

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 31st October 2012

**Present :HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

Judgment Pronounced at Chennai Circuit Bench on
31.10.2012

Appeal No.36 of 2012

In the Matter of:

**Asahi India Glass Ltd.
Plot No.F-76 to F-81,
SIPCOT Industrial Park
Sriperumbdur,
Kancheepuram District,
Tamil Nadu, PIN-602 105**

... Appellant

Versus

- 1. The Chairman, Tamil Nadu Electricity Board
(Now TANGEDCO),
NPKRR Maaligal, No.800,
Anna Salai,
Chennai-600 002, Tamil Nadu**
- 2. The Superintending Engineer,
Chegalpattu Electricity Distribution circle,
Chengalpattu-603 001
Tamil Nadu**

**3. Tamil Nadu Electricity Regulatory Commission,
No.19 A, Rukmini LakshmpathySalai,
Egmore, Chennai-600 008
Tamil Nadu**

..Respondent(s)

**Counsel for the Appellant(s): Mr. A. Venayagam Balan
Mr. D. Ravichander
Ms. Santhana Lakshmi**

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

Appeal No.37 of 2012

In the Matter of:

**Technical Stamp Lings Automotive Ltd.
Plot No.G 16-18,
SIPCOT Industrial park,
Irungattukottai, Sriperumbudur,
Kancheepuram District,
Tamil Nadu, PIN-602 105.**

... Appellant

Versus

- 1. The Chairman, Tamil Nadu Electricity Board
(Now TANGEDCO),
NPKRR Maaligal, No.800,
Anna Salai,
Chennai-600 002, Tamil Nadu**
- 2. The Superintending Engineer,
Chegalpattu Electricity Distribution circle,
Chengalpattu-603 001
Tamil Nadu**

3. **Tamil Nadu Electricity Regulatory Commission,
No.19 A, Rukmini LakshmpathySalai,
Egmore, Chennai-600 008**

..Respondent(s)

**Counsel for the Appellant(s): Mr. A. Venayagam Balan
Mr. D. Ravichander
Ms. Santhana Lakshmi**

**Counsel for the Respondent(s):Mr. S. Guru Krishna Kumar,
AAG for State of Tamil Nadu
Mr. S. Vallinayagam**

Appeal No.49 of 2012

In the Matter of:

1. **National Textile Corporation Ltd.
Scope Complex, Core IV,
7, Lodhi Road,
New Delhi-110 003**
2. **M/s. CAMBODIA Mills,
A unit of National Textile Corpn Ltd.,
Trichy road, Ondipudur,
Coimbatore-641 016**
3. **M/s. Pankaja Mills,
A Unit of National Textile Corpn Ltd.,
Pankaja Mills Road,
Ramanathapuram,
Coimbatore-641 045**
4. **M/s. Sri Ranga Vilas SPG & WVG Mills,
A Unit of National Textile Corpn Ltd.
Aviashi Road, Peelamedu
Coimbatore-641 004**

5. **M/s. Kaleeswara Mills “B”Unit,
HTSC No.15, Kalayarkoli,
Sivagangai,
Tamil Nadu-630 551**

6. **Pioneer Spinners,
HTSC No.5, Paramakudi,
1, Ramanathapuram,
Tamil Nadu-623 719**

... Appellant(s)

Versus

1. **Tamil Nadu Electricity Regulatory Commission
19-A, Rukmini Lakshmi Pathy Salai,
Egmore, Chennai-600 008, Tamil Nadu**

2. **Tamil Nadu Electricity Board,
144, Anna Salai
Chennai-600 002**

3. **Member (Distribution)
Tamil Nadu Electricity Board
144, Anna Salai
Chennai-600 002**

4. **Chief Financial Controller (Revenue)
Tamil Nadu Electricity Board,
144, Anna Salai
Chennai-600 002**

5. **Superintending Engineer (Metro)
Coimbatore electricity Distribution Circle
Tamil Nadu Electricity Board,
Coimbatore-641 012**

....Respondent(s)

**Counsel for the Appellant(s): Mr. Sanjay Ghose
Mohd. Farrukh**

**Counsel for the Respondent(s): Mr. S. Guru Krishna Kumar,
AAG for State of Tamil Nadu
Mr. S. Vallinayagam**

Appeal No.50 of 2012

In the Matter of:

**TMT Muthammal Textile Mills Pvt. Ltd.
Boothakudi Village,
Erasanayakanpatti Post
Viralimalai, Puddokottai-621 316**

... Appellant

Versus

**1. Tamil Nadu Electricity Board
800, Anna Salai,
Chennai-600 002**

**2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No.19-A, Rukmani Lakshmipathy Salai,
Marshalls Road,
Egmore, Chennai-600 008**

..Respondent(s)

**Counsel for the Appellant(s): Mr. T Srinivasa Murthy
Ms. Pankhuri Bharadwaj
Mr. Rahul Balaji**

**Counsel for the Respondent(s): Mr. S. Guru Krishna Kumar,
AAG for State of Tamil Nadu
Mr. S. Vallinayagam**

Appeal No.55 of 2012

In the Matter of:

**The Southern India Mills Association
No.41, Race Course Road,
Coimbatore-641 018**

... Appellant

Versus

**1. Tamil Nadu Electricity Board
No. 144, Anna Salai,
Chennai-600 002**

**2. Tamil Nadu Electricity Regulatory Commission,
TIDCO Office Building,
No.19-A, Rukmani Lakshmipathy Salai,
Mrshalls Road, Egmore,
Chennai-600 008**

..Respondent(s)

**Counsel for the Appellant(s): Mr. N L Rajah
Mr. S S Swaminadhan
Mr. Saurabh Gupta
Mr. Arun Anbumani**

**Counsel for the Respondent(s): Mr. S. Guru Krishna Kumar,
AAG for State of Tamil Nadu
Mr. S. Vallinayagam**

J U D G M E N T

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

1. “Whether the State Commission was right in restricting the benefit of operation of the order dated 7.9.2010, passed in favour of the Consumers, to be effective from 17.8.2010 in spite of the fact that the power was being purchased by the consumers from the 3rd party source much earlier than 17.8.2010?” This is the question posed in these batch of Appeals.
2. Since the impugned order is common in all these five Appeals, the common judgment is being rendered.
3. These Appeals are confined to the prayer of the Appellants that the findings in the impugned order dated 28.12.2011 passed by the State Commission that the operation of the earlier order dated 7.9.2010 would take effect only from 17.8.2010 and not before, be declared as contrary to law.
4. The short facts leading to filing of these Appeals are as under:
 - (a) The Appellants are the HT Consumers. Tamil Nadu Electricity Board is the Respondent in all these Appeals. The State Commission passed

several orders in relation to fixation of quota for HT consumers in MP No. 42 of 2008 on 28.11.2008 and on subsequent dates.

- (b) In implementing the said orders passed by the State Commission, the Tamil Nadu Electricity Board, the Respondent issued two memos which provided for 3rd party sale subject to the base demand.
- (c) The main purpose of the 3rd party purchase is to bridge the gap between the quota demand and the sanctioned demand. When the HT consumers were purchasing the 3rd party power, they faced piquant situation because of the revised billing procedure instructions which deducts the 3rd party purchase from the base demand to arrive at the Electricity Board's grid supply. This has led to huge penal charges in respect of the bills for consumption.
- (d) Therefore, the HT consumers as well as their Association filed batch of Petitions in MP No.9 of 2010 etc., before the State Commission praying for permitting them to allow for the 3rd party purchase up to the sanctioned demand.

- (e) In these Petitions, the State Commission passed the interim order on 17.8.2010 directing the State Electricity Board to the effect that the base demand as worked out by the Electricity Board on the basis of the Circular dated 17.11.2008 shall remain and procurement through Open access which was protected by the Electricity Act, 2003 shall be treated as an additionality but limited to the sanctioned demand of the consumer.
- (f) Ultimately, all the Petitions were taken up for final hearing. After hearing the parties, the final order had been passed by the State Commission on 7.9.2010 permitting all the HT consumers having captive generation for power purchase from 3rd party source to get additional demand and energy quota over and above the demand and energy quota from the Electricity Board's source subject to sanctioned demand as prayed for by the Petitioners. However, the State Commission restricted the benefits of this order to be effective from 17.8.2010; i.e. the date of the interim order, even though the said order was in the nature of a clarificatory order to the orders passed earlier.

- (g) Therefore, as against this portion of the order dated 7.9.2010 by the State Commission, the Appellants earlier filed separate Appeals before this Tribunal on the issue of restricting the benefits of the said order to the period only from and after 17.8.2010.
- (h) After hearing the parties, this Tribunal, partly allowed those Appeals setting aside the order dated 7.9.2010 only on the issue of restricting the benefit of said order to be effective from 17.8.2010, on the ground that no reasons were given for such restriction and remanded the matter to the State Commission directing it to reconsider and decide the said question as to when actually the order dated 7.9.2010 would come into effect and what are the reasons for the same.
- (i) Pursuant to the order of this Tribunal, the State Commission took-up all the matters and heard all the parties concerned and passed a common order dated 28.12.2011 reiterating that the order dated 7.9.2010 would be effective from 17.8.2010 by giving some reasons.

- (j) Challenging the reasons and conclusion, the HT consumers as well as their Association have filed these Appeals.

- 5. The limited question as framed above in these Appeals is as follows:

“Whether the State Commission is justified in restricting the benefit of the order dated 7.9.2010 passed by the State Commission earlier only from the date of the interim order dated 17.8.2010 and not before?”

- 6. According to the Appellants, even though the consumers (Appellants) who had a sanctioned load of 500 KW and above, were permitted by the Electricity Board for 3rd party purchase through the Circular dated 30.12.2008 which had been modified through the another circular dated 17.7.2009 to the effect that the consumers who had maximum demand of 250 KW were permitted to purchase power from 3rd party source, the State Commission has committed wrong in giving the finding that the order dated 7.9.2010 passed by the State Commission would take effect only from 17.8.2010 and not before.
- 7. On the other hand, the learned Counsel appearing for the Tamil Nadu Electricity Board, the Respondent submits that

the retrospective effect would not be given for the prayer of the Appellant as it would result in the heavy loss to the public exchequer.

8. As stated above, the State Commission though allowed the prayer of the Appellant by giving the benefit through the earlier order dated 7.9.2010, it restricted the benefit of the order only from 17.8.2010 on which date, the interim order was passed in the Petitions filed by the Appellants. As mentioned earlier when this order dated 7.9.2010 had been challenged before this Tribunal, we found that there were no reasons for coming to the conclusion that the benefit of the order would take effect only from 17.8.2010 and not before. Therefore, by the order dated 9.8.2011, we set aside the earlier order dated 7.9.2010 and remanded the matter to the State Commission for reconsideration of the limited issue as to when the benefit of the said order dated 7.9.2010 would come into effect and what are the reasons for the same.
9. Accordingly, the State Commission after hearing the parties passed the impugned order on 28.12.2011 reiterating the same finding to the effect that the earlier order dated 7.9.2010 would take effect only from 17.8.2010 onwards and not before by giving various reasons. These Appeals have been filed, assailing those reasons and the conclusion.

10. In view of the above, we are only concerned with the question as to whether the finding given by the State Commission to the effect that the benefit of order dated 7.9.2010 would take effect from 17.8.2010 is based upon correct reasonings or not ?
11. While dealing with this question, it would be appropriate to refer to the reasonings and findings on this issue given by the State Commission in the impugned order dated 28.12.2011. The relevant discussion and findings are as follows:

“8.8.....In fact the petitioners before this Commission in MP no. 6 of 2010, 9 of 2010 and 17 of 2010 and DRP no. 9 of 2010 have only assailed the TNEB memo dated 25.11.2009 and brought out that introduction of reliability power, open access, parity between various captive generators should increase the availability of power to the consumers but on the contrary the impugned instructions issued by TANGEDCO results in reduction in quota of TNEB with such changes thereby reducing the overall availability of power to consumers. The TNEB on its part has pointed out in view of the order of the Commission in SMP no. 1 of 2009 wherein declaration by the captive consumers makes the TNEB quota of base demand a variable figure.

8.9 Keeping in view the difficulties expressed by the Petitioners who are consumers as well as generators and the licensee the TNEB/TANGEDCO, the Commission had to modify its order on the very first day of hearing in these matters on 17.8.2010. The interim order of the Commission issued on 17.8.2010 is reproduced below:

“The base demand as worked out by the TNEB on the basis of their Circular dated 17.11.2008 shall remain. Procurement through Open Access which is protected by the Electricity Act, 2003 may be treated as an additionality but limited to the sanctioned demand of the consumer. This has been admitted by the TNEB in their communication dated 17.7.2009 “Procedure for allowing Third party Sale/Purchase under Intra State Short Term Open Access”.

The Consumer should declare in advance one month prior to the billing period for availing of Open Access procurement. For example for a billing period commencing from 27th September, 2010, the declaration should be made before 27th August, 2010.

If the Open Access procurement does not materialize to the extent projected by the consumer, he will limit his drawal to the extent of actual availability of Open Access procurement”.

8.10. *Thereafter, the detailed order was issued on 7.9.2010. The issue regarding the date of effect of this order which has been ordered as 17.8.2010 is to be seen in the context of the above developments.*

8.11 *Petitions MP No.6 of 2010, MP No.9 of 2010, MP No.17 of 2010 and DRP No.9 of 2010 were filed between February and April, 2010. All these Petitions were bunched together since they dealt with the same issue. On completion of the pleadings the matter was listed on 17.8.2010. Since both the petitioners and the Respondents expressed certain difficulties in the order issued by the Commission in SMP No.1 of 2009, the matter was examined. The petitioner’s grievance was that with increase in the procurement of Open Access power, the quota of TNEB was going down. The grievance of the Respondent TNEB was that the declaration by the wind energy generators is making the TNEB’s quota a variable figure which poses problem for them. Both these issues arose based on the order issued by the Commission in*

SMP No.1 of 2009. The Commission sought to address these issues in this order issued on 7.9.2010. Since the entire issue arose on the basis of the impugned clarificatory memo dated 25.11.2009 giving effect to the order in SMP No.1 of 2009, the cut off date in any case cannot go before the date of issue of the order in SMP No.1 of 2009 i.e. 28.10.2009. But the same has to be examined further in the context of the evolving scenario of R&C measures and relaxation provided in the same from time to time. Various developments took place in R&C measures since its introduction as narrated in paras 8.2 to 8.10. Open Access was made available by this Commission with effect from 17.2.2010 by way of amendment to the TNERC Open Access Regulations, 2005. Therefore, the HT Consumers of Tamil Nadu could avail Open Access only after 17.2.2010. The cause of action arose only when the petitions were filed by the parties and difficulties raised by both sides were to be examined for issuing appropriate orders. On the first day of hearing on 17.8.2010, the Commission clarified the matter by pronouncing an Interim order in the open court. The same order stipulated that if Open Access procurement does not materialize to the extent projected by the consumer, he will limit his drawal to the extent of actual availability of Open Access procurement. There was no further hearing between 17.8.2010 and 7.9.2010, when the final order was pronounced by the Commission. In the final order pronounced on 7.9.2010, the requirement of declaration by the consumer for procurement of power through Open Access was dispensed with. From this it could be observed that the order dated 7.9.2010 had two parts. One relating to procurement of power through Open Access going upto the sanctioned demand and the other dispensing with the advance declaration of consumer for procurement of power through open access. These two parts of the orders have to have effect from the same date. The argument of the learned counsels for SIMA, M/s. T.M.T Muthammal Textiles

Limtied and M/s. National Textile Corporation Limited that one part of the order namely going up to the sanctioned demand shall have retrospective effect while the second part dispensing with the declaration having prospective effect is illogical. Therefore, the Commission is of the view that these two parts of the order would have effect from the same date which shall be 17.8.2010 as already indicated in the combined orders dated 7.9.2010 in the concerned Petitions”.

12. The gist of the above findings is as under:

- (a) **In the Petitions filed by the Petitioners, they expressed some difficulties with regard to clarificatory memo dated 25.11.2009 issued by the TANGEDCO/Electricity Board on the basis of the State Commission’s order in SMP no. 1 of 2009 dated 28.10.2009. Therefore, on the first date of hearing, the State Commission issued interim order on 17.8.2010 directing that the base demand worked out by the Tamil Nadu Electricity Board on the basis of their circular dated 17.11.2008 shall remain and that the procurement through Open Access to be treated as an additionality but limited to sanctioned demand of the consumers.**
- (b) **Ultimately, while finally disposing of all the Petitions, after hearing the parties, a detailed common order was passed by the State**

Commission on 7.9.2010 indicating that the benefit of the said order would take effect from 17.8.2010 i.e. the date of the Interim Order.

- (c) As indicated above, Tribunal remanded the matter for fresh consideration. Accordingly, this issue was examined again with reference to the date on which the order dated 7.9.2010 would come into effect. The cause of action arose only when the Petitions were filed by the parties and difficulties raised by both sides. On the first date of hearing on 17.8.2010, the State Commission clarified the matter by pronouncing the interim order.**
- (d) In the final order issued by the State Commission on 7.9.2010, the State Commission dispensed with the requirements of the declaration by the consumers for procurement of power through Open Access.**
- (e) The order dated 7.9.2010 had two parts. The first part relates to the procurement of power through Open Access going up to the sanctioned demand. The second part relates to the dispensing with advance declaration of the consumers for procurement of power**

through Open Access. These two parts of the order have to have effect from the same date. Therefore, the State Commission is of the view that both the parts of the order would take effect from the same date which shall be 17.8.2010 as already indicated in the order dated 7.9.2010.

13. The gist of the impugned order would show that the substantive reason furnished by the State Commission for coming to the conclusion that the order dated 7.9.2010 would come into effect from 17.8.2010 is that the restriction and controlled measures have been evolving over a period of time since the initial order was issued on 28.11.2008 and hence, the cause of action arose only when the Petitions were filed by the parties and difficulties raised by both the sides on 17.8.2010.

14. At the outset, it shall be stated that the State Electricity Board (the Respondent) issued two memos dated 30.12.2008 and 17.7.2009 permitting the HT consumers to go up to the sanctioned demand for 3rd party purchase by bringing down the open access limit from 1 MW to 500 KW and further down to 250 KW. These memos would reveal that the Chairman of the Electricity Board himself had issued the procedure for allowing 3rd party sale/purchase and Intra

State Short Term Open Access. In the Memo dated 17.7.2009 it is specifically stated that the purchasers can use the purchased power over and above the original quota fixed for him under the Restriction and Control measures and at any cost, the consumer shall not draw more than the sanctioned demand.

15. These memos would make it clear that the Electricity Board itself had permitted the HT consumers to go up to the sanctioned demand by 3rd party purchase with effect from January 2009 with load of 500 KW and with effect from 17.7.2009 with maximum demand of 250 KW.
16. Despite this stand taken through these two memos, the Electricity Board has now taken the stand that the 3rd party purchase has to be deducted from base demand and energy to compute the quota for drawal from the Electricity Board and determination of excess consumption over and above the quota. When this contrary stand taken by the Electricity Board was pointed out by the Petitioners/Appellants to the State Commission in these proceedings, the State Commission accepting this point has recognised and recorded it in the impugned order. The relevant portion is as follows:

“7.4 The learned Counsel for TNEB submitted that retrospective implementation of the order of the Commission

dated 7.9.2010 earlier than 17.8.2010 would impose severe financial hardship of Rs.30 crores on the TNEB. To the question as to why then the TNEB brought down the open access from the limit of 1 MW to 500 KVA on 30.12.2008 and further down to 250 KVA on 17.7.2009 and permitted the consumer to go upto the sanctioned demand by third party purchase, the learned Counsel for TNEB did not have an answer”.

17. According to the Appellant, having recorded that there was no answer from the learned Counsel for the Electricity Board to the question as to why the TNEB through the circulars dated 30.12.2008 and 17.7.2009 permitted the consumers to go upto the sanctioned demand by 3rd party purchase, the State Commission without taking into account the said relevant material, has hastened to take a decision to the effect that it would take effect only from 17.8.2010 on the reasons which are not valid to substantiate the findings given in the earlier order dated 7.9.2010.
18. In the light of the above factual position pointed out by the Appellants which has not been disputed by the Respondent, we have to go into the validity of reasonings and the findings given in the impugned order.
19. The entire controversy was generated only on account of the Electricity Board's departure from a formula that was laid down by the Electricity Board itself. On account of this departure from the formula as prescribed by the State

Commission's earlier order, it was the Appellants which had to initiate legal proceedings to remedy the situation. As quoted in the impugned order, the State Commission in fact agreed with the Appellants and passed the orders on merits on 7.9.2010 in favour of the Appellant.

20. The specific case of the Appellant is that when the Electricity Board has itself laid down a clear formula in accordance with the excess demand and energy quota which is to be given effect to, there is no scope for the Electricity Board to deviate from the same so as to result in grave prejudice and loss to the Appellant. It is further contended by the Appellant that instead of directing the Electricity Board to correct its wrong action and to apply the formula correctly, the State Commission went wrong in coming to the conclusion that the order dated 7.9.2010 would take effect only from 17.8.2010 and not before.
21. As indicated above, as early as on 17.7.2009, the Chairman of the Electricity Board himself had issued the procedure for allowing 3rd party purchase under the Intra State Short Term Open Access. These memos or circulars provided that the power purchased from 3rd parties can be over and above quota fixed for the HT consumers under the restriction and control measures. When the bills were issued contrary to the formula, the Appellants had to approach the State

Commission over the erroneous application of the formula clearly stipulated by the Electricity Board which culminated into the order dated 7.9.2010.

22. As a matter of fact by its order dated 7.9.2010, the State Commission, after noticing the communication dated 17.7.2009 issued by the Chairman of the Electricity Board concluded as follows:

“4.5 The equivalent demand brought in by the consumer from captive and third party sources should be subtracted from the maximum demand recorded by the meter of the consumer. Balance would be the demand actually supplied by the TNEB. If this figure exceeds the quota demand of the TNEB, the consumer would be liable to pay excess demand charges at the rates stipulated in the order of the Commission in MP No.42 of 2008. Similarly, the energy purchased from captive and third party sources would be subtracted from the total energy consumed by the consumer. The balance would be deemed to be the energy actually supplied by the TNEB. If this quantum exceeds the energy quota of the TNEB, the consumer would be liable to pay excess energy charges at the rates stipulated in the order of the Commission in MP No.42 of 2008”.

23. Thus, this order dated 7.9.2010 in effect directed the Electricity Board in accordance with its own mechanism stipulated on 17.7.2009. When such being the case, the State Commission should have decided this aspect taking into consideration the stand taken by the Electricity Board through the Circular which was issued on 17.7.2009.

24. The Electricity Board, having allowed for procurement of power from 3rd party source for consumers at a sanctioned load of more than 500 KVA from 30.12.2008 and 250 KVA from 17.7.2009, cannot take a different stand by levying the excess demand and excess energy charges on the consumers who acted in conformity with the circulars dated 30.12.2008 and 17.7.2009 issued by the Electricity Board and purchased the power from the 3rd party source.
25. In our view, the State Commission mixed up the two issues with reference to the dispensation of the advance declaration as well as fixing the date for accrued benefit of the operational date of the order.
26. As pointed by the learned Counsel for the Appellant, the State Commission's direction in its order dated 7.9.2010 dispensing with the advance declaration by the consumers for procurement of power through the open access was neither prayed for by the consumers nor by the Electricity Board. It is noticed that the dispensation of the advance declaration was suo-moto order of the State Commission which is altogether a different aspect. Thus, the direction given on this aspect could not furnish any justification for restricting the operation of the order to 17.8.2010.
27. The only issue before the State Commission with regard to the fixing the date relating to the operation of the date of the

order was raised with a view to ensure that the consumers were not imposed penalties for acting strictly in compliance with the circulars issued by the Electricity Board dated 30.12.2008 and 17.7.2009.

28. In this context, it has to be noticed that the circular dated 17.7.2009 issued by the State Electricity Board introduced “procedure for allowing 3rd party sale/purchase under Intra State Short Term Open Access” superseding the earlier procedure published on 30.12.2008. The said procedure is given as under:

“The Purchaser can use the purchased power over and above the original quota fixed for him under the Restriction and Control measures. However, in any case, the consumer shall not draw more than the sanctioned demand. The TNEB shall re-fix the energy quota and demand quota by adding the quantum of power purchased by the consumer”.

29. At the risk of repetition, it has to be stated that having rightly recognised that the procurement of the power by the Consumers through Open Access from 3rd party purchase is protected as per the Electricity Act, 2003 and that the role of the Electricity Board is limited to that of a mere carrier, the State Commission could not restrict the operation of the order to be effective only from 17.8.2010.

30. In fact, the State Commission by taking into consideration the provisions of the Electricity Act, 2003 and the procedure

for allowing 3rd party sale vide order dated 17.7.2009, specifically held in the earlier order dated 7.9.2010 that the procurement through Open Access will be treated as an additionality.

31. Having held so, that the State Commission in the said earlier order concluded that the above benefit would be given effect only from 17.8.2010 without assigning any reason. Only on that issue, the said order was set aside by this Tribunal for reconsideration to find out the exact date on which this would take effect and to give reasons. But, the State Commission has reiterated the same finding in the impugned order dated 28.12.2011 by adding some reasons which are not germane to the issue.
32. As stated above, the Electricity Board itself issued guidelines on 17.7.2009 permitting the consumers to the effect that they can use the purchase power over and above the original quota fixed by them under Restriction and Control Measures. But now the State Electricity Board is taking the contrary stand to deduct the power procured through open access from the base demand to work out the TNEB's quota. This is quite strange. The State commission should not have allowed the State Electricity Board which is a State under Article 12 of the Constitution of India to blow hot and cold.

33. According to the State Commission, the cause of action arose only on 17.8.2010 when the Petitions were filed by the Appellants raising some difficulties experienced by them. This finding is not correct since the State Commission itself held that the procurement through Open Access should be treated as an additionality limited to the sanctioned demand and as such the said Open Access shall be protected by the Electricity Act, 2003.
34. As mentioned earlier, the main reason given by the State Commission for giving the finding that it would take effect from 17.8.2010 is that there are two parts of the order, one relating to the procurement of power through open access and the other relating to the dispensation of the advance declaration of the consumers for procurement of power through Open Access and both the parts have to have effect from the same date which shall be 17.8.2010. The relevant portion of this findings is as follows:

“From it could be observed that the order dated 7.9.2010 has two parts one relating to procurement of power through Open Access going up to the sanctioned demand and the other dispensing with the advance declaration of the consumer for procurement of power through open access. These two parts of the orders have to have effect from the same date. The argument of the learned counsels for SIMA, M/s. T.M.T Muthammal Textiles Limited and M/s. National Textile Corporation Limited that one part of the order namely going up to the sanctioned demand shall have retrospective effect while the second part dispensing with the declaration

having prospective effect is illogical. Therefore, the Commission is of the view that these two parts of the Order would have effect from the same date which shall be 17.8.2010 as already indicated in the combined order dated 7.9.2010 in the concerned Petitions.”

35. As indicated above, the first part of the order is relating to the procurement of power through open access going up to the sanctioned demand. The other part of the order is for dispensing with the advance declaration of the consumers for procurement of power through Open Access. Both are not connected to each other. Both the parts are mutually exclusive of each other.
36. The State Commission held that the consumers who had a sanctioned load of 500 KW on 30.12.2008 could procure 3rd party power up to the sanctioned demand which limit was reduced to consumers who had the sanctioned load of 250 KW on 17.7.2009 as per the Circular issued by the Electricity Board. Having found that the Electricity Board itself had permitted the consumers to procure power from 3rd party sources up to the sanctioned demand, the State Commission on the strength of the Circular issued by the Electricity Board on 17.7.2009 should have decided that the order dated 7.9.2012 would take effect from the date of the circular i.e. dated 17.7.2009.

37. The State Commission as indicated above passed two directions. The first is with reference to the grievance expressed by the Appellants with regard to levy of excess demand and excess energy charges when they procured power from 3rd party source. The second part of the order is with regard to the grievance of the Electricity Board with regard to advance declaration by wind energy generators. These were two distinct issues. Such being the case, the date of operation of these directions with regard to this shall be from different dates.
38. The grievance of the Appellants before the State Commission was that the increase in procurement of the Open Access power, the Electricity Board's quota was going down. On the other hand, the grievance of the Electricity Board before the Commission was that the declaration of the Wind Energy generators was making their quota variable figure which poses problem for them.
39. As indicated above, the State Commission passed two different directions. The first is with regard to the concern agitated by the Appellant with regard to levy of excess demand and excess energy charges when they procured power from 3rd party source. The second part of the order is with reference to the concern of the Electricity Board with regard to advance declaration by wind energy generators.

40. The State Commission should have considered that these are the two distinct issues and as such, the date of the operation of these directions also should have been on different dates.
41. As a matter of fact, the State Commission has taken into consideration the circular issued by the Electricity Board on 17.7.2009.
42. As quoted above, on the basis of the said Circular, the State Commission concluded as follows:

“The equivalent demand brought in by the consumer from captive and third party sources should be subtracted from the maximum demand recorded by the meter of the consumer. Balance would be the demand actually supplied by the TNEB. If this figure exceeds the quota demand of the TNEB, the consumer would be liable to pay excess demand charges at the rates stipulated in the order of the Commission in MP No.42 of 2008. Similarly, the energy purchased from captive and third party sources would be subtracted from the total energy consumed by the consumer. The balance would be deemed to be the energy actually supplied by the TNEB. If this quantum exceeds the energy quota of the TNEB, the consumer would be liable to pay excess energy charges at the rates stipulated in the order of the Commission in MP No.42 of 2008”.

43. Thus, the above order dated 7.9.2010 earlier passed in fact directed the Electricity Board to act in accordance with its own mechanism stipulated on 17.7.2009. The State Commission never laid any new principle so as to be able to

characterize the same as a work in progress, evolutionary step in the implementation of Restriction and Control Measures.

44. Despite the said circular dated 17.7.2009, issued by the Chairman of the Electricity Board, the Board has given a go by to the norms laid down by the Board in the circular dated 17.7.2009.
45. If consequential proceedings are perforce required to be brought out by the parties to ensure that the Electricity Board acts in accordance with express norms and conditions as per the circular dated 17.7.2009, surely the same cannot be characterised as an evolutionary process of implementation of the Restrictions and Control Measures so as to give effect from the date when the corrections are directed to be made.
46. In these cases, it would be necessary that the correct formula be directed to be applied from inception as intended by the circular dated 17.7.2009 issued by the Electricity Board.
47. The TNEB's quota for use of power has been fixed based on the consumption of consumers for the period October 2007 to October 2008 when there was no restriction and control over use of electricity. The third party purchase through

open access was not available to the Appellants during the period October 2007 to October 2008. The procurement from third party through open access was allowed only after 1.11.2008 for consumers with connected load of 1 MW and above. Further, the consumers upto load of 500 KW and 250 KW were permitted third party purchase through open access by the Electricity Board by memos dated 30.12.2008 and 17.7.2009 respectively. Thus, the power procured through third party by the Appellants could not be deducted from the base energy/demand computed from actual consumption for the period October 2007 to October 2008 to fix the quota of supply of TNEB's grid power. The third party purchase was only to bridge the gap between the sanctioned demand of the consumers and TNEB's quota and should be treated as an additionality. The proposed cut on TNEB's supply could not be imposed on the power procured by the consumers from third party.

48. In view of the above discussion, the findings of the State Commission that the order dated 7.9.2010 shall have effect from 17.8.2010 the date of interim order in the Petitions filed by the Appellants is without any legal basis.
49. Therefore, it would be appropriate to direct the Electricity Board to apply the formula as contained in the circular dated 17.7.2009 with effect from the said date.

50. Accordingly, the impugned order dated 28.12.2011 is set aside. The State Commission is directed to take note of the observations in this judgment and pass a consequential order as expeditiously as possible.

51. **Summary of Our Findings**

(i) The quota for use of power from TNEB after imposition of restriction and control measures has been fixed based on the consumption of consumers for the period October 2007 to October 2008 when there was no restriction and control over use of electricity. The third party purchase through open access was not available to the Appellants during that period. The third party purchase of power through Intra-State open access was introduced after 1.11.2008 for consumers with connected load of 1 MW and above. Subsequently, TNEB permitted third party purchase by memos dated 30.12.2008 and 17.7.2009 respectively for consumers with connected load upto 500 KW and 250 KW. The third party power purchase by the consumers could not be deducted from the base demand/energy computed on the basis of the actual consumption for past period to fix the TNEB's quota of supply as third party purchase was meant to bridge the gap between the consumers' sanctioned demand and TNEB's quota and should be

treated as on additionality. TNEB's proposed power cut could not be imposed on the power procured by the consumer from third party purchase through open access.

(ii) TNEB issued two memos dated 30.12.2008 and 17.7.2009 permitting to go upto the sanctioned demand by third party purchase to HT consumers with connected load upto 500 KW and 250 KW respectively. In the memo dated 17.7.2009 issued by the Chairman, TNEB it has been specifically stated that the purchaser can use the purchased power over and above the original quota fixed for him under restriction and control measures upto the sanctioned demand. TNEB cannot take a contrary stand to its own memos dated 30.12.2008 and 17.7.2009.

(iii) In the order dated 7.9.2010, the State Commission after taking note of the memo dated 17.7.2009 from Chairman, TNEB directed the TNEB to act in accordance with its own stand. Thus, the State Commission has erred in deciding the date of effect of its order to 17.8.2010.

(iv) The procurement of power through open access from third party is protected under the Electricity Act, 2003 and the State Commission could not restrict the

operation of its order effective from 17.8.2010 as the same has to be made effective from the date when third party purchase through open access was permitted by the Electricity Board.

(v) The date of effect of the order for third party purchase should not have been mixed up with the advance declaration by wind energy generators as they are two distinct issues.

52. In view of the above, the Appeals are allowed. The impugned order is set aside with the above directions.

53. However, there is no order to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 31st October, 2012

✓ ~~REPORTABLE/NON-REPORTABLE~~