TAMIL NADU ELECTRICITY REGULATORY COMMISSION

(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru.M.Chandrasekar .... Chairman

and

Thiru.K.Venkatasamy .... Member (Legal)

D.R.P. No.18 of 2013

M/s. ITC Limited
having its registered office at
"Virginia House"
37 J.L. Nehru Road, Kolkata – 700 071
and its factory at Post Box No.227
Tiruvottiyur, Chennai – 600 019 …… Petitioner

(M/s.S.Ramasubramaniam & Associates)
Advocate for the Petitioner

Versus

1. The Chairman and Managing Director,
   TANGEDCO,
   144, Anna Salai, Chennai – 600 002.

2. The Director Finance,
   TANGEDCO,
   7th Floor, NPKRR Maaligai,
   No.144, Anna Salai,
   Chennai.

3. The Superintending Engineer,
   Tirunelveli Electricity Distribution Circle,
   TANGEDCO
   Tirunelveli – 627 011

4. The Superintending Engineer,
   Chennai EDC/North,
   TANGEDCO
   Chennai – 600 002

….Respondents

(Thiru. M.Gopinathan
Standing Counsel for TANGEDCO)

Dates of hearing : **11-02-2014; 17-04-2014; 06-08-2019; 14-07-2014; 22-02-2019; 23-07-2019; 06-08-2019; 27-08-2019; 17-09-2019; 22-10-2019; 10-12-2019; 28-01-2020; 28-07-2020; 01-09-2020; 08-09-2020; 22-10-2020; 27-10-2020; 03-11-2020; 24-11-2020; 08-12-2020; 19-01-2021 and 09-02-2021**

Date of Order : **17-08-2021**

The DRP No.18 of 2013 came up for final hearing on 09-02-2021. The Commission upon perusing the affidavit filed by the petitioner, counter affidavit filed by the respondent and all other connected records and after hearing both the parties passes the following:-

ORDER

1. Prayer of the Petitioner in D.R.P.No.18 of 2013:-

The prayer of the petitioner in D.R.P. No. 18 of 2013 is to direct the Respondents to make payment of an amount of Rs.91,16,143/- (Rupees Ninety One Lakhs Sixteen Thousand and One Hundred and Forty Three Only) together with further interest at the rate of 12% p.a from the date of filing of thePetition till the date of payment and costsand pass such further or other orders as this Commission may deem fit and proper.

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2. Facts of the Case:

This petition has been filed to direct the Respondents to make payment of an amount of Rs.91,16,143/- (Rupees Ninety One Lakhs Sixteen Thousand and One Hundred and Forty Three Only) together with further interest at the rate of 12% p.a from the date of filing of thePetition till the date of payment and costs.

3. Contentions of the Petitioner:-

3.1. The Petitioner is an existing Company within the meaning of the Companies Act, 1956 and is inter-alia engaged in the business of manufacture of packaging products at its factory at Tiruvottiyur, Chennai. One of the main input/raw material involved in the production activities of the Petitioner is electricity. The Petitioner therefore requires continuous uninterrupted electricity supply for its manufacturing activities which apart from being provided from the Petitioner's captive generating plant at Tirunelveli and Theni District, is also beingsourcedfrom the Respondents, Tamil Nadu Generation and Distribution Corporation Limited (hereinafter referred to as 'TANGEDCO')

3.2. The aforesaid factory of the Petitioner was established in the State of Tamil Nadu on the basis of the various declarations made by State Government through its Industrial Policies to provide appropriate infrastructure and other basic requirements, particularly, uninterrupted supply of electricity commensurate with its manufacturing activities. However, due to industrial growth, there was severe power shortage in the State of Tamil Nadu. In such circumstances, the State Government was constrained to promote and encourage private captive generation of electricity, particularly, by industries such as the Petitioner's to address the severe power crisis in the State of Tamil Nadu. As a result, several consumers such as the Petitioner set up their own captive generating plant in order to generate electricity to use for its manufacturing activities, particularly, due to the inability of TANGEDCO to meet the electricity requirements of such consumers.

3.3. The Petitioner's captive generating plant at Tirunelveli and Theni District generates electricity from windmills. The electricity provided from the aforesaid

windmills would be utilized by the Petitioner in addition to the electricity procured from TANGEDCO. The Petitioner has installed 9 numbers of WEGs of total 14.1 MWs capacity (4 Vestas-make WEGs of 1.65 MW each and their Service Connection No: HTSC No. T04, T05, T06 and T07and 5 Suzlon-make WEGs of 1.5 MW each and their Service Connection No: HTSC No: 2666, 2665, 2672, 2682 and 2687). The project was commissioned in September 2008 and power was wheeled from the windmills to its factory in Tiruvottiyur. The energy generated by the windmills of the Petitioner is banked and consumed by the Petitioner as per its requirements.

3.4. Since the main objective of setting up these wind mills is to meet the electricity requirementof industries in Tamil Nadu, State and Central Governments are encouraging entrepreneurs to put more and more windmills for production of electrical energy to ease the power shortage and for the purpose of wheeling this energy from the production site to the consumption end, the transmission lines of the Respondents are being used by Windmill Owners, after paying the necessary wheeling charges. In some cases, where the wind energy is not used for captive consumption by the windmill owners, it is sold to the Respondent at the rates fixed by the Commission from time to time.

3.5. Therefore, for the purpose of wheeling the wind power energy generated through their wind mills, the members are entering into agreements with the Respondent, through whom the energy is transmitted to the consumption end or to the grid of the Tamil Nadu Electricity Board. Such agreements are of two types, one is for wheeling the energy i.e., Energy Wheeling Agreement and the other is for selling the energy to the Respondent or third parties for which Energy Purchase Agreement is entered into with the buyer.

3.6. When the Wind Energy Generator signs the Energy Wheeling Agreement and wheels its wind energy during high wind summer months, such Wind Energy Generator may not be able to consume during the month all the wind energy generated by the Wind Energy Generatorduring that particular month. The monthly surplus wind energy generated by the windmill is banked with the Respondent by paying the banking charges prescribed by the Regulator to the Respondent for consumption before but not later than 31st of March every financial year. Any unutilized banked energy as on 31s' March is sold to the Respondents at 75% as per the rates fixed by the Commission from time to time.

3.7. During the year 2009-10, TANGEDCO imposed restrictions and control on the use of energy by way of scheduled and unscheduled power cuts. As a result of such unilateral restrictions on the utilization of energy imposed by TANGEDCO, significant amount of unconsumed banked energy was accumulated by the Petitioner similar to several other consumers. TANGEDCO imposed conditions like restriction on consumption of power by fixing quota for demand and energy consumption, restriction on consumption of power during peak hours, i.e., between 6 PM and 10 PM, failing in its duty to provide uninterrupted supply, shutting loads and connectivity without notice for hours, 2 hours per day scheduled electricity stoppage, not permitting the wind mill owners to consumer their banked units and also day-to-day generation from windmills due to power holidays, demand cut, energy cut, load shedding and such other various restrictions. Hence, the Petitioner was not able to consume the entire power generated by their Wind Turbine Generators for their captive consumption. This resulted in the Petitioner having sizeable quantity of unutilized banked units in their

account with TANGEDCO.

3.8. By its Suo Moto Order (No.1 of 2009, Date: 28th October 2009) the Commission allowed the consumption of unconsumed banked units in 5 equal monthly installments from November 2009 until March 2010. However, pursuant to the aforesaid Order dated 28.10.2009, TANGEDCO had delayed the communication of quota allocation to its consumers. In some cases, the communication of quota allocation was delayed by one month (i.e) the communication was received by the consumer only during the end of November 2009 and by two months (i.e) the communication was received by the consumer only during the end of December 2009. As a result, the consumers including the Petitioner were unable to avail the benefit of the aforesaid Order dated 28.10.2009. In other words, due to the delay in communication, the consumers including the Petitioner were unable to avail of the consumption of unconsumed banked units in 5 equal monthly installments as provided under the aforesaid Order dated 28.10.2009 of this Commission. It is pertinent to mention that the Petitioner received the communication of quota allocation issued by the TANGEDCO vide letter dated 17.12.2009.

3.9. It is evident from the above that that due to the implementation of therestrictions and controls measures by TANGEDCO on the utilization of the energy, the Petitioner along with other consumers were unable to consume their banked energy. In such circumstances, the consumers including the Petitionerhad failed to satisfy the requirement of a captive generating plant as provided under Rule 3 of the Electricity Rules, 2005 (i.e) captive consumption of atleast 51% ofthe energy generated by the captive generating plant. As a result, this Commission had by its Order dated 28.10.2009 permitted the consumers including the Petitioner to

consume the unconsumed banked units in 5 equal monthly instalments from November 2009 until March 2010. However, again consumers including the Petitioner were unable to avail the benefit of aforesaid 5 equal monthly instalments granted under Order dated 28.10.2009 of this Commission as the communication for quota allocation was delayedand received by certain consumers only during the end of November 2009 and others during the end of December 2009.

3.10. In such circumstances, when the Petitioner raised an invoice on the Respondentsfor realization of the unutilized banked energy as on 31st March 2009, the Petitioner had been informed by TANGEDCO that it had failed to satisfy the requirement of 51% captive consumption of the total generated energy in accordance with the provisions of Rule 3 of the Electricity Rules, 2005 and consequently the entire energy generated by the Petitioner would come under the "Sale to Board" category. As a result, the Petitioner, was directed to pay the electricity charges for the units consumed at its factory at Tiruvottiyur, Chennai. Based on the consumption of captively generated electricity from 01.11.2009 to 31.03.2010 (the aforesaid 5 equal month period), invoice was raised for the Petitioner's WTGs HT SC No. T04, T05, T06 & T07 on Superintending Engineer, Theni under cover of letter dated 15.12.2010 for Rs.6,54,69,797/- and for the Petitioner's WTGs HT SC No. 2665, 2666, 2672, 2682 & 2687 on Superintending Engineer, Tirunelveli under cover of letter dated 21.12.2010 for Rs.7,06,75,042/-. The total invoice value was Rs.13,61,44,839/-. The Petitioner was constrained to make payment under protest of the electricity bill for the period 2009-10 amounting to Rs.9,02,47,908/- vide Receipt No. 04Q042547 dated 20/05/2011 which included a penalty amount of Rs.1,99,00,000/. The penalty amount was levied for exceeding the demand and

energy quota fixed for the Petitioner even though the Suo Moto Order dt. 28.10.2009 issued by the Commission permitted the exceeding of the energy and demand Quota by Wind Energy Generators. Subsequently, the Petitioner has received payment of the electricity charges of Rs.13,62,00,000/- from TANGEDCO. It is pertinent to mention that the aforesaid payment of Rs.9,02,47,908/- have been made by the Petitioner under protest.

3.11. By Order dated 29.03.2012 in M.P. Nos. 10, 11 & 12 of 2010, this Commission extended the aforesaid 5 month period by one month in cases where the communication of quota allocation issued by the TANGEDCO was received by the consumer during the end of November 2009 and two months in the cases where the communication of quota issued by the TANGEDCO was received by the consumer during the end of December 2009. In other words, acknowledging the delay in communication of the quota allocation by TANGEDCO, the Commission had extended the aforesaid 5 month period permitted for consumption of unconsumed banked energy vide Order dated 28.10.2009 by one or two months depending on when the respective consumer received the quota allocation communication from TANGEDCO.

3.12. The Petitioner received the communication of quota allocation issued by TANGEDCO vide letter dated 17.12.2009. Hence, it is evident from the above that the Petitioner had consumed the banked units only from January 2010 after receipt of the letter dated 17.12.2009 issued by TANGEDCO communicating the quota allocation. As a result, the Petitioner entitled to consume banked units for a period of 3 months (from January to March 2010) and for a further period of two

months (until 31.05.2010) as per theextension provided in the aforesaid Order dated 29.03.2012 in M.P. Nos. 10, 11 &12 of 2010. However, the determination to verify compliance of the aforesaid requirement of 51% captive consumption was based on the 5 months (from November 2009 until March 2010) consumption of banked units by the Petition rather than 5 months (from January 2010 until May, 2010) consumption of banked units by the Petitioner.

3.13. By virtue of the Order dated 28.10.2009 and Order dated 29.03.2012 of the Commission is entitled to consume banked units for a period of 5 months from January 2010 until 31.05.2010 in order to satisfy the aforesaid requirement of 51% captive consumption. The determination based on the 5 months (from November 2009 to 31.03.2010) consumption of the banked units by the Petitioner as provided by TANGEDCO is blatantly wrong, illegal and liable to be set aside. This aforesaid entitlement ofthe Petitioner to consume banked units for a period of 5 months from January'2010 to May'2010 is also substantiated by paragraph 2.2 in the letter date 10.03.2011 issued by the 2nd Respondent herein.

3.14. The Petitioner is entitled to consume the banked units for a period of 5 monthsfrom 01.01.2010 until 31.05.2010 (i.e) 3 months from January 2010 as per the Su Moto Order dated 28.10.2009 after receipt of the communication of quota allocation issued by the TANGEDCO vide letter dated 17.12.2009 and addition 2month extension from 31.03.2010 until 31.05.2010 as per the Order date 29.03.2012 in M.P. Nos. 10, 11 & 12 of 2010. In light of the above, it is evident that the Petitioner is entitled to consume banked units from January 2010 to31.05.2010 in order to satisfy the requirement of 51% captive consumption of the total generated energy in accordance with the provisions of Rule 3 of the Electricity Rules, 2005.

3.15. The consumption of banked units by the Petitioner from January 2010 to 31.05.2010, as provided in the documents filed by the Petitioner substantiates the Petitioner had indeed satisfied the requirement of 51% captive consumption of the total generated energy in accordance with the provisions of Rule 3 of the Electricity Rules, 2005. As a result and based on the revised workings submitted by the Petitioner an amount of Rs.74,29,619/- is payable by TANGEDCO to the Petitioner. The aforesaid facts were also communicated to the Respondents by the Petitioner vide its several letters dated 18th April 2012, 8th May 2012, 17th Sept'2012 and 18th February 2013. The Petitioner has also visited the Respondents' office on several occasions to seek a response. However, no reply has been issued by the Respondents till date.

3.16. Only as a result of the restriction and control measures implemented by the Respondents, the Petitioner had sizeable quantity of unutilized banked units in its account with TANGEDCO similar to several other captive generating plants. In such circumstances the Commission by its Suo Moto Order dated 28th October 2009 allowed the consumption of unconsumed banked units in 5 equal monthly instalments from November 2009 to March 2010. However, the aforesaid period granted to several captive generating plants including the Petitioner could not be availed by them as the Respondents had delayed the communication of quota allocation to its consumers. The delay by the Respondents in communication of quota allocation in the case of the Petitioner was by two months. In such circumstances, acknowledging the delay in communication of the quota allocation by TANGEDCO, the Commission had extended the aforesaid 5 monthsperiod permitted for consumption of unconsumed banked energy vide Order

dated 28.10.2009 by one or two months depending on when the respective consumer received the quota allocation communication from TANGEDCO. Hence, as the Petitioner received the communication of quota allocation vide the TANGEDCO's letter dated 17.12.2009, the Petitioner had consumed the banked units only from January 2010 after receipt of the aforesaid letter dated 17.12.2009 and as a result, the Petitioner is entitled to consume banked units for a period of 3 months (from January to March 2010) as per Suo Moto Order dated 28th October 2009 and for a further period of two months (until 31.05.2010) as per the extension provided in the aforesaid Order dated 29.03.2012. However, contrary to the above, the determination to verify compliance of the requirement of 51% captive consumption as per Rule 3 of the Electricity Rules, 2005 was based on the 5 months (from November 2009 until March 2010) consumption of banked units by the Petitioner which is wholly illegal, wrong and devoid of merits. The 5 months (from January 2010 until May 2010) consumption of banked units by the Petitioner would substantiate that the Petitioner has fulfilled the requirement of 51% captive consumption as per Rule 3 of the Electricity Rules, 2005.

3.17. Having no other efficacious alternate remedy, the Petitioner has approached the Commission to redress its grievances and claim from the Respondents an amount of Rs.74,29,619/- together with interest at the rate of 12% per annum from 20.05.2011 till the date of payment by the Respondents. The Petitioner had planned out its manufacturing and allied processes based on the assurances of the Respondents. The Petitioner has a legitimate expectation of this being honoured and the failure by the Respondentsto honour the same has resulted in immeasurably monetary loss to the Petitioner.

3.18. The total outstanding amount payable by the Respondents to the Petitioner is Rs.91,16,143/- (Rupees Ninety One Lakhs Sixteen Thousand and One Hundred and Forty Three Only) which includes the principal outstanding amount of Rs.74,29,619/- (Rupees Seventy Four Lakhs Twenty Nine Thousand Six Hundred and Nineteen Only) and interest @ 12% p.a from 20.05.2011 till the date of filing of this Petition amounting to Rs.16,86,524/- (Rupees Sixteen Lakhs Eighty Six Thousand Five Hundred and Twenty Four Only).

4. Contention of the Respondent:

4.1. The petitioner is a HT consumer, namely M/s. ITC limited, HT.SC.No.1028 pertaining to the Superintending Engineer/Electricity Distribution Circle/North/Chennai having its factory at Tiruvottiyur, Chennai. M/s. ITC Ltd., Chennai had executed Energy Wheeling Agreements to wheel the power from Group II Wind Energy generators which are commissioned after 15.05.2006 and are located at Udhayathoor Village, RadhapuramTaluk in Tirunelveli District and Poomalaikundu Village, Theni (T.K). The total number of 9 WEGs had been installed with capacity of 14.1 MW as follows:

Tirunelveli Circle:

Sl.No	WEG SC.No	Name of the Generator	Capacity	Date of Commissioning	Date of EWA executed
1.	2665	M/s. ITC Limited	1.5 MW	20.09.2008	20.09.2008
2.	2666	M/s. ITC Limited	1.5 MW	20.09.2008	20.09.2008
3.	2672	M/s. ITC Limited	1.5 MW	24.09.2008	24.09.2008
4.	2682	M/s. ITC Limited	1.5 MW	26.09.2008	26.09.2008
5.	2687	M/s. ITC Limited	1.5 MW	27.09.2008	27.09.2008
			7.5 MW		

Theni Circle:

Sl.No	WEG SC.No	Name of the Generator	Capacity	Date of Commissioning	Date of EWA executed
1.	T04	M/s. ITC Limited	1.65 MW	-	23.09.2008
2.	T05	M/s. ITC Limited	1.65 MW	-	23.09.2008
3.	T06	M/s. ITC Limited	1.65 MW	-	30.09.2008
4.	T07	M/s. ITC Limited	1.65 MW	-	20.09.2008
			6.6 MW		

4.2. In exercise of powers conferred by section 176 of the Electricity Act,2003 (36 of 2003), the Central Government made the rules on 08.06.2005 in connection with Requirements of captive generating plant 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:"

4.3. The Commission's order dated 02.03.2011 in D.R.P No.8 of 2010 filed by M/s.Harshini Textiles Ltd against TNEB and the Superintending Engineer/Udumalpet EDC is a relevant order to be referred in this case. In the said order, it is pointed out that the agreements entered into after the coming into force of the Electricity Rules,2005 (from 08.06.2005) alone requires to satisfy the norms under the Electricity Rules,2005 to determine the status of captive generator. In so for as the agreements entered into prior to 08.06.2005 the generators would be covered by the respective agreements with TNEB. Applying the said decision, in this case, the agreements in respect of the all 9 number of WEGs are required to fulfill the norms of requirements of Captive

Generating Plant as stipulated under Rule, 3 of the Electricity Rules-2005, since they were executed agreements on or after 08.06.2005.

4.4. The method of arriving 51% consumption is furnished below in accordance with the Electricity Act, 2003 and the Hon'ble APTEL as follows:

Total generation minus Auxiliary consumption (if any) = Aggregate generation (available for captive use)

(Import units should not be deducted from total generation of captive status annually)

Therefore, the formula to arrive at the percentage of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use is furnished as follows:

$$\frac{\text{Actual energy adjusted by captive user}}{\text{Aggregate generation}} = \_\_\_\_\_\%$$

4.5. The details of the wind energy generation and adjustment against consumption of the petitioner for the financial year 2009-10 are furnished below:

Wind Energy Generation for the Financial Year 2009-10 of Tirunelveli Circle:

Month	WEG.No. 2665	WEG.No. 2666	WEG.No. 2672	WEG.No. 2682	WEG.No. 2687	**TOTAL**
April - 09	81312	57672	74256	54744	82440	**350424**
May - 09	298680	209760	296880	194328	301392	**1301040**
Jun - 09	635184	586944	652992	482304	652464	**3009888**
Jul - 09	654432	435856	632280	576864	678624	**2978056**
Aug - 09	522384	412848	546600	421008	515736	**2418576**
Sep - 09	476688	420480	466224	423432	455904	**2242728**
Oct - 09	454416	410160	436200	425088	437688	**2163552**
Nov -09	170880	155232	179592	178368	186216	**870288**
Dec - 09	207720	174360	220368	227760	257112	**1087320**
Jan - 10	318504	299136	379560	362640	398040	**1757880**
Feb - 10	360696	336528	380112	414312	475608	**1967256**
Mar - 10	110352	111384	122688	135696	136008	**616128**
TOTAL	**4291248**	**3610360**	**4387752**	**3896544**	**4577232**	**2,09,63,136**

Wind Energy Generation for the Financial Year 2009— 10 of Theni Circle

Month	WEG.No. T04	WEG.No. T05	WEG.No. 106	WEG.No. T07	**TOTAL**
April - 09	61128	60600	34008	35304	**191040**
May - 09	274536	326016	275784	273192	**1149528**
Jun - 09	823848	872808	734760	764856	**3196272**
Jul - 09	997776	1036776	906768	955560	**3896880**
Aug -09	1023816	1125600	1011744	1027152	**4188312**
Sep - 09	764904	868032	766800	769968	**3169704**
Oct - 09	603936	680736	632568	613080	**2530320**
Nov - 09	66936	67008	60408	61128	**255480**
Dec - 09	29160	34872	34560	35712	**134304**
Jan - 10	74808	76704	76200	85992	**313704**
Feb - 10	66264	68376	33792	37656	**206088**
Mar - 10	72192	83472	33768	34512	**223944**
TOTAL	**4859304**	**5301000**	**4601160**	**4694112**	**1,94,55,576**

Aggregate generation

1. Tirunelveli Circle : 20963136
2. Theni Circle :19455576

TOTAL: 40418712

Industrial consumption and adjustment from wind energy in respect of the petitioner, HT.SC.No. 1028 for the financial year 2009-10.

Month	**Industrial Consumption**	**Adjusted units**	**Billed Units**
April - 09	1109340	503280	606060
May - 09	983295	983295	0
Jun - 09	1439370	1439370	0
Jul - 09	1497645	1497645	0

Aug - 09	1434555	1434555	0
Sep - 09	1466955	1466955	0
Oct - 09	1389195	1389195	0
Nov - 09	1544895	1544895	0
Dec - 09	1830150	1830150	0
Jan - 10	1893735	1893735	0
Feb - 10	1926810	1926810	0
Mar - 10	1872135	1872135	0
TOTAL	**18388080**	**17782020**	**606060**

4.6. In accordance with Rule, 3 of the Electricity Rules-2005, the percentage of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use is furnished as follows:

$$\frac{\text{Actual energy adjusted by captive user}}{\text{Aggregate generation}} = \frac{1,77,82,020}{4,04,18,712} = 43.99\%$$

Hence, the petitioner has not fulfilled one of the twin Rule, (viz) Rule 3 of Electricity Rules - 2005 (i.e), not less than fifty one percent consumption shall be made captive users for of the aggregate electricity generated in such plant, determined on an annual basis. Pursuant to the above, the petitioner had been informed that he had failed to satisfy the requirement of 51% captive consumption of the aggregate generated energy in accordance with the provisions of Rule of the Electricity Rules, 2005 and consequently the entire energy generated by the petitioner shall be treated in accordance with the said Rules. As a result, the petitioner was directed to pay the electricity charges for the units consumed at its factory, HT.SC.No.1028, under letter dated. 11.05.2011 for Rs.9,02,47,908/- and the same had been made on 20.05.2011.

4.7. The Commission has ordered in M.P.Nos,10,11& 12 of 2010 filed

by the Southern India Mills Association and the Indian Wind Power Association, as follows:

"COMMON ORDER

It transpires from the correspondence produced by the learned counsel for the Tamil Nadu Electricity Board that the earliest intimation of quota to the consumers took place in the end of November 2009 and in some cases the intimation was given as late as end of December 2009. Thus, the Commission Order was implemented by Tamil Nadu Electricity Board in a time frame of not less than one month and in some cases as late as 2 months. Wherever the communication of quota allocation was received by the consumers in the end of November 2009 the delay was one month and wherever the intimation was received in the end of December 2009 the delay was two months. Therefore it is fair toextend the utiliation of the banked energy up to 30th April, 2010or 31 May, 2010 depending on whether the intimation was received by the consumer from the Tamil Nadu Electricity Board by one month later or two months later. However, the consumers who hadavailed of the 1/5th of the banked energy from November onwards will not be eligible for the extension of banking period. Conversely, if any consumer has been penalized from November onwards for not being able to utilize the 1/5th of banked energy due to the delay in intimation of quota, such penalty shall be reversed.

The extension of banking period will apply to 1/5th of the banked energy as on 1-11-2009."

4.8. In accordance with the said order, the petitioner was eligible for extension of banking period up to May -2010, since the petitioner had been communicated of quota allocation vide letter dated.17.12.2009 by the fourth respondent. In this regard, the petitioner had nearly 2 Crs units in banking as on 30.03.2010. Hence, the entire industrial consumption for the month of April - 2010 and May - 2010 in respect of the petitioner, HT.SC.No.1028 had been adjusted against the banked units available as on 31.03.2010. Now, the petitioner has requested that the months [from January 2010 until May,2010] consumption of banked units

by the petitioner would substantiate that the petitioner has fulfilled the requirements of 51% captive consumption as per the Rule 3 of the Electricity Rules – 2005. The percentage of aggregate electricity generated in such plant, determined on an annual basis shall be in accordance with the Rule - 3, Electricity Rules - 2005. So, the energy adjusted during the month of April - 2010 and May - 2010 could not be considered for arriving percentage of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use. Hence, the contention of the petitioner is against the Electricity Rules - 2005 and Electricity Act, 2003.

4.9. If the request of the consumer considered for the financial year 2009-10, which resulted in difficult and procedure lapsed for the subsequent financial years also and the same mistake could not be rectified at all. This leads to contravention of the Electricity Rules, 2005. Even if the request of the petitioner is considered, his captive consumption is not crossed 51% of generation, which is tabulated as follows:

Month	Consumption	Current Net Generation	Billed units	Energy adjusted from banking as on 31.03.2010	Net Billed units
April-10	1698795	929078	769717	769717	0
May -10	1458225	782291	675934	675934	0
TOTAL				**1445651**	

Total adjusted units against the generation during the financial year 2009-10.

1. Energy adjusted during the financial year 2009-10
[04/09 to 03/10] = 17782020 Units
2. Energy adjusted during the April - 10 and May -10 = 1445651 Units

TOTAL = 19227671 Units

$$\frac{\text{Actual energy adjusted by captive user } 19227671}{\text{Aggregate generation } 40418712} = \frac{}{} = 47.57\%$$

From the above, the contentions of the petitioner that the months [from January 2010 until May,2010] consumption of banked units by the petitioner would substantiate that the petitioner has fulfilled the requirements of 51% captive consumption as per the Rule 3 of the Electricity Rules - 2005 is not correct.

4.10. In this regard the Hon'ble APTEL has ordered dated.18.02.2013 in Appeal No.33 of 2012, as follows:

"30. To Sum Up

a. Rule 3 of Electricity Rules 2005 specifically prescribes that two conditions are to be satisfied by the power plant to be qualified as a captive power plant. If any one of those conditions is not fulfilled, the captive power plant will lose its status and become a generating plant. Hence, the State Commission does not have any powers to relax the provisions of the Electricity Act, 2005. -------"

4.11. From the above it may be seen that at the end of the financial year, if the twelve months aggregate generation had been taken for arriving at the percentage of the captive consumption in the financial year 2009-10 [from April -2009 to March - 2010], twelve months adjusted energy should have been taken. If the request of the petitioner is considered then, the

aggregate generation and energy adjusted from captive becomes un-uniform (i.e)., the aggregate generation will be twelve months and the captive consumption will be fourteen months. This may be termed as relaxation of Rule 3, Electricity Rules -2005, which is not permissible under the law. Hence, the petition is neither maintainable in law nor on facts.

4.12. M/s. Southern India Mills Association, M/s. Biomass Power Producers Association, etc. have filed Miscellaneous Petitions vide M.P.No. 9 of 2010 and M.P.No.6 of 2010 and 17 of 2010 and D,R.P.No.9 of 2010 with contentions as follows:

Contention of the Petitioners:

a) xxxxxx

b) xxxxxx

c) xxxxxx

d) xxxxxx

e) Since the infrastructure facilities has already been created based in the sanctioned demand by the Tamil Nadu Electricity Board, it is but logical to allow purchase of power from third parties up to the sanctioned demand instead of restricting the same to the base demand.

Commission's order dt.07.09.2010 in connection with procurement of power in M.P. Nos. 6of 2010, 9 of 2010 and 17 of 2010 and D.R.P. No.9 of 2010 I.A. Nos. 1 and 2 of 2010 in M.P. No. 9 of 2010 reads as follows.

"The HT consumer is unable to utilize the permitted and purchased power from captive sources as well as procurement of power by the consumer through open access within Base Demand and Base energy. The role of the licensee is limited to that of a carrier. Procurement through open access will be treated as an additionality. The ceiling limit up to which a consumer can utilize power including the TNEB quota demand, captive power and

third party purchasewould be the sanctioned demand.

4.13. Therefore TANGEDCO had permitted to reach the maximum demand over and above the quota demand up to the sanctioned demand in respect of the HT consumers who are using partially TANGEDCO's power and power from other sources such as captive, third party during 24 hrs. Hence, the contention of the petitioner that not permitting to consume their banked units and also day-to-day generation from windmills due to power holidays, demand cut, energy cut, load shedding and such other various restrictions, consequently, the petitioner was not able to consumer the entire power generated by their Wind Turbine Generators for their captive consumption, this has resulted in the petitioner having sizeable quantity of unutilized banked units in their account with respondent is not correct and not acceptable.

4.14. Regulation 38 of Tamil Nadu Electricity Distribution Code, is extracted below:-

"38. RESTRICTIONS ON USE OF ELECTRICITY:

The consumer shall curtail, stagger, restrict, regulate or altogether cease to use electricity when so directed by the Licensee, if the power position or any other emergency in the Licensee's power system or as per the directives of SLDC/ SSLDC warrants such a course of action. The Licensee shall not be responsible for any loss or inconvenience caused to the consumer as a result of such curtailment, staggering, restriction, regulation or cessation of use of electricity. Notwithstanding anything contained in any agreement/ undertaking executed by a consumer with the Licensee or in the tariff applicable to him, the consumer shall restrict the use of electricity in terms of his/her maximum demand and/or energy consumption in the manner and for the period as may be specified in any order that may be made by the Licensee on the instructions of State Government or the Commission".

4.15. On a plain reading of the above Regulation, it may be seen that the petitioner shall curtail, stagger, restrict, regulate and altogether cease to use electricity when so directed by the licensee if the power position or any other emergency in the licensees power supplies or as per the directives of SLDC /SSLDC warrant such a course to action. The licensee shall not be responsible for any loss or inconvenience caused to the appellant as a result of such curtailment staggering, restriction, regulation or cessation of use of electricity. The R&C Measures like percentage of power cut on Demand & Energy, peak hour restriction, power holidays and load shedding period are enforced considering the overall requirement and availability of the supply position. Besides, the above, depending upon the grid condition, further load shedding .may also have to be done as per the instruction of SLDDC/SSLDC to maintain the grid safety. The petitioner cannot claim any inconvenience or loss for such load shedding also. Hence, the contention of the petitioner to the contrary is not admitted and the petitioners are bound by the above said provisions contained in TNE Distribution Code. Hence, the contention of the petitioner is neither maintainable in law nor sustainable one.

4.16. The petitioner has no prima facie case to further pursue the above Dispute Resolution Petition. Therefore, the petitioner is not entitled to any relief as prayed for in the above petition. The balance of convenience is clearly in favour of the respondents herein. Hence, considering all the above and more particularly relevant Rule 3, Electricity Rules -2005, the above petition is liable to be dismissed. By dismissing the same, no prejudice will be caused to the petitioner as the percentage of the aggregate electricity

generated in such plant, determined on an annual basis, is consumed for the captive use was arrived at in accordance with law.

5 Reply Affidavit filed on behalf of the Petitioner:

5.1. For the determination of percentage of energy consumed captively by the Petitioner, the Respondents wrongly contend that imported units and wheeling, charges ought not to be reduced from the total electricity generated by the Petitioner. In other words, the Respondents wrongly contend that actual energy adjusted by the Petitioner must be divided by the total generation of electricity withoutunits of imported units and wheeling charges in order to determine the percentage of captive consumption by the Petitioner. This method of determination of the percentage of captive consumption by the Petitioner suggested by the Respondents is wholly wrong and has no legal or logical basis.

5.2. For the years 2010-2011, 2011-2012 and 2012-2013, the Respondents have determined the percentage of captive consumption by the Petitioner by considering the aggregate generation of electricity (i.e) total generation of electricity less imported units and wheeling charges. In other words, till date, the Respondents have always reduced the imported units and wheeling charges in order to arrive at the aggregate generation of electricity. Thereafter, the actual energy adjusted by the Petitioner is divided by such aggregate generation of electricity to determine the percentage of captive consumption by the Petitioner. It is evident from the above that the Respondents

are resorting to their illegal and wrongful method of determination of the percentage of captive consumption only to evade their liability of making payment to the Petitioner. Further, in the letter dated19.10.2010 issued by the Superintending Engineer, North Circle, it is indicated that the aggregate generation 3,88,36,545 units and not 4,04,18,712 units aswrongly contended by the. Respondents which would substantiate that imported units and wheeling charges are to be reduced from the total generation in order to determine the aggregate generation of electricity by the Petitioner.

5.3. The total generation is 4,04,18,712 units and after reduction of imported units and wheeling charges, the aggregate generation is 388,36,529 units. In such circumstances, the correct method of determination of the percentage of captive consumption by the Petitioner for the months from April 2009 to March 2010 would be as follows:

$$\frac{\text{Actual energy adjusted by the Petitioner} \quad 177,82,020 \text{ units}}{\text{Aggregate generation} \quad 388,36,529 \text{ units}} = 45.79\%$$

(total generation less imported units andwheeling charges)

5.4. The entire energy consumed by the Petitioner for the months of April and May 2010 must also be added to the energy adjusted by the Petitioner for the months from April 2009 to March 2010 mentioned above by virtue of the Suo Moto Order No. 1 of 2009 dated 28.10.2009 and the Order dated 29.03.2012 in M.P. Nos.10,11&12of2010 in order to determine the percentage of captive consumption by the Petitioner for the year 2009 to 2010 failing which the purpose and import of the aforesaid Orders dated 28.10.2009 and 29.03.2012 would be

defeated and their benefit would not be available to the Petitioner. In such circumstances, it would be evident that the Petitioner has satisfied the requirements under Rule 3 of the Electricity Rules, 2005 and the Respondents' allegation tothe contrary are wholly baseless and devoid of merits.

5.5 It isadmitted that the Petitioner is eligible for extension of banking period up to May 2010 on the basis of the Order dated 29.03.2012 in M.P Nos. 10,11& 12 of 2010 as the quota allocation was communicated to the Petitioner only vide letter dated 17.12.2009. It is also admitted that the entire consumption of the Petitioner during the months of April and May 2010 is to be adjusted against the banked units available as on 31.03.2010 for the Petitioner. If the entire consumption of the Petitioner during themonths or April and May 2010 is adjusted against the banked units available as on 31.03.2010 for the Petitioner then the Petitioner would satisfy the requirements under Rule 3 of the Electricity Rules, 2005 and the Respondents allegations to the contrary are false and baseless. In other words, if the entire consumption of the Petitioner during the months of April and May 2010 is adjusted against the banked units available as on 31.03.2010 for the petitioner in accordance with the aforesaid Orders dated28.10.2009 and 29.03.2012 then the logical consequence is that such entire consumption during the months of April and May 2010 would then be added to the energy adjusted by the Petitioner for the year 2009 to 2010. Needless to state that if the aforesaid method is not adopted then the purpose and import of the aforesaid Orders dated 28.10.2009 and 29.03.2012 would be defeated and their benefit would not be available to the Petitioner. In such circumstances, thecorrect method of determination of the percentage of

captive consumption by the Petitioner from April 2009 to March 2010 (including the entire consumption during the months of April and May 2010 as per the aforesaid Orders dated 28.10.2009 and 29.03.2012 would be as follows:

Energy adjusted by the. Petitioner from April 2009 to March 2010.	177,82,020 units
Entire consumption during the months of April and May 2010 to be adjusted with the banked units as on 31.03.2010 and consequently added to the energy adjusted for the year 2009 to 2010	31,57,020 units
Hence, total energy adjusted by the Petitioner for the year 2009 to 2010 (177,82,020 units + 31,57,020 units)	209,39,040 units
Aggregate Generation (total generation less imported units and wheeling charges) for the year 2009 to 2010	388,36,529 units
Percentage of Captive consumption by the Petitioner for the year 2009 to 2010 (209,39,040 units /388,36,526 units)	53.92%

5.6. The Petitioner has satisfied the requirements under Rule 3 of the Electricity Rules, 2005. It is denied that if the request of the Petitioner is considered for the financial year 2009,2010, the same would result in difficulty and procedural lapse for the subsequent financial years and cannot be rectified at all. The Respondents having failed to favourably and properly consider the repeated requests of the Petitioner from the year 2010 cannot now seek shelter on the basis of its own default and delay. In any event, such alleged difficulties cannot be a ground to deny the legitimate claims of the Petitioner particularly since the Petitioner has

diligently pursued its claims against the Respondents.

5.7. The Respondents are only taking a portion of the entire consumption during the months of April and May 2010 by the Petitioner for the purposes of adjustment of banked energyas on 31.03.2010 which is contrary to the Respondents' own contentions. In other words, instead of taking the entire industrial consumption during the months of April and May 2010 towards adjustment of banked units as on31.03.2010, the Respondents are taking only the remainder of such consumption during the months of April and May 2010 after first deducting from the current month's generation of electricity by the Petitioner. Such method of determination is firstly contrary to the Respondents' own contentions/statements, secondly has no legal or statutory basis, thirdly has only been adopted to defeat the purpose and objective of the aforesaid orders dated 28.10.2009 and 29.03.2012 and lastly to deny the Petitioner of its legitimate claims against the Respondents. The legal basis for adopting such wrongful method of taking only the remainder of the consumption during the months of April and May 2010 after first deducting from the current month's generation of electricity by the Petitioner requires to be substantiated by the respondents.

5.8. Assuming without admitting for argument sake if the Respondents' method of determination of the percentage of captive consumption is to be adopted (i.e) the use of total generation without reducing imported units and wheeling charges, the non-inclusion of the entire consumed units during the months of April and May 2010 for adjustment of banked energy and/or the adjustment of only a portion of the entire consumption with the banked units as on 31.03.2010 after reducing current month's generation of electricity by the Petitioner, the same would only

result in the aforesaid Orders dated 28.10.2009 and 29.03.2012 having no significance and being made redundant in as much as the Petitioner although is allowed to consume the banked units until May 2010, such consumption would not go towards the usage of banked units for the year 2009 to 2010 resulting in non-compliance of the 51% captive consumption requirement as per Rule 3 of the Electricity Rules, 2005.

5.9. Consequently, the entire energy generated by the Petitioner from its windmills during the year 2009-2010 would be deemed as sale to the Respondents and the entire energy consumed by the Petitioner during the year 2009-2010 would be deemed as supply by the Respondents. In such circumstances, it is evident that although the aforesaid Orders dated 28.10.2009 and 29.03.2012 permit the Petitioner to adjust its consumption with the banked energy until May 2010, the result of adopting the Respondent's method of determination of the percentage of captive consumption would be that the entire consumption by the Petitioner during the year 2009 to 2010 shall be deemed as supply by the Respondents resulting in the Petitioner making payment for the same to the Respondents thereby negating the benefit provided by the aforesaid Orders dated 28.10.2009 and 29.03.2012 of the Commission. The calculations provided by the Respondents in Paragraph 8 of the Counter Affidavit filed on behalf of the Respondents are denied and the correct calculations have already been enumerated by the petitioner.

5.10. By no Stretch of imagination can it be contendedthat by extending the adjustment period up to May 2010 in the case of the Petitioner or by adjusting the entire consumption during the months of April and May 2010 towards the banked

units as on 31.03.2010 would tantamount to relaxation of Rule 3 of the Electricity Rules, 2005. The Respondents have admitted that as a result of their conduct (i.e) imposition of various measures, many consumers including the Petitioner were unable to utilize the banked energy as a result of which theCommission has permitted the adjustment of banked energy towards consumption until May 2010. In such circumstances, it is only a logical and natural consequence that the entire energy consumed until May 2010 in thecase of the Petitioner ought to be adjusted with the banked energy andconsequently the same would be considered towards satisfying the requirements under Rule 3 of the Electricity Rules, 2005 for the year 2009-2010. This is clearly the purport of the aforesaid Orders dated 28.10.2009 and 29.03.2012 which has not been challenged by the Respondents and in such circumstances is final and binding on the Respondents. It is futile for the Respondents to now contend that the implementation and consequences of the aforesaid Orders dated 28.10.2009 and 29.03.2012 tantamount to relaxation of Rule 3 of the Electricity Rules, 2005. In any event, there is no relaxation of Rule 3 of the Electricity Rules, 2005 as even according to the petitioner the calculations are for the financial year 2009 to 2010 but only the entire consumption (without any reduction) during the months of April and May 2010 are to be adjusted with the banked units as on 31.03.2010 and consequently included towards the banked units for the financial year 2009 to 2010. Hence, there is no relaxation of Rule 3 of the Electricity Rules, 2005 as wrongly contended by the Respondents.

5.11. The Respondents have admitted that as a result of their conduct (i.e) imposition of various measures, many consumers including the

Petitioners were unable to utilize the banked energy. Further, the Orders dated 28.10.2009 and 29.03.2012 are final and binding on theRespondents. The Respondents are liablefor the claims of the Petitioner particularly since it is the default, delay andwrongful or evident lack of application of mind of the Respondents that havecaused loss to the Petitioner and in such circumstances, the Respondents areliable for the same and cannot seek to evade their liability by relying oninapplicable and irrelevant provisions of laws, rules and regulations.

5.12. The letter dated 10.03.2011 merely denied the legitimate claims of the Petitioner without providing any details and it is strange that the Respondents are referring to the letter dated 10.03.2011 as a detailed reply in the matter. It is evident from the above that the claims of the Petitioner are legitimate and consequently the same ought to be upheld.

6. Additional Counter Affidavit filed by Respondents:-

6.1. None of the averments and allegations contained in the Reply Affidavit filed on behalf of the Petitioner shall be deemed to be admitted by the Respondents.

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:

xxxxx"

6.2. From the above, it can be understood that the twin rules of Ownership and Consumption have to be satisfied as per the Electricity Rules-2005 in order to qualify as a Captive Generating Plant. The Petitioner fulfilled the "Ownership" criteria as the captive user and owner of the Captive Generating Plant are one and the same. With regard to "Consumption" criteria, the petitioner has not fulfilled it. The Respondent issued circular in connection with calculation of Aggregate electricity generated vide circular dated. 15.03.2017, wherein the relevant portion which held as follows:

"xxx

2.1. The general formula for calculating percentage of the captive consumption:

Total generation of the Financial/ year- Auxiliary consumption (if any)
= Aggregate generation (Available for captive use)

The determination of percentage of energy consumed captively

$$= \frac{\text{Total Consumption for the financial year}}{\text{Aggregate generation}} = \text{----}\%$$

2.2. Auxiliary Consumption means, the quantum of the energy consumed by auxiliary equipment of generating station and transformer losses within generating station. The maximum percentage of auxiliary consumption is 10% of the Highest capacity of the generating unit of the generating station or as per the percentage of auxiliary consumption as specified in the Commission's Tariff regulations or the actual auxiliary consumption whichever is less."

6.3. This is the method to determine the percentage of energy consumed captivelyby the captive user in accordance with the Electricity Rules, 2005. In this regard, it is most relevant to mention that Government of India, Ministry of

Power issued Draft amendments in the provisions relating to Captive Generating Plant in Electricity Rules-2005 on 22.05.2018, wherein it has been stated that the method of the aggregate electricity generated shall be computed:

XXX

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 "aggregate electricity generated" shall be computed:

a) as the total electricity generated in the power plant minus the auxiliary consumption where in the auxiliary consumption for this purpose shall be the actual auxiliary consumption or normative Auxiliary consumption, whichever is higher, for similar kind of units as per the regulations of Appropriate Commission.

b) Where any free power supplied by the Hydro Generating Station to the StateGovernment, same shall be excluded from calculating the aggregate electricity generated in such plants.

c) in case of Renewable generators, banking of power which is redeemed for consumption for own use by the captive users, shall be included for the purpose of determination on an annual basis. The redemption of banked energy will be permitted within the same financial year.

xxxx"

6.4. The Commission issued Terms and Conditions for Determination of Tariff Regulations, 2005, wherein it specified the definition of the Auxiliary Energy Consumption or AUX as follows:

xxx

(e). Auxiliary Energy Consumption or AUX in relation to a period means the quantum of

energy consumed by auxiliary equipment of the Generating Station and transformer losses within the Generating Station, and shall be expressed as a percentage of the sum of gross energy generated at the generator terminals of all the units of the Generating Station.

Xxxx

6.5. Though the definition of "Aggregate Electricity Generated" is available in the draft amendment to Electricity Rules-2005, it conveys the general meaning of "Aggregate Generation" during any time period. From the above it could be clearly observed that if the above draft amendment rules and the present regulations are read in conjunction with each other, it can be concluded that the import units of the generating unit, wheeling charges including line loss and Transmission charges which are in kind do not come under the ambit of the Auxiliary Consumption. Therefore, import units of the generating unit, wheeling charges including line loss and Transmission charges which are in kind could not be deducted from the total energy generated for computing the determination of percentage of energy consumed captively. Hence, the contention of the petitioner that for the determination of percentage of energy consumed captively by the petitioner, the Respondents wrong contention that imported units and wheeling charges ought not be reduced from the total electricity generated by the petitioner has no legal basis and is a misleading one.

6.6. The Commission has issued Comprehensive Tariff order on Wind Energy vide Order.No.1 of 2009 dated. 20.03.2009, wherein the banking provision is described as follows:

“8.2 Banking

8.21. Banking as a concept was introduced by the Tamil Nadu Electricity Board in 1986 to encourage generation of wind energy. The banking charge was fixed at

2% in 1986 and raised to 5% in 2001. The figure remained at 5% when the Commission issued order No..3 dated 15-5-2006. The banking period was fixed at one month in March 2001 by the TNEB and doubled in September 2001. It was further raised by TNEB to one year in March 2002 commencing from 1st April and ending on 31st March of the following year.

8.2.2. The banking charges shall be realized every month for the quantum of units generated during the billing month less the consumption of the captive users/third party sale. Slot-wise banking is permitted to enable unit to unit adjustment for the respective slots towards rebate / extra charges. No carry over is allowed beyond the banking period. Unutilised energy at the end of the financial year may be encashed at the rate of 75% of the relevant purchase tariff The Commission proposes to retain the same features with some modifications based on the suggestions made by the stakeholders. As and when the distribution licensee enforces restriction control measures for restricting the consumption of wind energy generators, the Commission finds justification in the plea that the unutilized energy at end of the financial year may be encahsed at full value of the relevant tariff for sale to the licensee. The plea of the TNEB to raise the banking charge from 5% to 15% and curtail the banking period from one year to one month are too radical to be accepted by the Commission.

8.2.3. Therefore, the Commission decides to retain banking charges at 5%. Banking charges will be levied on the net energy saved by the generator in a month after adjustment of the consumption during that month. The banking period commences on 1st April and ends on 31stMarch of the following year. The energy generated during April shall be adjusted against consumption in April and the balance if any shall be reckoned as the banked energy for April. The generation in May shall be first adjusted against the consumption in May. If the consumption exceeds the generation during May, the energy banked in April shall be drawn to the required extent. If the consumption during May is less than the generation during May, the balance shall be reckoned as the banked energy for May and banking charges for May will be leviable only for this component. This procedure shall be repeated every month.

.xxxx"

6.7. From the above, it could be concluded that the energy generated during April shall be adjusted against consumption in April and the balance if any shall be reckoned as the banked energy for April. The generation in May shall be first adjusted against the consumption in May. If the consumption exceeds the generation during May, the energy banked in April shall be drawn to the required extent. If the consumption during May is less than the generation during May, the balance shall be reckoned as the banked energy for May and banking charges for May will be leviable only for this component. The banked energy had been adjusted from the month of November-2009 onwards after adjustment of energy generated in that current month. Hence, this is the legal basis method of taking only the remainder of the consumption during the months of April and May 2010 for adjustment against banked units after first deducting from the Current month's generation of electricity by the petitioner.

"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:

xxxxx

Explanation.- (1) For the purpose of this rule:

a. Annual Basis" shall be determined based on a financial year;

xxxxx"

6.8. The "Consumption" criteria not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis i.e Financial year basis, is consumed for the captive use. Therefore, the energy generated and adjusted units during the financial year 2009-10 i..e. from the month of April-2009 to March-2010 should have been taken for arriving "Consumption" criteria.

6.9. As per the contention of the petitioner adjusted units during the month April-2010 and May -2010 could not be taken for computation of "Consumption" as per Electricity Rules-2005. Hence, request of the petitioner is not considerable one. If doing so, this may be termed as relaxation of Electricity Rules-2005, Which is not permissible under the law. Hence, the petition is neither maintainable in law nor on facts.

6.10. As a matter of fact it is the claimant who has received payment of about Rs.13 Crs towards encashment of wind energy which may be liable to refund a significant portion of the same.

7. **Additional reply affidavit filed on behalf of the petitioner.**

7.1. The Petitioner has satisfied both criteria of a captive generation plant (i.e) the "ownership" criteria and the "consumption" criteria. It is denied that the Petitioner has not fulfilled the "consumption" criteria as falsely alleged by the Respondents. As per the Suo Moto Order No.1 of 2009 dated 28.10.2009 and the Order-in-M.P.Nos.10, 11 & 12 of 2010 dated 29.03.2010 passed by this Commission, the Petitioner is entitled to utilize the banked energy in five equal monthly instalments from November 2009 until March 2010 and the same was extended by a further period of two months until the end of May 2010 (the period of five months calculated from January 2010 until May 2010). The consumption of banked energy by the Petitioner during this period would substantiate that thePetitioner has fulfilled the "consumption" criteria (i.e) 51% captive consumption as per Rule 3 of the Electricity Rules, 2005. Therefore, it is erroneous for the Respondents to allege that the Petitioner has not fulfilled the "consumption" criteria.

7.2. The averments with regard to the Circular dated 15.03.2017 are denied as false and baseless which is substantiated by the Respondents' own letters for the period 2009-2010 and for the subsequent years also. In other words, the determination of the aggregate generation would be total generation less imported units and wheeling charges and this method of determination of the aggregate generation is confirmed by the letters dated 19.10.2010, 29.09.2012, 28.01.2013 and 18.11.2013 issued by the Respondents themselves. Therefore, the contentions of the Respondents that imported units, wheeling charges including line loss and transmission charges cannot be deducted from the total generation in order to determine the aggregate generation is wholly unsustainable particularly considering the letters of the Respondents, mentioned above.

7.3. The Respondents have referred to certain provisions of law and circulars which are not applicable to the facts of the present case. Admittedly, the relevant year is 2009-2010. In such circumstances, the Respondents' reliance on the Circular dated 15.03.2017 is wholly erroneous in as much as the Circular dated 15.03.2017 was not even applicable during the relevant year mentioned above. Also, the Circular dated 15.03.2017 does not have retrospective effect. The Respondents have not even alleged that the Circular dated 15.03.2017 has retrospective effect to cover the relevant year mentioned above. Hence, no reliance can be placed on the Circular dated 15.03.2017 as wrongly alleged by the Respondents. On the contrary the Respondents' letters cited above would substantiate that to determine aggregate generation, the import and wheeling units would have to be reduced from the total generation. It is illegal, unfair and unconscionable for the

Respondents to now contend that there would be no reduction of imported units and wheeling charges from the total generation for determining the aggregate generation since the Respondents are stopped by their own conduct from raising such frivolous contentions.

7.4. It is preposterous for the Respondents to rely on such draft amendments which are yet to come into force as law. Further, assuming without admitting for argument sake that such draft amendments were in force even then the same were not applicable during the relevant year, mentioned above, as retrospective effect cannot be given to such draft amendments. Furthermore, the Respondents have not even alleged that such draft amendments would be applicable retrospectively. Therefore, it is completely erroneous for the Respondents to rely on such draft amendments which are yet to come into force as law. With regard to the Respondents' contentions regarding the definition of Auxiliary Energy Consumption (AUX) contained in the Terms and Conditions for Determination of Tariff Regulations, 2005, the same is wholly inapplicable to the present case. From the above, it is evident that the contention of the Respondents relating to the draft amendments to the Electricity Rules, 2005, the definition of AUX as contained in the Terms and Conditions for Determination of Tariff Regulations, 2005 and the Circular dated 15.03.2017 are wholly misconceived and erroneous. It is reiterated that the Circular dated 15.03.2017 and the draft amendments dated 22.05.2018 to the Electricity Rules, 2005 were not even applicable during the relevant year (2009-2010). It is for this reason that the Respondents themselves have issued letters year after year wherein they have categorically admitted that for each year the determination of the aggregate energy would be on the basis of the

total generation less import and wheeling units. In such circumstances, the Respondents are estopped from alleging now that there will be no reduction of import and wheeling units from the total generation to determine the aggregate generation of electricity.

7.5. The contentions raised by the Respondents on the basis of the Comprehensive Tariff Order on Wind Energy dated 20.03.2009 is wholly misconceived and erroneous. For the relevant year 2009-2010, the Petitioner by virtue of the Suo Moto Order No.1 of 2009 dated 28.10.2009 and the Orderin M.P.Nos.10, 11 & 12 of 2010 dated 29.03.2010, is entitled to consume the banked energy up to the end of May 2010 as explained above and such consumption of energy by the Petitioner up to May 2010 would be the total consumption of energy by the Petitioner for the relevant year. Further, the whole purpose of the Suo Moto Order No.1 of 2009 dated 28.10.2009 and the Order-in M.P.Nos.10, 11 & 12 of 2010 dated 29.03.2010 permitting the consumers such as the Petitioner to consume the banked energy up to the end of May 2010 is to enable such consumers to consume the substantial quantum of energy banked with the Respondents. Seen from this perspective, the Respondents' contention that the current month's generation shall be first adjusted and then only the banked energy shall be adjusted cannot be accepted since it would defeat the entire purpose of the Suo Moto Order No.1 of 2009 dated 28.10.2009 and the Order-in M.P.Nos.10, 11 & 12 of 2010 dated 29.03.2010, mentioned above. In other words, if the Respondents' contention that the current month's generation shall be first adjusted and then only the banked energy shall be adjusted is to be accepted then the consumers such as the Petitioner would not be able to consume their banked energy and

consequently, such consumers including the Petitioner would be deprived of the benefit guaranteed by the Commission vide the Suo Moto Order No.1 of 2009 dated 28.10.2009 and the Order-in M.P.Nos.10, 11 & 12 of 2010 dated 29.03.2010. Therefore, the Respondents' contention ought not to be accepted. The total consumption of the Petitioner up to the end of May 2010 without adjustment of current month generation when computed with the aggregate generation (total generation less import and wheeling units) would make it evident that the Petitioner has satisfied the "consumption" criteria (i.e) 51% captive consumption as per the Electricity Rules, 2005.

7.6. Only after the Comprehensive Tariff Order on WindEnergy dated 20.03.2009, the Commission had passed the Suo Moto OrderNo.1 of 2009 on 28.10.2009 and the Order-in-M.P. Nos.10,11& 12 of 2010 on 29.03.2010. Therefore, it is evident that the Commission was well aware of the Comprehensive Tariff Order on Wind Energy dated 20.03.2009 and accordingly had passed the Suo Moto Order No.1 of 2009 dated 28.10.2009 and the OrderinM.P.Nos.10, 11 & 12 of 2010 dated 29.03.2010. In such circumstances, the reliance of the Respondents on the Comprehensive Tariff Order on Wind Energy dated 20.03.2009 is wholly misconceived. It appears that the Respondents are implying that the Commission was not aware of its own Comprehensive Tariff Order on Wind Energy dated 20.03.2009 while passing the Suo Moto Order No.1 of 2009 on 28.10.2009 and the Order-in-M.P.Nos.10, 11 & 12 of 2010 on 29.03.2010 which contention only deserves to be rejected at the very threshold.

7.7. The Suo Moto Order No.1 of 2009 on 28.10.2009 and the OrderinM.P.Nos.10, 11 & 12 of 2010 on 29.03.2010 have not been challenged by the

Respondents for nearly a decade and the same have obtained finality. In such circumstances, the Suo Moto Order No.1 of 2009 on 28.10.2009 and the Order-in-M.P.Nos.10, 11 & 12 of 2010 on 29.03.2010 are binding on the Respondents. The Respondents cannot wriggle out of their obligations under the aforesaid two Orders of the Commission by citing either draft amendments which are yet to come into force as law, Circulars which came into effect after the relevant year (2009-2010) and/or the order of the Commission passed prior to the Suo Moto Order No.1 of 2009 and Order-in-M.P.Nos.10, 11, and 12 of 2010. It is denied that the "consumption" criterion is to be determined on an annual basis (i.e) financial year basis in the case of the Petitioner as wrongly contended by the Respondents. In the present case, by virtue of the Suo Moto Order No.1 of 2009 and Order in M.P.Nos.10, 11 and 12 of 2010 passed by the Commission, the Petitioner is entitled to consume the banked energy up to the end of May 2010 for the relevant year (2009-2010) and therefore, such consumption of the Petitioner would have to be reckoned for the purpose of determining whether the Petitioner has satisfied the "consumption" criteria. The contention that only the "consumption.' for the financial year would be taken for the purposes of determining the "consumption" criterion is totally contrary to the Suo Moto Order No.1 of 2009 and Order-in-M.P.Nos.10, 11 and 12 of 2010 passed by the Commission and therefore such contention of the Respondents ought to be rejected at the threshold. It is also denied that there is any relaxation of the Electricity Rules, 2005 as wrongly contended by the Respondents. It is denied that the present Petition is neither maintainable in law nor on facts as wrongly contended by the Respondents. The Petitioner is placing full reliance on the Suo Moto Order No.1 of 2009 and Order-in-M.P.Nos.10, 11 and 12 of 2010 passed by the Commission and therefore, adherence to such Orders cannot be

considered as a relaxation of the Electricity Rules, 2005 by any stretch of imagination.

7.8. It is denied that the Petitioner had received payment of Rs.13.00 crores towards encashment of wind energy and it is also denied that the Petitioner is liable to refund significant portion of the same as falsely alleged by the Respondents. The Respondents have not filed any documents to substantiate such allegations relating to payment and / or refund. It is preposterous for the Respondents to reserve their right to proceed against the Petitioner since such recovery of the amount apart from being vehemently disputed by the Petitioner is also hopelessly time barred.'

8. Additional Affidavit filed by the Petitioner:-

8.1. The Respondents for the first time vide their Affidavit dated 07.12.2020 have contended that the banked energy of the Petitioner was adjusted from November, 2009 onwards and therefore, the Petitioner is not entitled to the extended period for adjustment of banked energy up to end of May, 2010. However, such contention of the Respondents is legally and factually incorrect since the Petitioner was neither allowed to adjust 1/5thof the banked energy available as on 01.11.2009 as per S.M.P. No. 1 of 2009 nor allowed to adjust its entire consumption against the banked energy. On the contrary, the Respondents had adjusted the entire consumption against the current month generation and only the balance was adjusted against the banked energy thereby disentitling the Petitioner to the benefit granted under S.M.P. No. 1 of 2009. In such circumstances, the Petitioner is very much entitled to the extended period for adjustment of banked energy up to end of May, 2010 which fact has also been categorically admitted by the Respondents in their Counter Affidavit.

8.2. The Respondents, it is submitted thatthe Respondents for the first time have now contended that the banked energy had been adjusted from the month of November, 2009 onwards to the extent of the consumption in excess of current month generation and therefore the contention of the Petitioner that the Petitioner was not able to consume 1/5thof the banked energy as ordered in S.M.P.No.1 of 2009 is not acceptable, since the entire consumption had been adjusted fully. In other words, the Respondents are now contending that the Petitioner is not entitled to avail the extended period of adjustment of banked energy (i.e) up to end of May, 2010 since the banked energy was adjusted from the month of November, 2009 onwards. Such contention of the Respondents is unsustainable for the following reasons:

8.3. It has been categorically admitted by the Respondents in the counter that the Petitioner is eligible for extension of banking period up to end of May, 2010 since the Petitioner had been communicated of the quota allocation vide letter dated 17.12.2009 by the 4th Respondent. The relevant extract of the Counter Affidavit dated April, 2014 filed by the Respondents is as follows:-

> *"In accordance with the said order, the petitioner was eligible for extension of banking period up to May-2010, since the petitioner had been communicated of quota allocation vide letter dated 1 7.12.2009 by the fourth respondent….."*

8.4. It is evident that the Respondents have unequivocally admitted that the petitioner is entitled to the extended period for adjustment of banked energy up to end of May' 2010, since the Petitioner was communicated the quota only in the

month of December' 2009. In such circumstances, the present contention of the Respondents in their Counter Affidavit dated 07.12.2020 is clearly contrary to the earlier pleadings filed by the Respondents and for this reason alone, such contention of the Respondents as stated in their Counter Affidavit dated 07.12.2020 has to be dismissed.

8.5. The Respondents are taking different positions at different points of time. After filing the Counter Affidavit dated April 2014 the Respondents have categorically admitted that the Petitioner is entitled to the extended period for adjustment of banked energy up to end of May 2010, strangely, the Respondents have now changed their entire position in the matter and for the first time after arguments have already been made by the counsel for the Petitioner raised such contention which is clearly contrary to their earlier position taken by the Respondents in the matter. Therefore, it is evident that the Respondents are taking contrary positions in the matter which ought not to be entertained.

8.6. In the Suo Moto Order No.1 of 2009, it has been stated that "unutilized banked energy available as on 01.11.2009 may be utilized by the wind captive users in five equal monthly installments from 01.11.2009 up to 31.03.20010 in addition to current generation of that month". As on 01.11.2009, the Petitioner had unutilized banked energy of 2,20,24,615 units. Therefore, every month, the Petitioner should have been permitted to adjust 1/5thof the said banked energy available as on 01.11.2009 (i.e) in five equal monthly installments. Even as per the data provided by the Respondents in the Counter Affidavit dated 07.12.2020, it is evident that the Petitioner was not permitted to adjust 1/5thof the banked energy available as on 01.11.2009 and therefore the benefit granted under the Suo Moto Order No.1 of 2009

was not extended to the Petitioner from November 2009 onwards as wrongly contended by the Respondents. In such circumstances, the Petitioner is entitled to the extended period for adjustment of banked energy up to the end of May, 2010 as per the Order dated 29.03.2010 of the Commission.

8.7. The Order dated 29.03.2010 of the Commission clearly states thatfor those consumers who have been intimated of the quota in December 2009, shall be entitled to avail the extended period for adjustment of banked energy up to end of May, 2010. Admittedly, the Respondents issued the quota intimation to the Petitioner only on 17.12.2009 and therefore the Petitioner is clearly entitled to avail the extended period for adjustment of banked energy up to 31st May 2010.

8.8. In the said Order dated 29.03.2010, only consumers who had availed of the 1/5thof the banked energy from November 2009 onwards will not be entitled for the extended period for adjustment of banked energy. However, as mentioned above, the Petitioner was not permitted to avail 1/5thof its banked energy available as on 01.11.2009. Further, the Petitioner was not even permitted to adjust its entire consumption from the banked energy since the Respondents had first adjusted the consumption against the current month generation and thereafter only the balance was adjusted against the banked energy available as on 01.11.2009.

8.9. The Respondents have not extended to the Petitioner any benefit granted to consumers under the Suo Moto Order No.1 of 2009 and the Order dated 29.03.2010 passed by the Commission. The Respondents have adjusted banked energy as they would have done in normal circumstances and have not permitted the Petitioner to avail any benefit under the SuoMoto Order No.1 of 2009 and the Order

dated 29.03.2010 passed by the Commission. In such circumstances, it is baseless and unsustainable for the Respondents to contend that the Petitioner is not entitled to the extended period for adjustment of banked energy up to 31.05.2010 since the banked energy was adjusted during November 2009 itself.

8.10. Only after the Wind Tariff Order dated 20-03-2009, the Commissionpassed the Suo Moto Order No.1 of 2009 dated 28.10.2009 and the Order dated 29.03.2010. Therefore, it is evident that the Commission was well aware of the Suo Moto Order dated 20.03.2009 and accordingly passed the Suo Moto Order No.1 of 2009 dated 28.10.2009 and the Order dated 29.03.2010. In such circumstances, the reliance of the Respondents on the Suo Moto Order dated 20.03.2009 is wholly incorrect. It is incorrect to state that in the case of the Petitioner the consumption is to be first adjusted against the current month generation and only thereafter to be adjusted against the banked energy.

8.11. By taking such an erroneous approach, the benefit extended to consumers by the Commission vide Suo Moto Order No.1 of 2009 and Order dated 29.03.2010 has not been extended to the Petitioner. Such methodology adopted by the Respondents would defeat the entire purpose of the Suo Moto Order No.1 of 2009 and the Order dated 29.03.2010. As on 01.11.2009, the Petitioner had 2,20,24,615 units as banked energy. As per the Suo Moto Order No.1 of 2009, the Petitioner ought to have been allowed to adjust the 1/5th of the banked energy available as on 01.11.2009. However, this was not extended to the Petitioner. At the very least, the Petitioner should have been permitted to adjust its entire consumption from the banked energy but even this the Respondents did not permit/extend for the Petitioner

which is evident from the data submitted by the Respondents in their Counter Affidavit which clearly shows that the entire consumption of the Petitioner from November'2009 onwards was first adjusted against the current month generation and only the balance was adjusted against the banked energy. Therefore, seen from any perspective and particularly in the light of the categorical admission in the Counter Affidavit dated April 2014 filed by the Respondents, the Petitioner is clearly entitled to the extended period for adjustment of banked energy up to 31.05.2010. Hence, the contention of the Respondents that even though the quotawas communicated on 17.1.2009, the banked energy had been adjusted from November, 2009 onwards to the extent of consumption in excess of the current month generation and therefore the stand of the Petitioner that it could not consume 1/5thof the banked energy as per the Suo Moto Order No.1 is not acceptable, is legally and factually incorrect and unsustainable.

8.12. The Petitioner was not permitted to avail 1/5th of the banked energy available as on 01.11.2009 from November 2009 onwards and furthermore, even the total consumption for the month of November 2009 was not permitted to be adjusted in full against the banked energy and therefore no benefit as guaranteed under the Suo Moto Order No.1 and the Order dated 29.03.2010 was extended to the Petitioner. Therefore, the Petitioner is very much entitled to the extended period for adjustment of banked energy up to end of May 2010 which fact has also been admitted by the Respondents.

9. Written Submission filed by Petitioner:-

9.1. As per Suo Moto Order No.01 dated 28.10.2009 the "Un-utilized Banked Energy available as on 01.11.2009 may be utilized by the Wind Captive Users in

five equal monthly instalments from 01.11.2009 upto 31.03.2010 in addition to current generation of that month".

9.2. The Petitioner received quota intimation vide letter dated 17.12.2009. Thereafter, by Order in M.P.No.10, 11 and 12 of 2010 dated 29.03.2010, it was held

> *"Therefore it is fair to extend the utilization of the banked energy up to 30thApril, 2010 of 31st May, 2010 depending on whether the intimation was received by the consumer from the Tamil Nadu Electricity Board by one month later or two months later. However, the consumer who had availed of the 1/5thof banked energy due to the delay in intimation of quota, such penalty shall be reversed. The extension of banking period will apply to 1/5th of the banked energy as on 01.11.2009."*

9.3. The Petitioner having been intimated the quota vide letter dated 17.12.2010is entitled to the extended period up to end of May 2010 (31.05.2010) for adjusting banked energy as per the aforesaid Order dated 28.10.2009 and Order dated29.03.20210 of the TNERC.

9.4. The Respondents contend that the Petitioner is not entitled to the extendedperiod up to 31.05.2010 for adjustment of banked energy for certain reasons which are denied as erroneous and unsustainable as explained below.

(a) Wrongful Reliance on the Comprehensive Tariff Order of WindEnergy vide Order No.01 of 2009 dated 20.03.2009 by the Respondent - The contention of the Respondent that as per Order dated 20.03.2009, the current month generation will first be adjusted and if the consumption exceeds the current month generation only then the banked energy will be adjusted and therefore, the Petitioner is not eligible for the extended period up to 31.05.2010 is not legally or factually sustainable.

(b) If such an argument of the Respondent is to be accepted then it implies that the Commission was not aware of the Order dated 20.03.2009 while passing the subsequent orders (i.e) Order dated 28.10.2009 permitting consumers to utilize banked energy in five equal monthly instalments in addition to the current month generation; and Order dated 29.03.2010 extending the period upto 31.05.2010 for consumers who received quota intimation during December 2009.

(c) The Commission was well aware of the Order dated 20.03.2009 and appreciating the same has passed the Order dated 28.10.2009 and Order dated 29.03.2010 enabling the consumers such as the Petitioner to utilize the banked energy upto 31.05.2010.

d) Further, if such contention of the Respondent is accepted then the benefitof the Order dated 28.10.2009 and Order dated 29.03.2010 would not be available to consumers. In other words, if as per the Respondent, the current month generation is first adjusted and only thereafter the banked energy is adjusted towards the consumption then the consumers such as the Petitioner would be deprived of the benefit granted by the Commission vide Order dated 28.10.2009 and Order dated 29.03.2010.

e) In the case of the Petitioner, the consumption from November 2009 to March 2010 if first adjusted against current month generation as argued by the Respondents then there would be no chance for properly utilizing the banked energy. Therefore, the logical and correct interpretation of the order dated 28-10-2009 and order dated 29-03-2010 would mean that the banked energy is adjusted towards consumption before adjusting the current month generation. The contention of the respondent that current month generation

shall be first adjusted and only thereafter the banked energy shall be adjusted towards consumption is not correct in as much as the same would render ineffective and redundant, the Order dated 28.10.2009 and Order dated 29.03.2010 granting benefit of extended period for adjustment of banked energy for consumers such as the Petitioner.

f) Respondent wrongly contends that Banked Energy has been adjusted from November 2009 –

The Respondent wrongly contends that since banked energy has been adjusted from November 2009, the Petitioner is not entitled to the extended period of adjustment upto 31.05.2010. Such contention of the Respondent is wrong and contrary to the pleadings of the Respondent itself. The Respondent categorically admits in the counter that the Petitioner is eligible for the extended period upto May 2010 since the Petitioner was intimated of the quota vide letter 17.12.2009. Therefore, the Respondent cannot now contend that the Petitioner is not eligible for the extended period upto 31.05.2010. The Respondent is taking different positions at different points of time which itself substantiates that the contention of the Respondent is not sustainable.

g) The Respondent has been wrongly adjusting the consumption with the current month generation (i.e.) the Respondent has first adjusted the current month generation and only an insignificant and small portion of energy has been adjusted from the banked units. This is evident from the data provided by the Respondent in its Affidavit dated 07.12.2020, details provided below:

i. For November 2009 out of 15,44,895 consumed units, 10,36,717 units has been adjusted with current month generation and only 5,08,178 units has been adjusted from banked energy.

ii. For December 2009 out of 18,30,150 consumed units, 11,34,482 units has been adjusted with current month generation and only 6,95,668 units has been adjusted from banked energy.

iii For January 2010 out of 18,93,735 consumed units, 18,42,232 units has been adjusted with current month generation and only 51,503 units has been adjusted from banked energy.

iv. For February 2010 out of 19,26,810 consumed units, 17,27,958 units has been adjusted with current month generation and only 1,98,852 units has been adjusted from banked energy.

v. For March 2010 out of 18,72,135 consumed units, 7,73,194 units has been adjusted with current month generation and only 10,98,941 units has been adjusted from banked energy.

h) Thebenefit of the Order dated 28.10.2009 and Order dated29.03.2010 whereby the Petitioner was entitled to adjust the banked energy in addition to current month generation was not extended to the Petitioner. Hence, the contention of the Respondent that since the banked energy was adjusted from November 2009 for the Petitioner, the extended period is not available to the Petitioner is not correct. It is for this reason that the Respondent themselves in their Counter Affidavit dated April 2014 have categorically admitted that the Petitioner is eligible for the extended period upto 31.05.2010, as mentioned above.

i) The Petitioner had 2,20,24,615 units as banked energy on 01.11.2009. The Petitioner should have been allowed to adjust 1/5thof the banked energy every month (five equal monthly instalments) as per the Order dated 28.10.2009. Unless and until the Petitioner was permitted to adjust 1/5thof the banked energy from November 2009, the Respondent cannot claim that the benefit of the Order dated 28.10.2009 (i.e) adjustment of banked energy was already provided from November 2009 onwards. Admittedly from the data provided by the Respondent, the Petitioner was not allowed to adjust the banked energy in five equal monthly instalments (i.e) 1/5thbanked energy every month from November 2009 onwards. Therefore, adjustment of banked energy as per the Order dated 28.10.2009 has not been provided to the Petitioner and in such circumstances, the Petitioner is entitled to the extended period until 31-05-2010 more so since the quoted intimation was sent only on 17-12-2009.

j) Further, not even the total consumption of the petitioner was permitted to be adjusted against the banked energy from November 2009. Therefore, by any stretch of imagination it cannot be said that the Petitioner was allowed to adjust the banked energy from November 2009 as wrongly stated by the Respondent.

k) Wrongly Interpretation of II Annual Basis" by the Respondents –

The contention of the Respondent is that as per the explanation for the term of "Annual Basis" contained in the Electricity Rules, 2005, it means "financial year" and therefore, the Petitioner is not entitled to the extended period until 31.05.2010 as the same would result in the relaxation of the said Rules, is illogical and unsustainable.

l) Such a contention appears to imply that the TNERC is not aware of the provisions of the Electricity Act, 2003 and the Electricity Rules, 2005 while passing the Order dated 28.10.2009 and Order dated 29.03:2010 granting consumers the extended period for adjustment of banked energy upto 31.05.2010. The Commission is well aware of the relevant explanations and definitions contained in the Act and Rules and on that basis the Order dated 28.10.2009 and Order dated 29.03.2010granting consumers the benefit of adjustment of banked energy for the extended period until 31.05.2010 was granted by the Commission. Therefore, such benefit granted by the Commission cannot be considered as relaxation of the Rules as wrongly contended by the Respondent.

m) As per Rule 3, a captive generating plant is required to have not less than 26% ownership held by captive users and not less than 51% of theaggregated electricity generated determined on an annual basis is to be consumed for the captive use. With regard to the second condition of 51%captive consumption, the Order dated 28.10.2009 andOrder dated 29.03.2010 has not violated the Rules or relaxed the Rules in any manner whatsoever. The said Rule does not in any manner restrict the extension of the consumption period as has been done by order dated 28-01-2009 and order dated 29-03-2010 of the Commission. In other words, the consumption can be for any period of time. It is only the generation that is to be determined on an Annual Basis (Financial Year).

n) Therefore, a proper interpretation of the said Rule would mean thatthe aggregated electricity generated is to be determined on an Annual Basis

and the energy consumed is not required to be determined on an annual basis. The determination of aggregate energy generated(not captively consumed) is to be done an annual basis (financial year). Therefore, the said Rule does not restrict in any manner, the extension of the period of consumption and it is exactly this that has been granted under the Order dated 28.10.2009 and Order dated 28.03.2010 of the Commission.

o) In other words, appreciating that the period of consumption is not restricted by the said Rule but it is only the period of generation that is to be determined on an annual basis, the Commission has granted the benefit of the extended period in adjustment of banked energy under the Order dated 28.10.2009 and Order dated 28.03.2010. Therefore, the extended period for adjustment of banked energy is legally sustainable and is not contrary or in relaxation of the Rules.

p) The Respondents have accepted the Order dated 28.10.2009 andorder dated 28.03.2010 which has become final and binding of the parties.Therefore, it not open to the Respondent to raise arguments that the Orderdated 28.10.2009 and Order dated 29.03.2010 is contrary to the relevant Rules and such arguments of the Respondent only deserves to be dismissed.

q) Wrongly determination of "Aggregated Generation" by the Respondents -

The Respondent's contend that the aggregate generation will be less import and wheeling units. This is not correct which is evident from theRespondent's own letters.

r) Year after year calculation of 51% captive consumption by the Petitioner has been done by the Respondent taking aggregate generation as total generation less imported units and wheeling charges. Therefore, the contention now raised by the Respondent that imported units and wheeling units are not to be reduced is contrary to their own letters and correspondences.

s) Draft Amendments to the Electricity Rules, 2005 –

The reference to the Drafts Amendment to the Electricity Rules, 2005 is not relevant as they are merely drafts amendments which are yet to come into force arid in any event it does not have retrospective effect. The draft amendments are dated 22.05.2018 whereas the disputed period is 2009-2010. Therefore, the drafts amendments would have no relevance.

9.5 The Petitioner is entitled to the extended period of adjustment of banked energy upto 31.05.2010 and the arguments of the Respondents deserve to be dismissed for the following reasons:-

a) The Petitioner was not allowed to utilise the banked energy due to restriction and control measures. -

b) ThePetitioner is entitled to the adjustment of the banked energy in five equal monthly instalments from November 2009 in addition to current monthgeneration as per the Order dated 28.10.2009 of the Commission.

c) The quota intimation letter was issued only on 17.12.2009.

d) ThePetitioner is entitled to extend the period for adjustment of banked energy upto 31.05.2010 as per the Order dated 29.03.2010 of the Commission.

e) The Petitioner is entitled to adjust the banked energy upto 31.05.2010 as per the Order dated 28.10.2009 and Order dated 29.03.2010 since:

i. Admittedly the quota intimation letter was issued only on l7.12.2009.

ii. The Respondents admitted in Page 7 of their Counter Affidavit dated April 2014 that the Petitioner is entitled to the extended period until 31.05.2010.

f) The adjustment of banked energy was not extended/granted to the Petitioner from November 2009 onwards as wrongly contended by the Respondent since:

i. The Respondents did not allow the Petitioner to adjust 1/5th(five equal monthly instalments) of the banked energy from November 2009. The petitioner had 2,20,24,615 units as banked energy on 01.11.2009.

ii. The Respondents had wrongly adjusted the current month generation first and then only a small portion was adjusted from banked energy. This is evident from the data provided by the Respondents in thisAffidavit dated 07.12.2020.

iii. Even the total consumption of the Petitioner from November 2009 was not fully adjusted against banked energy.

iv. The contention of the Respondent on the basis of the Tariff Order No. 01 of 2009 dated 20.03.2009 is irrelevant and inapplicable and in any event the said Order dated 20.03.2009 was prior to the Order dated 28.10.2009 and Order dated 29.03.2010 of the Commission and was well aware of the said Tariff Order while passing the Order dated 28.10.2009 and Order dated 29.03.2010 extending the banking adjustment period.

g) For the purpose of determining the 51% captive consumption requirement, the total consumption of the Petitioner upto 31.05.2010 is to be taken into consideration since:

i. The Rule 3 of the Electricity Rules, 2005 only states that the determination of aggregate generation of electricity is to be done on an annual basis (financial year). There is no restriction for extending the consumption period in the Rules.

ii. Therefore, the Order dated 28.10.2009 and Order dated 29.03.2010 of the Commission extending the period until 31.05.2010 is in accordance with law.

iii. The Respondents have not challenged the Order dated 28.10.2009 and Order dated 29.03.2010 and the same have become final and binding on the parties.

h) The aggregate generation has always been total generation less imported and wheeling units. This was the methodology adopted by the Respondent year after year which is evident from the Respondents own letters.

i) The reference to the draft amendments to the rules is irrelevant as it has not come into force and in any event it will not have retrospective effect.

10. Written Submission filed by Respondent:-

10.1. The Commission issued Comprehensive Tariff Order on Wind Energy vide Order No.1 of 2009 dated 20-03-2009. The clause relating to banking is extracted below:-

"8.2 Banking

8.2.1. Banking as a concept was introduced by the Tamil Nadu Electricity Board in 1986 to encourage generation of wind energy. The banking charge was fixed at 2% in 1986 and raised to 5% in 2001. The figure remained at 5% when the Commission issued order No.3 dated 15-5-2006. The banking period was fixed at one month in March 200] by the TNEB and doubled in September 2001. It \Vas further raised by TNEB to one year in March 2002 commencing from 1st April and ending on 31st March of the following year.

8.2.2. The banking charges shall be realized every month for the quantum ofunits generated during the billing month less the consumption of the captive users / third party sale. Slot-wise banking is permitted to enable unit to unit adjustment for the respective slots towards rebate / extra charges. No carry over is allowed beyond the banking period. Unutilised energy at the end of the financial year may be encashed at the rate of 75% of the relevant purchase tariff. The Commission proposes to retain the same features with some modifications based on the suggestions made by the stakeholders. As and when the distribution licensee enforces restriction control measures for restricting the consumption of wind energy generators, the Commission finds justification in the plea that the unutilized energy at end of the financial year may be encahsed at full value of the relevant tarifffor ale to the licensee. The plea of the TNEB to raise the banking charge from 5% to 15% and curtail the banking period from one year to one month are too radical to be accepted by the Commission.

8.2.3. Therefore, the Commission decides to retain banking charges at 5%.Banking charges will be levied on the net energy saved by the generator in a month after adjustment of the consumption during that month. The banking period commences on1st April and ends on 31st March of the following year. The energy generated during April shall be adjusted against consumption in April and the balance if any shall be reckoned as the banked energy for April. The generation in May shall be first adjusted against the consumption in May. If the consumption exceeds the generation during May, the energy banked in April shall be drawn to the required extent. If the consumption during May is less than the generation during May, the balance shall be reckoned as the banked energy for May and banking charges for May will be leviable onlyfor this component.This procedure shall be repeated every month.xxxx"

10.2. From the above, it could be clearly seen that the energy generated during April shall be adjusted against consumption in April and the balance energy if any remaining after such adjustment shall be reckoned as the energy banked for April. In the subsequent month i.e. May, the current month generation i.e. in May month shall be first adjusted against the consumption during May month. Only if theconsumption exceeds the current month generation during May month, the energy

already banked in April shall be drawn to meet the remaining unadjustedconsumption to the extent required. If the consumption during May month is less than the current month generation during May month, the energy remaining after adjustment of consumption against current month generation during May month, shall be reckoned as the banked energy for May and banking charges for May will

beleviable only for this component.

10.3. In the case of the petitioner, the banked energy had been adjusted from the month of November,2009 onwards after adjustment of energy generated in thatcurrent month as per the above procedure prescribed by the Commission in the aforesaid Comprehensive Tariff order on Wind Energy vide OrderNo.1 of 2009 dated20.03.2009 as detailed below:-

Month 11/2009

Descriptions	Peak	Night	Normal	Total
Consumption	2,51,910	5,29,695	7,63,290	15,44,895
Wind energy adjusted from current month generation	2,04,562	2,24,945	6,07,210	10,36,717
Wind energy adjusted	47,348	3,04,750	1,56,080	5,08,178

frombanked energy				
Net Billed Units	0	0	0	0

Month 12/2009

Descriptions	Peak	Night	Normal	Total
Consumption	4,27,185	5,41,215	8,61,750	18,30,150
Wind energy adjusted from current month generation	2,39,468	2,91,794	6,03,220	11,34,482
Wind energy adjusted from banked energy	1,87,717	2,49,421	2,58,530	6,95,668
Net Billed Units	0	0	0	0

Month 01/2010

Descriptions	Peak	Night	Normal	Total
Consumption	3,25,530	5,40,990	10,27,215	18,93,735
Wind energy adjusted from current month generation	3,25,530	5,01,372	10,15,330	18,42,232
Wind energy adjusted from banked energy	0	39,618	11,885	51,503
Net Billed Units	0	0	0	0

Month 02/2010

Descriptions	Peak	Night	Normal	Total
Consumption	5,80,950	5,62,005	7,83,855	19,26,810
Wind energy adjusted from current month generation	4,71,641	4,72,462	7,83,855	17,27,958
Wind energy adjusted from banked energy	1,09,309	89,543	0	1,98,852
Net Billed Units	0	0	0	0

Month 03/2010

Descriptions	Peak	Night	Normal	Total
Consumption	4,50,585	5,68,845	8,52,705	18,72,135
Wind energy adjusted from current month generation	1,71,274	1,54,128	4,47,792	7,73,194
Wind energy adjusted from banked energy	2,79,311	4,14,717	4,04,913	10,98,941
Net Billed Units	0	0	0	0

10.4. From the above, it is revealed that after adjustment from current month generation, banked energy had been adjusted to the requirement of the petitioner. Therefore, it is stated that even though, the demand and energy quota based on the S.M.P.No.1 2009 had been communicated to the petitioner on 17.12.2009, the banked energy had been adjusted from the month of 11/2009 onwards to therequirement of the petitioner. Hence, the contention of the petitioner that the demand and energy quota based on S.M.P.No. 1 of 2009 had been communicated only 07.12.2009, therefore, it could not be consumed 1/5thbanked energy as ordered in the S.M.P.No.1 of 2009 is not acceptable one. Further, the percentage of aggregate electricity generated in such plant, determined on an annual basis shall be in accordance with the Rule-3, Electricity Rules, 2005 which states as follows:-

10.5. For the purpose of this rule.- a. "Annual Basis" shall be determined based on a financial year. Therefore energy adjusted during the month of April-2010 and May-2010 could not be considered for they FY 2009-10 for arriving at the percentage of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use. Without prejudice to the above, in doing so, it will result in relaxation of the Electricity Rules, 2005 which is

impermissible in law. In this regard, the Hon'ble Appellate Tribunal for Electricity Ordered in A.No.33 of 2012, ordered as follows: -

> *“30. To Sum Up:*
>
> *(a). Rule 3 of Electricity Rules-2005 specifically prescribes that twoconditions are to be satisfied by the power plant to be qualified as a captive power plant. If anyone of those conditions is not fulfilled, the captive power plant will lose its status and become a generating plant. Hence, the State Commission does not have any powers to relax the provisions of the Electricity Rules-2005.*
>
> *(b). In the present case, the Appellant could not satisfy one of the conditions of Rule-3 viz consumption of 51 % of the annual aggregate electricity generated by its power plant for captive use during the year 2009-10 due to breakdown in its Steel Plant. Therefore, the power generation from its power plant shall be treated as if it is a supply of electricity by a generating company as per Rule 3(2) of the Electricity Rules, 2005. The State Commission does not have any power to relax the requirement of consumption of not less than 51 % of the electricity generated from the Appellant's power plant for captive use."*

10.6. From the above, it could be seen that at the end of the financial year, if the twelve months aggregate generation had been taken for arriving at the percentage of the captive consumption in the financial year 2009-10 (April 2009 to March 2010), twelve months adjusted energy can only be taken. If the request of the petitioner is considered then, the aggregate generation and energy adjusted from captive would become un-uniform i.e., the aggregate generation will be twelve months and thecaptive consumption will be fourteen months. This will result in relaxation of Rule-3, Electricity Rules, 2005, which is not permissible under the law.

10.7. 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:

xxxxx"

10.8. From the above, it can be understood that the twin rules of Ownership and Consumption have to be satisfied as per the Electricity Rules-2005 in order to qualify as a Captive Generating Plant. The Petitioner fulfilled the "Ownership" criteria as the captive user and owner of the Captive Generating Plant are one and the same. With regard to "Consumption" criteria, the petitioner has not fulfilled it. The Respondent issued circular in connection with calculation of Aggregate electricity generated vide circular datcd.15.03.2017, wherein the relevant portion which held as follows:

"xxx
2.1. The general formula for calculating percentage of the captive consumption:

Total generation of the financial year –Auxiliary Consumption (if any)
= Aggregate generation(Available for captive use)

The determination of percentage of energy consumed captively.

Total Consumption for the financial year

= ---------- = ------ %

Aggregate Generation

2.2. Auxiliary Consumption means, the quantum of the energy consumed by auxiliary equipment of generating station and transformer losses within generating station. The maximum percentage of auxiliary consumption is 10% of the Highest capacity of the generating unit of the generating station or as per the percentage of auxiliary consumption as specified in the Commission's Tariff regulations or the actual auxiliary consumption whichever is less."

10.9. The above method to determine of percentage of energy consumed captively by the captive user in accordance with the Electricity Rules-2005 and has been consistently adopted by TANGEDCO from time to time. In this regard, it is most relevant to mention that Government of India, Ministry of Power issued Draft amendments in the provisions relating to Captive Generating Plant in Electricity Rules, 2005 on 22.05.2018, wherein it has been stated that the method of the aggregate electricity generated shall be computed: -

"xxx

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 "aggregate electricity generated" shall he computed:

a) as the total electricity generated in the power plant minus the auxiliary consumption where in the auxiliary consumption for this purpose shall be the actual auxiliary consumption or normative Auxiliary consumption, whichever is higher, for similar kind of units as per the regulations of Appropriate Commission.

b) Where any free power supplied by the Hydro Generating Station to the State Government, same shall be excluded from calculating the aggregate electricity generated in such plants.

c)in case of Renewable generators, banking of power which is redeemed for consumption for own use by the captive users shall he included for the purpose of determination on an annual basis. The redemption of banked energy will be permitted within the same financial year.

xxxx"

10.10. The Commission issued Terms and Conditions for Determination of Tariff Regulation, 2005, wherein it specified the definition of the Auxiliary Energy Consumption or AUX as follows:

> *"xxx*
> *(e). Auxiliary Energy Consumption or AUX in relation to a period means the quantum of energy consumed by auxiliary equipment of the Generating Station and transformer losses within the Generating Station, and shall be expressed as a percentage of the sum of gross energy generated at the generator terminals of all the units of the Generating Station.*
> *xxxx"*

10.11. Though the computation of "Aggregate Electricity Generated" is available in the draft amendment to Electricity Rules, 2005, it conveys the general meaning of "Aggregate Generation" during any time period. From the above it could be clearly observed that the import units of the generating unit, wheeling charges including line loss and Transmission charges which are in kind do not come under the ambit of the Auxiliary Consumption. Therefore, import units of the generating unit, wheeling charges -including line loss and Transmission charges which are in kind could not be deducted from the total energy generated for computing thedetermination of percentage of energy consumed captively. Hence, the claim of the

petitioner for deduction of imported units and wheeling charges ought not to be allowed and the petitioner has no legal basis for the same and their contention is a misleading one.

11. Findings of the Commission:-

11.1. The prayer of the petitioner is to direct the Respondents to make payment of an amount of Rs.91,16,143/- (Rupees Ninety One Lakhs Sixteen Thousand and One Hundred and Forty Three Only) together with further interest at the rate of 12% p.a from the date of filing of thePetition till the date of payment. The said amount which has been paid by the petitioner for the electricity charges paid by him under protest. The said charges had been levied by the respondent without adjusting the banked energy available at his credit.

11.2. The petitioner havetheir HT service connection 1028 (M/s. ITC Limited, Chennai) in Chennai EDC/North of Tamil Nadu Generation Distribution Corporation Limited (Respondent no.1) and also installed 9 numbers of WEGs of total 14.1 MW capacity in Tirunelveli and Theni.The main objective of setting up this Wind project is to meet the electricity requirements of the Packaging and printing facility unit located atChennai EDC/North.

11.3. Whileso, the petitioner was informed by the TANGEDCO, vide Lr.no.SE/TEDC/ Tin/AO/Rev/HTS/AS/F.WEG HT.SCno.2665/D.2226/10 Dt.15-11-2010 that it has not fulfilled one of the conditions stipulated under the Rule 3(1) of the Electricity Rules 2005 i.e., 3(1)(a)(ii), in respect of the financial year 2009-2010.In result of this, entire power generated during 2009-10 was considered as sale to TANGEDCO and wheeled power so adjusted in HT.SC.1028 was reversed for demand of payment at the HT Tariff rate.

11.4. It is the argument of the petitioner that as per theSuo Moto Proceedings No.1 of 2009 dated 28-10-2009 of the Commission, unutilised banked energy

available as on 01-11-2009 was permitted to be utilised by the wind captive users in five equal monthly instalments from 01-11-2009 upto 31-3-2010.In compliance with the above directions of the Commission,very first quota intimation was issued to the petitioner belatedly on 17-12-2009. Due to this delay, the petitioner was not able to utilise such 1/5th of banked energy during November and December 2009 and hence the petitioner has sought adjustment of the banked energy during the period from January 2010 to May 2010 as permitted by the Commission forthe extended banking period in the Order dated 29-03-2010 in M.P.Nos.10, 11 & 12 of 2010. It issubmitted by the petitioner thattaking into consideration of the above, the petitioner has satisfied the CGP norms and in result of this the petitioner is eligible for refund of Rs.91,16,143 together with interest (i.e., 74,29,619 plus interest of Rs.16,86,524) for subsequent period.

11.5. It is amatter of fact that in the Suo Moto Proceedings No.1 of 2009 dated 28-10-2009, the Commission has permitted all the captive users to avail banked energy available as on 01-11-2009 in five monthly instalment as stated in Para 16(11) of the said order which read as below –

> *"(11) Unutilised banked energy available as on 01-11-2009 may be utilised by the wind captive users in five equal monthly instalments from 01-11-2009 upto 31-03-2010 in addition to current generation of that month;*
>
> *(12) The energy which remains in the bank of wind energy generators as on 1-11-2009 after adjustment in accordance with para (8) above, shall be available for consumption of the wind energy captive user between 01-11-2009 and 31-3-2010 in five equal monthly instalments. In addition, current generation would also be eligible for additional energy and additional demand quota; both current generation as well as the energy drawn from the bank would count for computation of equivalent demand;*

(13) From 1-11-2009, all captive users, whether thermal or wind, shall declare on the first day of every month, the energy proposed for captive use for the following month, which shall be considered as B and F for the purpose of energy quota and demand quota respectively in terms of the memo of TNEB dated 17-11-2008; the energy so declared shall roughly be the monthly average generation;"

11.6. It is evident from the submissions of both the parties that as per the directions of S.M.P. 1 of 2009 the quota intimation was given to the petitioner only on 17.12.2009 only and the said fact is agreed by both the parties. Therefore, the petitioner is eligible to claim the benefits arising out of extended banking period relying on the Order of the Commission in M.P.Nos.10,11 & 12 which reads as below:-

Common Order

"It transpires from the correspondence produced by the learned counsel for the Tamil Nadu Electricity Board that the earliest intimation of quota to the consumers took place in the end of November 2009 and in some cases the intimation was given as late as end of December 2009. Thus, the Commission's Order was implemented by Tamil Nadu Electricity Board in a time frame of not less than one month and in some cases as late as 2 months. Wherever the communication of quota allocation was received by the consumers in the end of November 2009 the delay was one month and wherever the intimation was received in the end of December 2009 the delay was two months. Therefore it is fair to extend the utilization of the banked energy up to 30th April, 2010 or 31st May, 2010 depending on whether the intimation was received by the consumer from the Tamil Nadu Electricity Board by one month later or two months later. However, the consumers who had availed of the 1/5th of the banked energy from November onwards will not be eligible for the extension of banking period. Conversely, if any consumer has been penalized from November onwards for not being able to utilize the 1/5th of banked energy due to the delay in intimation of quota, such penalty shall be reversed. The extension of banking period will apply to 1/5th of the banked energy as on 1-11-2009."

11.7. The intention of the above order was to allow every captive user to avail the benefit of 1/5th banked energy so as to avoid the levy of Excess demand and Excess energy charges for exceeding the Demand and Energy quota and in case any consumer is so penalised due to delay in intimation of quota it is also to be reversed.

11.8. The Respondent has stated that the banked energy had been adjusted in respect of the petitioner's service connection HTSC No. 1028 from the month of November 2009 onwards after adjustment of energy generated in current month as per the procedure prescribed by the Commission in the Comprehensive Tariff order on Wind Energy Order no.1 of 2009 dated 20-03-2009 as below:

"8.2 Banking

8.2.1. Banking as a concept was introduced by the Tamil Nadu Electricity Board in 1986 to encourage generation of wind energy. The banking charge was fixed at 2% in 1986 and raised to 5% in 2001. Thefigure remained at 5% when the Commission issued order No.3 dated 15-5-2006. The banking period was fixed at one month in March 2001 by the TNEB and doubled in September 2001. It was further raised by TNEB to one year in March 2002 commencing from 1st April and ending on 31st March of the following year.

8.2.2. The banking charges shall be realized every month for the quantum of units generated during the billing month less theconsumption of the captive users / third party sale. Slot-wise bankingispermitted to enable unit to unit adjustment for the respective slots towards rebate / extra charges. No carry over is allowed beyond the banking period. Unutilised energy at the end of the financial year may be encashed at the rate of 75% of the relevant purchase tariff. The Commission proposes to retain the same featureswith some modifications based on the suggestions made by the stakeholders. As and when the distribution licensee enforces restriction control measures for restricting the consumption of wind energy generators, the Commission finds justification in the plea that the unutilized energy at end of the financial year may be encashed at full value of

the relevant tariff for sale to the licensee. The plea of the TNEB to raise the banking charge from 5% to 15% and curtail the banking period from one year to one month are too radical to be accepted by the Commission.

8.2.3. Therefore, the Commission decides to retain banking charges at 5%. Banking charges will be levied on the net energy saved by the generator in a month after adjustment of the consumption during that month. The banking period commences on 1st April and ends on 31st March of the following year. The energy generated during April shall be adjusted against consumption in April and the balance if any shall be reckoned as the banked energy for April. The generation in May shall be first adjusted against the consumption in May. If the consumption exceeds the generation during May, the energy banked in April shall be drawn to the required extent. If the consumption during May is less than the generation during May, the balance shall be reckoned as the banked energy for May and banking charges for May will be leviable only for this component. This procedure shall be repeated every month. The following illustration would clarify the above formula."

Thus, the power generated by the Captive user had been adjusted against the HT.SC. No.1028 as below:

Consumption and adjustment of wheeled / banked energy during the month from 11/2009 to 3/2010

Details	**Consumption / Adjusted Units**				
Month	11/2009	12/2009	1/2010	2/2010	3/2010
Consumption (HT.1028)	15,44,895	18,30,150	18,93,735	19,26,810	18,72,135
Wind energy adjusted from current month generation	10,36,717	11,34,482	18,42,232	17,27,958	7,73,194
Wind energy adjusted from banked energy	5,08,178	6,95,668	51,503	1,98,852	10,98,941
Nett Billed Units	0	0	0	0	0
Energy Quota	14,68,168	0	0	0	0

And it is the contention of the Respondent that eventhough the demand and energy quota based on the S.M.P.No.1 of 2009 had been communicated to the petitioner

on 17-12-2009, the withdrawal of energy from the banked energy was permitted only from the month of 11/2009 onwards to the requirement of the petitioner and therefore it is to be construed that 1/5th of banked energy permitted under SMP.1 of 2009 has been complied with.

11.9. The Commission, however, does not agree with the above contention of the Respondent that the withdrawal of banked energy had already been permitted from November 2009 and that the adjustment of 1/5th of the banked energy was also considered. The Order in SMP.1 of 2009 was to permit a consumer to withdraw the 1/5th banked energy in accordance with the formula of 17-11-2008 as stated in Para 16(13) of the Order from 01-11-2009 onwards based on the energy proposed/declared by the captive users; when the quota was not fixed according to revised method, banking withdrawal permitted under the normal course of quota method during November 2009 and December 2009 cannot be interlinked up here.

S.M.P.1 of 2009, Dt.28-10-2009 reads as below -

"Para 16 :

(8) For the period from 1-5-2009 to 31-10-2009, the formula for computation of energy quota and demand quota contained in the circular of TNEB dated 17-11-2008 shall apply, that is,. with effect from 1-5-2009 the petitioners are entitled to demand quota for current generation in accordance with the formula of 17-11-2008; if the energy quota and demand quota during this period has been exceeded by the captive user, he will be entitled to draw from the energy banked during this period to the extent of adjusting the excess demand and excess energy consumption;

(9) The excess demand charges and excess energy charges for the period from 1-5-2009 to 31-10-2009 shall be determined with reference to the demand and energy quota calculated in accordance with para (8) above;

XXXX XXXX XXXX

(11) Unutilised banked energy available as on 1-11-2009 may be utilized by the wind captive users in five equal monthly instalments from 1-11-2009 upto 31-3-2010 in addition to current generation of that month;

XXXX XXXX XXXX

(13) From 1-11-2009, all captive users, whether thermal or wind, shall declare on the first day of every month, the energy proposed for captive use for the following month, which shall be considered as B and F for the purpose of energy quota and demand quotarespectively in terms of the memo of TNEB dated 17-11-2008; the energy so declared shall roughly be the monthly average generation;

11.10. The petitioner has stated that quota intimation was given only on 17-12-2009 and hence the petitioner was eligible for the adjustment of 1/5th of banked energy, available as on 01-11-2009, from 01/2010 to 05/2010; and further sought to adjust such 1/5th banked energy first against the total consumption i.e., before the current month generation.

11.11. In this connection, we would like to refer (i) the para 8.2.3 of the Comprehensive Wind Tariff order dated 20-03-2009 and (ii) para 16(8) and 16(11) of the S.M.P.no.1 of 2009 dated 28-10-2009, wherein the Commission has clearly laid down the procedure of adjustment, and as per which the generation in current month shall be first adjusted against the consumption during current month and if current month consumption exceeds current month generation, the banked energy shall be drawn. **This procedure is applicable to all wind generators**. Similar procedure has been reiterated in para 16(8) of SMP.1 of 2009.The 1/5th banked energy permitted for adjustment in addition to current month generation, is not a privilege to claim that the banked energy is to be adjusted first instead of current month generation.The common order passed by the Commission in M.P.10,11,12

of 2010 is only an extended concession allowed with reference 16(11) of the S.M.P.no.1 of 2009.

11.12. The Respondent has stated that the petitioner has an 'Aggregate generation' of 4,04,18,712 units from its windmills situated in Tirunelveli Circle and Theni Circle of TANGEDCO. Actual energy adjusted in captive user's HT service connection is 1,77,82,020, which amounts to 43.99% of 'Aggregate generation'; and hence the petitioner has not fulfilled one of the twin Rule of Rule 3 of the Electricity Rules 2005.

Month	Industrial Consumption	Adjusted units from Wind	Billed units
Apr-09	1109340	503280	606060
May-09	983295	983295	0
Jun-09	1439370	1439370	0
Jul-09	1497645	1497645	0
Aug-09	1434555	1434555	0
Sep-09	1466955	1466955	0
Oct-09	1389195	1389195	0
Nov-09	1544895	1544895	0
Dec-09	1830150	1830150	0
Jan-10	1893735	1893735	0
Feb-10	1926810	1926810	0
Mar-10	1872135	1872135	0
Total	**18388080**	**17782020**	

Import Units - 2,24,088 units
Wheeling charges - 13,58,095 units

11.13. The respondent further stated that, even if the request of the petitioner is considered for extending the 1/5th banking adjustment period upto 5/2010 as permitted by the Commission under M.P.Nos.10,11& 12 of 2010, the petitioner's captive consumption has not fulfilled the required 51% of Aggregate generation and it amounts to only 47.57% (i.e., percentage of 192,27,671 (17782020+1445651) units divided by 4,04,18,712 units)

	4/2010	**5/2010**	**Total**
Consumption	16,98,795	14,58,225	31,57,020
Wind energy adjusted from current month generation	9,29,078	7,82,291	17,11,369
Wind energy adjusted from banked energy	7,69,717	6,75,934	14,45,651
Nett Billed Units	0	0	0

11.14. On the other hand, the petitioner's contention is that during the year 2009-10, TANGEDCO imposed restrictions and control on the use of energy by way of scheduled and unscheduled power cuts. Due to implementation of R&C measures of the TANGEDCO, the petitioner, alongwith other consumers, were unable to consume their banked energy. In such circumstances only, the consumers including the petitioner had failed to satisfy the requirement of a captive generating plant as provided under Rule 3 of the Electricity Rules 2005 i.e., captive consumption of atleast 51% of the energy generated by the CGP.

11.15. However, the petitioner submits that Rule 3(1)(a)(ii) i.e., requirement of minimum 51% is fulfilled, if (i) 1/5th of the banked energy to be counted from 1/2010 to 5/2010 since the quota intimation was issued to the petitioner only on 17-12-2009 based on the S.M.P.1 of 2009 and (ii) during the months of 04, 05/2010 entire

consumption shall have to be adjusted first from their banked energy instead of current month generation, since it is the intention of the Commission in Common order passed in M.P.10, 11, 12 of 2010 dated 29-03-2010.Hence the consumption shall be calculated as 2,09,39,040 units (1,77,82,020 + 31,57,020) divided by 3,88,36,529 units (4,04,18,712-2,24,088-13,58,095) its percentile is 53.92% and thus Rule 3 is fulfilled by the petitioner.

11.15.1 .As the said contention of the petitioner has already been discussed in paras 8.6 and 8.7, therein nothing more to discuss on the same. Be that as it may, we have to decide whether the petitioner (captive user) has fulfilled the "Requirement of Captive generating plant" during the Financial year 2009-2010 as stipulated under Rule 3 of the Electricity Rules 2005 read as below -

"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:"***

Pursuant to the above, a power plant shall have to fulfil both the conditions stipulated in clause (i) and (ii) of Rule 3(1)(a) to qualify as a Captive generating plant. Section 2(8) of the Electricity Act 2003 has defined the "Captive generating plant" as below -

"(8) "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating

electricity primarily for use of members of such co-operative society or association;"

11.15.2.From the submissions of both the parties, it is observed that the petitioner (captive user) generates the power in two places viz., Tirunelveli and Theni and it is adjusted in its user HT service connection available in Chennai/North circle. The power is transmitted from the generating station to user end in another place which is not connected through a dedicated transmission lines from its generating plant.When the petitioner is connected through Distribution feeders, it is subjected to normal load shedding also like all other LT/LTCT consumers.

11.15.3. The Government of Tamil Nadu vide Letter No. (Ms) No.121, Energy dated 22-10-2008, announced the Restriction & control measures in the State and 40% power cut on Base demand and Base energy was imposed on HT consumers with effect from 01-11-2008. The HT consumers were allowed to consume the power @ 60% quota on Base demand/energy and 5% of such quota was allowed for essential lighting and security purposes during Evening peak hours (i.e., 18.00 to 22.00 hours). And subsequently, TANGEDCO (erstwhile TNEB) revised the % of power cut according to the availability of power on their side in between the financial year.Exact availability of power to the consumer against the Base demand / Base energy is calculated below:

Hours in a day	When 60% of Quota is permitted	When 70% of Quota is permitted
20	50.0% (60% x 20/24 hrs)	58.3%

4 (Evening Peak hours)	0.5% ((60% x 5%) x (4/24))	0.6%
Total % of quota on Base demand/ energy eligible to a consumer	**50.5%**	**58.9%**

11.15.4. Also, the Government of Tamil Nadu vide G.O.Ms.No.10 Energy (C3), 27th February 2009, issued the following directions in public interest–

"In exercise of the powers conferred by sub-section (1) of Section 11 of the Electricity Act, 2003 (Central Act 36 of 2003), the Governor of Tamil Nadu hereby issues the following directions in the circumstances arising in the public interest namely:-

(i) All power generation units operating Tamil Nadu shall operate and maintain generating stations to maximum capacity and Plant Load Factor (PLF); and

(ii) *All generating stations shall supply all exportable electricity generated to the State grid for supply to either Tamil Nadu Electricity Board, or to any other HT consumers within the State*

as per the regulations notified in this regard by the Tamil Nadu Electricity Regulatory Commission."

As a result of the above Government order, all the generators were directed to generate the power to their maximum extent of capacity and there was no restriction on the generation side of the generator including captive users.

11.15.5. Also it is an admitted fact that there were many scheduled and unscheduled load shedding throughout the State as stated by the petitioner.The Government of Tamil Nadu directed the load shedding at the range of 2/4/10 hours

in various feeders and unscheduled load shedding due to Demand-supply issue. HT services are available in the same feeder which feed supply other LT/LTCT category consumers and hence, the HT services were also affected due to this load shedding in addition to their power cut imposed to HT services.

11.15.6. In the instant case on hand, it is seen that the consumer has adjusted almost their entire industrial consumption against its wheeled power at 96.7% i.e., in 11 months out of 12 months and balance of current month's generationwas taken to banking. The petitioner had no other arrangement for sale of power from such source. It could be inferred that if the petitioner had been permitted either by way of higher quota or more hours of power supply at its user end, the captive consumption would have been definitely more, in which case the petitioner could have satisfied the conditions of rule 3.

11.15.7. It may be pertinent to mention here that the Distribution Licensee is not expected to receive revenue from the consumers when there is no adequate supply of power. Resultantly, no compensation in the form of cross subsidy surcharge is leviable. It has been affirmed by the Hon'ble APTEL in M/s.Steel Furnace Association of India Vs PSERC and Anr. In Appeal no.38 of 2013 in its Order dated 01-08-2014 at para 31, 32 as below –

> *31. … when the power cut is imposed on a subsidising consumer, the Distribution Licensee is not expected to receive revenue for electricity from such consumers as during that period, there is no supply of power.*
>
> *32. If the consumers do not procure power from the market through open access under such conditions of power cuts imposed on them by*

the Distribution Licensee and shut down their plant, no energy will be consumed by them and no charges will be collected by the Distribution Licensee for the period of power cut and hence no cross subsidy would be available from the charges of such subsidizing consumers to the subsidized consumers. Similarly if the power restriction is improved on the industrial consumer by the Distribution Licensee and the consumer shuts down its production accordingly, the power drawal of the consumer will reduce to that extent and on such reduction no charges and consequently no cross subsidy will be collected by the Distribution Licensee for subsidizing the subsidized consumer categories. Therefore, if during the period of power restriction/power cuts, the consumer procures power from the market to continue its production instead of closing it down, no financial loss will be caused to the Distribution Licensee. Hence no compensation in the form of cross subsidy surcharge is leviable.

Though the was a case of Cross subsidy surcharge levied on the power procured from third party sources, Hon'ble APTEL clearly expounded the extent and scope of of the Electricity Rulesto hold that the Distribution licensee shall not expect revenue from the consumers when the consumers areput to hardship due to power restrictions / power cut in the State.

11.15.8. The Commission is of well considered view that when the Government of Tamil Nadu, on the one hand, directed all the generating stations to operate at their maximum capacity to receive the power, and at the same time limited the allocation to the extent of 60% / 70% level with peak hour restriction and scheduled load shedding vide its Letter dated 22-10-2008, we find that a consumer cannot be penalised. When a consumer is not given even 51% of his requirement, as stated supra, the Distribution licensee in our viewcannot expect fulfilment of the conditions of 51% of consumption as required under Rule 3(1)(a).

11.15.9. Rule 3(1)(a) stipulates a power plant to satisfy both the conditions stated therein to qualify as a “Captive generating plant”. it is applicable under normal circumstances when the distribution/transmission grid is open to the captive user without any restriction and not when there is no fault on the part of the captive user in consuming power on its side and at a time when stringent measure was imposed both in the form of restricted Quota as well as grid restrictions.We find no merit in insisting on adherence of conditions under rule 3 of the Electricity Rules 2005 for a captive generating plant in such conditions.

11.15.10. In the result, we direct the respondents that the energy accounting may be revised in the light of the above discussion by the Licensee for the year 2009-10 in respect of the petitioner’s case; and refund the energy amount paid by the petitioner with interest 12% per annum with effect from 2009-2010within 30 days from the date of this order.

In the result, the petition is allowed.

(Sd.....)
(K.Venkatasamy)
Member (Legal)

(Sd.....)
(M.Chandrasekar)
Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission