Counsel for the Appellant, the State Commission, having rightly concluded that the Electricity Board is not entitled to levy the wheeling charges for the period from 25.5.2006 to 18.10.2007, should not have taken into account the said period while considering the question of Appellant's entitlement to be treated as a Short Term Open Access Customer or Long Term Open Access Customer.
24. Admittedly, the grant of Open Access or the wheeling approval dated 24.5.2006 did not specify the period.

Therefore, upon execution of the Energy Wheeling Agreement on 4.10.2008, the term of the wheeling approval is deemed to have come to an end. In other words, the terms of wheeling approval dated 24.5. 2006 and the terms of Energy Wheeling Agreement dated 4.10.2008 are independent from each other. They cannot be clubbed together especially in the absence of any specific clause in this regard in the Energy Wheeling Agreement.

25. According to the Electricity Board (R-1), the Appellant is liable to pay the transmission charges and other charges only as a Long Term Open Access Customer, since the Appellant itself invoked clause 12(h) of the Inter-state Open Access Regulation 2005 which relates to the Long Term Open Access Customer while seeking for the approval of the State Commission for reduction in the Open Access capacity and as such the clause 13(h) of the Intra-state Open Access Regulation 2005 which relates to the Short Term Open Access Customer would not apply to the Appellant. This contention, in our view is misplaced.
26. The Intra-state State Open Access Regulation makes it clear that the Agreement in the present case, entered into between the parties amounts to a short term Open Access. In the present case, admittedly the Agreement is for a period of three years. In terms of the Regulations, it has to be a

Short Term Open Access Wheeling Agreement. Consequently, it has to be held that the Appellant is a Short Term Open Access Customer as per the Regulation.

27. Mere fact that the Appellant invoked clause 12(h) of the Regulation and paid the charges of Rs.5,000/- towards Agreement fees and Rs.50,000/- towards registration fees which relates to the long term Open Access would not deprive the liberty of the Appellant to claim the benefit, which it is entitled, when it is established that the Appellant is a Short Term Open Access Customer as per the Regulation.
28. The Open Access means non-discriminatory provision for use of transmission line or distribution or associated facilities with such lines or system, wheeling licensees or consumers or a person engaged in generation in accordance with the Regulation. The Regulation 6 refers to the categorization of the Intra-state Open Access Customer. The said Regulation quoted as below:-

“Subject to the provisions of Regulation 5 above, the Open Access customers shall be classified into the following categories:

*(i) Short-term intra-state Open Access customer
An Open Access customer, availing intra-state Open Access for a period of one year or less shall be short-term intra-state Open Access customer.*

*(ii) Long-term intra-state Open Access customers.
An Open Access customer availing intra-state Open Access for a period of five years or more shall be long-term intra-state Open Access customer.*

Note 1: Open Access applications for a period less than five years and more than a year shall be considered under short-term Open Access only and shall be allowed at a time for a period not exceeding one year. (emphasis supplied).

Note 2: A generator of electricity through non-conventional energy sources shall be treated as long term intra-state Open Access customer and shall be eligible for Open Access irrespective of the generating capacity.”

29. The reading of the above Regulation would make it clear that there are two types of Open Access customers namely (1) Short Term Open Access Customer and (2) Long Term Open Access Customer. The short term Open Access customer is one who avails the intra-state Open Access facility for a period of one year or less. The Long Term Open Access Customer is one who avails Open Access for a period of 5 years or more. In between these two customers, there is no other said clause for one who enters into the Wheeling Agreement for a period of more than one year or less than five years. As per the Regulation there is no bar on a Short Term open access customer to take open access continuously for a number of years on year on year basis.

30. However, Note 1 as contained in Regulation 6 provide that the Open Access application for a period of less than five years and more than a year shall be considered under short term Open Access only and shall be allowed at a time for a period not exceeding one year. The Electricity Board here entered into wheeling agreement for a period of 3 years. In the instant case, it is not disputed that the Agreement is for a period of three years. If the provision in Note No.1 is applied, the Energy Wheeling Agreement would come under Short Term Intra-state Open Access Wheeling Agreement as the Regulation itself makes it clear that the Agreement in question comes under the category of Intra-state Short Term Open Access Agreement. It is immaterial what the parties had paid charges by invoking 12(h) of the Regulation. In the same way, non-invoking of clause 13(h) of the Agreement by the Appellant and deposit of Rs.50,000/- towards Agreement charges also is of no consequence.
31. In other words, if a customer has a short term Open Access Agreement which specifies the meaning of the Short Term Open Access Customer as referred to in the definition contained in clause 6, then it is be held that the party is a Short Term Open Access Customer irrespective of the fact whether he paid the charges towards fee for the Short Term Open Access Agreement or Long Term Open Access Customer.

32. The findings of the State Commission that the total period from the date of wheeling approval to the date of Energy Wheeling Agreement and the 3 years period of said Wheeling Agreement works out to be more than five years and as such the Appellant is a Long Term Open Access Customer are clearly wrong. Even assuming that the findings of the State Commission, the Energy Wheeling Agreement was to be given retrospective effect from 19.10.2007, the period from 19.10.2007 to 3.10.2011 will be less than five years. In that event, the Appellant can only be a Short Term Open Access Customer. In short, it has to be stated that the State Commission having allowed the Appellant's prayer and held that the Respondents are not entitled to make retrospective demand for the period from 25.5.2006 to 18.10.2007, ought not to have taken this period into account for computing the 5 years period.
33. As correctly pointed out by the Appellant, the State Commission while passing final order in DRP No.1 of 2008 in the Petition filed by the Appellant earlier for a direction to the Board to amend the capacity in the wheeling approval from 17.5 MW to 6.79 MW had in fact held that since there was no Wheeling Agreement between the parties at that time, the Regulation 12 (h) of the Intra State Open Access Regulations would not be applicable to the Appellant. When such was the finding given by the State Commission in the

earlier order dated 15.7.2008, the State Commission, while disposing of present proceedings in DRP No.13 of 2011 in the impugned order dated 28.12.2011, cannot hold that the Appellant is a Long Term Open Access Customer by adding the period prior to the Energy Wheeling Agreement when this was not covered by any Agreement.

34. The learned Counsel for the Respondent Board, during the final arguments, relied upon the letter dated 4.12.2007 to show that the Appellant paid the Long Term Open Access fee. As mentioned above, this will not disentitle the Appellant to claim the benefit which it is otherwise entitled. Even if this date is reckoned as the commencement of the term of Open Access, the Energy Wheeling Agreement dated 4.10.2008 had come to an end on 3.10.2011 and as such the said term also is less than five years. In that event, the Appellant should have been treated only as a Short Term Open Access Customer. If the intention of the Electricity Board was to give long term open access against the application of the Appellant it shall have entered into a Wheeling Agreement for 5 years or more as per the Regulations.
35. The learned Counsel for the Respondent Board has contended that the Energy Wheeling Agreement is different

from the Open Access Agreement stipulated under the Regulations and as such the Appellant's plea cannot be accepted. This is also not tenable as the learned Counsel for the Respondent Board has not produced any document or material in support of such a plea. Further, it is noticed that this is not the plea made by the Electricity Board (R-1) before the State Commission. This plea is the fresh plea raised only before this Tribunal without any supporting material.

36. It is the specific case of the Appellant that there was no difference between the Energy Wheeling Agreement and Open Access Agreement mentioned in the Regulations and both are one and the same. The only document other than, the Energy Wheeling Agreement under which the Open Access was granted to the Appellant is the Wheeling approval dated 24.5.2006. Admittedly, this does not stipulate the period to decide whether it is Long Term Open Access or Short Term Open Access.

37. The Energy Wheeling Agreement being one for a capacity of 6.79 MW, the State Commission should have reckoned only the period from 19.10.2007. Only on this date, the capacity was amended from 17.5 MW to 6.79 MW. The period from 19.10.2007, the date of amendment and 3.10.2011, the date of the expiry of Energy Wheeling Agreement is less than

four years. When such being the case, the Appellant has to be treated only a Short Term Open Access Customer and not a Long Term Open Access Customer.

38. The State Commission having held in favour of the Appellant who challenged the Respondent Board's decision to retrospectively apply the tariff order for the prior period, the State Commission should not have included the said period while deciding the question as to whether the Appellant is a Short Term Open Access Customer or a Long Term Open Access Customer.

39. As indicated above, the wheeling approval dated 24.5.2006 did not stipulate any duration of Open Access. In the Energy Wheeling Agreement dated 4.8.2010, it has been categorically admitted that it is for a period of 3 years from the date of its execution. Thus, the period prior to the Energy Wheeling Agreement has not been included under the Energy Wheeling Agreement.

40. Under those circumstances, the State Commission should not have included the said prior period along with the period under the Energy Wheeling Agreement.

41. At the risk of repetition, it has to be stated that the State Commission having held in favour of the Appellant on the

challenge to the decision of the Electricity Board, Respondent to retrospectively apply the tariff order for the said period, should not have included the said period while deciding whether the Appellant is a Short Term Open Access Customer or a Long Term Open Access Customer. In short, the State Commission having found in favour of the Appellant with regard to the prior period, should not have included the period prior to 19.10.2007 in order to justify its conclusions that the Appellant is a Long Term Open Access Customer.

42. The Electricity Board (Respondent) also incidentally pointed out that the Appellant in its earlier Petitions in DRP No.1 of 2008 had not raised the issues which were canvassed in the present proceedings i.e. DRP No.13 of 2011 as such it is barred by the order No.2, Rule 2 of the Civil Procedure Code. This contention is also untenable.
43. As correctly pointed out by the Appellant, the Provisions of order No.2, Rule 2 of the CPC are not applicable to the present case since the cause of action in DRP No.1 of 2008, the earlier proceedings and DRP No.13 of 2011, the present proceedings are entirely different. At the time of filing DRP No.1 of 2008, the Energy Wheeling Agreement dated 4.10.2008 was not executed and there was no demand for the period for from 25.5.2006 to 18.10.2007.

Therefore, the Appellant did not have an occasion to raise the issue when filing DRP No.1 of 2008.

44. As indicated above, the State Commission in the impugned order arrived at a specific conclusion that the Respondents are not entitled to levy the charges prescribed by it on the Appellant for the period from 25.5.2006 to 18.10.2007. When such was the finding, there was no reason as to why the said period from 25.5.2006 to 18.10.2007 has to be added along with three years period under the Energy Wheeling Agreement dated 4.10.2008 while determining the question of Appellant's entitlement to be treated as a Short Term Open Access customer.
45. The Learned Counsel for the Respondent as referred to in the counter statement as well as the written submissions filed by the Respondent by quoting the various clauses of the Regulations namely Clause 6, 10, 12, 13 and Clause 14 of the Open Access Regulations has argued that in the present case, the Appellant having accepted its status as a Long Term Open Access Customer and it is liable to pay Rs.2781 MW/day, cannot now dispute its status of the Long Term Open Access Customer by merely referring to the Energy Wheeling Agreement which has no bearing on the type of Open Access granted to the Respondent. It is further stated by the learned Counsel for the Respondent

that in this case, the Open Access was granted to the Appellant for more than 5 years as prayed for by the Appellant who applied for Long Term Open Access and that therefore, the same cannot be questioned now.

46. The said contention is vehemently refuted by the Appellant stating that the Wheeling Approval did not specify the period and that therefore, the contention of the Respondent that Open Access period was for 5 years is misplaced.

47. We find force in the contention made by the Appellant. As per Regulation 6, the Open Access for a term of 5 years and more alone is a Long Term Open Access and as per the Note to the said Regulations, the Open Access for a period in excess of one year but less than 5 years has to be considered as a Short Term Open Access. Admittedly, the Wheeling Permission dated 24.5.2006 did not stipulate any duration of Open Access. As mentioned earlier, the Energy Wheeling Agreement dated 4.8.2010 is categorical to indicate that it is for a period of 3 years from the date of its execution. Admittedly, there is no material produced either before the State Commission or before this Tribunal to show that the Open Access was granted for 5 years. Therefore, the statements made by the Respondent in Para-5 of the Written Submissions filed by the Respondent that the Long

Term Open Access was granted for more than 5 years are factually incorrect.

48. As a matter of fact, This Tribunal, in the case of TNEB Vs OPG Energy (P) Ltd. 2011 ELR (APTEL) 0477 and TNEB Vs Sree Rangarajan (Appeal No.108 of 2011) has decided very same issue which is in favour of the Appellant. In the said decision, it has been categorically held that mere fact that the customer has paid the fee applicable for a Long Term Open Access by invoking the Regulation 12(h) which relates to the Long Term Open Access Customer is irrelevant when the Energy Wheeling Agreement was for three years. It has been further held that since the Regulation clearly provides that when the duration of Open Access is more than one year and less than five years, it amounts to Short Term Open Access.

49. Let us quote the relevant findings given by this Tribunal as referred to above.

50. This Tribunal in Appeal No.113 of 2010 reported in the Case of the Chairman, TNEB and Anr V. OPG Energy (P) Ltd., Chennai and Anr, 2011 ELR (APTEL) 0477 has given a finding which is as follows:

“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 the customer is called a long term intra-state open access customer. 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 and shall be allowed at a 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”.

51. This Tribunal in Appeal No.108 of 2011, Chairman, TNEB and Anr V. Sree Rengaraaj Power India (P) Ltd., V Anr has given the following finding:

“The Respondent No.1 (Sree Rengaraaj Power India(P) Ltd.,) having entered into an Energy Wheeling Agreement with the Appellant (the State Electricity Board) 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”.

52. These finding would squarely apply to the present case. However, the ratio decided by this Tribunal in the cases referred to above have not been followed by the State Commission.

53. Therefore, the impugned order is liable to be set-aside and consequently, the Respondents are liable to refund the excess amount collected from the Appellant for the period from 19.10.2007 to 3.10.2008 as the Appellant has been erroneously treated as a Long Term Open Access Customer.

54. Summary of Our Findings

- i) The Open Access Regulations specify that Short Term Open Access customer is one who avails intra-state open access for a period of one year or less. The Long Term Open Access customer is one who avails open access for a period of 5 years or more. However, Open Access application for a period less than five years and more than 1 year has to be considered under Short Term Open Access only and to be allowed at a time for a period not exceeding one year. In this case the Wheeling Agreement dated 4.10.2008 was for a period of 3 years.**

- ii) The period prior to the execution of Energy Wheeling Agreement can not be taken into account**

while calculating the period for determining the question whether the Appellant is a Long Term Open Access Customer or not, particularly when the Energy Wheeling Agreement was valid for a period of three years from the date of execution of the Agreement. Accordingly, the Appellant has to be treated as a Short Term Open Access Customer. If the intention of the Electricity Board was to give long term open access then it should have entered into a long term wheeling agreement for a period of 5 years or more.

iii) The Respondent No.1 is liable to refund the excess amount collected from the Appellant from 19.10.2007 to 03.10.2008 wherein the Appellant was erroneously treated as a Long Term Open Access Customer.

55. In view of our findings, the impugned order is liable to be set-aside as the Appellant has to be treated as a Short Term Open Access Customer. Accordingly, the State Commission is directed to pass the consequential order regarding the refund of the amount in terms of our findings referred to above.

56. Appeal is allowed. The impugned order is set-aside.
However, no order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 24th Sept, 2012

√REPORTABLE/~~NON-REPORTABLE~~