

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

Dated: 19<sup>th</sup> April, 2012

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

**Appeal No.8 OF 2012**

**In the Matter of:**

**The Chairman**  
**Tamil Nadu Electricity Board**  
**144 Anna Salai**  
**Chennai-600 002**

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

**The Superintending Engineer (PEDC)**  
**Tamil Nadu Electricity Board**  
**No.255B/19 A, N.S.K Mahal,**  
**Vaddakku Madavi Road,**  
**Perambalur 621 212**

**Appellant(s)**

**Versus**

- 1. Madras Cements Ltd**  
**No.98 A, Dr. Radhakrishnan Road**  
**Mylapore, Chennai-600 004**
- 2. Tamil Nadu Electricity Regulatory Commission**  
**TIDCO Office Building**  
**No.19A, Rukmini Lakshmi pathy Salai**  
**Egmore, Chennai-600 008**

.....Respondent(s)

**Counsel for the Appellant :Mr. S Vallinayagam**

**Counsel for the Respondent : Mr. T.S Murthy  
Ms.Mukti Chaudhary for R-1  
Mr. Rahul Balaji  
Mr.Senthil Jagadeesan  
Mr. Krishna Dev**

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

1. The Appellants are Chairman and the Officials of the Tamil Nadu Electricity Board. M/s. Madras Cements Limited Chennai is the First Respondent. Tamil Nadu State Commission is the Second Respondent.
2. The Appeal has been filed by the Appellant challenging the order dated 2.3.2011 passed by the State Commission directing the Appellant to terminate the Energy Wheeling Agreement entered into between the Appellant Electricity Board and Madras Cement Limited, the First Respondent in respect of wheeling of electricity from its generating plant to its unit at Ariyalur.
3. The short facts are as follows:

- (a) M/s. Madras Cement Limited, the First Respondent has its cement factory at Alathiyur Works in Ariyalur District.
- (b) The First Respondent established a coal based thermal power plant with a capacity of 36 MW (2 x 18 MW) for its own consumption.
- (c) M/s. Madras Cements Limited applied for Appellant's approval for parallel operation of their generators.
- (d) The Appellant after examining the request made by M/s. Madras Cements Limited granted the approval for parallel operation of 2 x 18 MW generators with the Appellant's Grid through letter dated 15.3.2005.
- (e) In addition to that, M/s. Madras Cements Limited, the First Respondent applied for a Long Term Open Access under the provisions of the Intra State Open Access Regulations, 2005. Accordingly the Appellant issued approval for Long Term Open Access for Wheeling of 6 MW of power from the 2 x 18 MW Coal based power Plant at Alathiyur works of Perambalur Electricity Distribution Circle.

- (f) Under the above wheeling approval, 01 MW of power was wheeled to M/s. Madras Cements Limited plant at RR Nagar of Virudhunagar Electricity Distribution Circle and 5 MW of power was wheeled to its plant at Ariyalur.
- (g) Thereupon, the Madras Cements Limited entered into an Energy Wheeling Agreement with the Appellant on 7.3.2009 for wheeling energy to its plants. The said Agreement provided for wheeling of 1 MW of power to RR Nagar of Virudhunagar and 5 mw of power to Ariyalur factory. It further provided for payment of certain charges pertaining to the cost of the interfacing CPP with Appellant's grid and other charges.
- (h) Accordingly, M/s. Madras Cements Limited (R-1) made payment of charges to the Appellant.
- (i) In view of the relaxation in power grid and commissioning of a generating set at their Ariyalur plant, the wheeling of 5 MW power to their Ariyalur Plant was not required from 4.6.2009. Therefore, M/s. Madras Cements Limited(R-1) decided to withdraw wheeling of 5 MW power to its unit at Ariyalur. Accordingly, M/s. Madras Cements Factory(R-1) sent a letter on 27.6.2009 to the Appellant seeking

for termination of the Agreement in so far as it relates to the wheeling of energy to the Ariyalur unit.

- (j) In reply to above request, the Appellant sent a letter dated 9.7.2009 stating that their request to terminate the Energy Wheeling Agreement to Ariyalur Plant is not feasible for compliance since the Agreement was for a period of 3 years from 7.3.2009 upto 6.3.2012. It further stated that the Agreement could be terminated only in the event of any breach on the part of the Appellant and hence M/s. Madras Cements Factory (R-1) will have to pay the transmission charges and scheduling system operation charges continuously every month till the expiry of the Agreement whether the power is wheeled or not to its Ariyalur unit.
- (k) Aggrieved by the said letter dated 9.7.2009, M/s. Madras Cements Limited (R-1) filed a Petition before the State Commission seeking to set aside the letter dated 9.7.2009 sent by the Appellant and praying for a direction to the Appellant to terminate the Wheeling Agreement of the First Respondent's 2 x 18 MW captive generating plant at Alathiyur to

its unit at Ariyalur and directing the Appellant not to levy any further charges as per the Energy Wheeling Agreement in so far as it relates to Ariyalur Plant.

- (l) The State Commission, after entertaining the said Petition issued notice to the Appellant and heard the parties.
- (m) Ultimately, the State Commission by the impugned order dated 2.3.2011, directed the Appellant to terminate the Energy Wheeling Agreement in respect of the captive generating plant at Alathiyur to its unit at Ariyalur and set aside the letter dated 9.7.2009 sent by the Appellant. Aggrieved by this order, the Electricity Board, the Appellant has filed this Appeal.

4. The Appellant's submissions are as follows:

- (a) The State Commission does not have the powers to declare Energy Wheeling Agreement entered into between the Appellant Electricity Board and Ms/. Madras Cements Limited as terminated.
- (b) The present case is covered by the Regulation 12 (h) of the Tamil Nadu Electricity Commission Intra

State Open access Regulations 2005 which relates to the Long Term Open Access Customers and it does not relate to the Short Term Open Access Customers. In the instant case, the 1<sup>st</sup> Respondent obtained approval for Long Term Open Access from the Appellant. Hence the State Commission cannot invoke 13 (h) which relates to the Short Term Open Access customers.

5. In the elaboration of these points, the Learned Counsel for the Appellant submits that M/s. Madras Cements Limited (R-1) entered into an Energy Wheeling Agreement dated 7.3.2009 with the Appellant for wheeling 6 MW Electricity through the Appellant's network for 3 years from the date of the signing of the Agreement and this Agreement could not be terminated by the State Commission for the reason not contemplated under the Agreement and as per the order No.2 dated 15.5.2006 of the Regulatory Commission relating to the determination of the transmission charges and wheeling charges, M/s. Madras Cements Limited (R-1) is liable to pay transmission charges under the Open Access Regulations in addition to the wheeling charges and so, the Regulatory Commission cannot declare the Agreement to be terminated. It is further stated by the Appellant that the State Commission could not categorise M/s. Madras Cements Limited as Short Term Open Access customer

when M/s. Madras Cements Limited (R-1) applied and got the Long Term Open Access approval from the Appellant and that therefore, the impugned order is liable to be set aside.

6. In reply to the above submissions, the Learned Counsel appearing for the 1<sup>st</sup> Respondent stated that this issue has already been decided by this Tribunal as against the Appellant in the judgment dated 1.3.2011 in Appeal No.113 and 115 of 2010 wherein identical facts and issues as in the present case were involved and hence, this Appeal is liable to be dismissed.
7. In the light of the above submissions, two questions would arise for the consideration:
8. The Appellant's submissions are as follows:
  - (a) Whether the State Commission has the jurisdiction to declare an Agreement entered into between the Appellant and M/s. Madras Cements Limited as terminated contrary to the terms of the said Agreement ?
  - (b) Whether the State Commission could declare the wheeling agreement as terminated in a petition u/s 12 (h) of the Open Access Regulations 2005 which deals with the Long Term Open Access



customer after treating the Madras Cements Limited as a Short Term Open Access customer relying on the period of the Agreement mentioned in the Energy Wheeling Agreement?

9. We have carefully considered the submissions made by both the parties in the light of the questions framed above.
10. At the out set, it shall be stated that the present case is fully covered by the judgment dated 1.3.2011 passed by this Tribunal in Appeal No.113 and 115 of 2010. In this judgment, this Tribunal has confirmed the view taken by the State Commission that a customer under 3 years' agreement would be a Short Term Open Access Customer and consequently Regulation 12(h) would not govern but on the contrary Regulation 13 would govern the said customer of the Agreement entered into with the parties. The relevant observations given by this Tribunal is as follows:

*“20. Anatomized, this provision creates two types of open access customers, namely, short term and long term. The short term open access customer is he who avails himself or itself of intra state open access for a period of one year or less. When this period comes to the extent of five years or more, then that customer is called a long term intra state open access customer. In between the two customers, there is no other sub Clause for one who enters into an intra state wheeling agreement for a period of more than one year and less than five years. There*

*is Note 1 below the Regulation 6 which provides that the open access applicants intending to be such for a period of less than five years and more than a year shall be considered under short term open access only (emphasis ours) and shall be allowed at 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. The argument of the learned counsel for the Appellant that if it was the intention of the Respondent No.1 to enter into a short term agreement for a period of one year or less, then obviously the first Respondent would not have made deposit of Rs. 50,000/- towards wheeling charges; and more importantly the Respondent No.1 itself did not seek for any relief under Clause 13 (h); on the contrary it adhered to Clauses (f) & (h) of Clause 12 of the agreement. We are unable to accept the submission. When the Regulation itself makes it clear that the agreements in question come under the category of intra state short term open access agreement, then it is immaterial what the parties had intended for. The law settled is that where the agreement contradicts the law or is at variance with the latter, it is the latter that has to prevail and all disputes have to be adjudicated upon in terms of the law so declared.*

*There can be no quarrel to the legal proposition that statutory rules and regulations have the force of law; consequently, the agreements which are at variance with the delegated legislation are unenforceable. Therefore, non-invoking of Cause 6 of the agreement or Clause 13 (h) of the agreement by the Respondent No.1 or deposit of Rs. 50,000/- in each of the two is of*

*no consequence. It was the submission of the Appellant that for a short term customer it was not necessary for the first Respondent to go to the Commission as SLDC was competent enough for the purpose. This is not a material consideration for us. With reference to sub Clauses (c) and (e) of Clause 12 of the Regulations, 2005 it is submitted that because it was a long term agreement the modalities in details were worked out ,namely, capacity needed, point of injection, point of drawal, duration of availing open access etc. etc and the duty was cast on the nodal agencies to issue necessary guidelines and to intimate the applicant whether the application should be allowed or not. Further, strengthening of the system was essential before approval of the intra state open access wheeling agreement and all these modalities are not required in case an applicant wants to be a short term open access customer. Since these procedures were adopted in terms of Clause 12 which culminates in Clause (h), it is obvious that it was a long term open access agreement. To our mind, this is begging the question. If the law does not require of the nodal agency to examine the strength of the system and go through the details of the procedure because of the applicant coming under the law as a short term open access customer, then it cannot be said that merely because the procedures dealt with in Clause 12 were gone through, the applicant would be as styled as long term open access customer as it will be contrary to the position of law. Learned counsel for the Appellant too much harps on sub Clause (h) of Clause 12 and compares it with sub Clause (h) of Clause 13 which we reproduce hereunder:*

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

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

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

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

*21. If a customer is a short term open access customer as the first Respondent is, then, willy nilly, sub-Clause (h) of Clause 13 of the agreement has to be invoked. The party or the Tribunal cannot alter the situation of the law. It is not for the Tribunal to comment that the law is vague or unjust. It must not comment what the law should be. It is unable to say that the intention of the parties is so clear that the law has to take a back seat. In both the cases, the Commission found that the transfer point on transaction in each of the cases is the plant switch yard of the Respondent No.1 at 33 KV and the transaction between the first Respondent and the*

*PTC takes place at the switch yard of the Appellant and re-sale by the PTC to the Appellant also takes place at the same switch yard. This is not in dispute.*

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

*23. Accordingly, we dismiss the Appeals without costs”*

11. On going through the above judgment, it is clear that it squarely applies to the present facts of the case. The Agreement in the present case is also one for the term of 3 years. Therefore, Madras Cements Limited (R-1) cannot be characterised as a Long Term Open Access customer. Merely because the Madras Cements Limited (R-1) applied and got the approval for the Long Term Open access from the Appellant, it cannot be said Regulation 12 alone will govern since the term of the Agreement entered into between the Appellant and Madras Cements Limited is only for 3 years which is governed by Regulation 13 relating to Short Term Open Access customer. Therefore, the Madras Cements Limited cannot be characterised as a Long Term Open Access customer.

12. The Short Term Open Access customer is one, who avails himself of intra state Open Access for a period of one year or less. The Long Term Open Access customer is one, who avails himself of intra state Open Access for a period of five years or more. In between the two customers, there is no other sub Clause for one who enters into an intra state wheeling agreement for a period of more than one year and less than five years. This is provided in the Regulation. If this Regulation is taken into account, then the Madras Cement Limited, the first Respondent can be considered to be a Short Term Open Access Customer and in that event only 13(h) of the Agreement has to be invoked.
13. According to the Appellant, the provision of Clause 6(ii) of the Regulation should be read to mean that only when the Agreement entered into between the parties at a time for a period not exceeding one year, it should be treated as Short Term Open Access and that when it is executed at a time for a period exceeding one year shall be treated as Long Term Open Access and as such, the Madras Cement Limited, the first Respondent should have been considered only as a Long Term Open Access customer. This interpretation is wrong. As quoted above, clause 6(i) provides that the Short Term Open Access customer is availing intra state Open Access for a period of one year or less. Similarly, Clause 6(ii) which squarely defines that the customer

availing intra state Open Access for a period of 5 years or more is treated as a Long Term Open Access customer.

14. Thus, the reading of Clause 6 in its entirety makes it abundantly clear that any customer who would be availing intra state Open Access for a period of more than one year or less than 5 years shall be a Short Term Open Access customer.
15. This point has been dealt with and decided by the State Commission in the impugned order. The relevant observation is as follows:-

*“ It is to be noted that in the instant case, an Energy Wheeling Agreement (EWA) has been executed between the Petitioner and the Respondent on 7.3.2009 for wheeling 6 MW of power through Board’s grid for captive use. As per Clause 9(a) of EWA, the agreement shall remain in force for a period of three years. As the EWA was executed in March,2009, i.e. subsequent to the date of coming into force of the intra state Open Access Regulations,2005 made by the Commission, the said regulations would be applicable to this case.*

*Any customer who avails Open Access for less than five years has to be treated as a short term Open Access customer. The Petitioner will, therefore, have to be treated as a short term Open Access customer and compensation has to be determined with reference to Clause 13(h), which fastens liability on a customer, only if reserved capacity remains idle.*

*Clause 13(f) of the Intra-State Open Access Regulations, 2005 reads as follows:-*

*“ In case a short-term customer is unable to utilize the full or substantial part of the capacity reserved, he shall inform the State Load Dispatch Centre along with reasons for his inability to utilize the reserved capacity and may surrender the reserved capacity”.*

*Clause 13(h) of the said Regulations, 2005 reads as follows:-*

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

*In view of the findings in the preceding paragraphs, the letter of \_\_\_\_\_ the \_\_\_\_\_ third Respondent No.SE/PEDC/PBLR/AO/CRS/JA1/F.E.HT.SC.No.43-EWA/D No.308.o dated 07.7.2009 is set aside.*

In this finding, in our view there is no infirmity.

16. The Learned Counsel for the Appellant stated that the State Commission has no jurisdiction to decide the application under Clause-13(h) of the Regulations, 2005. The contention is not tenable. There are Regulations framed by the State Commission, which empowers the Commission to invoke the inherent powers of the Commission to make such orders as may be necessary to meet the ends of justice. They also provide that the Regulations already available shall not bar the State Commission from adopting any other



procedure which is at variance with any of the provisions of these Regulations. If the State Commission deems it necessary to pass appropriate orders by adopting different procedure, it can pass suitable orders with reasons to be recorded.

17. Therefore, the State Commission in this case has correctly concluded that the Respondent Company was a Short Term Open Access customer by suitably interpreting the Clause 6(i) and 6(ii) of the Regulations and granted the relief to it by giving valid reasons.
18. There is no dispute in the fact that there was no loss whatsoever had occasioned to the Appellant on account of the prayer for the termination. It is an undisputed fact that the expenditure for infrastructure in interfacing the captive generating plant of the Madras Cements Limited (R-1) with the Grid of the Appellant was entirely borne by Madras Cements Limited. In fact, Madras Cements Limited (R-1) has been assessed to demand charges for the entire sanctioned demand. The capacity reserved for the Madras Cements Limited through Open access is being utilised by the Appellant for providing power supply to the First Respondent consequent to the reduction of power cut to 20% with effect from 16.6.2009.

19. That apart, 3 to 12.9 MW of power is being generated and sold to the 3<sup>rd</sup> party through the Appellant's transmission system and the Madras Cements Limited has been paying the necessary charges for the same.
20. As pointed out by the State Commission, the Madras Cements Limited is a Short Term Open Access customer on account of the specific Terms of the Open Access Regulations as interpreted by the State Commission in the impugned order as well by the judgment dated 1.3.2011 in the Appeal No.113 and 115 of 2010 rendered by this Tribunal. The Appellant is duty bound to act swiftly in accordance with the Open Access Regulations and the orders passed by the State Commission.
21. The very same point has again been dealt with by this Tribunal in another Appeal in Appeal No.108 of 2011 in the judgement rendered in this Appeal on 19<sup>th</sup> March,2012. This Tribunal has given the following findings:-

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

*(ii) The request of the Respondent No.1 for reducing the reserved capacity of wheeling has to be governed by Clause*

*13(h) of the Intra-State Open Access Regulation applicable to Short Term Open Access customers.*

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

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

22. The above findings, as mentioned earlier, would squarely apply to the facts of the present case as well.

23. The Learned Counsel for the Appellant has cited Bihar State Electricity Board & Anr Vs UMI Special Steel Limited (2000) 8 SCC 560. The issue in the said case is different from the issue in the present case. In that case, there was no issue of the status of the Agreement which conflicts the Regulation. In the present case, the sole issue is whether the provision of the statutory Regulations can be overridden by the Agreement between the parties or not. As indicated above, the State Commission has correctly decided on the basis of the Regulations which will prevail over the Agreement.

#### 24. **Summary of Our Findings**

**i) The Respondent No.1 has to be treated as Short Term Open Access customer in terms of Intra-State Open Access Regulations, 2005 in spite of the**

**Energy Wheeling Agreement entered into between the Appellant and the Respondent No.1 being for a period of 3 years and inspite of its having deposited the registration fee and agreement fee applicable for Long Term Open Access customer at the time of seeking the Open Access.**

- ii) The request of the Respondent No.1 for termination of wheeling arrangement from its generating plant to its unit at Ariyalur will be governed by Clause 13(h) of the Intra-State Open Access Regulations applicable to Short Term Open Access customers.**
- iii) The State Commission has correctly utilised its inherent powers to decide the matter regarding termination of wheeling arrangement to the Ariyalur unit of the Respondent No.1.**
- iv) There is no infirmity in the findings of the State Commission that no compensation is payable by the Respondent No.1 to the Appellant consequent of the termination of the wheeling arrangement requested by the Respondent No.1.**

25. In view of the above findings, we hold that the order impugned passed by the State Commission is perfectly valid in the law, as it would not suffer from any infirmity.

26. Hence the Appeal is dismissed being devoid of merits.

27. However, there is no order as to costs.

**(Rakesh Nath)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated: 19<sup>th</sup> April, 2012

✓ ~~REPORTABLE/NON-REPORTABLE~~