

**APPELLATE TRIBUNAL FOR ELECTRICITY  
(APPELLATE JURISDICTION)**

**Appeal No. 8 of 2010**

**Dated: 19<sup>th</sup> November, 2010**

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

**In the matter of:**

**1. Sitapuram Power Limited,  
8-2-293/A/431/A,  
Road No. 22, Jubilee Hills,  
Hyderabad-500 033.**

**2. Zuari Cement Limited,  
Krishna Nagar, Yerraguntla,  
Kadapa District,  
Andhra Pradesh-616 311**

**...Appellants**

**Versus**

**1, Transmission Corporation of Andhra Pradesh Ltd.,  
Vidyut Soudha, Kairatabad,  
Hyderabad-500 082**

**2. Southern Power Distribution Company of A.P. Ltd.  
Renigunta Road,  
Tirupathi-517 501**

**3. Andhra Pradesh Electricity Regulatory Commission  
4<sup>th</sup> and 5<sup>th</sup> Floor,  
11-4-660 Singarareni Bhavan,  
Red Hills,  
Hyderabad-500 004. ... Respondents**

**Counsel for the Appellants : Mr. M.G. Ramachandran  
Mr. Rajiv Yadav**

**Counsel for the Respondent : Mr. Achintya Dvivedi  
Nos. 1 & 2 : Ms. Surbhi Sharma**

**Counsel for Respondent No.3 : Mr. K.V. Mohan**

### **JUDGMENT**

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

1. Sitapuram Power Limited, the 1<sup>st</sup> Appellant herein is a captive generator. Zuari Cement Limited, the 2<sup>nd</sup> Appellant herein is the captive user of the electricity supplied from the captive power station operated by the Appellant-1.

2. Both the Appellants filed a petition before the Andhra Pradesh State Electricity Regulatory Commission (State Commission) challenging the levy of penal demand charges imposed on the captive

user, the 2<sup>nd</sup> Appellant herein for the drawal of power during the outage of the power plant of the 1<sup>st</sup> Appellant for the entire amount calculated on the basis of “Maximum Recorded Demand”. However, the State Commission dismissed the said Petition by the order dated 19.08.2009. Hence this Appeal by both the Appellants, before this Tribunal.

3. The facts as are relevant for the disposal of this Appeal are as follows:-

4. The 1<sup>st</sup> Appellant, Sitapuram Power Ltd. is a generating company with a capacity of 43 MW. The 2<sup>nd</sup> Appellant is its captive user.

5. The 1<sup>st</sup> Respondent is the Transmission Corporation of Andhra Pradesh (APTRANSCO). The 2<sup>nd</sup> Respondent is Southern Power Distribution Company of Andhra Pradesh (APSPDCL). The third Respondent is Andhra Pradesh Electricity

Regulatory Commission. The 1<sup>st</sup> Appellant uses the transmission and distribution systems of the transmission and distribution licensees (Respondents 1 and 2). The 2<sup>nd</sup> Appellant, Zuari Cement Limited is a captive user of the electricity from the captive power station operated by the 1<sup>st</sup> Appellant. Appellant-2 also meets part of its electricity requirement through a supply agreement with the Respondent-2 (APSPDCL), the Distribution Licensee.

6. The 1<sup>st</sup> Appellant being an Open Access User entered into a long-term Open Access Agreement dated 26.2.2008 with the APTRANSCO (Respondent-1) and APSPDCL, the Distribution Licensee (Respondent-2) in terms of Regulation-2 of 2005, of Andhra Pradesh State Commission (Terms and Conditions of Open Access to intra-State transmission and distribution network) Regulations,

2005. Under the said Agreement, the 1<sup>st</sup> Appellant has a contracted capacity of 26 MW for transmission and wheeling of the electricity from its power plant to its captive user namely, the 2<sup>nd</sup> Appellant herein.

7. The 2<sup>nd</sup> Appellant Zuari Cement Limited set up a cement plant in Kadapa District, Andhra Pradesh. It also entered into a power supply agreement dated 01.03.2008 with Respondent-1, APTRANSCO and Respondent-2 (APSPDCL) for getting the supply of electrical energy for a Contracted Maximum Demand of 6500 kVA in addition to the supply from the 1<sup>st</sup> Appellant. As indicated above, the 2<sup>nd</sup> Appellant is a captive user of Appellant-1 which has a captive generation plant and a Special Purpose Vehicle (SPV) within the meaning of Electricity Rules, 2005.

8. As per Regulation 2 of 2006, the Interim Balancing and Settlement Code for Open Access Transactions Regulations, 2006 framed by the State Commission, the 1<sup>st</sup> Appellant has been providing wheeling schedule to the State Load Dispatch Centre and the 2<sup>nd</sup> Respondent herein. It further provides that in the event of any deviation between the wheeling schedule and the actual capacity injected into the grid, the shortfall is deemed to have been drawn from the Distribution Company and such shortfall shall be paid as per the Regulation. In terms of the said Regulations, Appellant-2 is a Scheduled consumer as it meets part of its demand from captive generator and partly from the Distribution Company, Respondent-2.

9. The State Commission by the order dated 20.03.2009 issued the tariff order. This order makes it mandatory for the billing to be based on

“Maximum Recorded Demand” or 80% of the contracted demand, whichever is higher for the consumers of Respondent-2. However, Regulation 2 of 2006 does not provide for the billing on the basis of the Maximum Recorded Demand, but the clauses 8.3 and 8.4 of the Regulation 2 of 2006 provide that after deducting the supply made available by the Open Access Generator, the balance energy shall be deemed to have been supplied by the Distribution licensee and the same shall have to be paid as per terms of the supply agreement. In the Open Access Agreement, Article 5.1 of the agreement provides that Open Access User, the 1<sup>st</sup> Appellant herein, shall pay to the Respondent-2 in accordance with the rates fixed under Balancing and Settlement Code approved by the Commission from time to time.

10. According to the Appellant, even though Regulation 2 of 2006 does not provide for the billing

on the basis of the Maximum Recorded Demand, the Respondent-2 began to levy unlawful charges and demanded that too from the 2<sup>nd</sup> Appellant on the basis of Maximum Recorded Demand.

11. Under these circumstances, on 7.08.2008 the Appellants jointly filed the Petition No. 15 of 2008 before the State Commission, against the alleged unlawful charges levied by the Respondent-2 on the 2<sup>nd</sup> Appellant.

12. Ultimately the State Commission passed the impugned order on 19.08.2009 dismissing the Petition holding that this dispute is in the nature of a dispute between the consumer and the Distribution licensee and as such, under Section 86(1)(f) of the Act, this cannot be adjudicated upon by the State Commission. Besides this in the said order, the State Commission imposed a commercial



burden retrospectively on the 2<sup>nd</sup> Appellant which is said to be inconsistent with the provisions of the Electricity Act, 2003, the Settlement Code, the National Electricity Policy and the National Tariff Policy as well as the applicable Open Access Agreement. Aggrieved by the same, both the Appellants have filed this Appeal.

13. Assailing this order impugned dated 19.08.2009, the Learned Counsel appearing for the Appellants would make the following submissions:-

(A) The Appellant-1 entered into a long-term Open Access agreement with Respondent-1 and Respondent-2 on 26.02.2008. The Appellant-2 being a captive user is not a party to the said agreement. Under the agreement dated 26.02.2008, the Open Access User, i.e. the Appellant-1, has to pay to Respondent-2 for all charges as specified by the

Commission on the basis of the settlement determined in accordance with Balancing & Settlement Code Regulations. The relevant regulations are contained in the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions of Open Access) Regulations, 2005 and Interim Balancing & Settlement Code (Regulation 2 of 2006) which has been notified by the State Commission. The relevant regulations are 8.3 and 8.4 of Regulation No. 2 of 2006.

(B) These Regulations also recognise the settlement of the bill including the deviation in the drawl, etc; between the Open Access generator and the licensee. In other words, these Regulations would specifically provide that where there is a deviation between the scheduled capacity and the actual capacity, being injected at an entry point, the shortfall in the capacity allocated to the scheduled consumer shall

be deemed to have been drawn by the scheduled consumer from the distribution company and the energy corresponding to such shortfall shall be paid for by the party who has contracted for the Open Access capacity with the distribution company.

( C ) In the present case, the Appellant-1 entered into a long-term Open Access agreement with Respondent-1 and Respondent-2 in terms of the above statutory provisions. Therefore, the dispute about compensation in regard to the deviation has to be settled only amongst the Open Access generator, the 1<sup>st</sup> Appellant herein and the licensee, Respondents herein in accordance with the Regulations. The captive user of electricity, the 2<sup>nd</sup> Appellant herein, has no involvement in the same. Therefore it is not open to the Distribution licensee to claim compensation differently or additionally

from any other person including the 2<sup>nd</sup> Appellant, other than the 1<sup>st</sup> Appellant.

(D) If the Distribution licensee namely, Respondent-1 and Respondent-2 are allowed to claim demand charges from the 2<sup>nd</sup> Appellant, the captive user of an amount determined based on the consumption during any time block of 15 minutes, treating the same as maximum demand charges applicable for the entire month, the entire statutory scheme of encouraging the captive generating plant would get defeated. In other words, the present demand charges levied on 2<sup>nd</sup> Appellant by the Respondent on the basis of maximum recorded demand in any 15 minutes time block for the entire month has rendered the Open Access transactions unviable.

(E) The statutory provisions including Regulations of State Commission have provided for the charges

to be paid by the Open Access generator to the distribution licensee in case of outages. This is to protect the Open Access consumer who is using the electricity and its captive user as they cannot be exploited for outages in the captive power plant which has occurred from time to time. The Distribution licensee, instead of claiming the compensation from the 1<sup>st</sup> Appellant and settling the dispute among themselves, as provided under the Regulations, has levied demand charges on the 2<sup>nd</sup> Appellant, which is against the spirit of the Regulations. This is not a mere billing dispute between the consumer and the licensee but it is a dispute between the generator and the licensee which could be resolved either among themselves or by the State Commission invoking the provisions of section 86(1)(f) of the Electricity Act, 2003. Therefore, the finding of the State Commission that

this is a mere dispute between the consumer and the licensee is quite wrong.

14. In reply to the above contentions, the Learned Counsel for the Respondents have made the following submissions:-

(A) “The 1<sup>st</sup> Appellant is a captive generator, of which the 2<sup>nd</sup> Appellant is a shareholder. The company is a separate entity other than its shareholders. Therefore, the captive user, the 2<sup>nd</sup> Appellant cannot be taken as a part of the captive generating plant. The dispute is pursuant to the bill raised by the Respondent-2 on the 2<sup>nd</sup> Appellant for demand charges wherein the calculation has been made on the basis of the maximum demand recorded in each 15 minutes time block.

(B) The Appellant contended that Respondent-2 is not entitled to levy charge on the 2<sup>nd</sup> Appellant for

the drawl of electricity during the temporary outages of the 1<sup>st</sup> Appellant on the basis of maximum demand recorded in a time block for the entire month. This is wrong. The State Commission finalized the question as to whether the prayer made by the Appellant before the State Commission with reference to the difficulty contemplated by the Appellant falls within the purview of section 15 of the Regulations. After analysing the said question, the State Commission has come to the conclusion that this prayer is not maintainable as the charges levied by the Respondent-2 on the 2<sup>nd</sup> Appellant are in terms of the Regulations. Therefore, this finding cannot be said to be wrong.

(C) The State Commission has also rightly held that it cannot exercise its power under the Electricity Act, 2003 to issue a general clarification for individual cases on adjudication. The demand charges were

made by the Respondent-2 on the 2<sup>nd</sup> Appellant, which is a separate entity, and as such the 1<sup>st</sup> Appellant's contention that the demand charges can be settled only between the 1<sup>st</sup> Appellant and the Respondent is wrong. Since nature of the dispute raised in this case is relating to the billing dispute between the 2<sup>nd</sup> Appellant and the Respondent-2, the 2<sup>nd</sup> Appellant has to approach the Appropriate Forum, namely Grievance Cell and this dispute cannot be agitated before the State Commission.

15. Taking note of the rival contentions urged by the learned Counsel for the parties, the following questions may arise for consideration:

- (i) Whether this is a dispute between the 1<sup>st</sup> Appellant and the Respondent-1 and Respondent-2 that can be covered under section 86(1)(f) of the Electricity Act, 2003?



- (ii) Whether the Commission was correct in holding that the 2<sup>nd</sup> Appellant is only a consumer and not a captive generating plant and that therefore, the dispute over the impugned levy of demand charge on the 2<sup>nd</sup> Appellant is a billing dispute?
- (iii) Whether the dispute raised by the Appellant comes under the scope of difficulty in giving effect to any provision of Regulation 2 of 2006 which necessitated the Commission to exercise its power under clause 15 of the said Regulations to remove such difficulty?

16. Since the issues involving the above questions relate to the common question as to whether the State Commission has got the power to entertain the petition filed by the Appellants involving the dispute between the parties over the levy of demand charges

imposed on 2<sup>nd</sup> Appellant, we shall examine this question comprehensively.

17. The 1<sup>st</sup> Appellant is a captive generator and a generating company within the meaning of section 2(28) of the Electricity Act. The 2<sup>nd</sup> Appellant is a captive user of electricity from the captive power station operated by the 1<sup>st</sup> Appellant. The first Appellant qualifies as a captive generating plant. It generates electricity primarily for its own use as recognized under section 2(28) of the Electricity Act. It is stated that it has also satisfied Rule-3 of the Electricity Rules in regard to shareholding (being not less than 26%) and in regard to quantum of minimum consumption (being not less than 51%) of the total electricity generated by the 1<sup>st</sup> Appellant. In order to substantiate this, the Appellants have submitted a certificate dated 25.03.2010, issued by the Chartered Accountant establishing the share

holding of the Appellant-2 in Appellant-1 as well as its power consumption from the captive power station. The second Appellant is a scheduled consumer in terms of Regulation-2 of 2006 as it meets part of its requirement from captive generating plant and part from the Distribution Company, Respondent-2 as per the supply agreement.

18. The Respondent-1 (APTRANSCO) is a transmission company and the Respondent-2 (APSPDCL) is a Distribution licensee in the area where the captive user of electricity namely Appellant-2 is located.

19. The matter in issue relates to the claim made by the Respondent-2, the Distribution Licensee from Appellant-2 towards the payment of electricity charges determined on the basis of Maximum

Demand in any time block, i.e. 15-minutes time block, during the month and the calculation of the claim for such electricity charges for the entire month treating the demand in one time block as the maximum demand for the entire month for the purpose of demand charges. Thus, if the captive power plant of 1<sup>st</sup> Appellant has tripped and Appellant-2 draws the scheduled power even for a 15 minutes time block from the distribution Licensee, the Respondent-2, then the latter will bill the Appellant-2 demand charges treating power drawn by it during such one time block as maximum demand for the whole month.

20. The Respondent-2 (APSPDCL) claimed this demand charges from 2<sup>nd</sup> Appellant treating the 2<sup>nd</sup> Appellant as its consumer having a connected load on the ground that such consumer had been drawing electricity during such time block.

21. It is the case of the Appellants that the electricity drawn by the Appellant-2 from the distribution licensee Respondent-2, during such time block is on account of outages in the captive generation plant, 1<sup>st</sup> Appellant and not on account of excess drawl by the captive user under its connected load with the 2<sup>nd</sup> Respondent. In other words, any drawal by the captive user over and above the contract demand is only as a stand-by power when the captive power plant is under outage. It is also the case of the Appellants that the Distribution licensee is entitled to be compensated for such drawal by the 2<sup>nd</sup> Appellant namely the captive user during the period of the outages of the captive power plant of 1<sup>st</sup> Appellant in terms of the specific Regulations notified by the State Commission and hence such drawl cannot be treated as excess drawl akin to a consumer of electricity which meets its

entire power requirement exclusively from the distribution licensee.

22. It is not disputed that the 1<sup>st</sup> Appellant entered into a long-term Open Access agreement with the Respondent-1 (APTRANSCO) and Respondent-2 (APSPDCL) on 26.02.2008. It is also not disputed that the Appellant-2, a captive user of electricity was not a party to the said agreement. In other words, the Agreement dated 26.02.2008 is only between the Appellant-1 as a generator seeking open access on transmission and distribution system of the licensees and the Respondents 1 and 2 as a Transmission licensee and Distribution licensee respectively and not between the Appellant-2 as a consumer and the Respondents 1 and 2, the licensees.

23. In the above factual background, the Regulations framed by the State Commission and the terms of the Open Access agreement entered into between the 1<sup>st</sup> Appellant and the Respondent-1 and Respondent-2 are quite relevant. It is stated that they provide for compensation to be paid for deviation for supply of electricity by the captive generating company in accordance with Regulations 8.3 and 8.4 of the Interim Balancing and Settlement Code Regulations.

24. Let us now refer to the relevant provisions to understand the core of the issue.

25. The term “Open Access” under section 2(47) of the Act, 2003 is defined as follows:-

*“(47) “Open Access” means the non-discriminatory provision for the use of transmission lines or distribution system or*

*associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission.”*

26. The term “captive generation” has been dealt with in section 9, of the Act, 2003 which is as follows:

**“ 9. Captive generation**

*(i) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines.*

*Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.*



*Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with provisions of this Act and the rules and regulations made thereunder and to any consumer subject to the regulations made under sub-section (2) of section 42.*

*(2) Every person who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from **his captive generating plant to the destination of his use.***

*Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission*

*Utility or the State Transmission Utility as the case may be.*

*Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the Appropriate Commission”.*

27. So, the reading of Section 2 (47) and Section 9 of the Act, 2003 would reveal that the captive generator shall have right to open access for the purpose of carrying electricity from the captive generating plant to the destination of its use and such open access shall be subject to the availability of the transmission facility and any dispute regarding the transmission facility shall be adjudicated upon by the Appropriate Commission.

28. Let us now quote section 42(2) of the Act, 2003. This Section deals with the Distribution licensee and open access. The provision is as follows:

*“(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 that such open access shall be allowed on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission.*

*Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee;*

*Provided also that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission.*

*Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.*

*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.”*

29. Section 3 of the Electricity Act, 2003 empowers the Central Government to notify the National Electricity Policy and the National Tariff Policy. In exercise of its power under Section 3, the Central Government have notified the National Tariff Policy on 06.01.2006. Para 8.5.6 of the National Tariff Policy specifically provides that in case of outages of the generator, supplying to an open access consumer, suitable arrangements should be provided by the licensee on payment of rate for temporary connection to that consumer category as specified by the Appropriate Commission. Section 61 (i) of the Act, 2003 stipulates that the said Commission shall be guided by the National

Electricity Policy and Tariff Policy for specifying terms and conditions for determination of tariff.

30. The State Commission has notified Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions of Open Access) Regulations, 2005. These regulations provide for methods of dealing with the application to be made for open access, categorization of Open Access users, the Nodal Agency, criteria of long-term Open Access, phasing of Open Access, etc. In these Regulations, clause 19(4) of the Open Access Regulation is relevant.

31. Regulation 19(4) of the Open Access Regulations is quoted below:-

*“19.4 **Energy and Demand Balancing** – All open Access users and users covered under clause 7.2, shall make reasonable endeavour to ensure that their actual demands or actual sent*

*out capacity, as the case may be, at an inter-connection does not exceed the contracted maximum demand or allocated sent out capacity for that inter-connection.*

*Provided that for carrying out balancing and settlement of energy and demand at all entry and exit points relating to Open Access Agreement, the licensee shall strictly adhere to the Balancing and Settlement Code to be approved by the Commission from time to time.”*

32. Thus this clause of the above regulations provide that the Open Access user shall ensure that their actual demand or actual power output does not exceed the contracted maximum demand or allocated capacity for the inter-connection and for carrying out balancing and settlement of energy and demand as per the Balancing and Settlement Code.

The licensee shall strictly adhere to the Balancing and Settlement Code to be approved by the Commission.

33. In pursuance to these regulations, the State Commission has notified the Andhra Pradesh Electricity Regulatory Commission (Interim Balancing and Settlement Code for Open Access Users), Regulation 2 of 2006. This Interim Balancing and Settlement Code has been introduced by the Commission pending finalisation of a comprehensive settlement system for the state pool under Availability Based Tariff (ABT). In these Regulations, Clause 8 of the Regulation applicable to scheduled consumer is relevant as the Appellant-2 is a scheduled consumer in terms of the Regulations. The same is as follows:-

***“8. Settlement of Energy/Demand at Exit Point in respect of Scheduled Consumer***



- 8.1 *The Scheduled energy (in kWh) at exit point shall be calculated for each time block from the scheduled capacity (kW) at the Exit point, as provided in the wheeling schedule by multiplying it with the period of time block in hours.*
- 8.2 *The Scheduled demand at exit point shall be calculated by dividing the scheduled capacity (kW) at exit point by the power factor for the time block, for which purpose the Power factor shall be equal to the recorded kWh divided by kVAh.*
- 8.3 *The Scheduled energy of a Scheduled Consumer from an OA Generator for each time block shall be deducted from the recorded energy (in the inter-se order of such Generators, as and if intimated by the consumer, in case the consumer is availing*

*of energy from more than one Generator) as a first charge. The balance energy shall be deemed to have been supplied by the DISCOM and shall have to be paid for as per the terms of the supply agreement with the DISCOM.*

**Provided that where there is a deviation between the scheduled capacity and actual capacity being injected at an Entry point in a time block the shortfall, if any, in the capacity allocated to the Scheduled Consumer shall be deemed to have been drawn by the Scheduled Consumer from the DISCOM and the energy corresponding to such shortfall shall be paid for by the party which has contracted for the Open Access capacity with the Licensee to the DISCOM as per the energy tariff applicable for the**

**same consumer category of DISCOM under which the Scheduled Consumer would normally fall** (emphasis supplied)

8.4 The Scheduled demand at Exit point or the actual demand made available to a consumer from each OA Generator at that Exit point in a time block whichever is less, shall be deducted from the recorded demand (in the inter-se order of such Generator, as confirmed by the SLDC while finalizing the day ahead schedule, in case the consumer is availing of energy from more than one Generator). The balance demand for each time block shall be deemed to have been consumed from the DISCOM and shall be paid for as per the terms of the supply agreement with the DISCOM”.

34. Clause-10 of Regulation 2 of 2006 deals with settlement for Open Access Generators at entry point. Appellant-1 is the Open Access Generator which has entered into an agreement with Respondent 1 & 2 for wheeling of electricity to the scheduled consumer. The relevant clause is 10.1, which is reproduced below:-

*“10. Settlement for O.A. Generator at Entry Point.*

*10.1. The excess drawals of energy and demand by the scheduled consumers on account of under-generation by the Generator for each time block shall be deemed to have been drawn from the DISCOM. The energy and demand charges for such excess drawals shall be paid for by the scheduled consumer in accordance with the proviso to clause 8.3 and as per clause 8.4 respectively”.*

35. Only in terms of the above statutory provisions, the long-term Open Access Agreement was entered into between the 1<sup>st</sup> Appellant and the Respondent-1 and Respondent-2 on 26.02.2008. According to this agreement, the open access user, viz; Appellant-1, has to pay the Distribution Company in accordance with the rates/charges specified by the Commission or Nodel agency, on the basis of settlement determined in accordance with the Balancing and Settlement Code approved by the Commission (clause-5.1). The Open Access User has also to provide payment security equivalent to about 2 months bill and for imbalance in supply and consumption of electricity upto a maximum of 10 days which the Distribution company has to provide in case of short-fall in supply from Open Access Generator (Clause 5.8 and 5.9).

36. From the above factual aspects and the provisions, quoted above the following factors would emerge:-

- (i) The 1<sup>st</sup> Appellant is a captive generating plant and is an open access user of transmission and distribution system of Respondents 1 and 2;
- (ii) The Appellant-2 is a 'scheduled consumer' in terms of Regulation 2 of 2006 getting part of its supply from the captive generating plant and balance part from the Distribution Licensee.
- (iii) In terms of the provisions of the Electricity Act, namely section 38, 39, 40 and 42 the Transmission and Distribution licensees are required to

provide non-discriminatory Open Access on their system subject to the available capacity.

- (iv) Such non-discriminatory Open Access can be obtained by a generating company and not necessarily by the consumer alone. Section 2(47) of the Act, 2003 recognises that a person engaged in generation is entitled to Open Access. Similarly sections 9, 38, 39 and 40 of the Act, 2003 also recognise the generating company to be entitled to Open Access. Regulation 2 of 2005 and Regulation 2 of 2006 of the State Commission also provide that the open access user could be a consumer or a generating company.

- (v) The National Tariff Policy, para 8.5.6 provides that in case of outages of a generator supplying electricity to a consumer of Open Access, stand-by arrangements should be provided by the licensee on payment of tariff for temporary connection to that consumer category. The Open Access Regulations notified by the State Commission recognise the Open Access Agreement between the generating company and the licensee. This would be clear from the Section 2(f) of Regulation 2 of 2005 defining Open Access Agreement. As per this Regulation, the Open Access Agreement means an agreement entered into between a licensee and the Applicant. Section 2(b) defines the



term 'Applicant' as "including a person engaged in generation".

- (vi) The Interim Balancing and Settlement Code Regulation 2 of 2006 recognises the settlement and balancing of the deviation in energy and demand at entry and exit points relating to open access arrangements. This is an interim arrangement pending implementation of Availability Based Tariff regime at the state level. These Regulations, particularly Regulations 8.3 and 8.4 provide for the settlement of compensation for deviation as between the Open Access Generator/Scheduled Consumer and the licensee.

(vii) Where there is deviation between the scheduled capacity and the actual capacity injected at the entry point in a time block, any shortfall, if any, shall be deemed to have been drawn by the scheduled consumer from the Distribution Company and the energy corresponding to such a shortfall shall be paid by the party which has contracted for the Open Access capacity to the Distribution Company. The energy tariff for such short-fall will be as applicable to the same category of consumer in which the scheduled consumer falls.

(viii) The scheduled demand or actual demand available to the scheduled consumer from Open Access

Generator, whichever is less, shall be deducted from the recorded demand for each time block and the balance demand shall be deemed to have been consumed from the Distribution Company. Such demand charges have to be paid in terms of the supply agreement with the Distribution Company.

- (ix) Clause 10 of Regulation 2 of 2006 cover the settlement for Open Access Generator at entry point. Clause 10.1 of the Regulation 2 of 2006 envisages that excess drawal of energy and demand by the Scheduled Consumer on account of under-generation by the Generator for each time block shall be deemed to be drawn from the

Distribution Company. The energy and demand charges for such excess drawal shall be paid for by the Scheduled Consumer in accordance with the proviso to clause 8.3 and as per clause 8.4 respectively. The underdrawal by the scheduled consumer shall be treated as inadvertent energy supplied by the Open Access generator and shall not be paid for by the Distribution Company.

- (x) Thus, complete reading of relevant clauses of Regulation 2 of 2006 would indicate that the billing for energy and demand charges on account of shortfall in availability of power from Open access generator will be made by

the Distribution Company directly on the Scheduled Consumer. On the other hand, the Open Access agreement dated 26.2.2008 entered into between the Open Access Generator (Appellant-1) and Respondents 1 & 2, the Appellant-1 is responsible for all payments and the bills have to be raised on Appellant-1 by Respondent-2. Regulation 8.6 of Regulation 2 of 2006 also indicates that the energy corresponding to shortfall by open access generator shall be paid by the party which has contracted for open access.

- (xi) According to Regulation 2 of 2006 the disputes are to be referred to the SLDC for resolution. In terms of the Open

Access Agreement between the Open Access Generator and Transmission and Distribution Companies, the dispute is to be referred to the Nodel Agency which is SLDC for short term open access. If the dispute involves Nodel agency then it has to be referred to the Forum for Redressal of Grievances of Consumers.

37. It is true that Clause 8.3 of Regulation 2 of 2006 indicates that the energy corresponding to short-fall in supply by Open Access Generator drawn by the scheduled consumer from the DISCOM shall be paid the party which has contracted upon for open access capacity. However, complete reading of Regulations namely clauses 8.3, 8.4 and 10.1 of Regulation 2 of 2006 would indicate that for recovery of money and settlement of compensation

for deviation as between the Scheduled Consumer and the Distribution licensee, the Open Access Generator is responsible for all such payments and also for the payment security to the Distribution company in terms of Agreement signed between Open Access Generator and Transmission and Distribution Companies.

38. This is not a case where open access has been denied to the open access user. Similarly, it is not the case where Transmission/Wheeling charges for use of transmission and distribution system has been denied to the Licensees. The dispute is also not with respect to the energy charges for energy drawn in a time block by the Scheduled Consumer when the generator has not supplied the scheduled capacity due to partial or total outage. The real dispute here is with respect to the capacity charges for the power drawn in a time block by the

scheduled consumer, the 2<sup>nd</sup> Appellant when the generator, the 1<sup>st</sup> Appellant has not supplied the scheduled capacity due to partial or total outage.

39. Reading of clause 10.1 and 8.4 of the Regulation 2 of 2006 would indicate that the capacity charges have to be paid by the scheduled consumer to the Distribution Company. As per open access agreement dated 26.2.2008, Open Access User, in this case Appellant-1, has to pay the charges to the Distribution Company on the basis of the Settlement Statement determined in accordance with Balancing & Settlement Code. It may be true that the Regulations which are subordinate legislation will have precedence over the Agreement between Appellant-1 and Respondents 1 and 2 and the dispute here has to be resolved by the Nodel Agency which is SLDC for short-term open access and since SLDC here is being operated by the



Respondent-1 which is also a party to the dispute, the same has to be referred to the Forum for Redressal of Grievances of Consumer.

40. But the main issue here is relating to the onerous terms and conditions imposed by the licensee on the scheduled consumer for stand-by power provided by the Distribution licensee deeming the shortfall in supply by the Open Access Generator with respect to the schedule in a time block. Even if the power overdrawn by the scheduled consumer with respect to the schedule is for a period of 15 minutes, the consumer is liable to pay demand charges for the whole month.

41. In this connection, it will be worthwhile to note the heavy charges put on the consumer for such overdrawals for short durations. The data filed by the Appellant for demand and energy charges for

such overdrawals for the period March 2008 & March, 2009 is as under:-

S.No.	Billing Month	No. of trippings of captive generator	Duration	Penal Amount By Discom (Rs.Lakhs)	Excess Energy (Amt. (Rs.Lakhs)	Rate per unit for Excess Energy Consumed (Rs./kWh)
1.	March 2008	3	4 Hrs.46 Mts.	78.61	-	-
2.	April 2008	5	16 Hrs.36 Mts.	81.49	8.34	30.26
3.	May 2008	6	9 Hrs. 11 Mts.	84.01	5.04	49.64
4.	June 2008	1	15 Mts.	3.04*	-	-
5.	July 2008	4	4 Hrs. 43 Mts.	92.39	3.44	78.19
6.	Aug., 2008	9	157 Hrs.	111.34	105.18	5.84
7.	Sept., 2008	6	31 Hrs. 25 Mts.	94.05	14.93	20.50
8.	Oct., 2008	6	92 Hrs.	97.09	55.74	7.70
9.	Nov., 2008	2	8.50 Hrs.	74.05	4.01	54.67
10.	Dec., 2008	2	2.75 Hrs.	89.35	1.71	149.17
11.	Jan., 2009	0	0	9.70	-	-
12.	Feb., 2009	0	0	13.88	-	-
13.	March, 2009	2	3.25 Hrs.	70.77	1.78	114.07
<b>TOTAL</b>				<b>911.82</b>		<b>12.68</b>

\* Quantum of excess drawal was small.

It may be seen that rate for excess energy drawn mainly due to the penal amount on account of demand charges in certain months has been in the range of Rs. 50 to 149 per kWh.

42. It is also be important to note the charges specified in Open Access Regulations of the Central Commission for such excess energy drawn from the Grid by the open access generator or consumer in inter-state transmission of energy. In the Regulation of the Central Commission the deviation in energy in open access transaction in the 15 minutes time block with respect to schedule is charged at Unscheduled Interchange rate. This rate is applicable only during the time block when the deviation has taken place.

43. In the preamble of Regulation 2 of 2006 it has been stated that pending finalisation of a comprehensive settlement system for the state pool under ABT, the Commission has implemented the Interim Balancing & Settlement Code. However, the State Commission in the interim scheme has

introduced a system of Balancing & Settlement which is not in consonance with the ABT and Tariff Policy and is detrimental to the scheme of Open Access. The keenness of the Parliament to introduce open access for consumers is clear from the fact that the Parliament through an amendment (57 of 2003) enacted the following proviso to Section 42(2) of the Electricity Act, 2003 to specify the time frame for introduction of open access in distribution of electricity to take care of the apprehension of some Members of Parliament recording delay in implementation of open access by the State Commission.

*“Provided also that the State Commission, 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”.*

44. However, by introducing a very onerous interim balancing and settlement system where the deviation in power injected by open access generator even for a time block of 15 minutes has to be paid as demand charges for the whole month, the very purpose of introducing open access to distribution is defeated. Undoubtedly, after introduction of ABT in intra-state system as intended by the State Commission in the preamble of Regulation 2 of 2006, this issue will be resolved, as the Distribution company will be compensated only for the period of deviation between Schedule and actual generation/drawal of the open access user. However, the Interim Scheme adopted by the Commission cannot be inconsistent to the Electricity Act, the National Electricity Policy, Tariff Policy and

the Open Access Regulations of the Central Commission.

45. Open Access is a result of the important policy decision taken by the Parliament as there should be a play of competitiveness in the electricity generation and availability of electricity. The above policy will get frustrated if the licensees indirectly impose onerous terms and conditions over an Open Access consumer.

46. In order to encourage captive generation, the Central Government has provided in the National Tariff Policy for licensee to make available standby arrangements in case of outages of generator supplying to Open Access consumer. The National Tariff Policy, as mentioned above, goes to the extent of specifying charges for such standby arrangements.

47. If the distribution licensee are allowed to claim charges from the open access consumer of an amount determined based on the consumption during any time block of 15 minutes to be the maximum demand, the purpose of entire statutory scheme of encouraging the captive generation will not get achieved. As contended by the Appellant, the present demand charges being levied by the Distribution licensee on the Appellant-2 on the basis of the recorded maximum demand has rendered the Open Access transactions unviable.

48. The contention of the Respondent that the distribution licensee is required to maintain the arrangements for the supply of electricity to the consumer during outages and said arrangements should be for the entire month, is without any basis. No materials have been placed by the distribution

licensee that it had maintained such segregated quantum for the entire month to meet the requirement of outages during any time block relating to Open Access consumer/scheduled consumer. By paying the transmission charges to the Respondents, the 1<sup>st</sup> Appellant has already paid for the transmission capacity which would be utilized for the conveyance of electricity. Such transmission capacity is reserved for the Open Access consumer irrespective of the fact whether the electricity is sourced from the captive power plant or the distribution company.

49. It is the responsibility of the Respondent Distribution licensee to provide supply during the period of outage in terms of Regulations framed by the State Commission. Even otherwise, any additional supply by the licensee on account of outages ought not to be charged at rate higher than



the cost incurred by the licensee in making such supply available to the captive consumer. Such cost would, at the most, correspond to the 105% of UI rate as specified in the Central Commission's Regulations. Therefore, the licensee should not recover more than what he is required to bear on account of overdrawl from the national grid occasioned by outages to the consumer's captive source of power supply.

50. Even assuming that the Respondents have to overdraw from the national grid on account of outages, the financial burden of such overdrawl on the Respondents would depend upon the prevailing UI rate and such additional burden can be passed on to the Appellant-1 for the period of outages. The provisions of the tariff order which is applicable to a consumer taking power exclusively from a distribution licensee and which deals with the

excess drawal cannot be applied to a situation of deviation in the drawal on account of outages for captive generation in open access transaction.

51. In cost plus regime, the licensee cannot be allowed to recover charges in respect of cost which it has not incurred. Admittedly, the Respondents have not given any facts or figures before the State Commission or before this Tribunal which would justify levy of penal demand charges to recover any additional cost incurred by them in maintaining the necessary infrastructure for meeting a situation caused by the outages of the Appellant-1 power plant. In the absence of a verifiable cost being incurred by the Respondent-2, the recovery of any charges from the consumer would not constitute a legal act and on the other hand it may constitute enrichment of licensee at the expense of the open access user/scheduled consumer.

52. The State Commission has held that there is no dispute between Appellant-1 and the Respondents and therefore, it cannot exercise its power under Section 86(1)(f) of the Act and also it can not invoke its powers under clause 15 of the Regulation 2 of 2006 to remove difficulty, individual case which comes within the purview of adjudication of billing disputes by the Forum for Redressal of Grievances of Consumers. This observation in our view is not correct as the present case is also a dispute with reference to charges for deviation in injection by open access user with respect to schedule and in the context of Open Access agreement entered into between the Appellant-1 and the Respondents.

53. In this regard, it should be reiterated that proviso to clause 8.3 of Regulations 2 of 2006 clearly provides for recovery of energy charges from

the party which has contracted for the Open Access, i.e. Appellant-1 herein. However, such a mechanism, though it is envisaged in the said Regulations, has not been put in place for settlement of Open Access transactions. That is how a difficulty has arisen in implementing the Regulations. Under those circumstance, the Appellant is justified in praying the State Commission to invoke the powers under clause 15 of Regulation 2 of 2006 to remove the difficulties arisen in implementing the Code. The present dispute has arisen due to difficulties experienced by Appellants in implementation of the open access and Interim Balancing and Settlement Regulation of the State Commission and can not be resolved at the Forum for Redressal of Grievances of Consumers.

54. **SUMMARY OF OUR FINDINGS:**

- (i) **The 1<sup>st</sup> Appellant is a captive generating plant and the 2<sup>nd</sup> Appellant is the captive user. The 2<sup>nd</sup> Appellant meets part of its power requirements from Respondent-2, the Distribution Licensee as per the supply agreement for which it has to pay to Respondent-2 at the tariff determined by the State Commission. Appellant-2 is a Scheduled Consumer in terms of the Regulations of the State Commission.**
- (ii) **The 1<sup>st</sup> Appellant entered into a long-term Open Access Agreement with Respondent-1, Transmission licensee and Respondent-2, the Distribution licensee on 26.02.2008. The Appellant-2, being a captive user admittedly was not**

**a party to the said agreement. Under the agreement dated 26.02.2008, the open access user i.e. Appellant-1 has to pay Respondent-2 in accordance with the rates/charges specified by the Commission from time to time, on the basis of the settlement statement determined in accordance with the Balancing and Settlement Code approved by the Commission. The Clause 8.4 of Regulations 2 of 2006 would specifically provide, where there is a deviation between the scheduled capacity and the actual capacity, being injected at an entry point, the shortfall in the capacity allocated to the scheduled consumer shall be deemed to have been drawn by the scheduled**

**consumer from the distribution company and the energy corresponding to such a shortfall shall be paid for by the party who has contracted for the Open Access capacity with the distribution company. However, the balance demand due to short-fall in supply by the Open Access Generator is treated in the same way as excess drawal by a consumer and has to be paid to the Distribution Company in terms of the supply agreement with the Distribution Company. According to clause 10.1 of the Regulations, dealing with Settlement for Open Access Generator at Entry Point, it is stated that the energy and demand charges for the excess drawals by the Scheduled Consumer on**

**account of under-generation by the Open Access Generator for each time block shall be paid by the Scheduled Consumer to the Distribution Company in accordance with the proviso to clause 8.3 and as per clause 8.4 respectively.**

- (iii) If the distribution licensee is allowed to claim demand charges from the 2<sup>nd</sup> Appellant, the captive user, of an amount determined based on the consumption during any time block of 15 minutes, treating the same as Maximum Demand Charges applicable for the entire month, the entire statutory scheme of encouraging the captive generation and open access would get defeated.**



**(iv) The National Tariff Policy, in para 8.5.6, provides that in case of outages of a generator, for supply of electricity to an Open Access consumer, suitable arrangements should be provided by the licensee on payment of rate for temporary connection to that consumer category as specified by the Appropriate Commission. The Central Commission in its Open Access Regulations for Inter-state transmission system has devised UI rates for deviation between scheduled and actual drawal/generation supply during a time block. Such UI charges are leviable only during the time block when the deviation from schedule takes place. The State Commission in the preamble to Regulation-2 of 2006 has**

**also expressed the intent to introduce Availability Based Tariff as implemented by the Central Commission and till then the State Commission has implemented the Interim Balancing & Settlement Code. The Interim code can not negate the intent of the Electricity Act to encourage open access in distribution and the provisions of the National Tariff Policy and Open Access Regulations of the Central Commission.**

- (v) The contention of the Respondents that the Distribution licensee is required to make the arrangements for the supply of electricity to the consumer during outages and said arrangements should be for the entire month, is without any basis. In order to substantiate this**

**contention, no material has been placed by the distribution licensee that it has maintained such segregated quantum for the entire month to meet the requirement of outage during any time block relating to Open Access consumer. It is the responsibility of the Respondent Distribution licensee to provide supply during the period of outages in terms of Regulations framed by the State Commission. Even otherwise, any additional supply by the licensee on account of outages ought not to be charged at a rate higher than the cost incurred by the licensee in making such supply available to the captive consumer.**

**(vi) In this case the dispute has arisen due to difficulties experienced by Appellant 1 & 2 in implementation of open access and Interim Balancing and Settlement Code of the State Commission and this can not be resolved at the Forum for Redressal of Grievances of Consumers. Under the circumstances, the Appellant is justified in praying the State Commission to invoke the powers under clause-15 of Regulation-2 of 2006. Accordingly, we are of the view that the Commission ought to have invoked its powers under clause-15 of Regulation-2 of 2006 to remove the difficulties being experienced by Open Access User.**

55. In view of the above findings, we conclude that the order impugned holding that it can not invoke

Section 15 of Regulation 2 of 2006 to remove difficulties being experienced by the Appellants in implementation of the Open Access and Billing & Settlement Code is liable to be set aside and accordingly, set aside. Consequently, it has to be held that levy of demand charges on the 2<sup>nd</sup> Appellant by the Respondent-2 is also not in accordance with law and therefore, the same also is set aside.

56. Appeal is allowed.

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

( Justice P.S. Datta )  
Judicial Member

(Rakesh Nath)  
Technical Member

(Justice M. Karpaga Vinayagam)  
Chairperson

REPORTABLE/NON-REPORTABLE

**Dated: 19<sup>th</sup> November, 2010**