

**TAMIL NADU ELECTRICITY REGULATORY COMMISSION**  
(Constituted under Section 82 (1) of the Electricity Act 2003  
Central Act 36 of 2003)

**PRESENT:-**

Thiru S. Kabilan ..... Chairman

Thiru.K.Venugopal ..... Member  
and

Thiru.S.Nagalsamy ..... Member

**I.A. No. 1 of 2011, I.A. No. 2 of 2011**  
**and**  
**D.R.P. No. 13 of 2011**

M/s Kaveri Gas Power Ltd.  
5, Ranganathan Garden  
Anna Nagar  
Chennai – 600 040.

..... Petitioner  
(Thiru. P.Vinod Kumar, Advocate for Petitioner)

**Vs.**

1. The Tamil Nadu Generation and Distribution Corporation Limited  
Represented by its Director  
800, Anna Salai  
Chennai – 600 002.

2. The Superintending Engineer  
Nagapattinam Electricity Distribution Circle  
The Tamil Nadu Generation and Distribution Corporation Limited  
Nagapattinam.

3. The Tamil Nadu Electricity Board  
Represented by its Chairman  
800, Anna Salai  
Chennai – 600 002.

..... Respondents  
(Thiru. P.H.Vinod Pandian, Advocate for Respondents)

**Dates of hearing: 20-4-2011, 21-4-2011, 17-6-2011,  
15-7-2011, 12-8-2011, 11-10-2011 and  
21-10-2011**

**Date of Order : 28-12-2011**

D.R.P.No.13 of 2011 and I.A. No. 2 of 2011 in DRP No. 13 of 2011 came up for final hearing before the Commission on **21-10-2011**. The Commission upon perusing the above petitions and other connected records and after hearing both sides passes the following:-

**ORDER**

**Prayer in D.R.P.No.13 of 2011:-**

1. The prayer in D.R.P. No. 13 of 2011 is
  - (a) to set aside the impugned notices dated 25-2-2011 and 4-3-2011 issued by the second Respondent calling upon the Petitioner to pay a sum of Rs.1,14,48,424/- towards transmission, wheeling, scheduling and system operating charges and grid availability charges for the period from 25-5-2006 to 22-9-2007 ;
  - (b) to direct the Respondents to refund the excess amounts of Rs.55,26,692/- collected in excess from the Petitioner towards transmission and other charges from October 2007 till September 2008 by erroneously treating the Petitioner as a Long term Open Access customer ;
  - (c) to direct the Respondents to refund the excess amounts of Rs.1,37,71,428/- collected in excess from the Petitioner towards transmission and other charges from October 2008 till March 2011 by

- erroneously treating the Petitioner as a Long Term Open Access customer ;
- (d) to direct the Respondents to treat the Petitioner as a Short Term Open Access customer for the remaining term of the energy wheeling agreement dated 4-10-2008 ;
- (e) direct the Respondents to pay costs of the present proceedings to the Petitioner.

**Interim Prayer in I.A.No.1 of 2011 in D.R.P No. No. 13 of 2011.:-**

2. The prayer in I.A. No. 1 of 2011 in D.R.P. No. 13 of 2011 is to grant an order of interim injunction restraining the Respondents from giving effect to the impugned notices dated 25-2-2011 and 4-3-2011 pending adjudication of the dispute resolution petition.

**Interim Prayer in I.A.No.2 of 2011 in D.R.P No. No. 13 of 2011.:-**

3. The prayer in I.A. No. 2 of 2011 in D.R.P. No. 13 of 2011 is to relax the order dated 21-4-2011 passed in I.A. No. 1 of 2011 in D.R.P. No. 13 of 2011.

**Facts of the case :-**

4. The Petitioner is a company incorporated under the provisions of the Companies Act, 1956 involved primarily in the business of setting up power plants and generating electricity. The Petitioner has set up a 6.79 MW natural gas based captive power plant at Maruthur Village,

Mayiladuthurai Taluk. The Petitioner's plant was accorded wheeling approval by the first Respondent on 25-5-2006. The said wheeling approval did not indicate the duration for which Open Access was granted to the Petitioner. An Energy Wheeling Agreement dated 4-10-2008 was entered into between the Petitioner and the first Respondent setting out the terms of the Open Access entitlement of the Petitioner. In terms of Clause 9 of the said agreement, the term of the agreement is three years.

5. The Petitioner was served with the notice dated 25-2-2011 (received on 28-2-2011) whereby the second Respondent called upon the Petitioner to pay an amount of Rs.34,21,003/- regarding the implementation of Order No. 2 and 4 with effect from 25-5-2006 to 22-9-2007. This was followed up by another notice dated 4-3-2011 (received on 7-3-2011) of the second Respondent, whereby it was stated that in the earlier notice the amount towards wheeling charges has not been included and the Petitioner has been called upon to pay an amount of Rs.1,14,48,424/- instead of Rs.34,21,003/- within 7 days and it is further stated that failure to make the payment will attract interest 18%.
6. The Petitioner has in letter dated 7-3-2011 put forth its objections to the demand made by the Respondents.
7. Being left with no other option, the Petitioner has filed the present dispute resolution petition challenging the notices dated 25-2-2011 and 4-3-2011 issued by the second Respondent calling upon the Petitioner to pay a sum

of Rs.1,14,48,424/- towards transmission wheeling, scheduling and system operating charges and grid availability charges for the period from 25-5-2006 to 22-9-2007 and for other consequential relief. Hence the petitioner has filed the above D.R.P. No. 13 of 2011 and I.A. No. 1 of 2011 before the Commission.

**Contention of the Petitioner :-**

8. This Hon'ble Commission was pleased to pass Order No. 2 dated 15-5-2006, fixing transmission charges, wheeling charges and other charges specified under the Open Access Regulations. For Long Term Open Access customers, the transmission charges were fixed at Rs.2781/- per MW per day. For Short Term Open Access customers, the rate was fixed at 25% of the rate of Long Term customers. Accordingly, the Short Term customers are to be charged at Rs.695.25 per MW per day towards transmission charges. The practice of collecting wheeling charges in kind by deducting 15% of the total energy fed into the grid, which was hitherto being followed by the Respondent, was dispensed with under Order No. 2. Therefore, the transmission and wheeling charges fixed under Order No. 2 was much less than what was being hitherto charged.
9. Order No. 2 was made applicable to all the Open Access customers covered under the Tamil Nadu Electricity Regulatory Commission Intra State Open Access Regulations, 2005 which came into effect on 3-8-2005. Although the wheeling approval granted to the Petitioner was dated

24-5-2006 and the Order No. 2 was applicable to the Petitioner, as per the wheeling approval issued to the Petitioner by the Board, wheeling charges were to be charged at 15% of the total units fed into the grid and not at the rate fixed by the Commission. The Petitioner's plant was commissioned on 9-6-2006 and the Respondent collected wheeling charges at 15% of the total units fed into the grid instead of levying transmission and wheeling charges in terms of Order No. 2. Hence, the Petitioner was denied the benefit of paying wheeling and transmission charges in terms of Order No.2.

10. Since the wheeling approval granted to the Petitioner did not specify the term for which Open access was granted to the Petitioner and the Respondent had called upon the Petitioner to pay transmission charges at Rs.2,781/- per MW which is the charges applicable in respect of Long Term Open access, the Petitioner was under the assumption that the Respondent has treated the Petitioner as a Long Term Open access customer. However, the energy wheeling agreement dated 4-10-2008 issued to the Petitioner was confined to three years, However, the Respondents continued to collect charges applicable to long term customers. The Respondent has always maintained that the term of the wheeling approval is only three years. In this regard reliance is placed on a letter dated 5-5-2010 issued by the Tamil Nadu Transmission Corporation Limited wherein it has been categorically stated that the

Energy Wheeling Agreement dated 4-10-2008 is for a period of three years (valid upto 3-10-2011)

11. The Petitioner has in letter dated 15-2-2011 requested the Respondent to collect transmission and other charges applicable to Short Term Open Access customers. The Respondents have not chosen to respond to the said letter issued by the Petitioner.
12. The Respondent has arrived at the aforesaid amount, by calculating the transmission, wheeling charges and other charges applicable for long term customers on the capacity of 17.5 MW as mentioned in the initial wheeling approval granted to the Petitioner. It is pertinent to note that since in terms of the energy wheeling agreement dated 4-10-2008, the term of agreement is only three years the Petitioner cannot be treated as a Long Term Open Access customer in terms of the regulations. Hence the levy of transmission and wheeling charges applicable to Long Term Open Access customers is erroneous and contrary to law.
13. The period from issuance of the wheeling approval (24-5-2006) to the execution of the energy wheeling agreement (4-10-2008) being less than five years, for the said period the Petitioner can be treated only as a Short Term Open Access customer. The period in question (25-5-2006 to 22-9-2007) which is prior to execution of the energy wheeling agreement, should be treated separately from the period under the energy wheeling agreement dated 4-10-2008 and hence the Respondents are not entitled

to collect any amount from the Petitioner treating the Petitioner as a Long Term Open Access customer.

14. Had the Respondent indicated in the wheeling approval issued to the Petitioner on 24-5-2006 that the Order No. 2 of the Hon'ble Commission would be applicable to the Petitioner and the transmission and wheeling charges will have to be paid on the basis of the said order, the Petitioner would have immediately sought an amendment of the wheeling approval to indicate the installed capacity of 6.79 MW instead of 17.5 MW as mentioned in the wheeling approval as issued to the Petitioner. The Petitioner who immediately on being informed of the Respondent's intention to apply Order No.2 had sought amendment of the wheeling approval cannot be now asked to pay the differential amount based on a decision of the Respondent to retrospectively apply Order No. 2. This would amount to penalizing the Petitioner for no fault of theirs.
15. The decision of the Respondents communicated to the Petitioner vide the impugned notices dated 25-2-2011 and 4-3-2011, to collect transmission and wheeling charges in terms of Order No. 2 of the Commission from the Petitioner in respect of the period from 25-5-2006 to 22-9-2007, is in addition to being contrary to law is also barred by the law of limitation.
16. The Respondent has unilaterally and arbitrarily fixed Rs.3.50 as amount to be paid to the Petitioner for the units which were deducted from the Petitioner's generation during the relevant period of time. Such unilateral

- and arbitrary price fixed by the Respondent is contrary to law and hence the Respondent should not be permitted to do so by the Commission.
17. The Respondent having failed to approach the Commission prior to making the impugned demand, the notice under challenge is without jurisdiction and hence liable to be set aside. The Commission having directed the Respondents to implement its Order No. 2 in a particular manner, the Respondent having not chosen to act in accordance thereof could not have unilaterally decided to act in a manner different from what the Hon'ble Commission had directed and introduce the order retrospectively and that too after more than three years.
  18. The installed capacity of the Petitioner was only 6.79 MW when the wheeling approval was granted and hence, without prejudice to the contention that the Petitioner can be treated only as a Short Term Open Access consumer and even assuming that the Respondent is entitled to treat the Petitioner as a Long Term Open Access customer, the Petitioner's liability towards transmission and wheeling charges ought to be calculated for 6.79 MW and not for 17.5 MW.

**Contentions of the Respondent in Counter Affidavit :-**

19. The consent under Section 44 of Electricity (Supply) Act, 1948, (CA 54 of 1948) was issued to M/s. Kaveri Gas Power Limited herein after referred to as the Petitioner company, for establishment of a natural gas based captive power plant of 17.5 MW capacity at Vallur vide Per B.P. (FB) No.

147 dated 1-12-2001. Subsequently approval was accorded to the Petitioner company for change of location of their proposed CPP from Vallur village of Thiruvarur District to Maruthur village of Nagapattinam District vide B.P. (CH) No. 384, dated 16-12-2002.

20. Even though parallel operation was accorded for 6.79 MW for the first phase, that the transmission system was installed at a cost of Rs.107.166 lakhs under Deposit Contribution Works (DCW) basis as approved in B.P. No. 177, dated 21-4-2005 for evacuating power to the tune of 17.5 MW at the request of the Petitioner company.
21. The Petitioner company stated that they are going to implement the project in two phases and in the first phase they will be generating 6.79 MW, due to the reduced allotment of gas. Considering the above aspects, the Respondent Board has issued wheeling approval for 17.5 MW of power vide letter dated 24-5-2006 as requested by the Petitioner company. In this regard, Clause 8 of the undertaking given by the Petitioner that it is agreeable to revision of wheeling charges, billing and adjustment subject to revision as may be prescribed by the Board / TNERC as the case may be from time to time which is relevant to note. A capacity of 17.5 MW in the system was earmarked to the Petitioner company after conducting the load flow study and installation of necessary power evacuation systems during 05/06. The Petitioners contention that the said approval is complete order enabling the Petitioner initially to

generate and operate 6.79 MW of power with provisions for enhancement as and when the gas supply are made available is correct, only if the transmission segment with capacity 17.5 MW is earmarked and reserved for the Petitioner's company.

22. The Commission in D.R.P. No. 1 of 2008 has held that the wheeling agreement was for 17.5 MW.
23. The Petitioner company requested for amendment to wheeling approval for the plant capacity from 17.5 MW to 6.79 MW, and it has to be treated as reduction of installed capacity only, because as per Clause 12 (h) of the TNERC's Intra State Open Access Regulations, 2005, dated 24<sup>th</sup> June 2005, the Long Term Open Access customer shall not relinquish or transfer his rights and obligations specified in the Open Access Agreement without prior approval of the Commission. The relinquishment or transfer rights and obligations shall be subject to payment of compensation, as may be determined by the Commission. The infrastructure has been created for the Petitioners company for evacuation of 17.5 MW of power which amounts to reserving the transmission capacity.
24. It is also relevant to state that the approval dated 10-09-2008 was among other things based on the letter dated 19-10-2007 of the Petitioner where the Petitioner itself has stated that it was also called upon to the meeting on the calculation of transmission charges for LTOA. Therefore, it is very clear that the Petitioner has been a LTOA customer all along but, as an

- after thought and for unjust enrichment, has at this distant period of time claimed that it comes under STOA which cannot be accepted. Further, in the EWA dated 4-10-2008 also it has agreed to pay the charges as per regulations and has been paying the charges as LTOA customer.
25. Only after the TNERC order dated 15-7-2008 in D.R.P. No. 1 of 2008 based on the revised order dated 10-9-2008 issued by the Respondent Board, the Petitioner company executed the EWA in prescribed format, in which in item No. 10 (3) of the EWA and the company accepted "Implementation of TNERC's Order No. 2 & 4 dated 15-5-2006, for the revised capacity of 6.79 MW is applicable from 19-10-2007 whereas prior to 19-10-2007, it will be applicable for 17.5 MW.
26. In Respondent's letter dated 5-5-2010 also it was clearly mentioned that the Petitioner is a LTOA customer and the LTOA agreement in force, which was not disputed and the same amounts to admission of status as LTOA. The Petitioner till 2011 has not raised any averment that comes under STOA and suddenly, at this distant period of time has claimed itself as STOA customer on the sole ground of the period of agreement (EWA was entered into as per the format prescribed by the Commission), which is not acceptable.
27. The retrospective implementation of Order Nos. 2 and 4, such as M/s. Saheli Exports Pvt. Ltd. M/s. MMS Steel etc for similar CPPs have been implemented and the settlement has also been made by the Respondent.

28. An application for Open Access was made by the Petitioner and Long Term Open Access charges of registration fees Rs.5,000/- and agreement fees Rs.50,000/- was paid on 6-12-2007 vide P.R. No. 134520 for availing Long Term Open Access. Therefore, it is clear that the Petitioner retains the power evacuation of 17.5 MW with Long Term Open Access only. Even in D.R.P. No. 1 of 2008 the objection regarding LTOA / STOA has not been raised by the Petitioner and it clearly establish that the Petitioner and the Respondent were dealing under the application for Open Access under LTOA only.
29. Clause 5 of the Intra State Open Access Regulations, inter-alia, provided that in case of existing agreement / contract, such persons are eligible to avail Long Term Intra State Open Access under these regulations on expiry of such existing agreement / contract. In view of the above provision also the Petitioner by correctly understanding that it will come under the LTOA category, applied for Open access by payments of all charges under LTOA category.
30. The Petitioner avails an Open Access continuously from 24-5-2006 to till date and it is covered under Long Term Open Access only (since the undertaking period is from 25-5-2006 to 3-10-2008 and the agreement period is from 4-10-2008 to 3-10-2011, totally 5 years 4 months and 10 days which is more than 5 years). Hence, the Petitioner has to pay the

Respondent's claim vide letter dated 25-2-2011 and 4-3-2011 an amount of Rs.1,14,48,424/- and also as per the State Commission's interim order.

**Reply of Petitioner to the counter of Respondents:-**

31. In D.R.P. No. 1 of 2008 there is no finding that the wheeling agreement was for 17.5 MW. On the contrary the Commission had held that there was no wheeling agreement or Open Access Agreement. It is submitted that the reference in paragraph 3 of the counter affidavit to the capacity initially reserved for the Petitioner's plant being 17.5 MW and the impact of such reservation on capacity allotment to other captive plants etc. are not relevant to the issues which arise in the present proceedings.
32. The Petitioner is not privy to either the B.P. No. 466 dated 8-9-2007 or the letter dated 6-11-2007. The Respondent has not chosen to file the said documents before the Commission and hence the Respondent is put to strict proof of the same.
33. The wheeling approval was dated 24-5-2006 and not 24-4-2006 as stated by the Respondents. In the petition, the Petitioner has not contended that the indication of 17.5 MW in the wheeling approval was a mistake or that it was incorrect. Hence, the allegation of the Respondents to the contrary are without any basis.

34. The Commission has in its order dated 15-7-2008 in D.R.P. No. 1 of 2008 held that Regulation 12 (h) of the Open Access Regulations are not applicable to the Petitioner.
35. It is denied that the approval dated 10-9-2008 was based on the Petitioner letter dated 19-10-2007. The Petitioner has in its petition explained the circumstances under which the Petitioner assumed that it is a long term customer. It is denied that the Petitioner has, as an afterthought and for unjust enrichment claimed that it should be treated as a Short Term Open Access customer.
36. The Petitioner was accorded permission to sell 5 MW from the 6.79 MW to third parties vide letter dated 11-3-2009. However, to utilize the said permission, the Respondent has been collecting Short Term Open Access charges from the Petitioner in addition to the long term charges being collected on the installed capacity of 7 MW. The Petitioner with no other option has been paying the said amounts under protest.
37. The fact remains that there was no EWA executed between the parties for the period from June 2006 to September 2008. It is for the Respondents as the provider of Open Access to ensure that the EWA is signed and hence the Respondent is not entitled to contend that the Petitioner did not insist on the execution of the EWA. The execution of the EWA dated 4-10-2008 is an admitted fact.

38. It is denied that the Petitioner did not object to being treated as a Long Term Open Access customer. In fact, the Petitioner had vide letter dated 4-10-2008 informed the TNEB that the EWA was being executed under protest. It is an admitted position that the term of the EWA dated 4-10-2008 is for three years and as per the Regulations, for being categorized as a Long Term Open Access customer, the term of the agreement has to be five years.
39. There was no direction by the Commission in its order in D.R.P. No. 13 of 2009 to retrospectively implement Order No. 2 and 4 for all the captive power plants. The facts in D.R.P. No. 13 of 2009 were not similar to that of the present case in so far as the Petitioner in D.R.P. No. 13 of 2009 was a plant which was accorded wheeling approval prior to the Commission's Order No. 2 and 4 and the Petitioner therein despite having opted to come under the Order No. 2 continued to be charged wheeling charges at the rate of 15% of the total energy generated and fed into the grid. The Respondents are not entitled to on its own accord decide to retrospectively implement Order No. 2 and 4 of the Commission after a period of more than four years.
40. The EWA dated 4-10-2008 was signed under protest and hence the fee which was paid in December 2007 under the assumption that the agreement will be for a period of five years in terms of the regulations cannot be put against the Petitioner as being an acceptance of the three

years term as long term. The facts leading to filing of D.R.P. No. 1 of 2008 were entirely different and hence there was no occasion for the Petitioner to raise the issue which has been raised in the present proceedings. Filing of D.R.P. No. 1 of 2008 was necessitated on account of the Respondents not considering the Petitioner's request to reduce the capacity mentioned in the wheeling approval. It is relevant to point out that the Commission has given a specific finding in D.R.P. No. 1 of 2008 that regulation 12 (h) of the Open Access Regulations are not applicable to the Petitioner.

41. Regulation 5 of the Open Access Regulations are applicable only to persons who were availing the Open Access facility on the date when the regulations came into force. The Petitioner admittedly being granted Open Access much after the said regulations coming into force, regulation 5 is not applicable to the case of the Petitioner.
42. The allegation that the undertaking given by the Petitioner at the time of grant of wheeling approval was for a period from 25-5-2006 to 3-10-2008 is denied. There is no period mentioned in the said undertaking.

**Contention of Petitioner in the affidavit filed in I. A. No. 2 of 2011**

43. The amount which is disputed in the present proceedings, even assuming that the Respondents are entitled to the same, ought to have been collected over a period of sixteen months (from June 2006 to September 2007) from the Petitioner at the rate of approximately Rs.7 lakhs. The

Respondent on their own accord decided not to implement the Order No. 2 and 4 of the Commission till October 2007 and for the period prior to October 2007, the Respondents decided to implement the orders much later in the year 2011 by issuing the impugned notices and asking to pay the amount to be paid in one stroke.

44. The Respondent has not issued any wheeling advice for the period from June 2006 to September 2007 containing details of the slot wise allotment to various consumers. In the absence of the wheeling advice, the captive consumers of the Petitioner will not be entitled to claim the applicable rebate for peak hour charges and demand charges and consequently, the Petitioner is a captive plant will not be able to claim its share of peak hour and deemed demand charges.
45. In view of the above facts, the petitioner in the said I.A. No. 2 of 2011 have made a request to relax the interim order dated 21-4-2011 passed in I.A. No. 1 of 2011 in D.R.P. No. 13 of 2011. The said interim order dated 21-4-2011 is extracted below:-

*“The balance of convenience is against the Petitioner. The payment may be made by the Petitioner which will be subject to the outcome of the main petition. The Petitioner is permitted to make the payment in four monthly installments. The Respondents are directed to file their counter within 4 weeks”.*

**Arguments of the Petitioner:-**

46. The Petitioner submitted that he sought approval for Open Access for 17.5MW and the wheeling approval was granted on 24-5-2006. The date of commissioning of the plant was 9-6-2006 and the installed capacity was only 6.79 MW. The wheeling agreement was executed on 4-10-2008. He requested the respondents to amend the wheeling agreement restricting wheeling to 6.79 MW instead of 17.5 MW.
  
47. As TNEB replied to approach the TNERC for amendment the DRP No.1 of 2008 was filed by the petitioner and the Commission directed the amendment as prayed for by the petitioner and the Commission also held that clause 12(h) of Intra State Open Access Regulation will not apply to the case of the petitioner. The petitioner claimed that though no duration was specified in the Energy Wheeling Agreement, his case has to be treated as a Short Term Open Access and charges need to be collected accordingly as stipulated in clause 9 of the Regulations and the excess amount collected has to be refunded to him.
  
48. The petitioner submitted that Order No.2 dated 15-5-2006 of the Commission cannot be implemented by the respondents retrospectively when the energy wheeling agreement was executed on 4-10-2008 i.e. subsequent to the date of the said order. Therefore, the petitioner is not liable to pay the sums demanded by the respondents based on the said order. He further submitted that in view of the ruling of the Commission

in M/s. Rangaraj Power case he has to be treated as a Short Term Open Access customer. He also submitted that the respondents are estopped from demanding the sums indicated in the impugned notices.

49. The counsel for petitioner submitted the following citations in support of his arguments: (1) D.R.P.No.3 of 2010. (2) 2011 ELR (APTEL) 0477. (3) AIR 1986 SC 806. (4) 2008 ELR (SC 0293. (5) 2011 ELR (APTEL) 458. (6) AIR 1979 SC 621.

**Arguments of the Respondent:-**

50. Since the petitioner has already given an undertaking to wheel 17.5 MW and the wheeling approval was granted as early as on 24-5-2006 the petitioner has to be treated as a Long Term Open Access customer and hence the charges were levied as applicable to Long Term Open Access customer for 17.5 MW. The learned Counsel for Respondent argued that the DRP No. 1 of 2008 filed by the petitioner was only for reducing the capacity from 17.5 MW to 6.79 MW and the said DRP did not deal with the Order No.2 of 2006 dated 15-5-2006.
51. When the Commission queried the counsel for the respondents as to why Order No.2 of 2006 was not implemented in time the counsel could not give any convincing reply. At this stage, the petitioner's counsel submitted that the fact that the petitioner has paid the charges at the rates for Long Term Open Access cannot be held against him to hold that he has waived his right to make the claim that he is a Short Term Open

Access customer. In support of this contention he relied on the ruling of the APTEL in TNEB vs. TCP Limited (Appeal No.12 of 2010 decided on 7-3-2011).

52. **Finding of the Commission**

52.1 The TNEB accorded approval for wheeling on 25-5-2006 without specifying the period of open access. The TNEB prescribed 15% of energy charges in their approval. This was because they did not choose to implement order No.2 dated 15-5-2006 till October 2007. This order of the Commission prescribed the transmission and wheeling charges both for short term and long term open access. Clause (8) of the approval of TNEB dated 25-5-2006 is reproduced below:-

*“The wheeling charge billing and adjustments of energy are subject to revision as may be prescribed by the Board / TNERC as the case may be from time to time”*

That approval mentions that the rate will be subject to revision by the TNERC. The TNERC prescribed the rates on 15-5-2006 and yet the TNEB did not adopt the rates in their approval dated 25-5-2006. This was because they did not implement the order No.2 dated 15-5-2006 of the Commission till October 2007. Although the TNEB mentioned in their approval that the rates are subject to revision by TNEB/TNERC, yet they did not incorporate the rates in the approval. This was clearly a case of double standard in the sense that they want to have the cake and eat it too.

52.2 As per the order of the Commission in DRP No.1 of 2008 dated 15-7-2008, the TNEB lowered the wheeling approval from 17.5 MW to 6.79 MW by an agreement dated 4-10-2008. The agreement prescribed that its validity would be for three years but it was given retrospective effect from 19-10-2007, the date on which the Petitioner gave application for reduction of

wheeling approval to 6.79 MW. The agreement provided that transmission and wheeling charges shall be as per the order of the Commission. The agreement dated 4-10-2008 was valid for a period of three years upto 3-10-2011.

52.3 The original approval of 25-5-2006 of TNEB was for a capacity of 17.5 MW. It was lowered to 6.79 MW in the agreement dated 4-10-2008. This agreement was valid for a period of three years upto 3-10-2011.

52.4 The relevant question is whether the TNEB's approval and subsequent agreement should be treated as a long term wheeling or short term wheeling. The approval of 17.5 MW was valid from 25-5-2006 to 18-10-2007. The approval for 6.79 MW was valid from 19-10-2007 upto 3-10-2011. The facts of the present case establish that wheeling approval for 17.5 MW was valid from 25-5-2006 to 18-10-2007. Wheeling approval for 6.79 MW was valid from 19-10-2007 upto 3-10-2011. The total period works out to more than five years. Therefore, the Petitioner should be treated as a long term customer and he should be charged at the rate of 15% energy charges for the period from 25-5-2006 to 18-10-2007 as communicated in the approved letter of TNEB and at the rates prescribed by the Commission in order No.2 dated 15-5-2006 for the period from 19-10-2007 to 3-10-2011. The Respondent having chosen to implement Order No.2 dated 15-5-2006 with effect from October 2007 is estopped from levying the charges prescribed by the Commission with effect from 25-5-2006.

DRP 13 of 2011 is ordered accordingly. No order as to cost.

53. **Appeal:**

An appeal under section 111 of the Electricity Act, 2003 against this order shall lie to the Appellate Tribunal for electricity within a period of 45 days.

**(S.Nagalsamy)**  
**Member**

**(K.Venugopal)**  
**Member**

**(S. Kabilan)**  
**Chairman**