

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)

I.A. No. 1 of 2014
in
D.R.P. No.48 of 2014
and
D.R.P. No.48 of 2014

M/s. Super Sales India Limited
Wind Energy Division
Represented by its General Manager-Finance
Mr.S.Ravindran
34-A, Kamaraj Road
Coimbatore – 641 018.

... Petitioner
(Thiru.Arun Anbumani,
Advocate for the Petitioner)

Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited
(TANGEDCO)
Represented by its Chairman and Managing Director
144, Anna Salai
Chennai – 600 002.
2. The Chief Financial Controller / Revenue
Tamil Nadu Generation and Distribution Corporation Limited
(TANGEDCO)
144, Anna Salai,
Chennai 600 002.
3. The Superintending Engineer
Tirupur Electricity Distribution Circle
Tamil Nadu Generation and Distribution Corporation Limited
(TANGEDCO)
Tirupur – 641 602.

4. The Superintending Engineer
Udumalpet Electricity Distribution Circle
Tamil Nadu Generation and Distribution Corporation Limited
(TANGEDCO)
Udumalpet

...Respondents
(Thiru. M. Gopinathan,
Standing Counsel for Respondents)

Dates of hearing : 04-04-2014; 30-06-2014; 05-09-2019;
01-10-2019; 05-11-2019; 10-01-2020;
11-02-2020; 15-09-2020; 03-11-2020;
08-12-2020; 02-02-2021; 09-03-2021;
30-03-2021; 31-08-2021; 21-09-2021;
05-10-2021; 09-11-2021; 23-11-2021;
04-01-2022; 25-01-2022; 15-02-2022
and 01-03-2022

Date of Order : 19-04-2022

The I.A. No. 1 of 2014 in DRP No. 48 of 2014 came up for final hearing on 01.03.2022. The Commission upon perusing the affidavit filed by the petitioner 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.48 of 2014:-

The prayer of the petitioner in D.R.P. No.48 of 2014 is to set aside the impugned Lr.No.CFC/FC/REV/AAO/HT/D.541/2013 dated 29-08-2013 issued by the 2nd Respondent culminating in the impugned Lr.No.SE/TEDC/TPR/AO/R/DFC/F.Wind/DOAB/D. /13 dated 08-01-2014 and Lr.No.SE/TEDC/TPR/DFC/AO/ Rev/F.HTWind/D 14 dated 02-2014 issued by the 3rd Respondent demanding from the Petitioner a sum of Rs.15,28,728/- as short levy of excess payment with costs.

2. Prayer of the Petitioner in I.A. No. 1 of 2014 in DRP No. 48 of 2014:-

The prayer of the petitioner in I.A. No. 1 of 2014 in DRP No. 48 of 2014 is to issue and order of Interim Injunction restraining the Respondents from taking any steps in any manner to recover from the Petitioner the sum of Rs.15,28,728/- as short levy of excess payment.

3. Facts of the Case:-

The petitioner, M/s. Super Sales India Limited, received an amount of Rs.61,14,911/- towards 100% payment for unutilized banked energy for the year 2010-11 @ Rs.2.75 / unit. Later SE/Tirupur EDC raised a demand of Rs.15,28,728/- towards recovery of excessively paid amount for unutilized energy instead of 75%. In this connection, petitioner prayed in this petition to set aside the impugned Lr.No.CFC/FC/REV/AAO/HT/D.541/2013 dated 29-08-2013 issued by the 2nd Respondent culminating in the impugned Lr.No.SE/TEDC/TPR/AO/R/DFC/F.Wind/DOAB/D./13 dated 08-01-2014 and Lr.No.SE/TEDC/TPR/DFC/AO/Rev/F.HTWind/D.14 dated. 02-2014 issued by the 3rd Respondent demanding from the Petitioner a sum of Rs.15,28,728/- as short levy of excess payment with costs.

4. Contentions of the Petitioner:-

4.1. The Petitioner a Company is engaged in spinning of yarn and has a High Tension Electricity Supply connection bearing HT SC No.155. The 4th Respondent has sanctioned the said HT supply with a maximum demand of 2,800 K.V.A.

4.2. The 1st Respondent, unable to supply sufficient quantity of power as early from

April 2007 onwards had been imposing power cuts, besides peak hour restrictions, unscheduled tripping and load shedding to the extent of 10 to 14 hours a day. In 2008, in view of the power shortage in the State of Tamil Nadu, the then TNEB approached the Commission in M.P.No.42 of 2008 for approval of proposals imposing restrictions and control of power supply and levy of excess demand charges and energy charges by invoking the powers conferred under Clause 38 of the Tamil Nadu Electricity Code, 2004 which permits licensees to impose such restrictions on the use of electricity for such period as may be specified in the Order. This Commission, after considering the said Petition, considered it necessary to issue certain directions. By an Order dated 28-11-2008 passed by the Commission in the said M.P.No.42 of 2008, certain Restriction and Control (R&C) measures were imposed

4.3. As HT consumers like the Petitioner were facing frequent fluctuations in supply and interruptions in power, in order to tide over the power crisis, the HT consumers installed wind mills for generating wind energy to meet out their energy requirements for their captive consumption or have been purchasing power from Power Exchanges and other Third Party Sources. The owners of the wind mills use the infrastructure provided by Tamil Nadu Transmission Corporation Limited (TANTRANSCO) to transmit and utilize the same power. The State of Tamil Nadu is blessed with friendly wind conditions thereby enabling it to be a forerunner and pioneer in the field of wind power generation as a non-conventional energy source providing clean and environmental friendly power to the state. The 1st Respondent is the principal purchaser of power generated by the Wind Energy Generators (WEG) and due to the policies of the Government, the incentives granted, favourable wind regime, positive approach of the wind power producers as also the encouraging policy directives of the

Commission, the growth of wind power production in the State has been exponential and the State of Tamil Nadu is presently the highest wind power generating State in the entire country.

4.4. The Commission, by its Order 07-09-2010, permitted the HT consumers to avail Third Party power over and above the Respondents' quota and up to the consumers' sanctioned demand, without incurring excess demand and excess energy charges. The Petitioner gets power from its wind mills throughout the day including evening peak hours, i.e., 6.00 PM to 10.00 PM. The Petitioner has installed and commissioned sufficient number of wind electric generators (WEGs) right from the year 2006 onwards to generate and wheel the green power required for their consumption and to lower the power cost and burden on the Respondents.

The following WEGs have been commissioned by the Petitioner in Elavanthi, Vavipalayam and Kethanur Villages of Palladam Taluk in Coimbatore District:

- a. WEG HT se No.30 (Old No.41) of Tirupur Electricity Distribution Circle
- b. WEG HT SC No.3 of Tirupur Electricity Distribution Circle
- c. WEG HT SC No.4 of Tirupur Electricity Distribution Circle

4.5. The total capacity of the above WEGs commissioned by the Petitioner is 6,025 KW. These wind mills are generating powers throughout the day. The energy generated by the Petitioner's above WEGs, are being adjusted by the Petitioner for their HT SC No.155, falling within the jurisdiction of the 4th Respondent. The Petitioner has executed a latest Energy Wheeling Agreements with the 1st Respondent in this regard on 28-02-2009 as per the format approved by the Commission. The Respondents permit adjustment of wind energy slot-wise and if there is any surplus,

such surplus energy is kept under 'banking' with the Respondents for future adjustment. The unutilized wind energy units, which are 'banked', can be drawn by the consumers for their consumption till the end of the banking period (i.e., from 1st April to 31st March). For the surplus unutilized energy at the end of the banking period, the Respondents pay the consumer appropriate tariff as fixed by the Commission. When the Respondents impose R&C measures, consumers like the Petitioner are entitled to 100% of the tariff. In normal times, i.e., when there are no R&C measures, the consumers are entitled to 75% of the tariff. The Wind Tariff Orders and the Order dated 28-10-2009 issued by the Commission governs the wind energy sector in the State of Tamil Nadu.

4.6. The present Petition pertains to the payment made by the 3rd Respondent to the Petitioner for their unutilized banked wind units for the year 2011-2012. The 3rd Respondent, being the Generation Circle, has made a payment of Rs.61,14,9111- to the Petitioner for their unutilized banked wind units of 22,23,604 for the year 2011-2012. This amount was calculated at Rs.2.75/- per unit and was received by the Petitioner in April, 2013. As stated supra, this payment was made in accordance with the Order dated 20-03-2009 passed in Order No.1 of 2009 and the Order dated 28-10-2009 passed in SMP No.1 of 2009.

4.7. While the facts are thus, the Petitioner received a letter bearing Lr.No. SE/TEDC/TPR/AO/RIDFC/F.Wind/DOAB/D. 113 dated 08-01-2014 from the 3rd Respondent informing the Petitioner that the Audit Party has pointed out a short levy of excess payment of surplus unutilized bank energy for the year 2011-2012. The said letter also pointed out that the short levy was a sum of Rs.15,28,728/-. The

Petitioner was directed to make the said payment on or before 23-01-2014, failing which the amount will be collected through the captive user HT SC Nos. The 3rd Respondent had enclosed a copy of the Audit Slip No.28 dated 07-01-2014 received by it. In the said Audit Slip, the justification for raising the demand for Rs.15,28,728/- was on the basis of the 2nd Respondent's letter dated 29-08-2013.

4.8. By letter dated 31-01-2014, the Petitioner brought to the notice of the 3rd Respondent that from the year 2008 onwards, R&C measures were enforced and load shedding was imposed by the 1st Respondent due to which the power generated could not be consumed. The Petitioner further brought to the notice of the 3rd Respondent that as per the Orders of the Commission, the Petitioner is eligible for encashment of utilized banked wind energy at the end of the banking period at full value and accordingly the invoice for the period 2011-2012 was raised and payment at 100% sale value of Rs.2.75/- was paid to the Petitioner. The Petitioner requested the 3rd Respondent not to insist for the payment or collection through the captive user as intimated in the Audit Slip No.28.

4.9. In response to the Petitioner's reply dated 31-01-2014, the 3rd Respondent issued his Lr.No.SE/REDC/TPR/DFC/AO/Rev/F.HT Wind/D/14 dated -02-2014 (signed on 11-02-2014). In the said letter, the 3rd Respondent has made a reference to the 2nd Respondent's letter dated 29-08-2013 and stated that in respect of Wind Farm HT SC No.30, the Agreement was executed on 28-02-2009, i.e., before issue of the Tariff Order No.1 of 2009, that no fresh EWA has been executed thereafter and hence the audit objection has been issued and demand raised. On the above basis, the Petitioner was requested to remit the audit levy short amount of

Rs.15,28,728/- within 7 days of receipt of the letter.

4.10. The Petitioner obtained a copy of the said letter dated 29-08-2013 issued by the 2nd Respondent. The said letter dated 29-08-2013 proceeded on the following basis to justify payment for unutilized bank energy at 75% instead of 100% :

"3. In this connection it is stated that as per the provisions of the Commission's Order No.1 of 2009 dt.20.03.2009, the WEG generators who have commissioned on or after 19.09.2008 and those WE generators who have executed EWAs/ revised EWAs as per the Order NO.1 of 2009 before 31.03.2011 & 31.03.2012 are alone eligible for 100% payment for the unutilized banked energy as on 31.03.2011 and 31.03.2012 respectively, when the distribution licensee enforces restriction control measures. However for the year 2009-10, the WE Generators are eligible to encash 100% of the relevant tariff for the unutilized banked energy as per SMP issued by Hon'ble TNERC dt.28.10.2009".

4.11. After the 3rd Respondent issued the impugned demand. the Petitioner's representatives met the 3rd Respondent on several dates in the past few weeks and tried explaining that the stand taken by them was not correct and opposed to the orders passed by this Commission. However, the 3rd Respondent was not willing to accept any explanation made on behalf of the petitioner and has now informed that the said amount of Rs.15,28,728/- will be included in the monthly CC Bill of the Petitioner's captive consumer HT SC No.155.

4.12. It is clear that a dispute has arisen between the Petitioner as a generator and the Respondents as a licensee and the same is to be adjudicated by the Commission. The impugned letter of the 2nd Respondent dated 29-08-2013 culminating in the impugned letters dated 08-01-2014 and -02-2014 of the 3rd Respondent are illegal and unsustainable.

4.13. The impugned letter of the 2nd Respondent dated 29-08-2013 culminating in the

impugned letters dated 08-01-2014 and -02-2014 of the 3rd Respondent are illegal, arbitrary, unsustainable, in excess of their jurisdiction, in violation of principles of natural justice and deserve to be set aside.

4.14. The Respondents failed to see that the provisions relating to Banking are dealt with in paragraph 8.2 of Order No.1 of 2009 dated 20-03-2009 passed by the Commission. The provisions of paragraph 8.2. clearly states as follows:

"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 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 carryover 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 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."

4.15. A reading of the above shows that the same, in particular paragraph 8.2.2., is a standalone provision and it very clearly imposes an obligation on the licensee to permit encashment at full value of the relevant tariff of the unutilized energy at the end of the financial year by the generator when restriction and control measures are in force. The 2nd and 3rd Respondents have read more into the Order than what the

Order itself conveys and have thus acted in excess of their jurisdiction.

4.16. The impugned letter of the 2nd Respondent dated 29-08-2013 has misinterpreted the Orders issued in SMP No.1 of 2009 dated 28-10-2009. In that Order, the Commission has held as follows:

"16. After taking into account the submissions made by both the parties, the Commission directs as follows: -

- (1)
- (2)
- (3)
- (4)
- (5)
- (6)
- (7)
- (8)
- (9)
- (10)
- (11)
- (12)
- (13)
- (14)

(15) Energy which remains unutilized as on 31-3-2010 shall be eligible for encashment at the rate prescribed in para 8.2.2 of Order No.1 of 2009 dated 20-03-2009 of TNERC.

- (16)
- (17)"

4.17. It must be borne in mind that the Order in SMP No.1 of 2009 was passed merely to indicate the manner in which the encashment of unutilized energy is to be regulated for the financial year ending 31-03-2010. This did not mean that the provisions of the above referred paragraph 16 (15) was not to be interpreted to mean that the benefit would be restricted for the financial year ending 31-03-2010 alone. The Respondents therefore misinterpreted the Order of the Commission dated 28-10-2009 and on the basis of such misinterpretation have raised the impugned demand on the Petitioner.

4.18. The Respondents failed to see that the interpretation restricting the benefits for the financial year ending 31-03-2010 would be unconstitutional and discriminatory since it would restrict the beneficiaries of the Order dated 28-10-2009 to the financial year ending 31-03-2010 alone, while restriction and control measures would continue to operate for subsequent years without the licensee suffering any detriment.

4.19. The reference in paragraph 3 of the impugned letter dated 29-08-2013 can only be with regard to the applicability of the Order dated 20-03-2009 in terms of Tariff determination. The 2nd and 3rd Respondents erred in linking the same to banking issues, which even according to the Order dated 20-03-2009 finds place in 'Related Issues'. The 2nd and 3rd Respondents failed to see that there was no warrant for linking paragraph 4 with the issues set out in paragraph 8.

4.20. In any case, the impugned demand of the 3rd Respondent is in violation of the principles of natural justice since the Petitioner was not even given an opportunity before making any such demand. The 3rd Respondent has simply directed the Petitioner to make the payment to avoid coercive action.

4.21. The 2nd and 3rd Respondents failed to see that since the nature of demand made by them required interpretation of the orders passed by this Commission, the proper course of action was to approach the Commission seeking clarification. As usual, such a procedure was not followed by the 2nd Respondent notwithstanding the fact that the Commission in its Orders has repeatedly frowned on the tendency of the Respondents issuing clarificatory letters and/or Memos without first approaching the

Commission.

4.22. The 2nd and 3rd Respondents failed to see that in any case they had no power or authority to threaten recovery of a demand against the generator in the Bill of the captive consumer, especially when there are difference service connections for the generator and the captive consumer.

4.23. The Respondents are seeking to unjustly enrich themselves by adopting such means. The Respondents are inventing ways and means to somehow or the other financially throttle the generator and avoid making payment for the units.

4.24. The Petitioner states that there is grave urgency in the matter as the 3rd Respondent will direct the sum of Rs.15,28,728/- to be included in the Petitioner's CC Bill for HT SC No.155 which is to be issued by the 4th Respondent. Though the Bill will be dated 01-04-2014 with due date as 07-04-2014, the Bill will be issued only on 06-04-2014 compelling the Petitioner to comply with the unlawful demand. If the Petitioner does not pay the said amount then the 4th Respondent will proceed to disconnect the service connection, which will be disastrous to the Petitioner. The Petitioner is thus left with no other remedy except approaching the Commission seeking necessary relief. Unless the Commission grants the relief as prayed for, the Petitioner will be put to irreparable loss, grave prejudice, undue hardship and financial loss. On the other hand, no prejudice, hardship or loss would be caused to the Respondents if such relief is granted. The Petitioner has made out a prime facie case and the balance of convenience is also in its favour in the grant of such relief. The Petitioner reserves its right to make additional pleadings and file additional

documents.

5. Contentions of the Respondents:-

5.1. The Respondent has stated that the subject issue in this Dispute Resolution petition is already covered by the orders of the TNERC, which is an expert body created under the Electricity Act, 2003. It is therefore, submitted that the Dispute Resolution Petition is liable to be dismissed in limine.

5.2. The Commission had issued its first order i.e., Order.No.3 of 2006, dt.15.05.2006 on NCES based power plants vide" Order on Purchase of Power from NCES based Generating Plants" with effect from 15.05.2006. This Order, inter - alia, covered various ruling on tariff and related issues. In the said Order No.3 dated 15.05.2006, the Commission had ordered to provide two set of agreements one for the generators selling the energy to TANGEDCO as Energy Purchase Agreement (EPA) and another for the generators/consumers who are captive users as Energy Wheeling Agreement (EWA).These agreements have also been got approved from the Commission. In this connection, Clause 4 of Order No.3 dt.15.05.2006 read as follows:

"4.0 Applicability of Order

This order shall come into force from the date of its issue. This order shall be applicable to all future and renewal of existing contracts /agreements for the Non-Conventional Energy Sources (NCES) based Generating plants and Non-Conventional Energy Sources based Co- Generation Plants located within the State of Tam/I Nadu. It should be noted that the existing contracts and agreements between NCES based generators and the distribution Licensee signed pr/or to the date of issue of this order would continue to remain in force. However, the NCES based generators and distribution licensees shall have the opt/on to mutually re - negotiate the existing agreements/contracts, if any, in line with this order even before the expiry of the contracts. Any renewal of the said agreements/contracts, new contracts /agreements shall be in line with this order"

From the above, it could be observed that in view of the above provision, all wind energy generators commissioned on or after 15.05.2006 (Wind Group —II) have come under Order No.3, dt 15.05.2006. Whereas, the wind energy generators commissioned before 15.05.2006 (Wind Group- I) are not automatically eligible for the benefits of Order No.3 dated 15.05.2006. In order to come under Order No.3, dt.15.05.2006, they ought to have re-negotiated and executed the Energy Wheeling Agreement in accordance with Order No.3 dt.15.05.2006 and then to be treated as Group —II generators and in that case, they are also eligible for the benefits of Order No.3 of 2006.

5.3. In Order No.3, dt.15.05.2006, under Para 10 – “General issues”, Commission had ordered as follows:

"10. General Issues.

10.4. Banking:

xxxxxx

The Commission fixes the banking charges as 5% for WEG. The licensee shall pay at a rate of 75% of normal purchase rate for the unutilized portion of energy banked by the NCES based wind electric generators.

Slot wise banking is permitted to enable unit to unit adjustments for the respective slots towards rebate/extra charges. However, the unutilized portion at the expiry of banking period will not be distinctly dealt with for adjustment. Such unutilized portion is eligible only for the 75% rate."

5.4. The Respondent submitted that clause 5 of the Energy Wheeling Agreement executed by the wind energy generators i.e., as per bilateral contract between WEG & TANGEDCO as per Order No.3 dt.15.05.2006 issued by the Commission read as follows:

"5. Banking:

a. The Wind Energy Generator shall bank the energy generated in the wind mill and the banking period shall be one year from April to March.

- b. *The unutilized portion the banked energy if any shall be purchased by the licensee at the rate of 75% of the normal purchase rate.*
- c. *The banking shall be done slot wise to enable unit —to-unit adjustment.*

From the above, it is clear that neither in Order No.3 dt.15.05.2006, of the Commission nor in the EWA executed between the WEG and TANGEDCO, no provision to encashat full value of the relevant tariff for sale to the Distribution Licensee, as and when the distribution licensee enforces restriction control and measures for restricting the consumption of wind energy generators the unutilized energy at the end of the financial year.

5.5. The respondent submitted that the Commission had issued the subsequent Comprehensive Tariff Order on Wind Energy vide Order No.1 of 2009 dated 20.03.2009. In the above said order, under relevant clause 4 & 8.2.2 thereof, thefollowing were stated:

"4. Applicability of this order:-

Order No.3 dated 15.05.2006 of the Commission lays down a control period of three years for that order and therefore normally the next order should have taken effect from 15.05.2009. The Commission in the Common Order in M.P. Nos .9, 14 and 23 of 2008 dated 19.09.2008 has ruled that the control period of three years specified in order No.3 dated 15.05.2006 is waived from the date of issue of that order. The control period of three years, thus, stands terminated on 19.09.2008. Therefore, the Commission holds that all the wind energy generators commissioned on or after 19.09.2008 shall become eligible for the benefits of the present order, subject to the condition that the monetary benefits shall accrue from the date of this order. The existing agreements between the Wind energy generators and the distribution licensee shall continue to be valid. The parties to the agreement are at liberty at any time to renegotiate the existing agreement mutually in accordance with this order. The agreements between the wind generators and the distribution licensee in relation to all machines commissioned on or after 19.09.2008 shall be in conformity with this order.

8.2. Banking:

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8.2.2. xxxxxUnutilised 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 encashed at full value of the relevant tariff for sale to the licensee."

5.6. Further, Clause 6 of the Energy Wheeling Agreement of Order No.1 of 2009 dated.20.03.2009 approved by the Commission read as follows:

"6. Banking:

(1). The banking charges of 5% 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.

(2). Slot—wise banking is permitted to enable unit to unit adjustment of the respective slots towards rebate/extra charges. No carry over is al/owed beyond the banking period unutilized energy at the end of the financial year may be encashed at the rate of 75%of the relevant purchase tariff.

(3) As and when the distribution licensee enforces restriction control measures for restricting the consumption of wind energy generators the unutilized energy at the end of the financial year shall be encashed at full value of the relevant tariff for sale to the Distribution Licensee.

(4). The banking period commences on ¹⁵ April and ends on 31st March of the following year.

From the above, it may be seen that the provision to encash at full value of the relevant tariff for sale to the Distribution Licensee as and when the distribution licensee enforces restriction control measures for restricting the consumption of wind energy generators the unutilized energy at the end of the financial year is applicable only for

the Wind Energy Generators who have executed Energy wheeling Agreement as per the Wind Energy Tariff Order No. 1 of 2009 dt.20.03.2009.

5.7. The petitioner had not executed the revised Energy Wheeling Agreement in accordance with terms and conditions of the Order No.1 of 2009, dt.20.03.2009 on Wind Energy issued by the Commission and therefore not eligible to get the benefits of Order No.1 of 2009, dt.20.03.2009. In this regard, it is pertinent to mention that the Commission in one of its orders mentioned herein below has categorically held that if a generator has to avail a benefit under a specific order, then such generator should have executed an agreement under the respective order. The relevant portions of the Commission's order, dated. 22.05.2008 in M.P.Nos. 6,11,12 and 16 of 2008 and M.P.No.15 and 12 of 2008 is extracted below:

"3. The generators whose wind mills were commissioned prior to 15.05.2006 ought to have utilized this period between November 2007 and March 2008 to execute a fresh agreement with the Licensee in order to avail of the benefits of the Order No.3 dated. 15.05.2006, particularly the one relating to encashment of unutilized wind energy. But, the present petition of those generators tantamount to virtually seeking a benefit of Order No.3 without going through the formalities of executing a fresh agreement with TNEB. They want to have the cake and eat it too."

4. xxxxx

5. *The commission makes it dear that this is a one timerelief necessitated by the uncertainties all around in regard to Implementation of Order No.3 dated 15.05.2006 and also the acute power crisis between November 2007 and March 2008. Now that the licensee has implemented the Orders 2,3 and 4 dated 15.05.2006 of the Commission in toto, the Commission would like to reiterate its direction that all those generators whose wind mills were commissioned prior to 15.05.2006 should execute fresh agreement in line with Order No.3 with the licensee,*

if they wish to avail of such benefits in future. Similarly, the Commission observes that all the generators whose wind mills were commissioned after 15.05.2006 should execute Energy Wheeling Agreement and Energy Purchase Agreement forthwith, failing which they will be deemed to have contravened the Orders of the Commission ".

From the above it could be revealed that all the generators whose wind mills were commissioned before 19.09.2008 should execute Energy Wheeling Agreement and Energy Purchase Agreement forthwith, failing which they will be deemed to have contravened the Orders of the Commission dated.20.03.2009 and they could not avail the benefits covered under the respective order. Considering the fact, the present petition is neither maintainable in law nor on facts.

5.8. The petitioner herein has failed to note the applicability of the order of the Commission dated. 20.03.2009. In this regard, it is pertinent to state that the Commission had approved the Revised Energy Wheeling Agreement covers the terms and conditions stipulated in the Order No.1 of 2009 dated 20.03.2009, even though the Commission had approved the Energy Wheeling Agreement in accordance with the Order No.3 dated.15.05.2006, Hence, it may be concluded that the existing agreements between the Wind energy generators and the distribution licensee shall continue to be valid. The parties to the agreement are at liberty at any time to renegotiate the existing agreement mutually in accordance with the Order No.1 of 2009 dated. 20.03.2009 in order to avail the benefits of the respective order. In accordance with said procedure, the payment has to be made for the 75% of the normal purchase tariff of the petitioner, since the petitioner had not executed the Energy Wheeling Agreement in accordance with the Order No.1 of 2009 dated 20.03.2009. Further, it is pertinent to note that the relevant clause of the Energy Wheeling Agreement executed by the petitioner i.e "5. Banking ", it denotes clearly that the

unutilized portion the banked energy if any shall be purchased by the licensee at the rate of 75% of the normal purchase. As per the agreement, the petitioner is not eligible to get full value of purchase tariff towards the payment of the unutilized wind energy. Hence, the short levy pointed out by the audit party is in order. Therefore, the contention of the petitioner that the Wind Energy Tariff Order.No.1 of 2009 by the Commission governs the wind energy sector in the State of Tamil Nadu is misleading one.

5.9. Pursuant to the representations received from various HT consumers requesting for fixation of quota as aggregate total of 60% of their TNEB supply and 100% of the power received from CPPs, a memo was issued to that effect on 17.11.2008 in connection with fixation of demand and energy quota for the HT consumers partially using power from CPPs.

5.10. The above memo was not adopted for fixation in respect of wind energy captive users at the time of issuance of the above mentioned memo, dated 17.11.2008. It is submitted that aggrieved by the memo dated 17.11.2008, some of the Wind Energy Captive users had filed W.P.No.12448 of 2009 etc, batch case before the Hon'ble High Court of Madras praying for re-fixation of their demand and energy quota on par with the CPP users. The Hon'ble High Court of Madras has passed the order dated 29.8.2009 and 01.09.2009.

5.11. Consequent to the order passed by the Hon'ble High Court of Madras, this Commission had initiated Suo Motu Proceedings vide SMP No.1 of 2009 on 28.10.2009 with regard to the fixation of quota for Wind Energy Captive users to be carried out on par with CPP users and thereby this Commission had formally approved the formula

contained in the respondent's memo, dt.17.11.2008 for re-fixing the demand and energy quota for the period from 12/2008 to 10/2009 and further had stated that from 01.11.2009 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 fixing energy quota and demand quota respectively, in the formula of the TNEB, dated 17.11.2008. It is further stated that, the energy declared shall be the monthly average generation. Further, from 01.11.09, the peak hour power generation shall be eligible for peak hour utilization for every month subject to a limit of one-twelfth of annual peak hour generation.

5.12. The relevant paragraph of the Commission's Order dated 28.10.2009 is reproduced below:

"14. The petitioners pleaded that the wind power capacity earmarked for wheeling and captive use should not be construed by the TNEB as belonging to them. The petitioners submitted that it is only the capacity, which is earmarked for sale to the TNEB, should be counted as the capacity belonging to the TNEB. The TA/EB in their additional affidavit submitted on 23-10-2009 stated that of the total installed capacity of windmills of 4535 MW as on 30-9-2009, a capacity of 2413 MW was earmarked for sale to the Board and a capacity of 2122 MW had sought wheeling facility. The TNEB further has affirmed that the banked energy as on 31-3-2009 stood at 224 MU. The banked energy for the period from 1-4-2009 to 30-9-2009 is 943 MU. That the banked energy has further swelled by 943 MU between 1-4-2009 and 30-9-2009 is indicative of the severe restrictions on power consumption during this period. They further submitted that the generation of energy by wind mills between 1-4-2009 to 30-9-2009 was 5876 MU. These figures were accepted by the petitioners. The wind energy generators submitted that they being both captive consumers as well as captive generators, deserve a special treatment as compared to ordinary consumers. Captive consumers draw power from their own source unlike the ordinary consumer who depend on the distribution licensee for supply of power. The petitioners submitted that as in

the case of thermal captive generators, the wind generators should be permitted to avail the full demand and energy quota of captive wind generation and the peak hour utilization as provided in the memo of the TNEB dated 17-11-2008. The petitioners further demanded a price of Rs. 3.50 per unit, which is the tariff for industrial consumers, for the unutilized banked energy on the ground that despite Commission's Order dated 28-11-2008, the wind generators were prevented from utilizing the banked energy between 1-12-2008 and 30-4-2009. Out of the 315 MU banked energy as on 1-11-2008 the TNEB has reported that 224 MUs remained in the bank as on 31-3-2009, which supports the contention of the petitioners that a significant portion of the banked energy as on 1-12-2008 was prevented from being utilized. The petitioners complained that they have been prevented from utilizing the wind energy at par with the thermal captive consumers during the current year (2009-10) too, as a result of which there is heavy accumulation of banked energy. They should be permitted to encash the accumulated wind energy remaining in the bank at the end of 2009-10 at the rate of Rs.3.50 per unit, which is the tariff applicable for HT industrial consumers. They justified it on the ground that a vast majority of the captive users of wind energy is industrial consumers. The petitioners further pleaded that peak hour generation should be available for peak hour consumption, whether drawn from current generation or from the bank.

15. The learned counsel for the TNEB in response to the arguments of the petitioners conceded that their memo dated 17-11-2008 permits adjustment of peak hour generation of captive power against peak hour consumption and therefore they have no objection to the plea of the petitioners in this regard. TNEB has, further, no objection to the utilization of current generation during the evening peak hours at par with thermal captive consumers."

Based on the above, TANGEDCO had issued circular to all the Superintending Engineer / Electricity Distribution Circles vide Memo.No.CE/Comml/EE/DSM/ AEE/ PMM/ F.Power cut/D.508/09,dt. 25.11.09 in connection with revised the energy and demand quota for the period from 11/2008 to 10/2009 so as to utilize the maximum of the captive generation of the wind energy by the way of adopting the memo dated 17.11.2008 in respect of the captive wind energy users. Furthermore

it is relevant to note that the Commission had stated in its order, dated 07.09.2010 in M.P.No.9 of 2010 and etc batch of cases filed by various petitioner, which read as follows :-

4.4. The consumer is at present permitted to utilise power from captive sources. The present order would enable a consumer to purchase power from third party sources as well. Procurement of power by a consumer through Open Access is protected by the Electricity Act, 2003. 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 purchase would be the sanctioned demand.

Based on the above order, the wind energy captive consumers are being utilized maximum level of their captive wind energy through wheeling. Hence, the provisions of the SMP No.1 of 2009 dated.28.10.2009 and benefit would be restricted for the financial year ending 31.03.2010 alone. Considering the said fact the 2nd respondent has issued instructions vide letter dated.29.08.2013 as follows:

"3. xxxx as per the provisions of the Commission Order No.1 of 2009 dt.20.03.2009, the WEG generators who have commissioned on or after 19,09.2008 and those WE generators who have executed EWAs/ revised EWA5 as per the Order NO.1 of 2009 before 31.03.2011 & 31.03.2012 are alone eligible for 100% payment for the unutilized banked energy as on 31.03.2011 and 31.03.2012 respectively, when the distribution licensee enforces restriction control measures. However for the year 2009-10, the WE Generators are eligible to encash 100% of the relevant tariff for the unutilized banked energy as per SMP issued by Hon'ble TNERC dt.28.10.2009."

From the above, it could be observed that the petitioner has not executed the Energy Wheeling Agreement in accordance with the Order.No.1 of 2009 dated.20.03.2009, which was approved by the Commission. Hence, the petitioner

is not eligible for the benefits of the Order No.1 of 2009 dated. 20.03.2009. Therefore, the contentions of the petitioners are misconceived one.

5.13. In view of the facts and circumstances of the case and position of law as stated above, the petitioner has no prima facie case to further pursue the above Petitions. Therefore, the petitioner is not entitled neither any interim relief nor main relief as prayed for in the above petitions. The balance of convenience is clearly in favour of the respondents herein. Hence, the above petition is liable to be dismissed. By dismissing the same, no prejudice will be caused to the petitioner as the demand notice has been issued in accordance with law and in the manner known to law.

6. Findings of the Commission:-

6.1. The petitioner (M/s. Super Sales India Limited) prayed in this petition to set aside the impugned Lr.No.CFC/FC/Rev/AAO/HT/D.541/2013, Dt.29.08.2013 issued by the Chief Financial Controller / Revenue culminating in the impugned Lr.No.SE/TEDC/TPR/AO/R/DFC/F.Wind/BOAB/D./13 dated 08.01.2014 and Lr.No.SE/TEDC/TPR/DFC/AO/Rev/F.HT Wind/D./14, dated 02-2014 issued by the Superintending Engineer / Tirupur demanding a sum of Rs.15,28,728/- towards excess payment for unutilised banked energy for the period 2011-12.

6.2. The petitioner is having 3 WEG HTSC.30, 3, 4 located in Palladam / Tirupur EDC. The Energy generated by the Petitioner from the above WEGs are being adjusted in their HT SC No.155 in the jurisdiction of 4th Respondent Udumalpet EDC.

6.3. The petitioner has stated that an Energy Wheeling Agreement was executed on 28.02.2009. The Respondent permitted for the adjustment of wind energy slot-wise and if there is any surplus, such surplus energy is kept under banking with the Respondents for future adjustment. The unutilised wind energy units, which are banked, can be drawn by the consumers for their consumption till the end of the banking period (i.e., 1st April to 31st March). For the surplus unutilised banked energy at the end of the financial year, the Respondents have to pay to the generator at the appropriate tariff as fixed by the Commission. During the time when the Restriction and Control (R&C) measures are in force, consumers like the petitioner are entitled for 100% of the tariff. In normal times, i.e., when there are no R&C measures, the consumers are entitled for 75% of the tariff.

6.4. The present issue pertains to the payment made to the petitioner by the Respondent for their unutilised banked energy for the year 2011-12. The petitioner has been paid Rs.61,14,911/- in April 2013 for the unutilised banked energy of 22,23,604 units at the rate of Rs.2.75 per unit, i.e., 100% payment for unutilised energy was paid by the Respondent. Subsequently, the petitioner was addressed by the Respondent to pay an amount of Rs.15,28,728/- towards the excess payment made at the rate of 100% of Wind tariff instead of 75% with reference to an Audit query raised based on the 2nd Respondent's circular reference of Lr.no.CFC/FC/Rev/AAO/HT/D.541/2013 dated 29.08.2013.

6.5. In this connection, the petitioner has sought interim injunction on demand an amount of Rs.15,28,728/- and sought to set aside the impugned letters of the Respondents. During the course of hearing the Respondent undertook not to make

any efforts to recover the impugned demand and to keep them in abeyance. The Commission accordingly accepted the undertaking as it met the interim prayer of the petitioner.

6.6. The petitioner has argued that the Respondent in its letter dated 29.08.2013 has misinterpreted the Orders issued in SMP No.1 of 2009 dated 28.10.2009, which was passed merely to indicate the manner in which the encashment of unutilized energy is to be regulated and that it would not mean that the benefit would be restricted for the financial year ending 31.03.2010.

6.7. Before going into the issue, we have to refer to the earlier Wind Tariff orders of the Commission. The Commission issued Order No.3 of 2006 dated 15.05.2006 – “Order on Purchase of Power from NCES based Generating Plants” with effect from 15.05.2006 and its applicability reads as below –

"4.0 Applicability of Order:

This order shall come into force from the date of its issue. This order shall be applicable to all future and renewal of existing contracts /agreements for the Non-Conventional Energy Sources (NCES) based Generating plants and Non-Conventional Energy Sources based Co- Generation Plants located within the State of Tam/I Nadu. It should be noted that the existing contracts and agreements between NCES based generators and the distribution Licensee signed pr/or to the date of issue of this order would continue to remain in force. However, the NCES based generators and distribution licensees shall have the opt/on to mutually re - negotiate the existing agreements/contracts, if any, in line with this order even before the expiry of the contracts. Any renewal of the said agreements/contracts, new contracts /agreements shall be in line with this order"

6.8. The Respondent has stated that in view of the above provision, all wind energy generators commissioned on or after 15.05.2006 (Wind Group —II) have come under

Order No.3, dt 15.05.2006. Whereas, the wind energy generators commissioned before 15.05.2006 (Wind Group- I) are not automatically eligible for the benefits of Order No.3 dated 15.05.2006. In order to come under Order No.3, dt.15.05.2006, they should have re-negotiated and executed the Energy Wheeling Agreement in accordance with Order No.3 dt.15.05.2006 for being treated as Group-II generators and only in such case, they also eligible for the benefits of Order No.3 of 2006.

6.9. Further, the Respondent has contended that as per the following Paras of the Wind Energy Tariff Order No.1 of 2009, dated 20.03.2009, the provision to encash at full value of the relevant tariff for unutilized energy at the end of the financial year arises only when Restriction and Control measures are in force and further it is applicable only to the Wind Energy generators who have executed Energy Wheeling Agreement as per the Wind Energy Tariff order no.1 of 2009 dated 20.03.2009.

"4. Applicability of this order:-

Order No.3 dated 15.05.2006 of the Commission lays down a control period of three years for that order and therefore normally the next order should have taken effect from 15.05.2009. The Commission in the Common Order in M.P. Nos .9, 14 and 23 of 2008 dated 19.09.2008 has ruled that the control period of three years specified in order No.3 dated 15.05.2006 is waived from the date of issue of that order. The control period of three years, thus, stands terminated on 19.09.2008. Therefore, the Commission holds that all the wind energy generators commissioned on or after 19.09.2008 shall become eligible for the benefits of the present order, subject to the condition that the monetary benefits shall accrue from the date of this order. The existing agreements between the Wind energy generators and the distribution licensee shall continue to be valid. The parties to the agreement are at liberty at any time to renegotiate the existing agreement mutually in accordance with this order. The agreements between the wind generators and the distribution licensee in relation to all machines commissioned on or after 19.09.2008 shall be in conformity with this order.

8.2. Banking:

xxxxxx

8.2.2. xxxxx 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 encashed at full value of the relevant tariff for sale to the licensee."

6.10. The impugned demand raised by the Respondent based on the Chief Financial Controller / Revenue's letter reference dated 29-08-2013 reads as below -

"3. In this connection it is stated that as per the provisions of the Commission's Order No.1 of 2009 dt.20.03.2009, the WEG generators who have commissioned on or after 19.09.2008 and those WE generators who have executed EWAs/ revised EWAs as per the Order NO.1 of 2009 before 31.03.2011 & 31.03.2012 are alone eligible for 100% payment for the unutilized banked energy as on 31.03.2011 and 31.03.2012 respectively, when the distribution licensee enforces restriction control measures. However for the year 2009-10, the WE Generators are eligible to encash 100% of the relevant tariff for the unutilized banked energy as per SMP issued by Hon'ble TNERC dt.28.10.2009".

6.11. With reference to Wind Order No.1 of 2009 dated 20.03.2009, the Respondent has argued that even though the Commission had approved the Energy Wheeling Agreement in accordance with the Order No. 3 dated 15.05.2006, the parties to the agreement are at liberty at any time to renegotiate the existing agreement mutually in accordance with the Order No.1 of 2009 dated 20.03.2009 in order to avail the benefits of the respective order but in the petitioner's case, the petitioner has not executed the Energy Wheeling Agreement in accordance with the Order No.1 of 2009 dated 20.03.2009, and hence the petitioner is not eligible to get full value of purchase tariff towards the payment of the unutilized Wind energy.

6.12. From the arguments of both the parties, we observe as follows:-

6.12.1. The petitioner has executed the latest Energy Wheeling Agreement 28.02.2009 in accordance with the Wind Tariff Order No.3 of 2006 dated 15.05.2006.

6.12.2. The stand of the Respondent in its letter dated 29.08.2013 is that “as per the provisions of the Commission’s Order No.1 of 2009 dated 20.03.2009, the WEG generators who have commissioned on or after 19.09.2008 and those WE generators who have executed EWAs / Revised EWAs as per Order No.1 of 2009 alone are eligible for 100% payment”, and the petitioner is not eligible for 100% of purchase rate for the unutilized energy since the petitioner has not executed EWA covering the terms and conditions stipulated under Order No.1 of 2009 dated 20.03.2009. But in para4 on Applicability of this Order in Order No.1 of 2009, the Commission ruled that the existing agreements between the Wind energy generators and the distribution licensee shall continue to be valid. However, as the Commission waived the control period of three years as specified in Order No.3 dated 15.5.2006 from 19.09.2008 i.e., from the date of Order in M.P.No.9, 14 and 23 of 2008, all the Wind energy generators commissioned on or after 19.09.2008 were given liberty to renegotiate the existing agreement mutually in accordance with the Order No.1 of 2009; and also Commission directed that the agreements between the Wind generators and Distribution licensee in relation to all machines commissioned on or after 19.09.2008 shall be in conformity with this Order.

6.12.3. The language in para 8.2. Banking in Order No.1 of 2009 shall have to be read carefully, wherein it is stated that

“8.2. Banking :

8.2.2.As and when the distribution licensee enforces Restriction and Control measures for restricting the consumption of wind energy generators, the Commission finds justification in the plea that the unutilized energy at the end of the financial year may be encashed at full value of the relevant tariff for sale to the licensee.”

It is to be read alongwith the para 16 (15) of the Order issued in SMP No.1 of 2009 dated 28.10.2009. SMP.No.1 of 2009 is the Order in which Commission directed to fix the quota in accordance with the formula in terms of memo of TNEB dated 17.11.2008 and allowed the captive users to utilize the Unutilised banked energy available as on 01.11.2009 in five equal monthly instalments from 01-11-2009 to 31-03-2009. Further, it was ordered that the energy which remains unutilized as on 31.3.2010 shall be eligible for encashment at the rate prescribed in para 8.2.2 of Order no.1 of 2009 dated 20.3.2009. The Order in SMP.No.1 of 2009 is applicable to all Wind generators covered under the R&C measures.

6.12.4. Having stated under para 16(15) of order in SMP No.1 of 2009 to encash the unutilized energy at the end of the financial year at full value of relevant tariff, the Distribution Licensee cannot limit the applicability of T.O.1 of 2009 only to those generators who executed EWAs in accordance with the Tariff order dated 20.3.2009. As the SMP.No.1 of 2009 is applicable to all the Wind energy captive users, the encashment of unutilized banked energy at full value (100%) cannot be refused to other WE generators covered under other Tariff Orders of the Commission. The requirement of revised agreement stated in T.O.1 of 2009 is for those generators who commissioned Wind Energy plants on or after 19.09.2008 to 20.03.2009, this cannot be misinterpreted in right to applicability of para 8.2.2 for the Wind Energy captive

generators during R&C period.

6.12.5. One another contention of the respondent is that as per the Commission's Order dated 07.09.2010 in M.P.No.9 of 2010 & batch, the Commission permitted the captive user / third party users to utilize the power upto the sanctioned demand including the TNEB quota demand, captive power and third party purchase and that the provisions of Order dated 07.09.2010 permit the Wind energy captive consumers to utilize maximum level of their captive wind energy and the benefit of SMP No.1 of 2009 dated 28.10.2009 shall have to be restricted upto the Financial year ending 31.03.2010 alone. Such a restriction on claiming of 100% for unutilized banked energy cannot be limited upto 07.09.2010, since it will be the violation of Wind Tariff Order No.6 of 2012 dated 31.07.2012 which provides for encashment of unutilized banked energy at full value in respect of all the wind energy generators irrespective of their year of installation.

6.12.6. In result, we conclude that the petitioner is eligible for encashment of unutilized banked energy at full value for the financial year ending 2011-12 when the R&C was in force. Therefore, the Commission set aside the recovery demand notices dated 08.01.2014 and 02-2014 issued by the 3rd Respondent.

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission