BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

Appeal No. 113 of 2010
And
Appeal No. 115 of 2010

Dated: 1st March, 2011

Coram: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Dutta, Judicial Member

In the matter of:

Appeal No. 113 of 2010

1) The Chairman
Tamil Nadu Electricity Board
144, Anna Salai
Chennai-600002.

2) The Chief Engineer/PPP
Tamil Nadu Electricity Board
144 Anna Salai
Chennai-600002. ….. Appellant(s)

Versus

1) OPG Energy (P) Ltd
No.26, K.B. Dasan Street
Teynampet
Chennai-600018
Rep. by its General Manager
D. Eswaramurthy

2) Tamil Nadu Electricity Regulatory Commission at Chennai
TIDCO Office Building
No.19A, Rukmini Lakshmipathy Salai,
Egmore, Chennai-600008
Represented by its Secretary …. Respondent(s)

Counsel for the Appellant(s) : Mr. R. Venkataramani, Sr. Advocate
Mr. Vallinayagam
Mr.Aljo K. Joseph
Mr. R. Nedumaran

Counsel for the Respondent(s) Mr. G. Umapathy
Mr. S. Ram Subramaniam for R-1.

Appeal No. 115 of 2010

The Chairman
Tamil Nadu Electricity Board
144, Anna Salai
Chennai-600002. ….. Appellant(s)

Versus

1) OPG Renewable Engery (P) Ltd
No.17, Mooker Nallamuthu Street
Chennai-600001.
Represented by its General Manager

2) Tamil Nadu Electricity Regulatory Commission at Chennai
TIDCO Office Building
No.19A, Rukmini Lakshmipathy Salai,
Egmore, Chennai-600008
Represented by its Secretary …. Respondent(s)

Counsel for the Appellant(s) : Mr. R. Venkataramani, Sr. Advocate
Mr. Vallinayagam
Mr.Aljo K. Joseph
Mr. R. Nedumaran

Counsel for the Respondent(s) Mr. G. Umapathy

Mr. S. Ram Subramaniam for R-1.

JUDGMENT

JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. Appeal No. 113 of 2010 and another being No. 115 of 2010 are being disposed of by this common judgment and order in view of the fact that both the Appeals arise out of identical question of fact and thus deserving a common treatment on this question of law whether agreement not in consonance with the law has to give way to the law.

   In Appeal No. 113 of 2010 facts are as under:-

2. The Respondent No.1, namely, OPG Energy (P) Ltd., had a captive generating plant having a generator with capacity of 17.5 MW in respect of which wheeling approval was accorded by the Appellant in respect of the said 17.5 MW of power which was, however, revised and reduced on the request of Respondent No.1 on account of shortage of supply of gas by Gas Authority of India Ltd., from 17.5 MW to 10 MW. The Tamil Nadu Electricity Regulatory Commission, which is the Respondent No.2 herein, passed an order on 17.07.2008 directing the Appellant to revise the wheeling approval to that effect w.e.f. 24.12.2007 so much so that revised wheeling agreement was executed between the first Respondent and the Appellant on

15.11.2008 and this agreement is, according to the Appellant, a long term open access agreement for a period of three years. When this agreement was in force, the Respondent No.1 requested for the amendment of the agreement in respect of payment of transmission and wheeling charges through their two letters dated 04.05.2009 and 11.05.2009 from 10 MW to 1 MW on the ground that the first Respondent was supplying 9 MW of power to the Appellant through PTC from February, 2009. The Appellant by the reply dated 09.06.2009 regretted the request on the ground that the agreement dated 15.11.2008 was a long term bilateral agreement for a period of three years from 15.11.2008 till 2011. According to the Appellant, the first Respondent never obtained prior approval of the Commission for reduction in capacity of long term open access in terms of Clause 12 (h) of the TNERC Open Access Regulations 2005. The first Respondent is bound to pay long term open access charges till the second Respondent, the Commission approves of relinquishment subject to payment of compensation under Clause 12 (g) of the TNERC Open Access Regulations 2005. The first Respondent informed the Appellant on 07.07.2009 that it was supplying 9 MW of power to the Appellant through PTC from 04.07.09 and paying transmission charges of Rs. 2781/- per MW per day for entire 10 MW of power and requested that levying of transmission charges for wheeling of power to TNEB would not be proper on the ground that such charges are not levied upon the other generators which supply power to the same Appellant and accordingly requested for reduction of the wheeling approval for evacuation facility only to 1 MW. This plea of the Respondent No.1 is wholly untenable because provision of

Regulation 12 (h) of the Intra State Open Access Regulations, 2005 was not followed and complied with. The sale of power to PTC by the generator amounts to open access and their request for waiver of transmission charges for the quantum of sale was not considered as sale was not made direct to the Appellant and the agreement was between the Appellant and the PTC for purchase of power direct from the PTC and the Appellant is not concerned with the question as to from whom or how PTC would be procuring power for supply to the Appellant. However, the first Respondent filed a petition before the second Respondent in DRP No. 29 of 2009 under Regulation 12 (h) of the TNERC Intra State Regulations, 2005 for waiver of the transmission and wheeling charges for evacuation of 9 MW of power and revision and modification of the wheeling agreement from 10 MW to 1 MW from 27.01.2009 and for refund of the excess transmission and wheeling charges. The Appellant contested the proceedings and pleaded before the Commission in the same manner as is being pleaded now before this Tribunal in the Appeal. The Commission by the impugned order dated 10.03.2010 held that the agreement dated 15.11.2008 between the Appellant and Respondent No.1 for wheeling of 10 MW of power through the Appellant's grid for captive use for a period of three years amounts to short term open access as per Clause 13 (h) of TNERC Open Access Regulations. The Commission directed that the Appellant shall not collect the transmission and scheduling and system operation charges from the Respondent No.1 from the date of order of the Commission till such time the reduced capacity continues to be utilized by the Appellant through such trading transaction of 9 MW between PTC and the

Appellant at the transfer point of the Respondent No.1 switch yard. The Commission further directed that the charges collected from 01.07.2009 should be refunded to the Respondent No.1. Hence the Appeal.

3. With respect to Appeal No. 115 of 2010 which arose out of the order of the Respondent No.2 dated 10.03.2010 in DRP No. 31 of 2009 the facts are these:-

4. The Respondent No.1 which is a special purpose vehicle captive generating plant with a capacity of 10 MW was permitted to wheel 7.2 MW of power to three captive users under long term open access who had equity share holding in the captive generating plant of the Respondent No.1. The Respondent No.1 executed an agreement for wheeling of power on 07.02.2009 with the Appellant and the Respondent No.1's generator is interfaced with the Board's grid at 33 KV level. This agreement was a long term open access agreement for a period of three years but while the agreement was in force, the Respondent No.1 requested for permission for third party sale and hence Intra State third party sale was permitted in respect of 4 MW of power on short term basis vide Board's letter dated 18.03.2009. Further, the Appellant was selling 3 MW of power to PTC which in turn is selling the same to the Board under a short term basis. The Appellant issued LOA vide letter dated 03.07.2009 to PTC India Ltd., for purchase of 650 MW firm power from CPPs for the period from July, 2009 to May, 2010 and entered into an agreement on 21.10.2009. The first Respondent is one of the suppliers of power to

the PTC. According to the Appellant, the first Respondent was permitted for third party sale and sale to PTC on short term open access basis when the long term agreement was in force for 7.2 MW. No approval of the Commission was obtained for reduction in capacity of long term open access or relinquishment of the right of the first Respondent in terms of Regulation 12 (h) of the TNERC Open Access Regulations 2005. Now, the first Respondent vide letter dated 07.07.2009 informed the Appellant that they were supplying 3 MW of power to the Appellant through PTC from 04.07.2009 on payment of transmission charges of Rs. 2781/- per MW per day for the entire 7.2 MW and requested that levying of long term transmission charges for wheeling of power to the Appellant would be inappropriate in as much as such charges are not levied to other generators who supply power to the Appellant and thus requested for reduction of the wheeling approval evacuation facility to 3 MW. The Appellant by their reply dated 05.09.2009 regretted the request on the ground that it was a long term open access agreement for wheeling of 7.2 MW of power to captive users for a period of three years. The first Respondent was further told that sale to PTC by the generator amounts to open access and the respondent no.1's request for waiver of transmission charges for the quantum of sale could not be conceded to as it was not a direct sale to the Appellant. Then the first Respondent filed a petition before the Commission in DRP No. 31 of 2009 under Regulation 12 (h) of the TNERC Intra State Open Access Regulations, 2005 on the ground that they are using only 3 MW of power to captive users and not using Appellant's network for evacuating 4.2 MW to captive users and their liability of payment of

transmission charges is to be reduced to 3 MW of power and prayed before the Commission to direct the Appellant for revision of the agreement from 7.2 MW of power to 3 MW of power from July, 2009 and refund the excess transmission and wheeling charges collected from the said month.

5. The Appellant contested the matter before the Commission on the ground that the agreement was an open access agreement and there was no direct sale by the Respondent No.1 to the Appellant and there should not be any question of reduction of transmission and wheeling charges for evacuation of 3 MW of power. The Commission by the order dated 10.03.2010 held that the Energy Wheeling Agreement which was executed by the Respondent No.1 with the Appellant on 07.02.2009 for wheeling of 7.2 MW of power through the Appellant's grid for captive use for a period of three years amounts to a short term open access agreement in terms of Clause 13 (f) of Open Access Regulations 2005. The Commission further held that the transaction between the first Respondent and the PTC takes place at the switch yard of the plant and re-sale by the PTC to the Appellant also takes place at the same switch yard and thus the Appellant started using the line capacity to the tune of 3 MW ever since this transaction commenced w.e.f. 04.07.2009 and would continue till 31.05.2010. The Commission directed the Appellant not to collect the transmission and scheduling and system operation charges from the Appellant from the date of the order till such time the reduced capacity is utilized by the Board by the trading transaction of 3 MW of power between the PTC and the Board at the transfer point of the Respondent No.1

switch yard. The Commission further directed refund of the charges so far collected w.e.f. 04.07.2009.

6. In Appeal No. 113 of 2010, the first Respondent contended that the first Respondent applied for wheeling approval of power from their captive power plant of 17.5 MW to their Group of companies and the TNEB accorded approval on 18.09.2003. the revised approval was accorded on 27.03.2004. Since the 1st Respondent could not generate and wheel power of 17.5 MW, as permitted, due to shortage of supply by the Gas Authority of India Ltd., the first Respondent had requested the Appellants to revise the wheeling from 17.5 MW to 10 MW. When the Appellants declined for the revision of wheeling agreement, the 1st Respondent approached the 2nd Respondent and obtained orders in DRP No.2 of 2008 dated 15.07.2008 and only thereafter a revised wheeling agreement was executed on 15.11.2008 to 10 MW. Thereafter, the TNEB floated a tender for purchase of power and awarded it to PTC Ltd. From February, 2009 to June, 2009, the 1st Respondent was supplying power as per the terms of the tender dated 24.12.2008 to the Appellants and requested the 2nd Appellant on 27.01.2009 and 04.05.09 to amend the Energy Wheeling Agreement from 10 MW to 1 MW. The 1st Respondent stated that it was supplying power as per the terms of the tender dated 24.12.2008 to the Appellants and requested the second Appellant on 27.01.2009 which was acknowledged by them to amend the Energy Wheeling Agreement from 10 MW to 1 MW and for the payment of transmission and wheeling charges for 1 MW. The second Appellant in his letter dated 09th June, 2009 had informed that the amendment to

Energy Wheeling Agreement from 10 MW to 1 MW cannot be entertained by the Board as the 10 MW Energy Wheeling Agreement is a Long Term Bilateral Energy Wheeling Agreement for a period of three years from 15.11.2008 which extends upto 2011. On 7th July 2009, the 1st Respondent once again requested the first Appellant to reduce the transmission capacity from 10 MW to 1 MW from the date of their letter dated 27th January, 2009 since they have been wheeling 9 MW of power to the opposite parties through PTC India from 1st July, 2009 to tide over power shortage and on the fact that transmission charges for wheeling power to the Appellants are not being levied to other generators who supply power to the Appellant. It is further contended that the Commission has rightly concluded that the agreement between the parties is clearly an agreement in relation to short term open access and, therefore, the Regulations applicable to a short term open access customer would apply and only the charges as approved and notified for the same would be payable.

Regulation 7 which deals with categorization of Intra State Open Access Customer specifically provides that a long term Intra State Open Access Customer would be one who avails intra state open access for a period of five years or more. In the present case, as would be evident from a reading of the agreement itself, the period under the energy wheeling agreement to which open access has been granted for a period less than five years, the respondent cannot be categorized as a long term intra state open access customer.

7. It is a settled proposition in law that mere wrong quoting of a provision cannot determine the application of such a provision. The 2nd Respondent has therefore rightly held that upon correct application of the regulations, inasmuch as the agreement is executed for a three year period, it is to be treated as short term open access agreement. The 2nd Respondent has also held that strictly following the regulations that in case of short term open access customer if the capacity allotted is to be surrendered, liability towards payment on the parties would cease upon reallocation of the transmission capacity. In the present case, since there has indeed been reallocation of transmission capacity and utilization of the same by the Appellant board itself for purchase of power through PTC India Ltd., the liability to pay charges does not arise. It is also clear that the transfer point takes place in terms of the agreement at this Respondent's switch yard and therefore no charges as claimed are payable. The 2nd Respondent has therefore rightly directed refund of all excess charges collected contrary to the Regulations.

8. In Appeal No. 115 of 2010, the Respondent No.1 contended that 1st Respondent established waste heat recovery based co-generation plant and entered into Energy Wheeling Agreement on 07.02.2009 with the Appellants to wheel the power generated from the said captive generation plant to the extent of 7.2 MW to their captive consumers. The 1st Respondent was supplying 3 MW power to the Appellants through PTC India Ltd from 4th July, 2009 to tide over the power situation. Since 3 MW was sufficient to cater to the needs of their captive consumers from out of 7.2 MW, the 1st Respondent requested

the Appellants to revise the wheeling approval and to reduce the evacuation facility to 3 MW from the date of supply of power to the Appellants through PTC India viz from 4th July, 2009. On 5th September, 2009, the second Appellant has sent an evasive reply and threatened to treat the 1st Respondent's power plant as a generating company. The 1st Respondent requested the Appellants to revise the wheeling approval and to reduce the evacuation facility to 3 MW from the date of supply of power to the opposite parties through PTC India viz from 04.07.2009. The other contentions of the 1st Respondent in this appeal are the same as in Appeal No. 113 of 2010 and we do not repeat the same.

9. In both the Appeals, the Appellant, namely, TNEB filed rejoinder the essence of which is reiteration of what had been stated in the memorandum of Appeals and accordingly it is not worthwhile to repeat the same all over again. But one fact needs narration which the Appellant has pointed out, namely, that the Respondent No.1 informed the Appellant that they were enclosing a cheque for a sum of Rs. 55,000/- (Rs. 5,000/- for long term open access registration fee and Rs. 50,000/- for long term open access agreement fee) and the Appellant acknowledged receipt of the money. This deposit of Rs. 55,000/- inclusive of registration fee of Rs. 5,000/- was made by the first Respondent with clear understanding that the proposed agreement was to be a long term open access agreement. The State Transmission Utility had to conduct system studies as per Regulation 12 (c) of the TNERC Intra State Regulations, 2005 in consultation with other agencies involved. The agreement was executed for a

minimum period of three years and the Commission was not justified to hold that it was a short term open access agreement. This is the rejoinder in Appeal No. 115 of 2010. Identical rejoinder has been filed in Appeal No. 113 of 2010 and no repetition is necessary.

9. The Commission in neither of the cases has filed any counter affidavit.

10. The points for consideration in the context of the pleadings are as follows:-

1. Whether the energy wheeling agreement in each of the two cases entered into between the Appellant and the first Respondent is a long term open access, as alleged by the Appellant, or a short term open access as held by the Commission?

2. Whether the Commission was justified in issuing order as per provisions of clause 13 (h) of the Open Access Regulations 2005 treating the agreement as short term one when the first Respondent did not claim any relief under this Clause but petitioned under Clause 12 (h) that deals with long term open access agreements?

3. Whether the Commission was justified in holding that sale of power by the first Respondent to the PTC which in turn sold to

the Appellant does not attract transmission charge, system and scheduling charges?

11. Before we proceed to examine the Appellant's points of view it is but proper to see what the Commission has held in each of the cases. Both the proceedings being DRP No. 29 of 2009 and DRP No. 39 of 2009 were heard by the Commission together and then the Commission passed two separate orders on the same day, namely, 10.03.2010. The findings in both the cases are identical, almost in the identical language. We reproduce paragraphs 5.3 and 5.4 of the Commission's order which is the same in each of the two Appeals.

"5.3. In the instant case, the agreement period is 3 years and hence as per note 1 short term open access agreement. Clause 13 of OA Regulations is applicable in the present case. As per Clause 13 (f) of the OA Regulations, in case a short term customer is unable to utilize the full or substantial part of the capacity reserved, he shall inform the SLDC along with reasons for his inability to utilize the reserved capacity and may surrender the reserved capacity. Clause 13 (h) 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."

"5.4 Since the petitioner has been granted open access for a period of 3 years in terms of Clause 13 of the OA Regulations which is a case of short term open access even if the petitioner surrenders OA capacity allotted to him, he can escape the charges only when the transmission capacity is re-allocated to somebody else or utilized by the TNEB. Till such re-allotment or utilization takes place, the petitioner shall continue to pay the open access charges as laid down in OA Regulations 2005."

12. Learned counsel for the Appellant in Appeal No. 115 of 2010 contended that the impugned order of the Commission in DRP No. 31 of 2009 is contrary to the law and facts of the case because the first Respondent company installed captive generating plant with capacity of 10 MW of power and permission for wheeling was given in respect of 7.2 MW of power to the captive users and the wheeling agreement was executed for a period of three years on 07.02.2009. The first Respondent was quite aware, conscious, and that too willful that the agreement it was executing with the Appellant was in respect of a long term open access agreement and with that end in view the first

Respondent of its own motion deposited requisite fees of Rs. 50,000/- which is payable only in case where the parties intended to have an agreement for a long term open access. The first Respondent subjected itself to the process of long term agreement by applying to the State Transmission Utility (here the TNEB), and if the first Respondent had intended to enter into a short term open access agreement it could have applied to the SLDC by paying applicable fees but it did not do so. The registration fee of Rs. 5,000/- was paid. The Commission committed error in setting aside Appellant's letter dated 05.09.2009, and directing it not to collect the transmission and scheduling and system operating charges. The Commission's order is totally contrary to the terms of Clause 13 (h) because whether it is a long term open access or short term open access, the transmission capacity was reserved for 8 MW of power and hence the generator was liable to pay the scheduling and system operating charges 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. Furthermore, in Appeal No. 115 of 2010, 7.2 MW of power was permitted for wheeling to captive users under long term open access and the sale of 3 MW of power to the Appellant through the PTC is to be treated as open access transaction under Clause 4 (1) of the Open Access Regulations 2005 because the first Respondent was not selling power to the Appellant directly and the 5 MW of power permitted for sale to third party is to be treated as short term open access transaction only. The first Respondent is liable to pay the transmission charges only as a long term open access customer and the charge is Rs. 2781/- per MW per day. It is submitted that the first

Respondent itself invoked the Clause 12 (h) of the Intra State Open Access Regulations, 2005 and prayed for the approval of the Commission for reduction only in the open access capacity. Therefore, the Commission was not justified in invoking the provision of Cause 13 (h) of the Intra State Open Access Regulations, 2005. The first Respondent itself did not plead as a short term open access customer. The Commission after disposal of the two cases revised the model energy wheeling agreement and deleted the word 'minimum period of three years'. The same argument is advanced in respect of the other Appeal also.

13. Mr. Umapathy, learned counsel for the first Respondent made a short submission in respect of both the Appeals, namely, it is not of importance what the parties had intended to agree for valuable consideration but the question is whether the agreement or the intention revealed in the agreement is contrary to the law. If the law, as regards the particular issue is specific and admits of no ambiguity then it is the demand of the law that it has to be applied or no matter what the parties had intended to agree as between themselves. If the TNERC Intra State Open Access Regulations, 2005 makes it abundantly clear that the agreement entered into by and between the parties amounts to a short term open access agreement, then it is so, no matter what languages are employed in the agreement in question. Since in both the cases, the agreement is for a period of three years, then in terms of the Regulations it has to be a short term open access wheeling agreement and even though a litigant is not aware of the law and because of being

unaware of the provisions of law appropriate remedy was not prayed for in terms of the law, the law must not refuse to offer such remedy if the facts presented make it clear that the party is entitled to such remedy in terms of the law though it was not invoked by it.

14. There has been no appearance on behalf of the Commission.

15. Let us look at the agreement in Appeal No. 113 of 2010 (corresponding to DRP No. 29 of 2009). This agreement entered into by and between the Appellant and the first Respondent is dated 15.11.2008 wherein the parties agree for wheeling of 10 MW of power through the Appellant's grid for captive use. There are 11 Clauses to the agreement and the Clause 9 says that it will remain in force for a period of three years. This is, of course, the revised wheeling approval from 17.5 MW to 10 MW subject to certain conditions which are not relevant for us. Clause 5 relates to charges which has been divided into 8 heads each under a distinct charge. Noticeably, the agreement does not expressly say whether it is a long term open access agreement or a short term wheeling agreement.

16. The other agreement (DRP No. 31 of 2009) between the self same parties is in respect of the open access wheeling of 7.2 MW of power for use by captive users/third party sale through the Board's grid for a period of three years from the date of the agreement. By this agreement interfacing and evacuation facilities have been provided for and details of operation, maintenance and metering arrangements have been worked out.

Charges have been specified as payable to the Appellant. In both the cases, the first Respondent deposited a sum of Rs. 55,000/- inclusive of registration fee of Rs. 5,000/- each.

17. Given the factual position in details as above, it is imperative that perusal is made of the Tamil Nadu Electricity Regulatory Commission Intra State Open Access Regulations, 2005 which has come into force by a Gazette Notification of the Government of Tamil Nadu on 24.06.2005. The enabling power behind framing the Regulations is Section 181 of the Act. It is needless to say, though not utterly irrelevant, that open access means non-discriminatory provision for use of transmission line or distribution or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the Regulations.

18. Regulation 6 under the heading "Categorization of Intra State Open Access Customers is reproduced below:-

"Subject to the provisions of regulation 5 above, the open access customers shall be classified into the following categories:

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

(ii) Long term intra-state Open Access customers.

An open access customer availing intra state open access for a period of five years or more shall be long-term intra state open access customer."

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

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

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.

24. Pronounced in the open Court on this 1st day of March, 2011.

(Justice P.S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

Dated: 01.03.2011

INDEX: REPORTABLE/NON-REPORTABLE

RKT