

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)
Appeal No. 137 of 2006**

Dated: 22nd January, 2007

Present:

**Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member**

**Sai Regency Power Corporation Pvt. Ltd.
Administrative Office,
8-2-293/82/A/431/A
V/s.**

-Appellant

**1 Arkay Energy (Rameswaram) Ltd.
GF 1 A, Prince Villa,
15, Rajamannar Salai ,
T. Nagar, Chennai - 600017**

**2 Tamil Nadu Electricity Board
800 Anna Salai,
Chennai - 600002**

**3 Tamil Nadu Electricity Regulatory Commission
17, Third Main Road,
Seethamal Colony,
Alwarpet, Chennai - 600018**

- Respondents

Counsel for Appellant : Mr. Sanjay Sen, Mr. Vishal Anand
& Ms. Ruchika Rathi

Counsel for Respondents : Mr. R. Muthukumaraswamy, Sr. Adv. with
Mr. C. Paramasivam & Mr. P. Ramesh
for Resp.1
Mr. H.S. Mohamed Rafi for Resp.2 - TNEB
Mr. G. Umapathy & Mr. Anirudharma
for Resp.3 - TNERC

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

1. This appeal is directed against the order of the Tamil Nadu Electricity Regulatory Commission (for short

‘TNERC’) dated June 9, 2006, whereby Clause 11 of the order dated February 17, 2006 issued by the Tamil Nadu Electricity Board (for short ‘TNEB’/ ‘Board’) approving the wheeling of power from Captive Power Plant (for short ‘CPP’) of the first respondent and Clause 13 of the agreement dated Feb. 18, 2006 between the TNEB and the first respondent has been held to be violative of Regulation 7 of the Tamil Nadu Electricity Regulatory Commission Open Access Regulations, 2005 and Article 14 of the Constitution. Consequently, the decision of the TNEB to allow the appellant evacuation of power on fortnightly basis from its captive power plant (CPP) through 110 KV line by directing the first respondent to step down its generation and share the transmission facility with the appellant on 15 days rotational basis, was set aside.

The facts giving rise to this appeal are as under:

2. By an application dated July 2, 2004, the appellant sought approval of the Tamil Nadu Electricity Board (for short ‘TNEB’) for evacuation of electricity that may be

generated at its proposed Captive Power Plant of 58 MW at Kalugurani Village, Ramanathpuram District.

3. The TNEB agreed to provide to the appellant the facility to evacuate power generated by its proposed captive power plant through Valathur Sub-station. By letter dated September 28, 2005, the TNEB asked the appellant to remit a sum of Rs. 1,34,15,277/- (Rupees one crore thirty four lakhs fifteen thousand two hundred and seventy seven only) towards the charges for bay extension works at Valathur SS end and towards the establishment charges of the works to be carried out under the supervision of the officials of the TNEB. By letter of the same date, viz. September 28, 2005, the TNEB informed the appellant to undertake the following works:-

- 1. Erection of 110 KV DC line on DC towers from Regency Power Corporation Ltd. to Valathur 230 KV SS with Panther conductor for a route length of 7 kms.*
- 2. 2 Nos. bay extensions at Regency Power Corporation Ltd. switchyard for linking 2 Nos. power evacuation lines proposed from the 230 KV Valathur SS.*

3. *Provision of PLCC equipment 1 No. (Station type) and 2 Nos. line type at Regency Power Corporation Ltd., end*
 4. *Provision of 2 Nos. line type PLCC equipments at Valathur SS end.*
 5. *Provision of RTU and Modem at the Regency Power Corporation Ltd. end*
 6. *Provision of Modem at Valathur SS end.*
 7. *Provision of Static Trivector Meter at Regency Power Corporation Ltd., end*
 8. *Provision of Static Trivector meter at Valathur SS end”.*
4. The appellant in order to comply with the directions of the TNEB contained in the aforesaid two letters deposited the requisite amount demanded by the TNEB.
5. Several parties in the State of Tamil Nadu, with the intention of setting up captive plants, applied to the TNEB, including the first respondent M/s Arkay Energy (Rameshwaram) Ltd. for evacuation of power that may be generated from the proposed power plants.
6. Earlier on Sept.8,2005, a meeting took place between the officials of the TNEB and the Private Project Promoters in

Vazhuthur area at which the appellant requested the TNEB for interfacing for start up power in February, 2006 for open cycle and for additional unit proposed to be commissioned in June, 2006. It also requested to the TNEB to establish the Vazhuthur 230 KV Sub-station urgently in order to facilitate evacuation of power from its plant.

7. On January 12, 2006, the appellant wrote a letter to the Chairman, TNEB, stating therein that the captive power plant of the appellant is expected to be commissioned in the month of March, 2006 and as requested in the meeting of September 8, 2005, the TNEB should consider its request to evacuate power from its captive power plant through the existing 110 KV lines till the 230 KV Sub-station at Vazhuthur was established. At this stage it will be appropriate to set out the relevant part of the letter:-

“Subject: Power Evacuation from out 58 MW Natural Gas based project in Kalugurani Village, Ramnathapuram (T.k & Dt)

As per our plan, the Gas Turbine of 38 MW at RPCL is expected to be commissioned in the month of March 2006. In this context we had requested you in the above referred meeting to consider, evacuation of this 38 MW power through 110 KV lines, till the above mentioned infrastructure is in place. You were kind enough to consider our proposal and indicated that 50% of balance available evacuation capacity (i.e. after the full capacity of Arkay is considered) would be earmarked to RPCL”.

8. On January 27, 2006, a second meeting was held between the officials of the TNEB and the Private project Promoters in Vazhuthur area. At this stage, the relevant part of the minutes of the meeting may be set out:-

“ M/s. Arkay Energy (Ramaswaram) Ltd. M/s. Regency Power Corporation Ltd., M/s. Coromandel Electric Company Ltd. & M/s. Arkay Energy Ltd. (IPP) were requested to indicate their position in this regard.

- I. *M/s. Arkay Energy (Rameswaram) Ltd.*

It was informed that they have obtained the CEIG and other clearances and the transmission lines have been erected and only fixing up of breakers are pending. It was requested that arrangements may be made immediately for evacuation of minimum of 25 MW. It was also informed that till Regency comes on bars whatever power is feasible for evacuation may be made to them and after Regency starts generating, the evacuation of power may be shared equally.

II. *M/s. Regency Power Corporation Ltd.*

It was informed that the plant will be ready by 25th March, 2006, NOC from Pollution Control Board has been obtained and final clearance for consent establish will be obtained before commissioning.

M/s. Regency wanted to know when the Vazhuthur 230 KV SS will be commissioned. It was informed that the work has been given on turn key basis and it take 9 months, M/s. Regency informed that if any help is required, the same can be changed by them as they have to synchronise their machine before this (illegible). It was informed that they are agreeable to do the SS work by themselves if TNEB permits. M (G) said that this will be discussed with the Chairman”.

9. On February 17, 2006, the Chief Engineer, TNEB addressed a letter on behalf of the Member (Distribution), Tamil Nadu Electricity Board on the subject of evacuation of power from the CPP of the appellant. While focusing the attention on the letter of the appellant dated Feb. 11, 2006, it was noted that the appellant was agreeable for permitting the evacuation of power generated at the captive power plant of the first respondent to the extent permissible. It was also recorded that in the event of the appellant, being ready for synchronization of its plant by March 23, 2006, the first respondent shall stop

- generation from March 23, 2006 to April 15, 2006 and the appellant shall be allowed to evacuate power from its captive power plant. It was indicated that thereafter, evacuation shall be allowed on fortnightly basis by rotation i.e. 15 days per month (PM) to the appellant and 15 days PM to the first respondent.
10. On February 17, 2006 itself, the TNEB accorded its approval for wheeling of power from the CPP of the first respondent through TNEB grid (for short the Wheeling Order) subject to certain conditions. The relevant conditions are set out as follows:-

“10. The company have to step down the generation based on the grid availability and condition till the new 230 KV SS is ready and share the available grid capacity equally with the other CPPs in Ramnad Region. The company has to carry out the repair works of the 100 MVA 230/110 KV transformer at SR Pudur and install the same at Paramakudi SS as an interim measure.

11. The company have to bring only 3 or 4 machines into operation and back down their generation depending on the grid condition. This arrangement will continue till the evacuation scheme proposed in the sanctioned power generation is

completed. M/s. Arkay Energy (Rameswaram) Ltd., will also share with M/s. Regency Power Corporation Ltd., the available evacuation capacity till that time by allowing to generate on alternate 15 days by M/s. Arkay Energy (Rameswaram) Ltd. and M/s. Regency Power Corporation Ltd.”

11. As is apparent from the above, according to the aforesaid wheeling conditions imposed by the TNEB, the first respondent was to step down the generation based on the grid availability till Valathur 230 KV sub-station was ready. It was to share the grid availability with the other CPPs. Besides the appellant and the first respondent were required to share the available evacuation capacity until the time indicated above, by allowing to generate on alternate 15 days basis. That apart, the first respondent was required to bring 3 or 4 machines into operation and back down the generation depending on the grid condition.
12. Pursuant to the Wheeling Order, on Feb. 18, 2006, an agreement for wheeling of power was entered between the first respondent and the TNEB (for short the wheeling agreement). As per the agreement, the TNEB agreed to

wheel the power generated by the CPP of the first respondent on monthly basis and it was to step down the generation based on the grid availability and share the available grid capacity equally with the other CPPs in Ramnad Region.

13. Subsequently, on February 28, 2006, the first respondent filed a representation before the Chairman, TNEB to the following effect:

(i) The first respondent was accorded approval to evacuate power from its CPP vide Board's Proceedings B.P. (Ch) No. 121 dated March 9, 2005 captioned: "Read: Chairman's approval dated 03.03.2005" according to which it could evacuate the power generated;

(ii) Their approval was based on the Load Flow study conducted by the TNEB;

(iii) In the attached approved drawing to the Load Flow Study, there was no mention of M/s. Regency Power Corporation Ltd. evacuating power from the same lines;

(iv) M/s. Regency Power Corporation Ltd. was permitted transmission of power generated by it only through proposed 230 KV Valathur Sub-station for which it had procured the land and had handed over the same to the TNEB;

(v) It was requested that the TNEB should adhere to the original evacuation scheme proposed under the Board's Proceedings B.P. (Ch) No. 121 dated March 9, 2005 without any amendment.

In nutshell, the first respondent requested the TNEB that the appellant should not be provided with the facility to evacuate power through the existing 110 KV line.

14. It appears that the representation of the first respondent did not have the desired effect. This led to the filing of the petition, being Dispute Redressal Petition No. 1/2006, by the first respondent before the TNERC on June 9, 2006. The Commission, on consideration of the matter, allowed the appeal of the first respondent.

15. The Commission recorded the following points in issue arising for its determination:-

(i) Whether Clause 11 of the wheeling letter dated 17.2.2006 is violative of Regulation 7(e), (f), (g) of TNERC Intra State Open Access Regulations 2005?

(ii) Whether Clause 13 of the agreement for wheeling of power entered into by the Petitioner with the Respondent Board which incorporated Clause 11 of the wheeling letter dated 17.2.2006 is violative of regulation 7 (e)(f) and (g) of the said Open Access Regulations?

(iii) Whether the Impugned Clause 11 of the Wheeling letter dated 17.2.2006 is arbitrary and violative of Article 14 of the Constitution of India as contended by the Petitioner?

(iv) Whether the Petitioner is entitled to the relief prayed for in the second part of his prayer viz. providing for uninterrupted evacuation of power from its unit to the grid of Respondent.

16. In so far as the first point is concerned, the Commission pointed out that the Order of TNEB according approval for wheeling of energy from the captive power plant of the first respondent was issued on Feb. 17, 2006 before the appellant was ready for evacuation of energy from the plant and that would show that the first respondent is the 'first come person' within the meaning of Clause 7 of the TNERC Open Access Regulations, 2005 and as such the first respondent should be served first for providing transmission facilities in preference to the appellant, which was not ready for evacuation of power. The Commission was of the view that Clause 7(f) of the Open Access Regulations does not contemplate any sharing of transmission facilities and it only provides for affording of available transmission facility in full to the 'first come

person'. It was held by the Commission that Clause 11 of the wheeling letter dated February 17, 2006 was contrary to Clause 7(f) and (g) of the Open Access Regulation.

17. As regards the second point in issue, the Commission held as follows:-

“ From the above, it would be seen that the Open Access Regulations issued under the Section 181 of the said Electricity Act 2003 shall be deemed to form part and parcel of the Act itself. In view of the above position, clause 13 of the wheeling agreement which is violative of clause 7 (f) and (g) of Open Access Regulations cannot taken into account by this Commission. This Commission is not bound to rely on the agreement and it is bound only by clause 7(f) and (g) of the Open Access Regulations while dealing this issue. So far as the Respondent Board is concerned, it may be pointed out that as per clause 4(1) of the General conditions contained in Part II of TNERC (Licensing) Regulations 2005, the Respondent Board being a deemed licensee shall comply with clause 7 of the Open Access Regulations.

As per clause 15 of the General conditions of Licensing Regulations the above clause 4(1) will apply to the Respondent Board which is a deemed licensee. Hence, it shall be obligatory for the Respondent Board to comply with clause 7(f) and (g) of the Open Access Regulations. The wheeling agreement entered into by Respondent Board is also against the said clause 4(1) read with clause 15 of the General conditions in TNERC Licensing Regulations”.

18. In so far as third point in issue is concerned, it was held by the Commission that the action of the respondent Board in introducing Clause 11 in the wheeling letter dated Feb., 17, 2006 is contrary to the Regulations 7 of the Open Access Regulations.
19. As regards the fourth point in issue, the Commission concurred with the following conclusions arrived at by the Committee appointed to undertake the study for power evacuation facility:

“(a) The Arkay (Rameshwaram) CPP can be allowed to generate 45 MW ex-bus with keeping open the switch at Mandapam SS towards Arkay (Rameshwaram) CPP. Whenever there is outage of any one of the three feeders viz. Valathur – RS Madai Feeder, Valathur – Arkay IPP Feeder and Valathur – Karaikudi feeder the switch at Mandapam SS towards Arkay (Rameshwaram) CPP will have to be closed and the generation by Arkay (Rameshwaram) shall be kept at the level specified by the LD centre.

b. Whenever, any margin is available due to reduction in generation of any or all the generating plants Viz. Valathur GTPP, Arkay IPP and Coromandel CPP, the Arkay (Rameshwaram) CPP can be permitted by LD centre to generate to the excess extent feasible subject to the satisfaction of

protection scheme and actual line loading at the instant of time.

20. In the light of its findings on the issues, the Commission allowed the appeal of the first respondent. The appellant aggrieved by the impugned order of the TNERC has filed the instant appeal.

21. We have heard the learned counsel for the parties. We do not find any reason to interfere with the order passed by the Tamil Nadu Electricity Regulatory Commission. It appears to us that the first respondent was treated unfairly by the second respondent, Tamil Nadu Electricity Board. This would be apparent from the following features of the case:

(i) The first respondent approached the Tamil Nadu Electricity Board for according approval to set up a Captive Power Plant in Valantharavai village and for evacuation of power generated by the proposed plant. The Board, by its letter dated September, 24, 2004, captioned: "An in-principle approval for setting up 65 MW

Captive Power Plant” Valantharavai village, Ramnad District in response to the request of the first respondent; informed the first respondent that the captive power plant owners are not required to obtain the consent from the Board for installation of the Power Plant. It also required the first respondent to deposit a sum of Rs. 30,000/- for load flow studies, which had to be conducted for finalizing the power evacuation proposal of the respondent. It will be relevant to set out the letter to the extent relevant:

- “(a) Consequent to the enforcement of Electricity Act, 2003, with effect from 10.6.2003 and according to (1) Definition under Section (8), (2) Section 7 & (3) Section 9 (1) & (2), the captive power plant owners need not obtain consent from TNEB for installation of captive power generators/plants.*
- (b) Wheeling of power to the joint venture companies of the owner of the captive power plant will be done through TNEB grid. Approval of TNEB has to be obtained for wheeling of power.*
- (c) Load flow studies has to be conducted before finalizing the power evacuation proposal of your project. For conducting load flow studies to decide the transmission system for evacuation of power an amount of Rs. 30,000/- is to be paid by the captive*

power plant owner and if a report on the load flow studies is required, the company has to pay an additional amount of Rs. 25,000/- for three copies of the report. The payment may be made by Demand Draft in favour of Chief Financial Controller, TNEB, Chennai-2.

- (d) A write up proposal along with neat sketch has to be sent to TNEB for paralleling of your CPP Grid and approval of TNEB has to be obtained for the above. Before paralleling safety certificate from CEIG is required.*
- (e) There is no banking facility under power feed scheme. Accounts will be closed every month except for cases where wheeling is done to the service in other distribution circles for which one more month is allowed for adjustment.*
- (f) The sale of surplus power to TNEB will be considered depending upon the supply and demand position of TNEB at the time of commissioning of your CPP subject to other rules and regulation in force.*
- (g) One IPP with 52.8 MW capacity is under erection by you at Valathur. The second unit for 65 MW as CPP by you has to be erected in a different location well away from the present site of the IPP unit.*
- (h) In all probability the 65 MW from this gap generation plant is to be connected to the proposed 230/110 KV Auto SS at Valathur.”*

- (ii) On receipt of the aforesaid letter the first respondent on September 27, 2004 deposited a sum of Rs.30,000/- with TNEB for conducting Load Flow studies.

22. On March 9, 2005 the TNEB issued the following proceedings:

Read: Chairman's approval dated 3.03.2005

- “1. The Tamil Nadu Electricity Board approves the proposal of the Chief Engineer/ Distribution/ Madurai Region & Superintending Engineer/ Operation/ Madurai for the transmission system for power evacuation from the captive power plant with a generation capacity of 65 MW being set up by M/s. Arkay Energy Ltd. at Valantharavai village, Ramnad District at an estimated cost of Rs. 771.28 lakhs (gross & net) chargeable to M/s. Arkay Energy Ltd. CPP on DCW basis. The detailed estimate is annexed to this proceedings.*
- 2. The expenditure is chargeable to TNEB funds – Capital Expenditure – A/c No. 14.646 chargeable to M/s Arkay Energy Ltd. CPP.*
- 3. By virtue of the provision contained in sub-section (2)(a) of Section 185 of the Electricity Act, 2003, the Board being the Transmission utility and Licensee will exercise the powers of the Telegraph Authority under provisions of Section 164 of the Electricity Act, 2003 which have already been conferred upon the Board under Section 51 of the Indian Electricity Act, 1910.*

4. *As the work is going to be executed on DCW basis, the entire estimated cost should be collected from M/s. Arkay Energy Ltd. CPP, before execution of work and difference in cost, due to escalation in the cost of materials, at the time of execution may also be collected from them. The company shall provide necessary breakers at the power plant end with necessary protection arrangement. Besides all other terms and conditions of DCW (i.e., obtaining undertaking from the company) may be followed without fail.”*

23. Alongwith the aforesaid proceedings the following Report of the system was enclosed:

“For deciding the power evacuation proposal of M/s. Arkay Energy Ltd. CPP, the following suggestions of Chief Engineer/ Distribtuion/Madurai and Superintending Engineer/ Operation/Madurai were studied and finalized.

1. *110 KV SC line on SC tower with panther conductor from M/s. Arkay Energy Limited CPP to the sanctioned Valathur 230/110KV SS for a route length of 8 kms.*
2. *110 KV DC line on DC tower with panther conductor for a route length of 10 kms. to LILO the existing Keelakarai-Mandapam 110 KV line at M/s. Arkay Energy Ltd. CPP.*
3. *110 KV SC line on SC Tower Panther conducted from M/s. Arkay Energy Ltd. CPP Arkay IPP for a route length of 1 km.*

The following are the major works involved in the proposed transmission system.

1. *Erection of structure and station auxiliaries at the M/s Arkay Energy Ltd. CPP end.*
2. *Extention of Bay at Valathur 230 / 110 KV SS, Perungulam 110KV SS (since no space available at Mandapam for Bay expansion), Keelakarai 110KV SS and Arkay IPP.*
3. *Erection of 110 KV SC line on SC tower with panther conductor from M/s Arkay Energy Ltd. CPP to sanctioned Valathur 230/110KV SS for a route length of 8 Kms.*
4. *Erection of 110KV DC line on DC tower with panther conductor for a route length of 10 Kms to LILO the existing Keelakarai – Mandapam 110 KV line at M/s Arkay Energy Ltd. CPP.*
5. *Erection of 110 KV SC line on SC tower with panther conductor from M/s Arkay Energy Ltd. CPP to Arkay IPP for a route length of 1 km.*
6. *Provision of PLCC station equipment at M/s Arkay Energy Ltd. CPP, Keelakarai 110 KV SS end.*
7. *Provision of PLCC line equipments at*
 - (a) *M/s Arkay Energy Ltd. CPP end – 4 nos.*
 - (b) *Keelakarai 110 KV/SS - 4 no.*
 - (c) *Valathur 230/110KV SS - 1 no.*
 - (d) *Perungulam 110 KVSS - 1no.*
 - (e) *Arkay IPP - 1 no.*

8. *Conversion of Keelakarai 110KV SS as grid 110 KV SS.*
9. *Provision of RTU at plant end and modems at plant and TNEB ends.*

The estimate has been prepared based on the latest cost data for the year 2004-05 and the estimated cost of the above proposed transmission system works out to Rs. 771.28 lakhs.”

24. As is clear from the aforesaid proceedings dated March 9, 2005 and the aforesaid report, the TNEB approved the proposal for evacuation of Power from the 65 MW Plant of the first respondent, which was being set up at Valantharavai village, Ramnad District. The major works involved for evacuation of power from the CPP were required to be executed at an estimated cost of Rs. 771.28 crores and were chargeable to the first respondent. It is significant to note that the power was agreed to be evacuated through the following transmission lines:

1. 110 KV SC line on SC tower with panther conductor from M/s. Arkay Energy Limited CPP to the sanctioned Valathur 230/110KV SS for a route length of 8 kms.

2. 110 KV DC line on DC tower with panther conductor for a route length of 10 kms. to LILO the existing Keelakarai-Mandapam 110 KV line at M/s. Arkay Energy Ltd. CPP
 3. 110 KV SC line on SC Tower Panther conducted from M/s. Arkay Energy Ltd. CPP Arkay IPP for a route length of 1 km.
25. Thus, it was found feasible to evacuate power from the plant of the first respondent through the existing 110 KV line and for that purpose the first respondent was required to undertake major works, which were executed by it.
26. In so far as the appellant is concerned, it was only on July 15, 2005 that the transmission system for power evacuation from the Captive Power Plant proposed to be set up in Kalugurani village at an estimated cost of Rs. 390.18 lakhs was approved. It also needs to be noted that the evacuation of power was only through Valathur 230/110 KV sub-station. This is clear from the report accompanying the approval. The report, to the extent relevant, is set out below:

“A captive power plant with a generation capacity of 70 MW is being set up by M/s. Regency Power

Corporation Ltd. at Kalugurani village in Ramnad District.

For deciding the power evacuation proposal of M/s. Regency Power Corporation Ltd., the following transmission scheme was studied and finalized.

“Erection of 7 km. 110 KV DC line on DC tower with Panther conductor from M/s. RPCL to the sanctioned Valathur 230/110 KV SS.

The following are the major works involved in the proposed transmission system:

- (i) Erection of structure and station auxiliaries at M/s RPCL end.*
- (ii) Extension of 2 Nos. 110 KV Bays at Valathur 230/110 KV SS.*
- (iii) Erection of 110 KV DC line on DC towers from M/s RPCL to Valathur 230 KV SS with Panther conductor for a route length of 7 km.*
- (iv) Provision of PLCC equipment at*
 - (a) M/s. RPCL end - 1 no. station type
2 nos. line type*
 - (b) Valathur 230/110
KV SS - 2 nos. line type*
- (v) Provision of RTU at plant and modem at plant and TNEB ends.*

The estimate has been prepared based on the latest cost data for the year 2005-06 and the estimated cost of the above proposed transmission system works out to Rs. 390.18 lakhs (annexure I) gross and

net chargeable to M/s. Regency Power Corporation Ltd.”

27. On March 25, 2006, the Board issued proceedings, whereby the proposal for evacuation of power from the plant of the appellant through the existing 110 KV line as a temporary measure till such time the respondents plant is running in open cycle mode and when there is no generation from the first respondent's plant or establishment of Valantharavai, was approved. Relevant part of the proceedings reads as follows:

“The Tamil Nadu Electricity Board hereby approves the proposal of the Chief Engineer/Distribution/Madurai Region for the transmission system of making LILO of the VGTPP – Perunglam 110 KV line at M/s Regency Power Corporation Ltd. (M/s RPCL) for evacuation of power not exceeding 25 MW from M/s RPCL as a temporary measure till such time M/s Arkay IPP is running in OPEN Cycle mode and when there is no generation from M/s Arkay CPP or establishment of Valathur 230 KV SS at an estimated cost of Rs. 63.32 lakhs gross and net chargeable to M/s Regency Power Corporation Ltd. on DCW basis. The detailed estimate is annexed to these proceedings.”

28. The report accompanying the proceedings dated March 25, 2006 is also relevant for the determination of controversy, therefore, the same also needs to be taken into consideration. The report reads as follows:

“The transmission system for power evacuation from M/s Regency Power Corporation Ltd. at Kalugurani Village, Ramnad District has already been approved vide BP No. 311 dated 15.07.2005.

Since the transmission lines already sanctioned for the evacuation of power from M/s Regency has not been erected and the execution and the execution of work for the establishment of making LILO of the VGTPP-Perungulam 110 KV line at M/s RPCL for evacuation of power not exceeding 25 MW from M/s Regency Power Corporation Ltd. (M/s RPCL) till such time the M/s Arkay IPP is running in OPEN CYCLE mode and when there is no generation from M/s Arkay CPP or establishment of Valathur 230 KV was approved by Member (Distribution).”

The following are major works involved in the proposed transmission system.

Erection of DC line on DC tower with panther conductor for a distance of 1 Km by LILO of VGTPP-Perungulam 110 KV line at M/s Regency.

The estimate has been prepared based on the revised date for the year 2005-06 and the estimated cost of the above proposed transmission system works out to Rs. 63.32 lakhs (Gross & Net) Annexure I & II) chargeable to M/s Regency Power Corporation

Ltd., This estimate is in addition to the already approved transmission lines vide BP no 311 dated 15.07.2005”.

29. It is clear from the proceedings dated March 25, 2006, the report accompanying it, read with aforesaid approval of July 15, 2005, that the sanction to evacuate power from the power plant of the appellant was from Valathur 230 KV sub-station. Proceedings also record that the Sub-station had not been established and the execution of work was still in progress, and the transmission lines for the evacuation of power were not erected. It is note worthy that the permission to evacuate power from 110 KV transmission line was given to the appellant as a temporary measure. The facility to evacuate power was to be availed by the appellant only when the plant of first respondent is running in open cycle and there is no generation. It is in such an eventuality that the appellant could evacuate power from its plant through 110 KV transmission line.

30. Subsequently, for inexplicable reason the Board on April 25, 2006 decided to modify the proceedings dated March 25, 2006 by the following amendment.

“Utilizing the permissible balance capacity available in the transmission system as directed by the Operation Circle and the LD Centre, to M/s Arkay (Rameshwaram) Ltd. and M/s RPCL on 15 days rotation basis or till the establishment of Valathur 230 KV SS”.

31. From the aforesaid facts, it appears that the first respondent deserved priority over the appellant in terms of Regulation 7; particularly 7(f) of the TNERC’s Intra State Open Access Regulations, 2005. Regulation 7 reads as under:

“7. Allotment Priority:

The priority for allotment of open access shall be decided on the following criteria:

- a. A distribution licensee shall have the highest priority in allotment of open access capacity irrespective of whether the open access request is for long term or short term.*
- b. Other long term open access customers shall have the priority next to the distribution licensee.*

- c. *The short term open access customer shall have the priority next to the long term open access customer.*
 - d. *Allotment priority for short term open access customer shall be decided subject to capacity availability.*
 - e. *An existing open access customer shall have the priority higher than new open access customer under respective category provide he applies for its renewal thirty days prior to the expiry of existing terms of open access.*
 - f. *Subject to Clause (a) to (e) above, the decision shall be based on the basis of first come first served;*
 - g. *During capacity availability constraints, the allotment can be made available to the next senior applicant, provided that the first senior is not able to limit his requirement to the available capacity and so on.”*
32. As per Clause 7 (f), the priority for allotment of open access is required to be determined on the basis of ‘first come, first served principle’. The commission, on analysis of the facts, came to the conclusion that the first respondent was required to be given priority over the appellant as it was to be treated as “first come person”. We concur with the view of the commission. It is true that while the appellant applied on July 2, 2004 for transmission of power that was likely to be generated at the proposed CPP of 70 MW at Kalugurni village, Distt.

Ramanathpuram, the first respondent applied for evacuation of electricity that would be generated at its proposed CPP at Valantharavai village, in August, 2004. But the first respondent was given an 'In Principle Approval' for setting up of 65 MW CPP by the TNEB on September 24, 2004 and by B.P. (Ch) No. 121 dated March 9, 2005, TNEB accorded approval of the Chairman to the proposal of Chief Engineer/ Distribution/, Madurai Region and Superintending Engineer/ Operation/ Madurai for the evacuation of power from the CPP proposed to be set up by the first respondent. Through, the same proceedings, it was indicated that a sum of Rs. 771.28 lakhs was chargeable to the first respondent on DCW basis. Whereas in the case of the appellant, it was only on September, 28, 2005, that it was required to remit a sum of Rs. 1,34,15,277/- towards charges for bay extension works at Valathur SS end and towards the supervision and establishment charges of the works to be carried out under the supervision of the board's officials. Again from the

report accompanying the B.P. (Ch.) No. 121 dated March 9, 2005, it is apparent that for deciding the question of evacuation of power to be generated by the proposed CPP of the first respondent, the suggestion of the Chief Engineer/distribution/Madurai and Superintending Engineer(Operation), Madurai were studied and finalized. As already pointed out, the power was to be evacuated through the following lines:-

1. 110 KV SC line on SC tower with panther conductor from M/s. Arkay Energy Limited CPP to the sanctioned Valathur 230/110KV SS for a route length of 8 kms.
2. 110 KV DC line on DC tower with panther conductor for a route length of 10 kms. to LILO the existing Keelakarai-Mandapam 110 KV line at M/s. Arkay Energy Ltd. CPP.
3. 110 KV SC line on SC Tower Panther conducted from M/s. Arkay Energy Ltd. CPP Arkay IPP for a route length of 1 km.

33. In the case of the appellant, however, no such decision was made as is reflected from the aforesaid letter of TNEB dated September 28, 2005. At that stage, the appellant did not even agitate against the letter dated September, 28, 2005, which envisaged transmission of

power, to be generated by the CPP of the appellant, through Valathur 220 KV substation. It was not stated in the letter that until the Valathur sub-station is erected, the power to the appellant shall be transmitted through one of the 110 KV lines. In the notes of discussion of the first meeting of the representatives of the TNEB and the private projects promoters in Vazuthur area held on September 8, 2005, the appellant had requested the TNEB for interfacing for the startup power in February, 2006 for open cycle and for an additional unit proposed to be commissioned in June 2006. At the time of the meeting, the plant of the first respondent was in the advanced stage of erection and, therefore, a demand was made by it for connecting the CPP with the existing 110 KV line to allow evacuation of power. By letter of the appellant to the TNEB dated January 12, 2006, it was indicated that the gas turbine was expected to be commissioned in the month of March, 2006. The appellant at that stage did not object to the demand of the first respondent. It did not even seek connection of

its plant with the existing 110 KV lines to permit evacuation of power from its proposed CPP since there was still quite a substantial gap to be covered by it to reach the stage of commissioning of the plant. The first respondent was much ahead of the appellant, in so far as the execution of the work for commissioning of the plant was concerned.

34. It is stated in the petition filed by the appellant before the Regulatory Commission that the appellant had raised in the meeting of September 8, 2005, the question of transmission of power proposed to be generated by the appellant through the existing 110 KV transmission lines. But the record note of the discussion of the meeting held on September 8, 2005 does not show that any request was made by the appellant to the TNEB.

35. It was indicated by the TNEB that the power that may be generated by the first respondent could be evacuated through three transmission routes namely using Valathur 230 KV sub-station; LILO of existing 110 KV lines and by connecting to existing Arkay (IPP) facility.

In case this was not the intent of the Report accompanying the proceedings {B.P.(Ch).No.121 dated March 3, 2005}, then where was the question of stating that for deciding the power evacuation proposal of M/s Arkay Energy Ltd. CPP, the suggestion of Chief Engineer/ distribution/Madurai and Superintending Engineer (Operation), Madurai were studied and finalized. It clearly conveyed to the first respondent that the TNEB was willing to evacuate power through the existing 110 KV lines. This was in the nature of a guaranteed commitment given to the appellant and there is no dispute that the first respondent acted on the basis of the proceedings No. B.P. (Ch) No. 121 dated March 3, 2005 and spent an amount of Rs. 771.28 lakhs for obtaining access for evacuation of power through 110 KV line and ultimately through Valathur 230 KV substation. Though the appellant was required to expend a sum of Rs 1,34,15,277/- towards the charges for bay extension works at Valathur etc., there was not even an assurance given to it by the TNEB that till the

completion of the sub-station at Valathur, the power that may be generated by the appellant in its proposed CPP will be transmitted through the 110 KV lines. As already pointed out, it was as late as March 25,2006 that the TNEB issued proceeding BP(Ch) No.136, whereby the proposal for evacuation of power not exceeding 25 MW from the plant of the appellant through 110 KV lines as a temporary measure was approved and that too with a rider that the transmission will be allowed when the plant of the first respondent will be running in open cycle mode and when the plant is not generating. It is another story that subsequently, the Board decided to modify the proceedings dated March 25,2006 and allowed the first respondent to utilise the transmission system on 15 days rotational basis until Valathur 230 KV substation is commissioned.

36. When the first respondent was enticed by the approval to transmit its generation through 110 KV lines by the proceedings B.P. (Ch.) 121 dated March 9, 2005, there was nothing to suggest that the approval will not reach

its fruition because the appellant would have a share in the transmission system on rotational basis. The first respondent on the representation held out by the TNEB by means of the aforesaid proceedings, took steps to set up the plant and spent the amount indicated by the TNEB. The TNEB cannot at a later date ask the first respondent to step down the generation and share the transmission facility with the appellant on 15 days rotational basis.

37. It was submitted by the learned counsel for the appellant that the TNEB accorded approval for wheeling of power from the CPP of the first respondent on the condition that the first respondent will step down the generation based on the agreed availability and share the available evacuation capacity till the time 230 KV sub station is ready. He also pointed out that pursuant to the wheeling order, the TNEB and the first respondent entered into a wheeling agreement dated February, 18, 2006. He highlighted Clauses 11, 12 and 13 of the Agreement to urge that the first respondent willingly

agreed to share the evacuation capacity with the appellant on rotational basis and he cannot be allowed to go back on the agreement, especially when it has taken advantage of the wheeling order and the agreement. It was also submitted that the appellant is bound by the Clauses of the agreement. On the other hand, learned counsel for the first respondent submitted that the Clause 13 of the agreement was violative of Regulation 7 of the Open Access Regulations, particularly Clause (e) thereof. It was also submitted that the first respondent had no option but to sign on the dotted line and act & speak as per the dictates of the TNEB. The learned counsel contended that Clause 13 of the agreement was not binding on its client.

38. We have considered the submissions of the learned counsel for the parties. At this stage we may set out Clauses 10 and 11 of the Wheeling Order and Clauses 12 and 13 of the Wheeling Agreement and Regulation 7 of the Tamil Nadu Electricity Regulatory Commission Intra State Open Access Regulations, 2005:

Clauses 10 & 11 of Wheeling Order:

“10. The company have to step down the generation based on the grid availability and condition till the new 230 KV SS is ready and share the available grid capacity equally with the other CPPs in Ramnad Region. The company has to carry out the repair works of the 100 MVA 230/110 KV transformer at SR Pudur and install the same at Paramakudi SS as an interim measure.

11. The company have to bring only 3 or 4 machines into operation and back down their generation depending on the grid condition. This arrangement will continue till the evacuation scheme proposed in the sanctioned power generation is completed. M/s Arkay Energy (Rameshwaram) Ltd. will also share with M/s Regency Power Corporation Ltd. the available evacuation capacity till that time by allowing to generate on alternate 15 days by M/s Arkay Energy (Rameshwaram) Ltd. and M/s Regency Power Corporation Ltd.”

Clauses 12 and 13 of Wheeling Agreement:

“12. The company has to step down the generation based on the grid availability and condition till the new 230 KV SS is ready and share the available grid capacity equally with the other CPPs in Ramnad Region. The company has to carry out the repair works of the 100 MVA 230/110 KV transformer at SR Pudur and install the same at Paramakudi SS as an interim measure.

13. *The company has to bring only 3 or 4 machines into operation and back down their generation depending on the grid condition. This arrangement will continue till the evacuation scheme proposed in the sanctioned power generation is completed. M/s Arkay Energy (Rameshwaram) Ltd. will also share with M/s Regency Power Corporation Ltd. the available evacuation capacity till that time by allowing to generate on alternate 15 days by M/s Arkay Energy (Rameshwaram) Ltd. and M/s Regency Power Corporation Ltd.”*

Regulation 7 of Tamil Nadu Electricity Regulatory Commission Intra State Open Access Regulations, 2005:

“7. Allotment Priority:

The priority for allotment of open access shall be decided on the following criteria:

- a. *A distribution licensee shall have the highest priority in allotment of open access capacity irrespective of whether the open access request is for long term or short term.*
- b. *Other long term open access customers shall have the priority next to the distribution licensee*
- c. *The short term open access customer shall have the priority next to the long term open access customer*
- d. *Allotment priority for short term open access customer shall be decided subject to capacity availability.*
- e. *An existing open access customer shall have the priority higher than new open access customer under respective*

category provide he applies for its renewal thirty days prior to the expiry of existing terms of open access.

- f. Subject to Clause (a) to (e) above, the decision shall be based on the basis of first come first served;*
- g. During capacity availability constraints, the allotment can be made available to the next senior applicant, provided that the first senior is not able to limit his requirement to the available capacity and so on.”*

39. As is clear from Regulation 7(f), priority for allotment of open access is to be based on the first come, first served basis. The Regulation uses the word ‘shall’ to emphasize the mandatory nature of the Regulation. It seems to us that the provision has been incorporated to ensure that the board does not act arbitrarily and grant open access at its whim and fancy.

40. The TNEB in the State is the only transmission utility and this monopoly makes it powerful. Therefore, the first respondent has no option but to go to the Board with a request to transmit the power generated by it. The first respondent had spent huge amount of money in setting up the generating stations and other works directed to be

executed by the TNEB for transmission of power generated by the first respondent. Therefore, to keep itself afloat, it had to flow with the current and follow the directives of TNEB. The bargaining power of the Board cannot be matched by that of the first respondent. Since the first respondent did not have the privilege to choose the utility for transmission of power, there would be a strong presumption that the terms of the wheeling agreement are dictated by the board and that is obvious from the wheeling order itself. Wheeling agreement is a mirror image of the wheeling order. It does not stand to reason that the first respondent would have willingly agreed to the aforesaid burdensome and crushing conditions of the contract after it was indicated to the first respondent by the TNEB by its communication dated March 9, 2005, read with Load Flow Study that it was feasible to evacuate power through 110 KV line. The first respondent was made to undertake major works for which large sum of money were expended by it.

41. The Rajasthan High Court in DCM Ltd. Vs Asstt. Engineer (HMT Sub-Division), Rajasthan SEB; AIR 1988 Raj. 64; held an onerous condition in an agreement to be unreasonable. In this regard it was held as follows:-

“We may further add that for the reasons already given it is obvious that the giving of such an undertaking by execution of the agreement was no doubt a conscious act of the petitioner, but in the circumstances, it cannot be held to indicate the petitioner’s willingness to be bound by such an onerous condition, if it had the option. It is obvious that there was no option to the petitioner and therefore, it cannot be said that the petitioner voluntarily and willingly chose and accepted the more onerous condition of a higher rate instead of the normal rate for payment of minimum charges. The willingness to accept such an onerous term with free consent can be assumed only where a consumer has an option or in other words he can get the supply of electricity he wants even without agreeing to any such term specified by the Board for being incorporated in the written contract without execution of which the consumer cannot insist on supply of electricity to him. It is not the Board’s case that it was willing to honour the petitioner’s requisition and make the supply even without the petitioner undertaking in writing to pay minimum charges according to Clause 16(c). How can it then be said that the petitioner willingly accepted this term when the fact is that it had no option in the matter.”

42. Similarly in the instant case, the willingness to accept the burdensome conditions like sharing of transmission

system with the appellant on rotational basis can be assumed only when the first respondent had an option. In case he had not accepted this condition, he may not have secured the wheeling order.

43. This decision of the Rajasthan High Court was noticed by the Supreme Court in Pawan Alloys & Casting Pvt. Ltd., Meerut vs. U.P. State Electricity Board & Ors., (1997) 7 SCC 251. The Supreme Court while approving the observations of the Rajasthan High Court observed as under:-

“ We are of the view that the aforesaid observations of the Rajasthan High Court are in accord with the correct legal position”

We may also refer to the following observations of the Supreme Court in the aforesaid matter as they have a clear bearing on the case in hand:

“54. It would be totally absurd and incongruous to suggest on behalf of the Board that on the one hand it guaranteed to the new industrial units for a period of three years from the date of commencement of supply 10% development rebate on the total amount of the bill and on the other hand, the moment such supply started pursuant to the written agreement

the very incentive could be withdrawn by it from its inception as a new industrial unit had to sign a written agreement containing Clause 7(a), (b) and (c). If that submission on behalf of the Board which appealed, to the High Court is accepted a most incongruous, unreasonable and absurd result would follow. It can then be said that the Board on the one hand had given incentive to new industries by guaranteeing development rebate of 10% on the total bill of consumption of electricity for a period of three years from the date of commencement of supply but from the very inception of that period the Board on the other hand as per the very agreement with the promisee was enabled to immediately withdraw the very same development rebate in exercise of its contractual powers as per Clause 7(c) of that very agreement. If that happens the Board would be giving on the one hand incentive to new industries by way of development rebate of 10% and by another hand would immediately and almost simultaneously be withdrawing the said incentive by pinning down the consumer to 'the terms of the agreement as found at Clause, 7a), (b) and (c). This would result in a total exercise in futility. The incentive development rebate scheme would in such an eventuality be stillborn. It is also easy to visualize that a new industrial unit which spends large amounts for establishing Its infrastructure and gets lured in the light of the representation held out by the Board and establishes its plant and machinery in the new unit, would not simultaneously and voluntarily agree by signing such an agreement with the Board to give up the very same benefit of incentive by permitting the later to withdraw it at any time, it likes. That would be doing violence to common sense and business approach of an ordinary prudent businessman. No business man in his senses would ever agree voluntarily to such an absurd, incongruous and

inconsistent predicament.

55. It is, therefore, too much to imply any written consent on the part of a prudent consumer who established new industrial units to at once give up the incentive of development rebate guaranteed in his favour by the Board, Consequently it is not possible for us to endorse the reasoning which appealed to the High Court which decided Issue No.2 against the appellants.

56. We, therefore, hold that the new industrial units while signing the written agreements and agreeing to Clause 7(a), (b) and (c) found in the standard contract forms had only undergone a formality of signing such agreements before the electric supply could commence at their new units and such Clauses only reaffirm the statutory power of the Board under Section 49(1) of the Act and had nothing to do with the scheme of incentive, development rebate. They had not voluntarily or by even the remotest chance agreed to give up the benefit given to them by clear representation held out by the Board as per Item 8 of the rate schedule in the light of the earlier three notifications promulgated by the Board in exercise of its powers under Section 49 read with Section 78-A of the Act.

57. It must also be held that they have neither expressly nor impliedly agreed that the Board will have absolute power and discretion to withdraw this incentive of development rebate at any time prior to the expiry of three years for which it was guaranteed to them by the earlier representation held out by the Board and which representation resulted in to promissory estoppel against the Board and in favour of the appellants.”

44. In the circumstances, it can be visualized that the first respondent did not willingly agree to share the evacuation capacity with the appellant on rotational basis and the burdensome conditions imposed by the TNEB in clause 11 of the Wheeling Order and clause 13 of the Wheeling Agreement were totally unfair and one sided. In fact clause 11 of the Wheeling Order found its reflection in clause 13 of the Wheeling agreement. It appears to us that since the norms fixing priority were not adhered to by the TNEB; it has lead to arbitrariness, which is antithetic to Article 14. The norms fixing priority for allotment of open access cannot be diluted by contracting out of the Regulations. Therefore, we are of the view that the Regulatory Commission was entirely right in holding that Clause 11 of the wheeling order and Clause 13 of the wheeling agreement being not in consonance with Regulation 7 (f) of the Regulations are violative thereof. Since, they are violative of Regulation 7(f); they are of no effect whatsoever. Even otherwise Clause 13 of the wheeling agreement will be of no

consequence.

45. We are constrained to observe that the unfortunate situation involving infructuous expenditure on the alternative routes of evacuation of power from CPP, has been caused due to failure in timely implementation of works of Valathur 230 KV Sub-station by the TNEB. In case the TNEB wishes to allow the appellant Open Access and wheeling of energy through 110 KV line, it can do so by backing down its own generation and sharing the line capacity being used by it with the appellant, but it cannot compel the appellant to share the available evacuation capacity by directing it to generate energy on 15 days rotational basis.
46. For the above reasons, we do not find any merit in the Appeal and accordingly the same is dismissed.

(Anil Dev Singh)
Chairperson

(A.A. Khan)
Technical Member

Dated the, 22nd January, 2007.