TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 13th Day of July 2024

PRESENT:

Thiru M.Chandrasekar .... Chairman

Thiru K.Venkatesan .... Member

and

Thiru B.Mohan .... Member (Legal)

D.R.P. No. 10 of 2023

M/s. Krishnaveni Carbon Products P Ltd,
63/3, Athipalayam Road,
Chinnavedapatti, Coimbatore-641049,
Represented by its Authorized Signatory,
Mr.G.Balathandayutham. … Petitioner

Thiru.S.P.Parthasarathy,
Advocate for the Petitioner

Vs.

1. The Chief Engineer-NCES,
   Tamil Nadu Generation and Distribution
   Corporation Ltd, (TANGEDCO)
   2nd Floor, 144, Anna Salai,
   Chennai – 600002.

2. Chief Financial Controller/Revenue,
   Tamil Nadu Generation and Distribution
   Corporation Ltd, (TANGEDCO)
   7th Floor, 144, Anna Salai,
   Chennai – 600 002.

3. The Superintending Engineer,
   TANGEDCO,
   Tirunelveli Electricity Distribution Circle,
   Tirunelveli.

4. The Superintending Engineer,
   TANGEDCO,
   Coimbatore Electricity Distribution Circle/North,
   Coimbatore.

5. The Superintending Engineer,
TANGEDCO,
Coimbatore Electricity Distribution Circle/South,
Coimbatore. …. Respondents

Thiru.N.Kumanan and
Thiru.A.P.Venkatachalapathy,
Standing Counsel for TANGEDCO

This Dispute Resolution Petition stands preferred by the Petitioner M/s.Krishnaveni Carbon Products Pvt. Ltd., with a prayer to quash the 3rd Respondent's impugned demand notice bearing Lr.No.SE/TEDC/TIN/DFC/AO/WIND/AS/F.OA Software /D.No.354/23 dated 08.05.2023 and pass, such other or further orders, as deemed fit, in the circumstances stated above and accordingly, render justice.

This matter coming up for final hearing before the Commission on 25-07-2024 in the presence of Advocates from Thiru.S.P.Parthasarathy, Advocate for the Petitioner and Thiru.N.Kumanan and A.P.Venkatachalapathy, Standing counsel for the Respondents and upon hearing the submission made by the counsel for the petitioner and the respondents, on perusal of the material records and relevant provisions of law and having stood up for consideration till this date, this Commission passes the following

ORDER

1. Contentions of the Petitioner :-

1.1. The petitioner is a company owning WEG NO.079224723053 coming under the 3rd Respondent under Captive Scheme as provided under the Electricity Act 2003 and the Open Access Regulations framed by the Commission. The Petitioner owns two industrial units one bearing HTSC NO.039094300504 coming under the 4th Respondent

& another bearing HTSC No. 039094320822 coming under the 5th Respondent respectively.

1.2. Through the Electricity Act 2003, the subject of Electricity was liberalized and the system of granting licenses to generate electricity was dispensed with. In order to bring more private participation in the field of Generation of Electricity, the Act encouraged setting up of Captive Generating Plants (CGPs) considering the huge gap existing in between the demand and supply. As such, many private players such as the Petitioner have set up CGPs and started consuming the electricity by utilizing the infrastructure available with the Respondents and by paying appropriate wheeling / transmission charges, as fixed by the Commission from time to time. Hence, the mandatory position of receiving electricity, only through the State Electricity Boards, was so liberalized and the opportunity for any player to enter in to the field of generation, transmission, distribution and sale of electricity, is facilitated. With the introduction of Open Access System within the scope of the Act, such a facility was more strengthened and accordingly, the Electricity Act 2003 has made the entire areas of administration of electricity with a paradigm shift.

1.3. The above said WEG No. 079224723053 was purchased by the Petitioner in August /2020 and name transfer approval dated 28.08.2020 was obtained from CE/NCES. As per the approval dated 26.08.2020 issued by CE/NCES, the Petitioner's WEG NO.079224723053 is under Captive consumption against Petitioner's own industry bearing HTSC NO.039094300504 coming under Coimbatore North EDC and has

provision in the EWA dated 27.04.2020 for captive adjustment in Petitioner's HTSC NO.039094300504 with banking of surplus energy.

1.4. With respect to wind energy, according to various Wind Tariff Orders issued by the Commission and respective Energy Wheeling Agreements, if wind energy is not utilized fully during a month, the balance of it, will be transferred to a banking account at the generation end in the generator's account on payment of banking charges by units and accordingly, during the lean seasons of wind energy, such banked energy is allowed to be redrawn from the banking account for adjustment for the Captive user's consumption. Further the unutilized banked wind energy at the end of the financial year i.e. 31st March, is entitled for encashment at the rate of 75% of the relevant feed-in tariff rate as sale to the Respondents. In the matter of Captive Generators where the generators are supplying power for Captive Use, such banking arrangement is regulated by way of banking account at the generation end and the allotment from the banking account will be done by the Generator based on the availability and demand in the industry.

1.5. Due to space constraints the Petitioner split its manufacturing units and has obtained another HTSC NO.039094320822 coming under Coimbatore South EDC. In order to adjust the wind energy generated from petitioner's WEG No.079224723053 against the Petitioner's HTSC NO.039094320822 coming under Coimbatore South EDC the Petitioner made application dated 26.04.2021 for adding 'HTSC NO.039094320822 also under captive consumption scheme in addition to HTSC NO.039094300504. The

same was approved vide CE/NCES approval dated 01.09.2021 and consequently an EWA dated 04.09.2021 was executed by adding HTSC NO.039094320822 also under captive consumption scheme in addition to HTSC NO.039094300504. On the date of execution of EWA dated 04.09.2021 the Petitioner's WEG No. 079224723053 had 8,08,090 Units as banked energy in its banking account and the units in the banking account were eligible for adjustment against the industrial consumption of Petitioner i.e., M/s.Krishnaveni Carbon Products P Ltd HTSC NO.039094300504 & 039094320822 upto 31st March 2022 for the financial year 2021-22.

1.6. Such banked units of 8,08,090 Units in the Petitioner's WEG NO. 079224723053 were allotted to the Petitioner's own HTSC No.039094300504 & 039094320822 from 09/2021 to 03/2022. The TANGEDCO has allowed the adjustments on payment of necessary open access without any hassle and accordingly, raised the CC bills also for the months of 09/2021 to 03/2022 and the Petitioner has also paid the same without any default or difficulty.

1.7. While the facts remain so, the 3rd Respondent has issued a show cause notice dated 03.01.2023 based on certain Audit Slips alleging incorrect adjustment of wind energy against HTSC No. 039094320822 for the period from 09/2021 to 03/2022 and consequently demanded alleged short levy of Rs.55,68,476/- without any basis. On perusal of the demand notice dated 03.01.2023 it could be seen that the 3rd Respondent has deliberately not issued the copy of the audit slip/circular memos referred in the demand notice and has also failed to attach or serve a copy of it which is referred in the

present demand. From the notice it could be seen that audit slips have been internally circulated between the officers of TANGEDCO and none of the internal communications/circular/audit slip referred in the notice was communicated to the Petitioner in flagrant violations of the principles of natural justice. It is submitted that demanding a consumer to pay heavy demand without serving the copy of the circulars/Audit slips based on which the entire demand is calculated is illegal, arbitrary and against the principles of natural justice.

1.8. In pursuance of the demand notice dated 03.01.2023 it could be seen that the Petitioner's CC bills for HTSC No. 039094320822 for the period from 09/2021 to 03/2022 has been retrospectively revised without calling for explanations and affording an opportunity of being heard. Such action of the Respondent to revise past period statements without any notice and opportunity of being hearing is against the principles of natural justice.

1.9. Being aggrieved by the demand notice dated 03.01.2023, a detailed objections vide their letter dated 09.02.2023 was filed. The 3rd Respondent has issued the impugned demand notice dated 08.05.2023, however without any way considering and answering to the crux of the objections raised by the Petitioner in its reply dated 09.02.2023, without application of .mind and only with an intention to arm twist the Petitioner to pay the alleged demand.

1.10. The method of calculation and the alleged incorrect adjustment of wind energy against HTSC No. 039094320822 for the period from 09/2021 to 03/2022 on the ground

that the banked units of 8,08,090 Units in WEG NO. 079224723053 cannot be allotted to HTSC NO. 039094320822 is not approved by the Commission and has no statutory backing till date.

1.11. HTSC NO.039094300504 coming under the 4th Respondent & HTSC No. 039094320822 coming under the 5th Respondent belong to the Petitioner i.e., M/s.Krishnaveni Carbon Products P Ltd having common ROC certificate, common directors and Udyam registration certificate. The 2nd Respondent granted approval dated 26.08.2020 for the Petitioner's WEG NO.079224723053 under Captive consumption against Petitioner's own industry bearing HTSC NO.039094300504 coming under Coimbatore North EDC. In order to adjust the wind energy generated from the Petitioner's WEG NO.079224723053 against the Petitioner's HTSC NO.039094320822 coming under Coimbatore South EDC the CE/NCES granted approval dated 01.09.2021 and consequently EWA dated 04.09.2021 was executed by adding HTSC NO.039094320822 also under captive consumption scheme in addition to HTSC NO.039094300504. On the date of execution of EWA dated 04.09.2021 the Petitioner's WEG No. 079224723053 had 8,08,090 Units as banked energy in its banking account and the units in the banking account were eligible for adjustment against the industrial consumption of Petitioner i.e., M/s.Krishnaveni Carbon Products P Ltd HTSC NO.039094300504 & 039094320822.

1.12. Accordingly, when the Petitioner entered into an Energy Wheeling Agreement (EWA) dated 04.09.2021 for utilizing the energy generated / banked with their Wind mill

WEG No. 079224723053, for consumption at the consumption end of the Petitioner's HTSCs, the system was authorized in such a manner that not only the current generation out of the windmills could be allowed for adjustment, but also the units available in the banking account, could also be made eligible for consumption at captive users factories.

1.13. On the date of execution of the EWA dated 04.09.2021, the wind energy captive generator, i.e, the Petitioner had a total of 8,08,090 Units banked in its banking account maintained in the generation end, which are eligible for adjustment against the industrial consumption of the Petitioner upto 31st March 2022 as per the EWA and the Wind Tariff Orders issued by the Commission. The EWA agreements and the provisions of the Wind Tariff Order was rightly implemented by the 3rd Respondent in its letter and spirit and the adjustment of the allotted banked energy by the Petitioner was effected to the Petitioner's HTSC NO.039094300504 & 039094320822 for the month of 09/2021 to 03/2022. The 3rd Respondent has allowed the adjustments without any hassle and accordingly, raised the CC bills also for the months of 09/2021 to 03/2022 and the Petitioner has also paid the same without any default or difficulty.

1.14. In fact the Commission in DRP No.8 of 2008 in the matter of M/s.Mirra and Mirra Industries has ordered to transfer the balance unutilized units available in one HT Service to other HT Service on the account of change in utilization point by entering a new agreement on termination of the existing agreement. In line with the above order TANGEDCO has issued implementation circular dated 03.10.2013 clarifying that the

unutilized banked energy available in the banking account can be adjusted even in case of change utilization point by entering new agreement on termination of the existing agreement. This is the only circular which is approved by the Commission and has statutory value. Hence the demand notice is arbitrary, illegal and contrary to the orders passed by the Commission in DRP NO.8 of 2008 in the matter of M/s.Mirra and Mirra Industries .

1.15. The 3rd Respondent has proceeded as though there is transfer of ownership of the WEG from one concern to the other. In such a case, the previous owner of the WEG on the date of termination of the agreement would be eligible only for encashment of the unutilized banked energy. In the present case there is no change of ownership of the WEGs. WEG NO.079224723053 coming under the 3rd Respondent under Captive Scheme as provided under the Electricity Act 2003 and the Open Access Regulations framed by the Commission is owned by the Petitioner and the HTSC NO.039094300504 coming under the 4th Respondent & HTSC No. 039094320822 coming under the 5th Respondent both belong to the Petitioner i.e., M/s.Krishnaveni Carbon Products P Ltd. According to various Wind Tariff Orders issued by Tamil Nadu Electricity Regulatory Commission, if wind energy is not utilized fully during a month, the balance of it, will be transferred to a banking account on payment of banking charges by units and accordingly, during the lean seasons of wind energy, such banked energy is allowed to be redrawn from the banking account for adjustment against the consumption of the Petitioner's captive consumption. Further the unutilized banked wind energy at the end

of the financial year i.e. 31st March, is entitled for encashment at the rate of 75% of the relevant feed-in tariff rate as sale to the Respondents. Such banking arrangement is regulated by way of common banking account at the generation end and the allotment from the common banking account will be done by the Generator based on the availability and demand among the captive users. Whenever there is change in captive user, the Energy Wheeling Agreement is amended to add or delete certain captive users for utilizing the energy generated / banked with their Wind mills. Not only the current generation out of the windmills could be allowed for adjustment, but 'also the units available in the generators banking account maintained in the generation end EDC, could also be made eligible for consumption at the new captive users. In the present case, in order to adjust the wind energy generated from Petitioner's WEG NO.079224723053 against the Petitioner's HTSC NO.039094320822 coming under Coimbatore South EDC, the CE/NCES granted approval dated 01.09.2021 and consequently EWA dated 04.09.2021 was executed by adding HTSC NO.039094320822 also under captive consumption scheme in addition to HTSC NO.039094300504. Hence the interpretation of TANGEDCO in not allowing the banked energy in the generators account for adjustment of its captive user end before 31st March of the financial year and directing that such units can be only encashed at the rate of 75% of the tariff rate is illegal, arbitrary and contrary to the Wind Tariff Orders issued by the Commission.

1.16. The 3rd Respondent had failed to understand the difference between change in ownership of the WEGs and adding utility in the middle of the year. In case of name

transfer/ownership transfer of WEG in the middle of the year, as the agreement with the previous owner is terminated, the unutilized banked energy as on date of termination of the agreement will be paid at 75% of the relevant tariff rate only to the generator. In the present case there is only change in utility i.e., adding captive user under the same management. The energy generated and banked is maintained in the common banking account of the generator in the generation end EDC. As like current month generation, the banked units is allocated to the captive user according to the request of the generator and unutilized banked energy at the end of the financial year will be encashed at the generating end. Hence the action of the 3rd Respondent to treat the case of the Petitioner as though there is 'transfer of WEGs from one concern to the other is without application of mind, arbitrary and liable to be set aside.

1.17. The Petitioner has made out a prime facie case and the balance of convenience is in favour of the Petitioner. The 3rd Respondent has threatened to include the amount in the next CC bill of the Petitioner's Group Captive Consumers with an intention to disconnect the service connection if not paid within the due date.

2. Counter affidavit filed by the 3rd Respondent :-

2.1. The petitioner has Wind Energy Generator (WEG) vide WEG.No.53 in the Tirunelvei Electricity Distribution Circle. The above WEG is under captive wheeling to its HT consumer located in the Coimbatore/North Circle vide HT.SC.No.504. Subsequently, the HT consumer pertaining to the Coimbatore/North EDC vide HT.SC.NO.822 has been

included in the exiting captive wheeling by execution of revised Energy Wheeling Agreement which has been executed on 04.09.2021. In this connection, it is most relevant to mention that the banked units available in the said WEG's account prior to 04.09.2021 was 8,08,090 units and the said banked units had been allotted to the newly included HT consumer.No.822 for the months of 09/2021 to 03/2022 though the HT SC No.822 had entered in the EWA only on 04.09.2021. In this regard, based on audit objections, the 3rd respondent had issued a show notice to the HT SC No.822 for an amount of Rs.55,68,476/- vide letter dt.03.01.2023 towards incorrect adjustment of banked units, which was available prior to execution of Energy wheeling agreement. Pursuant to the above, the petitioner has furnished its reply on 14.02.2023. At this juncture, the 3rd respondent issued demand notice for the above mentioned sum on 08.05.2023. In regard to the same the petitioner filed the present petition before the TNERC.

2.2. In exercise of powers conferred by section 176 of the Electricity Act,2003 (Act 36 of 2003), the Central Government issued rules for requirements of Captive Generating Plant and the same is called the Electricity Rules -2005 which is as follows:

" 3. Requirements of Captive Generating Plant:-

(1). No power plant shall qualify as a 'captive generating plant' under Section 9 read with clause (8) of section 2 of the Act unless-

(a). in case of a power plant –

(i). not less than twenty six percent of the ownership is held by the captive user(s), and

(ii). not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use:

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the co-operative society:

Provided further that in case of association of persons, the captive user (s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

(b). in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies)the conditions contained in paragraphs (i) and (ii) of sub-clause (a) above including –

(1) The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with reference to generating station as a whole; and

(2) the equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen percent of the equity shares in the company (being the twenty six percent proportionate to Unit A of 50 MW) and not less than fifty one percent of the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

(2). It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

(1) For the purpose of this rule:

a."Annual Basis" shall be determined based on

a financial year;

b. "Captive User" shall mean the end user of the electricity generated in a

Captive Generating Plant and the term “Captive Use” shall be construed accordingly;

c. “Ownership” in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;

d. “Special Purpose Vehicle” shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity.”

In accordance to the above, the captive user[s] shall hold minimum 26% equity share capital with voting rights in the captive generating plant so as to adjust the energy under captive category. Based on above, necessary instructions had been issued, with regard to accounting of banked units whenever there is a change in utility/ transfer, vide Lr.No.CFC/ FC/DFC/ AAO.HT/ AS.3/ D.No.100/ 13 Dated 21.05.2013 issued by the 2nd Respondent and the relevant portion of the same is reproduced below:

xxx

(i). Whenever fresh EWA/Revised EWA is executed to include additional HT service(s) for wheeling /adjustment of energy by the WEGs, the generation on and from the date of execution of the such agreement is only eligible for wheeling and adjustment, as the contract commences from the date of its execution.

(ii). The unutilized energy prior to the revised EWA will continue to get adjusted against that service as per the original agreement standing prior to revised EWA or sold to TANGEDCO at the purchase rate as per the terms and conditions of the Agreement.

2.3. Further, the 2nd Respondent had issued another instruction relying upon the above mentioned circular vide CFC/FC/ REV/ AS.3/D.277/2016 dt.01.06.2016 and the operative portion is reproduced below:

3. Under the said circumstances, the benefit of 23,09,015 units of unutilized banked energy in existence, prior to the execution of the Second Energy Wheeling Agreement cannot be adjusted against the consumption of HT units. However, as per clause 6(2) of the terminated Agreement, the unutilized energy of M/s. S.G.Wind Farm (P)Ltd which has already been injected into TANGEDCO's grid as on the date of termination of agreement, may be eligible for encashment at the rate of 75% of relevant purchase tariff.

2.4. Per contra, the 1st Respondent had issued instructions in the matter of adjustment of banking vide bearing Circular Memo. No.CE / NCES /SE /EE /WPP /AEE2 / F.Banking instruction/ D.1947/ 15,dt:25.06.2015, the relevant portion of the same is reproduced below:

vi. If a captive consumer go out of the wheeling agreement in a middle of the year due to Name Transfer/Change in utility, the unadjusted banked

units if available at his credit is to be returned to generating end EDC and added to the existing banking account.

vii. As like current month generation, the banked units are also to be allocated to the consumer accordingly to the request of the generator.

2.5. In continuation, the first respondent had issued another circular vide bearing Circular Memo.No.CE/NCES/SE/EE/ WPP/ AEE2/F.Banking instruction / D.1342 / 16,dt:19.07.2016 and the relevant portion of the same is reproduced below:

xi. In in case of change in utility, (a) if a new captive consumer (s) is not added as against the terminated consumer(s), the existing banked units in the common banking account, can be allotted and adjusted to the existing captive consumers.(b) if a new captive consumer(s) is added as against the terminated consumer(s), the first month allotment to the new captive consumer(s) is from the current month generation only. From 2nd month onwards the banked energy can be allotted from the common banking account and adjusted.

2.6. Subsequently, the 1st Respondent had issued modified circular vide bearing Circular Memo. No. CE/NCES/ SE/ EE/ WPP/ AEE2/F.Banking instruction/D.903/17 dt.30/31.03.2017 which was reiterated in the letter dated 21.05.2013, the relevant portion of the same is reproduced below:

Xxx in case of change in utility, (a) if a new captive consumer (s) is not added as against the terminated consumer(s), the existing banked units of

the respective generator can be allotted and adjusted to the existing captive consumers. (b). if a new captive consumer(s) is included under EWA, only the generation on and from the date of execution of such revised EWA is eligible for wheeling and adjustment to the consumers under the EWA. The banked energy prior to commencement of the new EWA shall not be allotted to the new captive consumers as per the Rule-3 of Electricity Rules-2005.

2.7. In this connection, it is most relevant to mention that the Hon'ble High Court of Madras, Madurai Bench passed an order on 28.03.2018 in W.P.(MD).No.6221 and 6222 of 2018, in a similar matter, and the relevant portion is as follows:

" 4. The respondents have also filed counter affidavit wherein it is stated as follows:

Based on the above instructions, the banked energy prior to revised Energy Wheeling Agreement dated.26.09.2017 has not been allotted to the new captive user, M/s. Shree Renga Polymers, HT.SC.No. 121, however, the said banked energy is being allotted to existing captive user i.e M/s. Obli Granites, HT.SC.No.127 of Salem EDC, who is the captive user in the old agreement as well as newly executed Energy Wheeling Agreement upto end of the Financial year. Further, in this connection, it is most relevant to mention that the energy generated from the date of execution of revised Energy Wheeling Agreement dated.26.09.2017 is

being allotted to the new captive user M/s. Shree Renga Polymers, HT.SC.No. 121 up to end of the financial year. The unutilized energy at the end of the financial year may be encashed at the rate of 75% of the relevant purchase tariff. The payment will be released after verification of Captive Generating Plant status as per the Rule-3 of Electricity Rules, 2005.

5. In view of the said stand taken by the respondents, the respondents are directed to adjust banked energy to the existing captive users prior to the agreement or the respondents shall pay 75% of the cost of the energy to the petitioners in respect of new captive users as per the agreement. The release of the amount will be made after verification of the captive generation plant as per Rule-5 of the Electricity Rules-2005.

2.8. In such circumstances, the BOAB had raised audit objection vide Audit Slip No. 90 dated 23.07.2018 that the banked energy of 23,69,636 units prior to 12/2016 relating to M/s. CWRE Wind Power Pvt Limited, Tirunelveli (Wind form Nos 4220, 4221, 4222 & 4223) have been taken and allotted and adjusted against the consumption of HT SC No.174, M/s. Ammarun Foundries for the period from 1/2017 to 3/2017 are withdrawn and revise the CC bills which amounting to a short levy of Rs.1,63,56,016/- as per the Chief Financial Controller/Revenue's circular under reference 1st cited for the period 04/2016 to 03/2017. Subsequently, the Superintending Engineer/ Coimbatore/ North EDC had requested clarification vide bearing Lr.No .SE/ CEDC/ N/ CBE/ DFC/ AO/ Rev/

HT/ F.AUDIT/ D.609/18, dt.26.09.2018 reference 8th cited. In this connection, the Chief Financial Controller/ Revenue/ TANGEDCO had issued clarification vide bearing Memo. No.CFC/ REV/FC/ REV/ AS.3/ REV/D.No.437/ 19 dated.12.03.2019, the relevant portion of the same is reproduced below:

> 2.7. In view of the above, M/s. CWRE Wind Power Private Ltd is not eligible to permit to allot the banked energy, which is generated and banked prior to the date of execution of revised Energy Wheeling Agreement on 05.12.2016 to the new captive users, M/s. Ammarun Foundaries, HT.SC.No.174, pertaining to Coimbatore North EDC and M/s. Prithivraj Spinning Mills (P) Ltd, HT. SC. No. 600, pertaining Coimbatore/North EDC, as the same is not in accordance with the Rule 3 of Electricity Rules -2005. Hence, the audit objection is in order.

Pursuant to the above clarification and consequential demand notices, a batch writ petitions have been filed wherein the letter dated 12.03.2019 was challenged vide W.P.Nos.8634 of 2019 and others and interim order was obtained.

2.9. The Hon'ble High Court of Madras has passed an order on 17.08.2021 in W.P.Nos.8634 of 2019 & others and the relevant portion of the same is reproduced below:

> "*36. The facts of the present case will also attract the principles of promissory estoppal. The 2nd respondent who issued the Circular Memo on the approval and order of the 1st respondent, had given an assurance to all group captive consumers, who entered into an energy wheeling agreement during the period from 01-04-2016 to 31-03-2017, the manner in which the banking of wind energy, maintenance of banking*

account and adjustment of banked wind energy for captive use will be dealt with. This was acted upon by TANGEDCO and the captive users and bills were raised accordingly and payments were also made. The captive users had also arranged their affairs in line with the Circular Memo in force. The captive users cannot at a later point of time be informed that their current consumption bills are revised by relying upon a subsequent Circular Memo and superseded letters of the 3rd respondent and such an action on the part of the 4th respondent is certainly vitiated by the principles of promissory estoppal.

37.It is also noticed that in some of the writ petitions viz., W.P.Nos.11294 and 34444 of 2019, it pertains to the period prior to 01-04-2016, wherein, the bills are sought to be revised through the impugned proceedings bills issued by the 4th respondent. In all these cases, the 2nd respondent's Circular Memo dated 25-06-2015, was in force and it was implemented by the 4th respondent in letter and spirit and adjustments were permitted accordingly. None of the reasons cited by the 4th respondent in the impugned proceedings through which the bills are sought to be revised, will justify the demand. Therefore, the demand made by the 4th respondent whereby, a concluded payment is sought to be revived, cannot be sustained.

38. In the light of the above discussion, this Court is of the considered view that the demand made by the 4th respondent from the petitioners, by virtue of the respective impugned letter is held to be unsustainable in law and accordingly, all the impugned letters are quashed.

39. In the result, all the writ petitions are allowed and if any payments have been made by any of the petitioner on the basis of the impugned letter issued by the 4th respondent, the same is liable to be reimbursed or in the alternative adjusted in the future bills. Any consequential benefits to which the petitioners are entitled to, if any, will ensure in their favour by virtue of quashing the impugned letters issued by the 4th respondent.

40. All the writ petitions are allowed with the above directions. No costs. Consequently, all the connected miscellaneous petitions are closed."

By virtue of circular dated 25.06.2015 and 19.07.2016, which was issued by the 1st Respondent, the writ petitions were allowed and the letter dated 12.03.2019 which was issued by the 2nd Respondent was set aside thereby the adjustment of banking

methodology was stated in the circular dated 25.06.2015 and 19.07.2016 that in case of change in utility, (a) if a new captive consumer (s) is not added as against the terminated consumer(s), the existing banked units in the common banking account, can be allotted and adjusted to the existing captive consumers.(b) if a new captive consumer(s) is added as against the terminated consumer(s), the first month allotment to the new captive consumer(s) is from the current month generation only. From 2nd month onwards the banked energy can be allotted from the common banking account and adjustment has to be followed for the financial year 2015-16 to 2016-17.

2.10. Subsequently, aggrieved to the demand notice issued by the SE/Dindigul EDC, M/s. K.R.Wind Energy LLP had filed a Dispute Resolution vide D.R.P.No.1 of 2023 before this Hon'ble TNERC in the matter of directing TANGEDCO to give adjustments of the banked energy available in the Group Captive Generator., M/s.K.R.Wind Energy LLP's account maintained in the generation end EDC, against the consumption of the its newly added captive users up to 31st March of the respective years and to treat the unutilized banked energy after 31st March of the respective year alone for encashment at 75% of the relevant tariff rate as the wind tariff orders issued by this Hon'ble Commission.

2.11. Now, the Commission passed an order on 05.10.2023 in D.R.P.No.1 of 2023, the relevant portion of the same is reproduced below:

> *5.Findings of the Commission:-*
> *xxx*

5.6. It is seen that the stand of the respondent is that after the exit of a member of a captive group, the banked units can be allotted only to the existing users and not to the new user who has entered into a fresh EWA.

5.7. We have considered over earlier order dated 26-08-2009 passed in D.R.P. No.8 of 2009 in the matter of M/s. Mirra & Mirra Industries which is relied upon by the petitioner. It is true that the Commission gave the option to either adjust the unutilised bank energy against the new service connection or encash the energy unutilised as on 30-06-2008 at 75% of the purchase rate. The following portion of the order would berelevant:-

"5.6 The Commission in its Order dated 22-5-2008 passed in M.P. Nos. 6, 11, 12 etc. of 2008 extended the banking period for all wind energy generators by three months upto 30-6-2008. In terms of that Order, the petitioner had the option of adjusting the unutilized banked energy between 1-4-2008 and 30-6-2008 against the new service connection or encash the energy unutilized as on 30-6-2008 at 75% of the purchase rate."

However, we cannot stick to the same decision in the light of the decision rendered by the Hon'ble High Court of Madras which is a constitutional court. Two decisions of the Hon'ble High Court of Madras which have been placed before us are important in deciding the present case.

5.8. Coming to the first decision of the Hon'ble High Court of Madras in WP(MD) No.6221 of 2018, we find that the stand of the petitioner that the orders passed thereinis a case of voluntary encashment of unutilised banked energy is unacceptable. The following portions of the order is reproduced below.

"4. The respondents have also filed counter affidavit wherein it is stated as follows:

Based on the above instructions, the banked energy prior to revised Energy Wheeling Agreement dated.26.09.2017 has not been allotted to the new captive user, M/s. Shree Renga Polymers, HT. SC. No.121, however, the said banked energy is being allotted to existing captive user i.e. M/s. Obli Granites, HT.SC.No.127 of Salem EDC, who is the captive user in the old agreement as well as newly executed Energy Wheeling Agreement upto end of the Financial year. Further, in this connection, it is most relevant to mention that the energy generated from the date of execution of revised Energy Wheeling Agreementdated.26.09.2017 is being allotted to the new captive user M/s. Shree Renga Polymers, HT. Sc. No. 121 up to end of the Financial year. The unutilized energy at the end of the financial year may be encashed at the rate of 75% ofthe relevant purchase tariff. The payment will be released after verification of Captive Generating Plant status as per the Rule-3 of Electricity Rules, 2005.

5. In view of the said stand taken by the respondents, the respondents are directed to adjust banked energy to the existing captive users prior to the agreement or the respondents shall pay 75% of the cost of the energy to the petitioners in respect of new

captive users as per the agreement. The release of the amount will be made after verification of the captive generation plant as per Rule-5 of the Electricity Rules-2005."

5.9. The petitioner is incorrect in stating that the Hon'ble High Court decided the matter based on voluntary consent without going into the merits. The order nowhere states that it is a consent order. On the other hand, it is seen that the order has been passed after consideration of adversarial claims. Hence, we are of the view that the order passed by the Commission in M/s. Mirra and Mirra Industries can no longer survive after the interpretation of the constitutional court in W.P. (M.D.) No. 6221 of 2018 in the matter of the rights of the parties to adjustment of energy especially in a case where a new entrant seeks to enforce the right of the existing constituent of captive arrangement.
5.10. The order clearly directs that the respondents herein shall pay 75% of the cost of energy as per the agreement and adjust the banked energy to the existing captive users. Hence, we find that the order of the Hon'ble High Court has settled the issue which is before us and hence we need not consider the issue afresh.

5.11. Coming to another decision of Hon'ble High Court in WP.No.8634 of 2019, the decision delivered in WP(MD)No.6221 of 2018 came up for discussion in W.P.No.8634 of 2019 and order was passed only after consideration of the same. The Hon'ble High Court considered the same issue and drew a clear cut distinction between the wheeling agreement entered before the period 01.04.2016 to 31.03.2017 and entered thereafter and quashed only the demand in respect of agreement entered between 01.04.2016 to 31.03.2017 and allowed the WPs. This means, the circulars issued on 31.03.2017 and 03.10.2017 can be effective from 01.04.2017. This means that the right of the new entrant who has executed the fresh wheeling agreement is no longer res integra and well settled.

5.12. In the light of the categorical pronouncement made by our Hon'ble High Court, Madras vide orders passed in W.P. (M.D.) No. 6221 of 2018 and W.P. No. 8634 of 2019, this Commission decides that the unutilized energy cannot be allotted to the new entrant into the captive scheme with regard to the agreements entered after 01-04-2017 and only 75% encashment can be allowed. To avoid any ambiguity in this order, this Commission clarifies that the petitioner is at liberty to utilize the undrawn energy for the period upto 01-04-2017 in line with the order dated 26-08-2009 passed by this Commission in D.R.P. No. 8 of 2009 in the case of M/s. Mirra and Mirra Industries. Petition ordered accordingly with no order as to cost.

2.12. From the above it is clear that from 01.04.2017, in case of change in utility, (a) if a new captive consumer (s) is not added as against the terminated consumer(s), the existing banked units of the respective generator can be allotted and adjusted to the existing captive consumers. (b). if a new captive consumer(s) is included under EWA,

only the generation on and from the date of execution of such revised EWA is eligible for wheeling and adjustment to the consumers under the EWA. The banked energy prior to commencement of the new EWA shall not be allotted to the new captive consumers as per the Rule-3 of Electricity Rules-2005 and only encashment is permitted @ 75% of the relevant tariff rate. The issue in the present petition falls after 31.03.2017 and hence, the petitioner is not eligible to permit to allot the banked energy, which is generated and banked prior to the date of execution of revised Energy Wheeling Agreement on 04.09.2021 to the newly added captive user, HT.SC.No.822, pertaining to Coimbatore South EDC and hence, the impugned demand issued by the 3rd respondent is in order.

3.. Both side arguments heard. Records perused. Relevant provisions of the Electricity Act 2003 and applicable connected Regulations traversed.

4. The Seminal issue that arises for consideration in the instant case is whether impugned notice dated 08.05.2023 issued by the 3rd respondent is liable to be quashed as contended by the petitioner.

5. Findings of the Commission on the issue :-

5.1. The prayer of the petitioner is to quash the impugned notice dated 08.05.2023 issued by SE/Tirunelveli who sought to claim a sum of Rs.55,68,476/- from the petitioner for incorrect adjustment of Wind Energy in HTSC No.039094320822 for the period from 09/2021 to 03/2022. In order to understand the facts of the case, a brief history of the case is set out here. The petitioner has a WEG bearing No.079224723053 coming under SE/Tirunelveli who is the third respondent herein. The said WEG bearing

No.079224723053 is meant for captive generation and supply of the energy generated there from to Industrial service connection situated at Coimbatore EDC/North bearing No.039094300504 and Coimbatore EDC/South bearing No.039094320822.

5.2. It is noted that originally HTSC No.504 was only the point of Industrial consumption and a request made by the petitioner on 26.04.2021 for adding HTSC No.822 under Captive consumption in addition to HTSC No.504, and the same was approved by CE/NCES on 01.09.2021. Consequently, an EWA dated 04.09.2021 was executed adding HTSC No.822 under captive consumption in addition to HTSC No.504. It is further seen from the contentions of the petitioner that on the date of execution of EWA dated 04.09.2021, the WEG No.053 had 808090 units as banked energy in its account and the said units were eligible for adjustment against the industrial consumption of the same petitioner in HTSC No.504 which was existing earlier and HTSC No.822 which was later added. It is the case of the petitioner that such banked units of 808090 was initially allotted to HTSC No.504 and HTSC No.822 from 09/21 to 03/22 and adjusted on payment of necessary charges for open access. However, the same came to be reversed by the 3rd respondent based on audit slip which pointed out discrepancy in adjustment in regard to HTSC No.822 for the period from 09/2021 to 03/2022 resulting in levy of Rs.55,68,476/- on the petitioner which is impugned herein. . Aggrieved by the demand notice, the petitioner raised objections but the respondent proceeded to go-ahead with the claim impugned herein.

5.3. The entire dispute pertains only to HTSC No.822 coming under the Coimbatore/South in respect of which revision of bill has taken place On perusal of the records, it is seen that the only reasoning given by the respondent for reversal of the adjustment is that a new agreement having been signed in respect of HTSC No.822, the units available in WEG No.053 cannot be allotted to HTSC No.822. We find that the reasoning given by the respondent is not acceptable. We have held in D.R.P.No.8 of 2009 in M/s.Mirra and Mirra that the utilization of unutilized banked energy is permissible from one service connection to another of the same petitioner. Insofar as the present case is concerned, it is seen that it is a mere case of execution of fresh agreement upon expiry of the old agreement in regard to HTSC No.822 but the respondent has treated it as a case of fresh induction of a member. The impugned communication dated 8.5.2023 is bereft of any reasoning. Except for stating that a new HTSC is not eligible for adjustment from the existing banking units available before the date of agreement the impugned communication has not set out any other valid reasoning. It is not the case of the respondent that there is a change in the entity or that a new entrant has executed energy wheeling agreement or a new entrant has substituted a member of CGP who has exited captive scheme. The reasoning in the impugned order, in our view, is hardly sufficient to hold in favour of the respondent. On the other hand, we find that the petitioner has a fair case of adjustment given the fact that there is no change in the entity. Though the case is not cent percent identical to M/s.Mirra and Mirra, the basic fact remains in both these cases that there is no change in the ownership of HTSC. In

view of the same, we have to necessarily uphold the case of the petitioner and accordingly, the issue is decided in favour of the petitioner.

In the result this petition is allowed. The impugned demand notice dated 08.05.2023 issued by the 3rd respondent bearing Lr.No.SE/TEDC/TIN/DFC/AO/WIND/ AS/F.O.A is hereby set aside / quashed. Parties directed to bear their respective costs.

(Sd.....)	(Sd.....)	(Sd.....)
Member (Legal)	Member	Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission