

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**Appeal No. 37 of 2011 &
I.A. No. 60 of 2011**

Dated 4th November, 2011

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

In the matter of:

Tamil Nadu Electricity Board,
Represented by its Chairman,
144, Anna Salai,
Chennai-600 002

... **Appellant**

Versus

1. M/s. Saheli Exports Pvt. Ltd.,
New No. 25/Old No. 10,
Sir Madhavan Nair Road,
Mahalingapuram,
Nungambakkam,
Chennai-600 034

2. Tamil Nadu Electricity Regulatory Commission at Chennai,
TIDCO Office Building,
No. 19A, Rukmini Lakshmi pathy Salai,
Egmore, Chennai-600 008,
Represented by its Secretary

...**Respondent(s)**

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

Counsel for the Respondent(s) : Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan,
Ms. Swapna Seshdri &
Ms. Sneha Venkataramani for R-1

JUDGMENT

PER HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Tamil Nadu Electricity Board ("Electricity Board") against the order dated 17.8.2010 passed by the Tamil Nadu Electricity Regulatory Commission ('State Commission') in DRP No. 33 of 2009 filed by M/s. Saheli Exports Pvt. Ltd. for cancellation of the long term wheeling approval in respect of its power plant for supply to the captive consumers with effect from 1.10.2009.

2. State Electricity Board is the Appellant. M/s. Saheli Exports Pvt. Ltd. is the 1st Respondent. The State Commission is the 2nd Respondent.

3. The brief facts of the case are as under:

3.1. On 13.12.2004 the Appellant (Electricity Board) granted approval to the Respondent no. 1 (M/s. Saheli Exports Pvt. Ltd.) for parallel operation of its proposed Captive Power Plant of 6.12 MW capacity with the Electricity Board's grid as per Section 9(2) and 38(2) of the Electricity Act, 2003, subject to certain conditions. The Respondent no.1 gave its undertaking on 18.3.2005 to abide by the conditions.

3.2. On 28.3.2005 the Appellant accorded approval for wheeling of power from the Captive Power Plant of the Respondent no. 1 through the Appellant's grid to the joint venture companies of the Respondent no.1 subject to certain conditions. According to the approval, the billing and adjustment of energy had to

be done as per the Captive Power Plant Policy approved by the Government of Tamil Nadu in its Order No. 48 dated 22.4.1998. The Respondent no. 1 furnished its undertaking on 28.3.2005 to the effect of abiding by the conditions.

3.3. On 24.6.2005, the State Commission notified the Intra-State Open Access Regulations 2005 made applicable from 3.8.2005. The Regulations had a provision that the persons already availing open access to the intra-state transmission and distribution system could continue to avail the open access on the same conditions as stipulated under the existing agreement/contract till the expiry of such agreement/contract.

3.4. On 20.3.2006, the Appellant granted approval to the Respondent no.1 for parallel operation of one

additional generating unit of 2.69 MW with the grid over and above the existing capacity of 6.12 MW, subject to certain conditions.

3.5. The State Commission by its order no.2 dated 15.5.2006 determined the transmission charges, wheeling charges and other charges in terms of its Open Access Regulations 2005. The order no.2 was made applicable to all open access customers covered under the Open Access Regulations 2005 which was effective from 3.8.2005 but the existing open access customers where the period of agreement was not specified (open ended) could also opt to come under this order at an earlier date. The State Commission also passed order no.4 dated 15.5.2006 to fix the power purchase and procurement process, including the price for procurement of power by the Appellant

from fossil fuel based Group Captive Generating Plants and Co-generation Plants.

3.6. On 24.6.2006, the Respondent no.1 gave its option to the Appellant for order no. 2 dated 15.5.2006 for its existing wheeling agreement.

3.7. On 24.7.2006, the Appellant issued an amendment to its earlier approval dated 28.3.2005 amending the capacity of the Captive Power Plant of the Respondent no.1 for wheeling of power from 6.12 MW to 8.81 MW, subject to certain conditions. In this letter the Appellant also accepted to take payment of all charges in respect of 8.81 MW captive Power Plant of the Respondent no. 1 as per order no.2 and order no.4 of the State Commission on adoption of both the orders by the Appellant.

3.8. Subsequently, the Appellant vide its order dated 6.11.2007 decided the procedure for implementation of order no. 2 and 4 dated 15.5.2006. It was indicated that the retrospective effect for implementation of order no. 2 and order no. 4 dated 15.5.2006 will be dealt with case by case separately.

3.9. On 19.6.2009 the Respondent no. 1 filed a petition bearing DRP no.13 of 2009 regarding implementation of order no. 2 w.e.f. June 2006 and claiming credit of excess energy deducted by the Appellant out of the energy injected by the Respondent no. 1 for wheeling of energy alongwith interest on such credit. The State Commission passed an order dated 16.11.2009 regarding implementation of its order no.2 from July 2006 and allowed payment of excess energy recovered by the Appellant towards the wheeling

charges to the Respondent no. 1 for the period July 2006 to November 2007. However, the State Commission did not allow the interest charges.

3.10. Subsequently, the Respondent no.1 filed an Appeal before this Tribunal in Appeal no. 23 of 2010 claiming interest. Accordingly, the Tribunal allowed the payment of interest to the Respondent no. 1 vide its order dated 9.7.2010.

3.11. In the meantime on 24.9.2009 the Respondent no.1 approached the Appellant with a request to withdraw its Captive Power Plant status and reduce the long term open access transmission capacity from 8.81 MW to zero as the Respondent no.1 wanted to operate as a power generating company. The Appellant in turn advised the Respondent no. 1 to approach the State Commission.

3.12. Accordingly, the Respondent no.1 filed a petition bearing DRP no. 33 of 2009 before the State Commission for direction to the Appellant to cancel the long term wheeling approval as Captive Power Plant and refund the amount collected from the Respondent no.1 for the period after 1.10.2009 towards transmission and wheeling charges. The State Commission by its order dated 17.8.2010 directed the Appellant to cancel the wheeling approval dated 28.3.2005 granted to the Respondent no.1 in respect of its power plant for supply to the captive consumers with effect from 1.10.2009 without payment of any compensation to the Appellant. Aggrieved by the order of the State Commission, the Appellant has filed this Appeal.

4. The Appellant is aggrieved that the cancellation of the approval for long term open access has been allowed by the State Commission without any compensation to the Appellant which was due to him as per the Open Access Regulation 2005. The learned counsel for the Appellant made the following submissions in support of its claim.

4.1. The Respondent no. 1 had applied for grant of permission as a long term open access customer and had been availing long term open access only.

4.2. The Respondent no. 1 was originally granted permission to wheel energy on 28.3.2005 as per the policies governed under the State Government's order no. 48. The wheeling charges payable at that time as per the terms and conditions framed by the Appellant under Electricity (Supply) Act, 1948 and State

Government's order no.48 were 15% of total energy fed into the grid.

4.3. The Appellant had issued the revised wheeling approval on 24.7.2006 regarding the change in capacity of the Captive Power Plant of the Respondent no.1 from 6.12 MW to 8.81 MW after the issuance of the Open Access Regulation 2005 and order no. 2 dated 15.5.2006 by the State Commission. Thus, the revised approval was a fresh approval.

4.4. After the order no.2 dated 15.5.2006, the State Commission gave option to the Captive Power Plants to be covered under the Regulations, if they desire to do so. Accordingly, the first Respondent had expressed its willingness and opted to be covered under the new provisions of the Intra State Open Access Regulations 2005.

4.5. In fact, the applicability of the law in respect of the first Respondent after the revised approval had been shifted from the State Government order no. 48 framed under the Electricity Supply Act, 1948 to the new provisions of the Intra-State Open Access Regulations 2005.

4.6. In this process, the first Respondent was entitled to the benefits of the order no.2 in respect of the wheeling charges. The Orders no.2 was implemented on September 2007 by the Appellant and from that date onwards the wheeling charges payable by the first Respondent was charged as per the provisions of order no.2 dated 15.5.2006. Subsequently, the State Commission by its order dated 16.11.2009 allowed the benefit to the Respondent no.1 from July, 2006.

4.7. It is apparent from the above proceedings that the first Respondent was treated only under the new Regulations of 2005 and not under the State Government Order no. 48. Further under the State Government Order no. 48, the Respondent no. 1 did not have any right for the third party sale. Thus, the finding of the State Commission that the order no.48 of the State Government is applicable to the Respondent no.1 is not correct.

4.8. The State Commission in the impugned order has acknowledged the wheeling approval dated 28.3.2005 only but did not consider the revised wheeling approval for the enhanced capacity dated 24.7.2006, which was issued subsequent to the Open Access Regulations, 2005 and order no. 2 dated 15.5.2006.

4.9. The first Respondent having taken the benefit of the Open Access Regulations, 2005 and order no.2 dated 15.5.2006 of the State Commission has to be governed under the Regulation 12(h) of the 2005 Regulations with regard to payment of compensation to the Appellant on cancellation of the long term open access approval. The conduct of the parties on records clearly show that the first Respondent had availed long term open access. As such, non-execution of the agreement as per the 2005 Regulations has no effect in this case. The finding of the State Commission that the compensation is not payable as no agreement was signed as per the Regulations is wrong.

4.10. The Appellant has suffered loss because the first Respondent has sought to come out of the long term open access agreement with a view to pay short

term open access charges in future which is only 25% of the long term charges.

5. The first Respondent in its reply has submitted as under:

5.1. The first approval for open access granted by the Appellant on 28.3.2005 was before the notification of the Intra-State Open Access Regulations, 2005 made effective from 3.8.2005.

5.2. The revised approval accorded by the Appellant on 24.7.2006 was not a fresh approval but only to record the change in capacity from 6.12 MW to 8.81 MW. However, all other conditions mentioned in earlier approval dated 28.3.2005 continued to apply as indicated in the revised approval. It also provided that the transmission charges payable would be as determined by the State Commission.

5.3. The finding of the State Commission regarding the State Government order no. 48 dated 22.4.1998 being applicable to the Respondent no. 1 is only in so far as the terms and conditions for the grant of open access. However, the Open Access charges would be as determined by the State Commission under the provisions of the 2003 Act.

5.4. The order no. 2 dated 15.5.2006 passed by the State Commission is a revision of the charges and is automatically applicable to the Respondent no. 1.

5.5. Regulation 12 (h) of the Open Access Regulation has no application to the present case as the wheeling approval was granted to the Respondent no. 1 on 28.3.2005 i.e. prior to the coming into force of the Open Access Regulations. Further in the absence of

any specific agreement, the Regulation 12(h) will not apply.

5.6. There is no loss caused to the Appellant on account of relinquishment of the Open Access Capacity, so there is no question of any compensation. The Appellant has not placed any material to show any actual loss on this account.

6. On the strength of the grounds referred to above, the learned counsel for the Appellant made detailed submissions assailing the findings of the State Commission in the impugned order. Per contra, the learned counsel for the Respondent no. 1 made elaborate submissions in justification of the findings of State Commission.

7. We have carefully considered the respective submissions made by the learned counsel for the

parties and given our anxious consideration. On consideration of the above rival contentions, the following questions would arise for our consideration:

- i) Whether the State Commission was right in holding that the Open Access Regulations, 2005 would not be applicable to the first Respondent for cancellation of the wheeling approval granted by the Appellant for wheeling of power from the Captive Power Plant of the first Respondent to its captive consumers?

- ii) Whether the State Commission was correct in cancelling the wheeling approval dated 28.3.2005 without considering the revised wheeling approval dated 24.7.2006 which was issued after the notification of the Open Access Regulations 2005 and passing of

order no.2 dated 15.5.2006 by the State Commission?

iii) Whether the State Commission was correct in holding that the terms and conditions of State Government's order dated 22.4.1998 would be applicable to the first Respondent?

iv) Whether the Appellant is entitled to compensation as per Regulation 12 (h) of the Open Access Regulations, 2005?

8. The first three questions are interconnected and, therefore, we shall be dealing with them together.

9. Let us first examine the approval for open access granted by the Appellant by its letter dated 28.3.2005 for wheeling of power from the Captive Power Plant of 6.12 MW capacity of the first Respondent. The

Conditions (3) to (7) of the approval are relevant to the present case and are reproduced below:

“(3) The wheeling charges shall be at 15% of the total units fed into the grid irrespective of the distance and voltage for which wheeling is done (i.e.) 15% of the total energy fed into the grid shall be deducted and the balance units shall be permitted to be withdrawn by the companies above mentioned.

(4) Bill and adjustment of energy shall be done as per the CPP policy, approved by Government of Tamil Nadu in G.O. Ms. No. 48, Energy Department dt. 22.4.98 as may be amended from time to time.

(5) The wheeling charges billing and adjustment of energy are subject to revision as may be prescribed by the Board/TNERC from time to time, as the case may be.

(6) The company should not sell generated energy to any third party.

(7) The power generated from the CPP shall be used only by the joint venture companies above mentioned".

Thus, according to the approval dated 28.3.2005, the Wheeling Charges to be adjusted in kind by the Appellant were 15% of the total energy fed by the first respondent's Captive Power Plant subject to the revision as may be prescribed by the State Commission from time to time. The approval was open ended as no duration or end date was indicated. The conditions were accepted by the first respondent by the undertaking dated 28.3.2005.

10. The State Commission notified the Open Access Reulations,2005 which were made effective from 3.8.2005. The relevant provisions of the 2005

Regulations are reproduced below:

“5. Provisions for existing agreements / contracts for wheeling of power

The persons availing access to the intra state transmission system and / or of the distribution system in the State on the date of coming into force of these regulations under an existing agreement / contract shall be entitled to continue to avail such access to the transmission and distribution system on the same terms and conditions, as stipulated under such existing agreement / contract. Such persons are eligible to avail long term intra state open access under these regulations on expiry of such existing agreement / contract. Such of those persons, shall have to apply to come under the long term open access category at least thirty days prior to the expiry of such existing agreement / contract.”

“9. (1) (a) Transmission charges payable to State Transmission Utility / Transmission Licensee and

wheeling charges payable to Distribution Licensee, by an open access customer shall be determined by the Commission. Wheeling charges shall be determined on the basis of same principles as laid down for intra state transmission charges”.

Thus, the persons already availing open access were entitled to continue to avail the same as per the terms and conditions of the existing Agreement. However, they were eligible to avail long term open access on expiry of such Agreement for which they would apply at least 30 days prior to the expiry of the Agreement. Further, the State Commission had to determine the transmission and wheeling charges payable by the open access customer.

11. The State Commission by its order no.2 dated 15.5.2006 determined the open access charges. The order had a provision for option to change over to the

open access charges as per order no.2 for the existing open access customers having open ended agreement.

The relevant extracts of the order are as under:

“5.24 APPLICABILITY OF THE ORDER

5.24.1 The order will be applicable to all the open access customers covered under the TNERC intra state open access regulation 2005 which has taken effect from 3-8-2005.

Provided that the existing open access customers shall continue to be covered under the agreement for the balance period remaining after 3-8-2005, unless it is mutually agreed by both parties to come under this Order at an earlier date.

Wherever period of the agreement is not specified (open ended) in the agreement, such consumer may opt to come under this order and the Licensee shall agree for the same”.

Thus the Respondent no. 1 was entitled to opt for the order no. 2 dated 15.5.2006.

12. Subsequently, the first Respondent vide its letter dated 24.6.2006 to the Appellant regarding issue of 'Revised' wheeling order opted for order no. 2 dated 15.5.2006 of the State Commission for their existing wheeling agreement. Thus, in terms of order no.2, the transmission and wheeling charges as determined by the State Commission became applicable to the first Respondent.

13. On the request of the first Respondent, the Appellant vide its letter dated 24.7.2006 amended its earlier approval dated 28.3.2005 for the enhanced capacity, subject to certain conditions. The relevant conditions no. 6,9 & 10 are reproduced below:

“6. The Company shall be agreeable to make payment of all charges including surcharge towards cross subsidy, if applicable, as per Order No. 2 dated 12.05.2006 and Order No. 4 dated

15.05.2006 of the Hon'ble TNERC on adoption of both the orders by the Board”.

“9. The Company shall abide by the conditions stipulated on the approval for Parallel Operation Board's letter dated 28.03.2006.

10. All the other conditions mentioned in the Board's original letter dated 20.3.2005 cited (1) remain unaltered”.

Thus, the Respondent no. 1 had to also abide by approval granted for parallel operation of additional 2.69 MW Unit.

14. One of the Conditions (Condition no. xiii) in the approval dated 20.3.2006 by the Appellant while allowing parallel operation of the additional 2.69 MW unit was that “the company shall abide the regulations made under sub-section (2) of Section 42 of the Electricity Act, 2003.

15. Subsequently, the Appellant vide its letter dated 17.11.2007 informed the first Respondent the transmission charges as applicable to long term open access customer according to order no. 2 & 4 dated 15.5.2006 of the State Commission. The Appellant also informed the first Respondent to deposit Long Term Open Access Regulation fees and agreement fees as per the Open Access Regulations 2005 and execute fresh agreement incorporating the terms and conditions as per the State Commission's order no.2 and 4 dated 15.5.2006. However, no fresh agreement was signed.

16. The 1st Respondent had filed a Petition no. 13 of 2009 on 19.6.2009 for retrospective application of the transmission and wheeling charges as per the order no. 2 from July, 2006 to November, 2007. It would be

interesting to note that in the Petition before the State Commission, the Respondent no. 1 had pleaded for treating them as a new open access customer under the 2005 Regulations. The relevant extracts of the Petition are reproduced below :

“6. During pendency of the wheeling approval for the plant at the enhanced capacity, the Order No. 2 was passed by this Hon’ble Commission. The petitioner was required to give certain clarifications regarding the wheeling approval and in this regard vide its letter dated 24.06.2006, the petitioner in addition to the other particulars also informed the respondent of their intention to opt for Order No. 2 for their existing wheeling agreement also. The respondent vide its letter dated 24.07.2006 granted wheeling approval to the petitioner for the enhanced capacity of 8.81 MW. On being granted wheeling approval for the enhanced capacity of 8.81 MW, the petitioner was entitled to be considered as a new open access customer covered under intra state open access regulations 2005

and not as an existing customer for the purpose of applicability of Order No. 2 of this Hon'ble Commission and there was no requirement for any opting. However, the petitioner to avoid any doubts opted for Order No. 2 vide its letter dated 24.06.2006”.

Thus, in the Petition no. 13 of 2009 the Respondent no. 1 had submitted that on being granted the revised approval dated 24.7.2006 for the enhanced capacity it had to be considered as a new open access customer under the 2005 Regulations. However, in the present case, the Respondent no.1 has taken a different position that the provisions of Intra-State Open Access Regulation 2005 are not applicable in their case.

17. We also notice from the Petition filed by the first Respondent before the State Commission in DRP No. 33 of 2009 wherein it has pleaded that it is an open access consumer as per the Open Access Regulation,

2005. The relevant paragraph of the Petition is reproduced below:

“4. The Petitioner is an open access customer as per the Intra State Open Access Regulations, 2005 framed by this Hon’ble Commission. Regulation 12(h) of the said regulations provide that a long term open access customer shall not relinquish or transfer his rights and obligations specified in the open access agreement without the prior approval of the Commission. It is relevant to point out here that the Petitioner does not have an open access agreement with the Respondent. Since, the wheeling approval granted to the Petitioner was prior to 3.8.2005, the date of the aforesaid Open Access Regulations; the open access permitted to the petitioner is based on the orders of the Respondent. Since there is no open access agreement between the Petitioner and the Respondent, regulation 12(h) of the Open Access Regulations, 2005 may not be applicable to the Petitioner”.

Thus the Respondent no. 1 while accepting to be open access customer as per the 2005 Regulations had only submitted that Regulation 12 (h) was not applicable in its case as there was no open access agreement.

18. We shall now examine the impugned order of the State Commission. The relevant findings of the State Commission are summarized below:

(i) As the wheeling approval is prior to date of application of the Open Access Regulation i.e. 3.8.2005, the Open Access Regulations cannot be applied to the Respondent no 1.

(ii) In the amendment to the wheeling approval dated 24.7.2006, it has been specifically provided that the Conditions mentioned in the Appellant's original approval dated 28.3.2005 remains unaltered.

(iii) Condition no. 4 of the approval dated 28.3.2005 would indicate that only the State Government's order dated 22.4.1998 will be applicable in this case.

(iv) There is no Open Access Agreement in the present case and there is only an undertaking given by the respondent no 1. Hence, there is no question of applying Regulation 12 (h) of the Open Access Regulation.

19. We are unable to agree with the findings arrived at by the State Commission, as referred in para 17 (i) to (iii) above for the following reasons:

19.1. The revised wheeling approval was granted on 24.7.2006, after the implementation of Open Access Regulations, 2005 and order no. 2 of dated 15.5.2006, therefore, all the Conditions of the 2005 Regulations should apply. According to the Condition no. 9 of the

revised approval, all the conditions of the approval for parallel operation of the additional generating unit of 2.69 MW capacity would apply. One of the conditions (Condition no. xiii) of the approval dated 20.3.2006 for parallel operation of the 2.69 MW capacity additional unit was that the Respondent no.1 would abide by the regulations made under Section 42 (2) of the 2003 Act. The Section 42 (2) of the Act is reproduced below:

“42 (2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints.

Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 (57 of 2003) by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt”.

The State Commission notified its Regulations for Open Access in the year 2005 effective from 3.8.2005. Therefore, the Open Access Regulations became applicable to the Respondent no. 1 as a result of the condition imposed in the amended approval granted on 24.7.2006.

19.2. The State Commission has come to the conclusion on the basis of the Condition no. 4 of the approval dated 28.3.2005 that the State Government's order no. 48 would be applicable to this case. The

relevant portion of the impugned order is reproduced below:

“As the wheeling approval is prior to 03.08.2005, the O.A. Regulations cannot be applied to the Petitioner’s case. Further in the wheeling approval dated 28.03.2005, the Condition No. 4 reads as follows:

“Bill and adjustment of energy shall be done as per the CPP policy approved by the Government of Tamil Nadu in G.O. Ms. No. 48, Energy Department dated 22.04.1998 as may be amended from time to time”.

From the above Condition No. 4, it is to be noted that it is only G.O. Ms. No. 48, Energy Department dated 22.04.1998 which will be applicable to the Petitioner’s case”.

Condition no. 4 stated above only relates to billing and adjustment of energy and not any other terms and conditions. The G.O. no.4 of 22.4.1998

only provided for wheeling charges at the rate of 15% of the energy wheeled. Already the State Commission has allowed application of transmission and wheeling charges as per order no. 2 dated 15.6.2006 to the Respondent no.9 w.e.f. July 2006 by its order dated 16.11.2009. Thus, the Condition no. 4 of the original approval dated 28.3.2005 got superseded by the order of the State Commission and would no longer be applicable to the Respondent no.1.

19.3. Order no.2 dated 15.6.2006 was also issued in terms of the Open Access Regulations, 2005. Having opted for the Open Access Charges as per order 2 on the plea that the revised approval for the enhanced capacity was given after the issuance of the 2005 Regulations, the first Respondent cannot change its position while cancelling the long term open access that it is not governed by the terms and conditions of

the Open Access Regulations, 2005. The Respondent no. 1 cannot do cherry picking from the Open Access Regulations, 2005 read with order no.2 dated 15.5.2006 and the State Government order dated 22.4.1998 simultaneously.

19.4. The Respondent no. 1 in its Petition before the State Commission in DPR no.13 of 2009 and DPR no. 33 of 2009 has itself admitted that the Open Access Regulations, 2005 are applicable.

19.5. The State Government's order dated 22.4.1998 was issued under the Electricity Act, 1948 and a number of conditions such as wheeling charges, restriction on third party sale, etc., are not relevant after the enactment of the 2003 Act and issuance of Open Access Regulations under the 2003 Act.

19.6. The 2005 Regulations provide for surcharge if open access facilities are availed by a subsidizing consumer of a distribution licensee. However, the surcharge is not to be levied in case the access is provided to a person who has established a captive generating plant for carrying electricity to the destination of his own use. If the Respondent no. 1 has to wheel the electricity from its power plant for own use without payment of surcharge then it has to meet the requirement of Rule 3 of the Electricity Rules, 2005. Merely because the part capacity of the power plant of the Respondent no. 1 was commissioned before the enactment of the Electricity Rules 2005, the requirement of captive power plant under Rule 3 cannot be waived off for the purpose of surcharge.

20. In view of the above, we are of the opinion that the Open Access Regulations, 2005 are applicable to the Respondent no. 1.

21. Let us now take up the last issue regarding compensation to the Appellant according to the Open Access Regulations, 2005.

22. Admittedly, the first Respondent is a long term open access customer. Regulation 12 stipulates the procedure for long term open access customer. Regulation 12(a) and 12 (b)(c) stipulate the details of application, registration fee and system studies to be conducted by the nodal agency to find if the long term open access can be allowed without system strengthening. Regulation 12(d) to 12(h) are relevant

and are reproduced below:

“(d) Provided that where the long-term access can be allowed , subject to the provisions in these regulations and without further system strengthening, then such long term access shall be allowed immediately after entering into commercial agreements.

(e) If, in the opinion of the nodal agency, further system strengthening is essential before providing the long-term access, the applicant may request the nodal agency to carry out the system studies and preliminary investigation for the purpose of cost estimates and completion schedule for system strengthening; The nodal agency shall carry out the studies immediately on receipt of request from the applicant and intimate results of the studies within ninety days of receipt of request from the applicant. The applicant shall reimburse the actual expenditure incurred by the nodal agency for system strengthening studies.

(f) After the feasibility is established and prior to execution of agreement, a sum of Rs 50,000 (fifty thousand) shall be payable to the nodal agency towards the open access agreement fee.

(g) After agreements have been entered into and copies furnished to State Load Dispatch Centre, the State Load Dispatch Centre shall inform the open access customer the date from which open access will be available. Furnishing this information will not be later than three days from the date of entering into the agreements.

(h) A long-term open access customer shall not relinquish or transfer his rights and obligations specified in the open access agreement, without prior approval of the Commission. The relinquishment or transfer of right and obligations shall be subject to payment of compensation, as may be determined by the Commission”.

23. As per the above Regulations, open access is to be granted immediately where long term open access can be allowed without any strengthening of transmission system. However, in case the system of strengthening is required to facilitate open access, the date of open access will be informed to the open access customer. Regulation 12 (h) provides for relinquishing the rights and obligations specified in the open access agreement by the open access customer with prior approval of the State Commission and subject to payment of compensation as may be decided by the State Commission.

24. In the present case the Appellant has not stated that any system strengthening was carried out to facilitate long term open access to the Respondent no.1 at the Appellant's cost. Further, no commercial

agreement was signed for long term open access as per the terms of the 2005 Regulations.

25. We do not find any specific provision in the Regulations for determination of the compensation for relinquishing the access rights by the open access customer. There is also no commercial agreement signed between the parties. The open access agreement was only in the form of the approvals dated 28.3.2005 and 24.7.2006 and undertakings by the Respondent no.1 for accepting the term and conditions of the approvals. These approvals do not have any clause providing for compensation to the Appellant for relinquishing the open access rights by the Respondent no.1.

26. In our opinion, the cause for compensation to the Appellant would arise only if (i) relinquishment is

done before the expiry of the full term of long-term open access and, (ii) the relinquishment results in stranded transmission & distribution capacity.

27. In the present case, there is no submission by the Appellant regarding the system strengthening carried out for facilitating open access to the Respondent no.1 at the Appellant's cost or stranded transmission & distribution capacity as a result of the relinquishment of long term open access for captive use. Further no term of open access was indicated in the open access approval and the same was open ended.

28. In view of above, we do not find any reason for compensating the Appellant for relinquishment of long term open access rights by the Respondent no.1. This issue is therefore, decided as against the Appellant.

29. Summary of our findings

29.1. The term & condition of Open Access Regulations 2005 will be applicable to the Respondent no.1 for wheeling energy to its captive consumers. Accordingly, the relinquishing of the long term open access rights by the Respondent no.1 will have be decided according to the Regulations, 2005 and not the State Government order no. 48 dated 22.4.1998 as held by the State Commission. Further the Respondent no. 1 will have to meet the requirement of Rule 3 of Electricity Rules, 2005 qualifying as Captive Power Plant for wheeling of power to its captive consumers without payment of cross subsidy surcharge.

29.2. There are no specific provisions in the 2005 Regulations for determination of the compensation to the Appellant in case of

relinquishment of long term open access rights by the Respondent no.1. Further no commercial agreement was signed between the parties following the 2005 Regulations. In our opinion, the compensation will be payable only if (i) relinquishment is done before the expiry of the full term of the long term open access, and (ii) the relinquishment results in stranded transmission and distribution capacity. The Appellant has not provided any document to establish that any system strengthening was done to facilitate the open access to the Respondent no.1 at the Appellant's cost. No case has been made out by the Appellant regarding the stranded transmission and distribution capacity. In view of this, we reject the contention of the Appellant regarding the aspect of compensation.

30. In view of above, we allow the Appeal only with respect to applicability of the Open Access Regulations and set aside the impugned order of the State Commission to that extent. However, we reject the contention of the Appellant regarding compensation for relinquishment of long term open access rights by the Respondent no. 1. Thus, the Appeal is partly allowed. However, there is no order as to costs.

31. Pronounced in the open court on this **4th day of November, 2011.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE / NON-REPORTABLE

vs