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.81 of 2014

M/s. Dalmia Bharat Sugar and Industries Ltd.
Dalmiapuram
Tiruchirapalli – 621 651

… Petitioner
(Thiru Rahul Balaji
Advocate for the Petitioner)

Vs.

1. The Chairman
   Tamil Nadu Generation and Distribution
   Corporation Limited
   144, Anna Salai
   Chennai – 600 002.

2. The Director (Finance)
   Tamil Nadu Generation and Distribution
   Corporation Limited
   144, Anna Salai
   Chennai – 600 002.

3. The Chief Financial Controller
   Tamil Nadu Generation and Distribution
   Corporation Limited
   144, Anna Salai
   Chennai – 600 002.

4. The Superintending Engineer
   Tirunelveli Electricity Distribution Circle
   Tirunelveli – 627 001.

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

Dates of hearing : **30-10-2018; 20-08-2019; 27-08-2019; 24-09-2019; 29-10-2019; 10-12-2019; 28-01-2020; 22-09-2020; 10-11-2020; 22-12-2020; 05-01-2021; 03-02-2021; 10-02-2021; 11-02-2021; 16-02-2021; 23-02-2021; 02-03-2021; 09-03-2021; and 10-03-2021**

Date of Order : **31-08-2021**

The DRP No. 81 of 2014 came up for final hearing on 10-03-2021. 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.81 of 2014:-

The prayer of the petitioner in D.R.P. No. 81 of 2014 is to issue an interim order of stay of third respondent's proceedings bearing Lr.No.CFC/FC/REV/AAO /HT/D.419/2014, dated 11-07-2014 and all proceedings consequent or pursuant thereto including pending disposal of this petition; and call for the records of the third respondent bearing Lr.No. CFC/FC/REV/AAO/HT/D.419/2014, dated 11-07-2014 and all proceedings consequent or pursuant thereto and set aside the same as being arbitrary, illegal and without authority of law and contrary to the provisions of the Electricity Act, 2003 and consequently direct the 4th respondent to make payment of total amount of Rs.3,80,96,452/- being the amount including the principal and interest amount due as on 24-11-2014 together with further interest that would accrue from such date until the date of payment of the amount and pass such further or other orders as the Commission may deem fit and proper in the circumstances of the case.

2. Facts of the Case:-

This petition has been filed to call for the records of the third respondent - bearing Lr. No. CFC/FC/REV/AAO/HT/D.419/2014, dated 11-07-2014 and all proceedings consequent or pursuant thereto and set aside the same as being arbitrary, illegal and without authority of law and contrary to the provisions of the Electricity Act, 2003 and consequently direct the 4th Respondent to make payment of total amount of Rs.3,80,96,452/- which amount includes the principal and interest amount due as on 24-11-2014, together with further interest that would accrue from such date until the date of payment of the amount.

3. Contentions of the Petitioner:-

3.1. The present Petition is being filed challenging the arbitrary and illegal order of the 3rd Respondent in Lr.No. CFC/FC/REV/AAO/HT/D.419/2014 dated 11.7.2014 on the basis of which it is evident that the petitioner's dues are not being paid for the last 3 years. The said actions on the part of the Respondents, which effectively deny payments towards encashment of its banked units on the untenable claim that the petitioner has failed to consume 51 % of the generation during the relevant time, are wholly illegal in as much as, the consumption itself could not be achieved only due to the unscheduled power cuts imposed by the Respondent. Further such action is clearly contrary to the Respondents TANGEDCO's own approval letter which specifically provided that all surplus power would be treated as sale to the Board.

3.2. TANGEDCO is a government owned company and is State for the purposes of Art.12 of the Constitution and hence its actions are always to be just, fair and

reasonable. In any event an order issued by the 3rd Respondent in 2014 cannot be used as a basis for denying payments for the past period. The said action or the part of the respondent Board is a serious violation of the terms of the contract between the parties.

3.3. The petitioner is involved in the sugar business which commenced with a 2500 TCD plant at Ramgarh in Sitapur district of U.P. in 1994. During 2006-07, the petitioner as part of a major growth path set up two Greenfield plants at Jawaharpur (Dist. Sitapur, U.P.) and Nigohi (Dist. Shahjahanpur, U.P.) and expanded existing facilities at Ramgarh unit. The total cane crushing capacity of the petitioner is now 22500 TCD and it is one of the leading sugar producers in the country. In addition thereto it has 79 MW of cogeneration capacity & a distillery of 80 KLPD. The petitioner has had a long presence in the State of Tamil Nadu through its Wind farms in Kanyakumari and Tirunelveli district.

3.4. Being encouraged by the wind energy policies prevalent in the State of Tamil Nadu and also as part of their business diversification strategies and in order to secure a reliable source of power for their facilities, they decided to put up Windmills in the State of Tamil Nadu.

3.5. The petitioner which was originally operating in the State under the name of Dalmia Cement Bharat Limited had captive consumption of its wind generation by wheeling it for its use at Ariyalur Cement Plant. Being encouraged by the benefits given for wind energy generation and also with a view to captively adjust such generation put up wind mills at Kanyakumari EDC and Tirunelveli EDC with a

capacity of 16.525 MW with WTG HTSC No(s) 20,90,174, 250 and 336. The electricity generated by the said wind mill has been wheeled by the petitioner for its captive consumption for its HT SC at 74 of Perambalur EDC the consuming end. The balance of the wind mill generation after consumption is under a banking arrangement in terms of the Power Purchase Agreement. In terms of the applicable Tariff Orders and the Agreements the petitioner raised invoices for the sale of unutilised banked units of 96,87,591 units on 31st March 2011 for the period from April 2010 to September 2010, from their WTGs. The amount due on the said date was Rs.2,66,40,875/- which was calculated at the rate of Rs.2.75 / unit. After September, 2010, DBSIL entered into Energy Purchase Agreement with TNEB vide dated 2nd September 2010, for selling wind farm power to TNEB. Since Ariyalur cement plant has established its own captive thermal power plant and hence no wind farm power was required.

3.6. Although the invoices were originally raised by Dalmia Cement Bharat Limited, subsequently vide an order of the Hon'ble High Court of Madras, the petitioner had de-merged its cement and sugar business whereby wind farm has been renamed as Dalmia Bharat Sugar and Industries Ltd. which has been approved by TANGEDCO in its letter dated 01.06.2012. In addition to its claim for payment towards the unutilised and surplus banked units, the petitioner was also entitled to payment of interest as well for the delayed payments against our Invoices for supply of wind power. This demand was in accordance with the TNERC Wind Tariff Orders applicable to the petitioner and the Judgments of the TNERC and APTEL.

3.7. Under Tariff Order No.1 of 2009 issued by the TNERC, there is a specific inclusion of interest payment. Para 8.11.1.of the Tariff Order deals with billing and payment and is extracted hereunder:

> *"8.11.1.*
>
> *When a wind generator sells power to the distribution licensee, the generator shall raise a bill every month for the net energy sold after deducting the charges for startup power and reactive power. The distribution licensee shall make payment to the generator within 30 days of receipt of the bill. Any delayed payment beyond 30 days is liable for interest at the rate of 1% per month."*

3.8. The TANGEDCO took the position that only for windmills covered by Tariff Order No.1 of 2009, there is a requirement for paying interest. This resulted in IWPA filing a petition before the TNERC which upheld the right of all wind generators irrespective of the date of commissioning to receive interest on delayed payment at the rate of 1% per month. The said issue was finally decided by the Hon'ble APTEL in order in Chairman, TNEB & Anr. v. Indian Wind Power Association and Ors in Appeal No. 11 of 2012 dated 17.04.2012. The relevant paragraphs are extracted hereunder:

> *"13. It is settled law, when a certain time limit has been prescribed within which payments have to be made, it would mean that any payments made after the said time period would be subject to payment of interest as indicated above.*
>
> *17. In any power project, one of the important aspects is the promptitude in payment since the delays would seriously affect the viability of the project. All these projects are substantially funded through finances obtained from various funding organizations require regular repayment of principal loan amount with interest by the generators. Only if regular payments are made for the power generated and supplied the loans can be serviced long with the promised return of investment.*

21. Hence our conclusion is as follows:

The wind power generators are entitled for payment of interest on delayed payment made by the appellant for the purchase of the power from the generators"'

Therefore, we are entitled to interest on delayed payment @1% per month for every month's delay from the due date.

3.9. The petitioner states that 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. This policy framework and supporting legislation, along with the unique conditions existing in the State of Tamil Nadu due to power shortage, have led to an exponential growth in the number of wind energy generators and the State of Tamil Nadu is presently the highest wind power generating State in the country.

3.10. The WTGs have historically been erected in the state principally by various manufacturing units who, considering high cost of power and the need to remain competitive, have erected WEGs which generate power and the owners of the wind mills use the infrastructure provided by the TNEB by way of its transmission lines and utilize the same power and thereby have access to a cheaper source of power.

3.11. The petitioner company is allowed to wheel power from the WTG to its factory as per terms and conditions of the EWA entered into with the 1st respondent and payment of wheeling charges as fixed by the Commission vide various Tariff

Orders. According to the Tariff Orders issued by the Commission, it was ordered that if wind energy is not utilized fully during a month, the balance of it will be transferred to a banking account and accordingly, during the lean seasons of wind energy, such banked energy is allowed for adjustment from the banking account after paying notified banking charges to the Respondent by the WEG owners.

3.12. In Order No.3 dated 15-05-5006, the Commission permitted one year (from April to March) banking period for the WEGs with 5% banking charges. This Order No. 3 of 2006 decided maintenance of slot to slot banking account and adjustment in the same way as for other renewable generators against peak / off peak / normal consumption and beyond the banking period, the unutilised portion of the banked energy as on 31stMarch is to be treated as sold to distribution licensee at the rated fixed by the Commission. The State Commission allowed banking for wind energy generators at banking charges of 5%. For the unutilized energy at the end of the year, it was decided that the distribution licensee would pay at a rate of 75% of normal purchase rate.

3.13. In view of the power shortage in the State, the then TNEB approached the Commission for imposition of R & C measures. The Commission, after following the statutory procedure issued an Order dated 28-11-2008. The said Order came to be passed consequent upon filing of M.P.No.42 of 2008 by the TNEB seeking for approval of proposals imposing restrictions and control of power supply and levy of excess demand charges and energy charges. The Commission, after considering the Petition and taking into account the provisions of the Electricity Act, 2003, more

specifically mentioned under Section 86 (2), Section 23, Section 62 (1) (d), Section 61 (2) and (3), Section 88, Section 86 (i) (e), Section 61 (h), Preamble to the Electricity Act, 2003 as also the National Electricity Policy and the National Tariff Policy considered it to be necessary to issue directions in respect of wind energy captive users.

3.14. In the Order dated 28-11-2008 passed in M.P .No.42 of 2008, the Commission has specifically observed that the electricity supplied by Wind Power producers came to the rescue of the TNEB and if wind energy captive users are prevented from utilizing the banked energy generated by them, it would be grossly unjust. After balancing all interests and the interests of the consumers and the petitioner, the direction was issued to utilize banked energy in a staggered manner over a period of five months. It is also significant to state that the Commission in its Order dated 24-12-2008 passed in R.P.No.2 of 2008 filed by the TNEB seeking a review of the earlier order passed in M.P.No.42 of 2008 on 28-11-2008 held as follows:-

> *"3.11 Now coming to the merits of the case, perusal of figures of load shedding and wind energy generation during the period from April 2008 to October 2008, when the wind season was in full swing would undisputedly established, the fact that but for the wind energy, the State would have had to either face severe load shedding or the petitioner (TNEB) would have been compelled to buy costly power from other sources. The half-an-hour average frequency recorded by the TNEB grid between April 2008 and October 2008 never touched the ideal frequency of 50 hertz. The highest half an hour average frequency reached was 49.85 hertz. in April 2008. It reached the ideal frequency of 50 hertz for a few moments only once in April 2008, thrice in June 2008, once in July 2008. These facts clearly establish that the wind energy came to the rescue of the Board during the peak wind season, thus averting a power crisis.*
>
> *It would also be incorrect on the part of the TNEB to state that during this critical period of power shortage, if the banked energy of 315 million units is allowed to be drawn over a period of five months, this petitioner Board (TNEB) has to source and supply additional power to the developers of wind*

energy generators and thereby reduce the availability of power for domestic and other consumers to that extent defeating the very purpose of the restriction and control measures ordered by the Government. Moreover, this will further aggravate the power situation"

The Commission believes that it is a fair balance between the interests of the wind energy generators and the distribution licensee. The argument of the Petitioner that they have to buy high cost power, if banked wind energy is utilized now, is fallacious because if surplus wind energy had not been generated between April, 2008 and October, 2008, the Petitioner Board would have been compelled to buy power at high rate during that period. Therefore, the Commission do not find merit in the submission of the Petitioner Board that utilization of banked wind energy should be disallowed.

"Utilisation of wind energy of 315 million units banked as on 1.11.2008 would raise the burden of demand of the Petitioner Board (TNEB) from an average of 7500 MW by additional 100 MW, which amounts to 1.33%. Similarly utilization of banked wind energy in 5 equal monthly instalments would raise the electricity supply of the petitioner Board (TNEB) from an average 170 million units a day by additional 2 millions units a day which amounts to 1.17%. The argument of the Petitioner Board (TNEB) that they have to buy high cost power, if banked wind energy is utilized now, is fallacious because if the surplus wind energy had not been generated between April 2008 and October 2008, the Petitioner Board (TNEB) would have been compelled to buy power at high rates during that period."

3.15. Despite such clear directions from the Commission, the Respondents resorted to various steps to scuttle the benefit of the Orders by filing proceedings before the Hon'ble High Court of Madras, preventing wheeling of power through issuance of arbitrary and unapproved circulars which were subject matter of two separate proceedings before the Hon'ble High Court of Madras in W.P. No.30890 of 2008 and W.P. No.8366 of 2009. The Hon'ble High Court of Madras passed orders dated 30-03-2009 and 19-05-2009 respectively in the above W.Ps. in Suo Moto Proceedings No. 1 of 2009, the Commission considered the said orders as well as the issues referred to it by the Hon'ble High Court. The Commission, vide its order dated 28-10-2009 passed in Suo Moto Proceedings No. 1 of 2009, severely reprimanded the arbitrary actions of the Respondent Board and issued

certain directions as to the correct manner of imposition off the restrictions. The Commission gave elaborate working instructions for fixing the quota for wind energy as well as CPP. The Commission had further given directions for paying Rs.3.50 per unit for the units that stood lapsed as on 31-03-2009.

3.16. In the order dated 28-10-2009 passed in Suo Moto Proceedings No.1 of 2009, the Commission held as follows:-

> *"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 TNEB 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 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.

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

(1) ……..
(2) ……..
(3) ……..
(4) ……..
(5) ……..
(6) ……..
(7) The High Court has directed that the banked to the credit of the wind energy generator as on 31-3-2009 shall not lapse. Accordingly, we direct that any surplus banked energy remaining adjusted on 31-4-2009 would be eligible for encashment at the rate of Rs.3.50 per unit, which is the current tariff for industrial consumers. This is because the captive consumers were prevented from utilizing the banked energy adequately between 1-12-2008 and 30-4-2009."

3.17. Aggrieved over the above order dated 28-10-2009 by the Commission in Suo Motu Proceedings No.1 of 2009, the Respondent (then TNEB) filed Appeal No.53 of 2010 before the Hon'ble Appellate Tribunal for Electricity (APTEL). The 1st Respondent challenged the findings of the Commission in so far as the conclusion arrived at and the consequential directions to make payment of Rs.3.50 per unit for the unutilised banked wind energy as on 30-04-2009 and the directions to make payment for the banked energy remained unutilised as on 31-03-2010 to be encashed at the rate prescribed in para 8.2.2. of the Order No.1 of 2009 dated 20-03-2009 to wind energy captive users. The said Appeal filed by the Respondent

was dismissed by the Hon'ble APTEL vide its order dated 21-09-2011. In the said order, the Hon'ble APTEL held as follows:

> *"27. Summary of Our Findings*
> *a) The State Commission arrived at the figure of Rs.3.50 per unit for one period and Rs.3.39 per unit for the another period in order to prevent unjust enrichment by the Appellant through adoption of dubious methods and partially compensate the captive consumers for loss suffered as a consequence. The rate, at which the Electricity Board charged its HT consumers under Industrial Tariff, was Rs.3.50 per unit. The State Commission by the impugned order ensured that the Appellant did not unjustly benefit out of its tactics by directing return of the money calculated at the rate of Rs.3.50 per unit and Rs.3.39 per unit."*

3.18. It is also relevant to mention that against the order dated 28-10-2009 passed by the Commission in Suo Moto Proceedings No.1 of 2009, two more Appeals in Appeal Nos. 94 and 95 of 2010 were filed before the Hon'ble APTEL by M/s.Karunambikai Mills Private Limited praying that they should be allowed to utilize the banked energy instead of encashing it. These appeals were also disposed by the Hon'ble APTEL vide its order dated 21-09-2011, referred to above. In respect of these two appeals, the Hon'ble APTEL held as follows:-

> *"37. Summary of our Findings*
>
> *As per tariff order in respect of the year 2006, the unutilised energy at the end of the year would be encashed at 78% of the applicable tariff for wind energy sold to Tamil Nadu Electricity Board. This would indicate that there could be instances where the wind generators could not utilised their banked energy even under normal circumstances, Since the Electricity Board did not permit utilisation of banked energy, the State Commission relaxed this provision and fixed the rate of Rs.3.50 per unit which is much higher than the applicable rates"*

3.19. Even after such banking adjustments are provided, there remains large quantities of energy at the banking account as unutilized at the end of the banking Period on 31st March. According to the Tariff Orders of the Commission, such unutilized banked energy is eligible for encashment at 75% during normal

occasions and 100% during a period by which restriction and control measures are enforced. In the State of Tamil Nadu, the restriction and control measures are in force from 01.11.2008 onwards and are still continuing.

3.20. The extract of the order of the Commission as issued in Order No.1 of 2009 dated 20-03-2009 Comprehensive Tariff Order on Wind Energy and extract of Order No.6 of 2012 dated 31.07.2012 is reproduced below for the sake of convenience.

> *"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 sots 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 encashed at full value of the relevant tariff for sale to the licensee ……..."*
>
> *Extract of TNERC Order No.6 of 2012 dated 31.07.2012 Para 8.2.14:*
>
> *8.2.14 Unutilized energy as on 31st March every year may be encashed at the rate of 75% of the relevant purchase tariff. As and when the distribution licensee enforces restriction and control measures and such measures restrict the WEGs to consume their power in any manner, the unutilized energy at the end of the banking period may be encashed at full value of the relevant tariff as sale to the licensee."*

3.21. From the above, it is clear that the respondent Board is under obligation to make payment of 100% of the value of the unutilized banked energy as on 31st March every year. The order of the Commission setting out various terms and conditions towards captive consumption of wind energy are being converted into an Energy Wheeling Agreement and all the terms and conditions are being provided in

the agreement and accordingly, the wheeling, banking, adjustment and other such matters are being regulated through that agreement between the Respondent Corporation and the Wind Energy Generators like those of the petitioner.

3.22. In terms of the applicable tariff orders and regulations, the petitioner is entitled to receive the payments for the unutilized banked units at the end of each year. The very accumulation of units in banking is owing to the fact that the petitioner was unable to utilize the full generation due to various policies and practices of TANGEDCO, unscheduled load shedding and Imposition of R&C measures. It is also noteworthy to mention herein that in case of any payment due from TANGEDCO to the generator, interest at 1 % per month is payable in terms of the Tariff Orders and the orders of the Commission as upheld by the Hon'ble APTEL.

3.23. Due to the power position in Tamil Nadu with power cuts ranging from 20% to 40%, several other restrictions to use power during the hours of 6.00 p.m. and 10.00 p.m. every day at the HT Industries and announced and unannounced load shedding for about 6 hours to 18 hours in a day, the Petitioner was able to consume only a portion of the power and the balance units generated was fully utilised by the State to meet the power shortage situation in the State.

3.24. The Petitioner had accordingly raised an invoice for sale of unutilized banked units as on 31st March 2011 of 96, 87, 591 (which is confirmed by SE, Perambalur vide letter dated 28.09.2011) on 31st March 2011 for the period from April 2010 to September 2010 vide claim Lr.No.DCBL/001 dated 31.03.2011 at the

applicable Tariff value at the appropriate time with the Respondents. However, no payment made till date.

3.25. From time to time the Petitioner has made several representations requesting the respondents to make payment without delay and to make payment of the outstanding amounts with interest for which the Petitioner are legally entitled to.

3.26. The power scenario in the State of Tamil Nadu has deteriorated from the year 2007 onwards and the Respondent Board is not able to manage the power supply due to huge gap between the supply and demand. Due to severe power cuts in the State at that time and other transmission related problems the Chief Finance Controller, TANGEDCO, Chennai vide Circular No.CFC/FC/REV/AAO/HT/ D.578/2012 dated 3rd September, 2012 has instructed the distribution circles that wherever the CGP have not complied with the CGP requirement of meeting minimum requirement of 26% equity and 51% consumption instead of treating the generated energy as sale to Board Cross Subsidy Charges may be collected for the period from 15th June 2006 to 26th February 2009 and from 11th July 2012 at the applicable rate.

3.27. The respondents thereafter delayed payment as it was being examined whether the petitioner will attract Cross Subsidy Surcharge for non-fulfilment of norms. However, in the same circular TANGEDCO also waived the levy of Cross Subsidy Charges for the period from 27-02-2009 to 10-07-2012 due to the

implementation of Restrictions and Control Measures and the banking period of the petitioner falls under this period i.e. April 2010 to March 2011.

3.28. In any event, before making an analysis whether the captive consumer has consumed at least 51 % of the energy generated by his own CGP, the total number of hours in the year by which load shedding was enforced should also be taken and accordingly to that extent, the minimum percentage prescribed for eligibility for captive consumption needs to be discounted. Therefore, enforcing load shedding on one side and thereby preventing the captive consumer from consuming his own energy and on the other side to conclude that the consumer has not consumed 51% of the annual generation is unfair and unsustainable in law.

3.29. Despite this clear statutory mandate to make payment to the petitioner, the respondents have, citing Rule 3 of the Indian Electricity Rules, 2005 and on the pretext that 51 % of the energy generated was not captively consumed has withheld payments till date. This stand is clearly contrary to the express provisions of the Indian Electricity Rules, the relevant portion of which has been extracted below:-

> *Rule 3 (2) - It shall be the obligation of the captive users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company."*

3.30. The stipulation under the 2005 Rules state that 'in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

This merely means that instead of captive consumption the power would be treated as one pertaining to open access with certain consequences. In fact, the TNERC has also clarified this issue and as the position stands today, even in the event that the 51% consumption norm is not satisfied, the additional charges recoverable from the captive consumer due to non-fulfilment of norms is only the cross subsidy surcharges-in addition to transmission, wheeling charges etc. It would also be pertinent to state that the very reason for not consuming 51% is due to the respondent TANGEDCO's policies and not attributable to the petitioner.

3.31. A clarification was issued by the 2nd respondent herein vide letter CFC/FC/REV/AAO/HT/D.578/2012 dated 03.09.2012 stating that where 51% consumption is not met the cross-subsidy charges if applicable alone are to be collected. In this regard, the Tamil Nadu Government has waived the levy of cross subsidy surcharge has to be recovered for the period from 15-05-2006 to 26-06-2009 from 11-07-2012 onwards. Further, there would be no cross subsidy for wind.

3.32. Despite these clear guidelines, the petitioner's request for payment has been kept pending. Given that the legal position in this regard has already been clarified and that the 1st respondent has already issued a circular, the 2nd respondent herein is merely indulging in dilatory tactics to delay payment on the pretext of obtaining clarifications from the Head Office.

3.33. The details of the unutilized banked units and refund due for the years ended 31-03-2021 are set out as below:-

Year	Net Generation	Consumption	%	Unutilized Banked its (net of Commission)	Refund
31-03-2011	1,76,90,620	76,34,100	43%	96,87,591	2,66,40,875

3.34. The rate fixed by the Commission is lowest even when compared to the rate which the respondent pays for purchase of power from various other sources. Under such circumstances, the petitioner should be entitled to encash the surplus banked energy remaining unadjusted to its credit at different tariff rates as detailed below, which are the tariff applicable for HT industrial consumers.

Period	Tariff Rate Per Unit (Rs.)
April 2010 to July 2010	3.50
August 2010 to March 2012	4.00

It is necessary to state that all the available evidences point to the fact that the 1st respondent is only making a profit by permitting banking and till date no evidence has been produced to the contrary.

3.35. During the relevant period, there has not only been scheduled load shedding but unscheduled load shedding also to the extent of 15 hours a day. This has also contributed to distorting the ability of the petitioner to utilize the energy generated by them. As a matter of fact, the respondents restricted the petitioner from using the wind power generated by them or banked by them, during load shedding (both scheduled and unscheduled) period. Therefore, on the one hand the petitioner, due to Governmental mandate was to generate at the maximum at its captive thermal power plants and at the same time was disabled from drawing from its banked wind energy both because it could not reduce generation due to

governmental mandate and it could not draw maximum power from its banked units when required due to the power cuts in the grid.

3.36. As per the earlier orders of the Commission, the cost of encashment is to be determined on the basis of the tariff payable by industrial consumers in T.O.No.1 of 2012 dated 30-03-2012, the approved tariff for HT industrial consumers is Rs.5.50/- and hence the same rate should be paid for the surplus banked energy remaining unadjusted to the credit of the petitioner.

3.37. The continuous default on the part of the Respondents to make prompt payment for the unutilized energy to be encashable is causing a huge strain on the financial administration of the Petitioner and the failure of the Respondents, is causing irreparable loss and huge financial burden to the Petitioner company. The Petitioner had issued a detailed communication dated 4.8.2014 calling upon the respondents to make payment. However, till date no payment has been forthcoming.

3.38. The circular issued by the 3rd respondent is wholly arbitrary in as much it is TANGEDCO which is the cause for preventing adjustment of the units generated by the generating plants. Furthermore, the captive status has no impact upon the encashment of banked units in as much as whatever units are not adjusted and treated as banked units are required to be paid for at the rates fixed under the respective tariff orders. The said arrangement is one of energy wheeling and none of the terms of the said agreement or applicable tariff orders would result in lapsing of the banked units. The third respondent is in an entirely arbitrary manner seeking

to treat the consumption of units as a third party and therefore banking not being available to such captive consumers. Even assuming such a proposition can be created, it would apply only during normal circumstances and not at a time when R&C measures are in operation.

3.39. The petitioner has made several representations requesting the respondents to make payment without delay and to make payment of the outstanding amounts with interest.

3.40. The said actions of the respondents in denying payments to the petitioner are wholly arbitrary and illegal inasmuch as under the Electricity Rules, 2005 failure to comply with the consumption requirement would only result in the sale being treated as a sale by a generator thereby entailing for additional payment of cross subsidy surcharge, which aspect has already been covered by a circular of the third respondent. The regulation tariff order or agreement nowhere provides that where the consumer had been prevented due to load shedding, the benefit of banking would be withdrawn. The actions of the respondents are therefore wholly illegal.

3.41. The action of the respondent is also violative of the petitioner's rights emanating out of principles of promissory estoppel inasmuch as the petitioner has set up a wind energy generator and sought wheeling of power therefrom only after calculating the consumption that would be made by different consumers at the consuming end. The respondents, by their arbitrary imposition of power cut have clearly sought to interfere with such rights. It is the respondents who are greatly benefiting by such illegal power cuts inasmuch as if the petitioner had utilized the

generated and banked units, it would have operated at a much lower cost of electricity. The petitioner suffers from a disadvantage due to the action of the respondents because the banked units are compensated only at 75% of the applicable tariff rules.

3.42. The respondents having restricted and controlled the petitioner to consume lower than their entitlement, the respondents are seeking to unjustly enrich themselves by such arbitrary and illegal action for no fault of the petitioner.

3.43. Surprisingly, the 3rd respondent has issued a circular bearing reference - Lr.No.CFC/FC/REV/AAO/HT/D.419/2014, dated 11-07-2014 on the pretext issuing clarifications from the Head Office has stated that

> 3.0 In this connection it is stated that, in the event of a generator losing his captive status in any year, the entire electricity generated shall be treated as if it is supply of electricity by a generating company. In other words it is to be treated as energy from a 3rd party supply. The 3rd party power does not have banking provision as per reference 3rd cited. In view of losing captive status, the HT Bills of the captive consumers of the ……"

3.44. During the relevant period, there has not only been scheduled load shedding but unscheduled load shedding also to the extent of 15 hours a day. This has also contributed to distorting the ability of the Petitioner to utilize the energy generated by them. Owing to the operation of G.O. No.10, it was compelled to export power to the respondent Electricity Board and could not draw its banked wind energy through import mode.

3.45. As per G.O.Ms.No.10 dated 29-02-2009, the generating stations operating in the State of Tamil Nadu, including WEGs such as some of the members of the IWPA, were required to operate at maximum plant load factor and were also barred from selling power outside the State of Tamil Nadu. It is elementary principle of law that organs of the State have to act in a fair manner. Therefore, because of PLF maximizing at thermal power plants at Ariyalur, it was always exporting power to the respondent Electricity Board and could not draw its banked wind energy though import mode. For any energy generated by the petitioner and have been injected into the grid, if such energy has not been utilized by the petitioner, then the 1st Respondent must pay for it as the un utilized energy is used by them.

3.46. The effect of the impugned order issued by the third respondent is that while captive consumers such as the petitioners have suffered from the actions of TANGEDCO, TANTRANSCO and SLDC due to the unscheduled grid shut downs and unable to utilize their own power and have had to depend upon the expensive third party diesel generated power and at the same time, the TANGEDCO has benefitted from the power generated by the petitioner and sold to other consumers. As a matter of fact, the petitions seeking compensation in this regard are also filed by various associations and pending before the Commission.

4. Counter affidavit filed by the Respondents:-

4.1. The Electricity Act, 2003 define the Captive Generating Plant under section 2 (8) as follows:-

> *" xxx*
> *2. (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.
xxx"

4.2. The Cross Subsidy Surcharge is the payment of the tariff charges for availing open access by the subsidizing consumer of the distribution licensee, i.e. when they seek to purchase power from sources other than distribution licensee as provided for in the Electricity Act, 2003, National Electricity Policy and also the Open Access Regulation, 2014 of State Electricity Regulatory Commission which reads as follows:-

"PART VI
Distribution of Electricity
Provisions with respect to Distribution Licensees

42. Duties of distribution licensees and open access:
xxxx
The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:

Provided that such open access shall be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use:

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the

duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access .

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply.

The National Electricity Policy contains the following provisions regarding Open Access:

5.4. Distribution

xxxx

5.4.2 The Act provides for a robust regulatory framework for distribution licensees to safeguard consumer interests. It also creates a competitive framework for the distribution business, offering options to consumers, through the concepts of open access and multiple licensees in the same area of supply.

xxxx

5.4.5 The Electricity Act 2003 enables competing generating companies and trading licensees, besides the area distribution licensees, to sell electricity to consumers when open access in distribution is introduced by the State Electricity Regulatory Commissions. As required by the Act, the SERCs shall notify regulations by June 2005 that would enable open access to distribution networks in terms of sub-section 2 of section 42 which stipulates that such open access would be allowed, not later than five years from 27th January 2004 to consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one mega watt. Section 49 of the Act provides that such consumers who have been allowed open access under section 42 may enter into agreement with any person for supply of electricity on such terms and conditions, including tariff, as may be agreed upon by them. While making regulations for open access in distribution, the SERCs will also determine wheeling charges and cross-subsidy surcharge as required under section 42 of the Act.

5.8 FINANCING POWER SECTOR PROGRAMMES INCLUDING PRIVATE SECTOR PARTICIPATION

xxxx

5.8.3 Under sub-section (2) of Section 42 of the Act, a surcharge is to be levied by the respective State Commissions on consumers switching to alternate supplies under open access. This is to compensate the host distribution licensee serving

such consumers who are permitted open access under section 42(2), for loss of the cross-subsidy element built into the tariff of such consumers. An additional surcharge may also be levied under sub-section (4) of Section 42 for meeting the fixed cost of the distribution licensee arising out of his obligation to supply in cases where consumers are allowed open access. The amount of surcharge and additional surcharge levied from consumers who are permitted open access should not become so onerous that it eliminates competition that is intended to be fostered in generation and supply of power directly to consumers through the provision of Open Access under Section 42(2) of the Act. Further it is essential that the Surcharge be reduced progressively in step with the reduction of cross-subsidies as foreseen in Section 42(2) of the Electricity Act 2003.

Further, the State Commission had issued Open Access Regulation – 2014 which reads as follows:-

Chapter 5
Open Access Charges

20. Transmission Charges:-

Open Access customer using transmission system shall pay the charges as stated hereunder:

xxxx

21. Scheduling and System Operation Charges:-

Scheduling and System Operation Charges shall be payable by the Open Access Customers at the following rates:-

xxxx

22. Wheeling Charges

(a) Wheeling charges payable to Distribution Licensee, by an open access customer shall be as determined by the Commission;

(b) Where a dedicated distribution system used for open access has been constructed for exclusive use of an open access customer, the wheeling charges for such dedicated system shall be worked out by the Licensee and got approved by the Commission and shall be borne entirely by such open access customer till such time the surplus capacity is allotted and used by other persons or for other purposes;

(c) In case intra state transmission system or distribution system is used by an open access customer in addition to inter-state transmission system, transmission

charges and wheeling charges as fixed and approved by the Commission shall be payable for use of intra-state system in addition to payment of transmission charges for inter-state transmission.

23. Cross subsidy surcharge. -

(1) If open access facility is availed of by a subsidizing consumer of a Distribution Licensee, then such consumer, in addition to transmission and/or wheeling charges, shall pay cross subsidy surcharge as determined by the Commission. Cross subsidy surcharge determined on Per Unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access. The amount of surcharge shall be paid to the distribution licensee of the area of supply from whom the consumer was availing supply before seeking open access."

4.3. From the above, it could be clearly observed that if the above sections are read in conjunction with each other, Cross Subsidy Surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use. In this regard, it is most relevant to mention that the levy of the Cross Subsidy Surcharge by the distribution licensee (TANGEDCO) / Respondent is a legitimate one and is accordance with law after verification of Captive Generating Plant status.

4.4. 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 as follows:-

> *"3. Requirements of Captive Generating Plant.-*
>
> *(1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless- (a) in case of a power plant –*
>
> *(i) not less than twenty six percent of the ownership is held by the captive user(s), and*

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

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

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

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

Explanation :-

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

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

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

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

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

b. "Captive User" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;

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

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

4.5. 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. If the status of a Captive Generating Plant is lost due to any of the conditions (or) for both the conditions, the entire electricity generated from such plant in the year shall be treated as if is a supply of electricity by a generating company. In such cases of disqualification, Cross Subsidy Surcharge has to be levied for the entire adjusted units / consumed by the users treating such consumption as though it was supplied by the respective Generating Plant, since proviso 2 of section 42 of the Electricity Act, 2003 clearly states that surcharge is not to be levied only in case of captive consumption. Therefore, it is stated that the respondent has to verify the Captive Generating Plant status in order to decide on the levy of Cross Subsidy Surcharge towards providing Open Access under captive category in accordance with the Electricity Rules, 2005.

4.6. In respect of wind energy generators, the Commission had passed an order on 15-05-2006 vide Order No. 3 on purchase of power from NCES based generating plants, the relevant portion which held as follows:-

"xxxx
10.4 Banking

As followed by most of the other States, the Commission retains the existing practice of one year (from April to March) banking period of TNEB, for the NCES based wind electric generators. However, for the biomass and bagasse based cogen generators, banking provisions shall not apply.

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

xxxx

10.15 Billing and Payment to NCES generator by Distribution licensee

In case of captive use, the distribution licensee shall raise the bill after accounting for the net energy supplied at the end of each monthly billing cycle. Meter reading should be taken on the same day at NCES generator end and captive user / third party purchaser end. The generation at generator end shall be communicated to all the circles of the captive users / third party purchaser within2 days so as to facilitate for matching generation with consumption in the same billing month. This adjustment will be done on slot to slot basis taking in to account the (i) peak (ii) off peak and (iii) normal generation / consumption within monthly billing cycle /banking period. No carry over is allowed for the next month in case of firm power supply. In case of infirm power, no carry over is allowed beyond the banking period. Excess generation in a monthly billing cycle / banking cycle can be sold to the Licensee at the rate fixed by the Commission."

4.7. In accordance with above, the wind energy generator is eligible for encashment at rate of 75% of normal purchase rate for the surplus energy remains at the end of the financial year. Further, it is most relevant to mention that subsequently, the Commission issued Tariff Order No.1 of 2009 dated 20-03-2009, Tariff Order No. 6 of 2012 dated 31-07-2012 and Tariff Order No. 3 dated 31-03-2016 in connection with Wind energy, wherein it is stated that the existing practice of banking facility and unutilized captive banked energy is to be purchased by the TANGEDCO at 75% of the normal purchase rate. However, when TANGEDCO implemented Restrictions and Control measures, the generator is eligible to encash the unutilized energy at 100% of the normal purchase rate.

4.8. The wind energy captive generator has executed Energy Wheeling Agreement wherein the relevant clause which held as follows:-

> *"xxxx*
> *10. Applicability of the Acts and Regulations:*
> *Both the parties shall be bound by the provisions contained in the Electricity Act, 2003, Regulations, notifications, orders and subsequent amendments, if any, made from time to time by the Commission.*
> *xxxx"*

4.9. In accordance with the above clause of the Energy Wheeling Agreement, TANGEDCO and wind energy captive generator shall be bound by the provisions contained in the Electricity Act, 2003 and Rules, 2005. Therefore, in accordance with section 42 of the Electricity Act, 2003, the Wind Energy Captive generator wheels the energy to their captive users and exempted from the levy of cross subsidy surcharge for such captive transactions. Similarly, if the twin rules of the Rule-3 of the Electricity Rues-2005 are not maintained by the captive users and captive generator, the captive status of the generating plant will be lost and the entire electricity generated shall be treated as if it is a supply of electricity by generating company thereby the entire energy adjusted against HT consumption by the User(s) will attract levy of Cross Subsidy Surcharge. Consequently, TANGEDCO will be entitled to recover such amount of Cross Subsidy Surcharge. Therefore, TANGEDCO has to verify CGP status of the wind energy generator whether they had fulfilled the twin rules of the Electricity Rules -2005 before the payment of encashment of the unutilized banked after the said captive consumption.

4.10. TANGEDCO issued clarification vide letter dated.30.05.2015 in the matter of Encashment of unutilized energy of Wind energy generator namely M/s.Eveready

Spinning Mills (P) Limited, Theni Electricity Distribution Circle encashment of Tariff rate at 75% / 100% due to enforcement of R&C measures, the relevant portion of the clarification is as below:

"xxxx

3.1. The Commission has passed the order on 07.09.2010 in IA. Nos. 1 and 2 of 2010 in M.P. No.9 of 2010, M.P. No.6 of 2010, M.P. No. 17 of 2010 and D.R.P. No.9 of 2010. The operative portion of the said order is as follows:

4.6. To summarize, the present order enables a consumer to consume power up to sanctioned demand including TNEB quota demand and procurement of power from captive sources and third party sources. The need for advance declaration of the consumer for procurement of power through open access is dispensed with for the purpose of this order.

3.2. Based on the above order the CE/Commercial had issued instructions to the circles vide Memo. No. CE/Commf/EE/DSM/AEE1/F.Power Cut/D.358/2010, dt.17.09.2010 wherein it has been stated that at present the wind mill generators have already been permitted to use their full wind mill generation up to the sanctioned demand without any restriction and CPP's consumers may also be permitted to use full wheeled energy without any cut.

3.3. The regulation 8.2.14 of the Order No.6 of 2012 dt.31.07.2012 (Comprehensive Tariff Order on Wind energy) is as follows:

"8.2.14 Unutilized energy as on 31st March every year may be encashed at the rate of 75% of the relevant purchase tariff. As and when the distribution licensee enforces restriction and control measures and such measures restrict the WEGs to consume their power in any manner, the unutilized energy at the end of the banking period may be encashed at full value of the relevant tariff as sale to the licensee.

3.4 The above regulation permits the wind energy generator to encash @ 100% for the unutilized energy as and when the distribution licensee enforces restriction and control measures only when such measures restrict the WEGs to consume their power in any manner. But TANGEDCO had permitted the captive consumers to use the wind energy up to the sanctioned demand with effect from 07.09.2010. In this case the consumer has furnished the power cut details during the financial Year 2012-13 as follows:-

Month	*Power Cut Details*	
	No. of times	*Hours*
April 2012	*(Supply effected from 20-04-2012)*	
May 2012	*66*	*281.10*
June 2012	*75*	*115.30*
July 2012	*49*	*59.05*

August 2012	*94*	*148.00*
Sep. 2012	*135*	*201.05*
Oct. 2012	*119*	*188.05*
Nov. 2012	*14*	*3.35*
Dec. 2012	*6*	*9.40*
Jan. 2013	*14*	*18.55*
Feb. 2013	*27*	*49.00*
Mar. 2013	*22*	*40.15*
Total	*621*	*1113.00*

In this connection, the Commission has ordered on 15.09.2014 in M.P. No. 17 of 2013 and other batch, the relevant portion reads that considering the norms fixed by the Commission in the Standard of Performance Regulation and other practical conditions, a supply interruption of 20% and more in a billing cycle can be considered as a " longer duration. " Herein, instead of billing cycle banking period has to be taken. In this case, the actual power availability hours during the financial year is 8760 hrs [365x24}. On the other hand, a supply interruption during the said financial year is 1113 hrs. Therefore, the percentage of supply interruption is 12.7% against the power actually availability hours which below 20% in the banking period cycle thereby it cannot be considered as longer duration by considering the norms fixed by the Commission in the Standard of Performance Regulation. Furthermore TANGEDCO has permitted the captive users to use their captive power over and above the quota demand up to the sanctioned demand from 07.09.2010.

3.5. Under the said factual position, it may be concluded that the Restrictions and Control measures may not restrict the captive users to consume their wind captive power. Therefore, the above WEG is eligible for encashing the unutilized energy at the end of the banking period only at 75% of the relevant tariff during the financial year 2012-13. Further, in this regard, it is relevant to mention that the captive user of the said WEG has obtained the dedicated feeder on 17.10.2012. On obtaining the dedicated feeder, the captive user run their industry without supply interruption on consumption of captive wind power. Therefore, the said WEG is eligible for encashing the unutilized energy at the end of the banking period at 75% of the relevant tariff from the financial year 2013-14 onwards in accordance with the Commission order dated. 07. 09.2010 and the contention of the BOAB audit and AG Audit is correct.

3.6. At this juncture, it is stated that the dedicated feeder captive user of the WEG is eligible for encashing the unutilized energy at the end of the banking period only at 75% of the relevant tariff from the respective financial year, since Restriction and Control measures does not restrict the captive user to consume their captive power in any manner. Similarly, the common feeder captive user of the WEG is eligible for encashing the unutilized energy at the end of the banking period at full value of the relevant tariff for the respective financial year subject to the condition that a supply interruption/power cut in respect of the captive user is 20% and more in banking period cycle when prevailing R&C measures. On the other hand, a

supply interruption is below 20% in respect of the mixed feeder captive user, the mixed feeder captive user of the WEG is eligible for encashing the unutilized energy at the end of the banking period only at 75% of the relevant tariff when prevailing R&C measures. "

4.11. Further, the generation of wind energy and adjustment is not on a real time basis. The energy generated during a month on daily basis are aggregated and sorted slot wise. Similarly, the consumption is also aggregated and sorted slot wise in a billing month. Hence the question of preventing of WEGs to consume their power may not arise.

4.12. In accordance with the above circular, a supply interruption within 20% in respect of the mixed feeder where captive user is connected, then the WEG is eligible for encashing the unutilized energy at the end of the banking period at 75% of the relevant tariff during R&C period. Similarly, it is stated that the captive user of the WEG connected through dedicated feeder is also eligible for encashing the unutilized energy at the end of the banking period only at 75% of the relevant tariff from the respective financial year, since Restriction and Control measures does not restrict the captive user to consume their captive power in any manner. Herein, the petitioner is dedicated feeder consumer.

4.13. However, the aforesaid circular was challenged by TASMA and others and obtained interim injunction vide W.P.(MD).No.17091 of 2015 and the case is pending before the Hon'ble High Court of Madras Madurai Bench.

4.14. The impugned circular bearing Lr.No. CFC/FC/REV/AAO/HT/0.419/2014 dt l1.07.2014 has been modified by way of circular Memo. No.CFC/REV/DFC/

REV/AAO.HT/AS.3/D.No.426/18, dated. 07.07.2018, the relevant portion which held as follows:

"xxx

4.4. Back Ground of the Issues:

4.4.1. The Hon'ble Commission had issued Tariff order on the Fossil Fuel Based Captive Generating plants [Thermal] on 15.05.2006 vide Order.No.4 dated. 15.05.2006, wherein the relevant provisions which held as follows:-

3. Banking and Commercial Mechanism:

Fossil fuel based power plants can produce firm power. Hence, there is no justification in providing banking provision for fossil fuel based CGPs or Co-generation plants. Meter reading should be taken on the same day at CGP holder end and captive user/third party purchaser end. The generation at CGP holder end shall be communicated to all the circles of the captive users/third party purchaser within 2 days so as to facilitate for matching generation with consumption in the same billing month. This adjustment will be done on slot to slot basis taking in to account the (i) peak (ii) off peak and (iii) normal generation/ consumption within monthly billing cycle. No carry over is allowed for next month. Excess generation by the CGP holder in a monthly billing cycle can be sold to the Licensee, Excess drawal will be charged under respective tariff applicable to the user.

Xxx

8 (f), Energy Purchase Agreement:

The CGP Holder shall sign an EPA with Distribution Licensee or Third party consumers for sale of power of minimum 1MW (i.e equivalent to 700 units per hour). The criterion shall be applicable for "Firm" as well as "Infirm" power. Any power interred into the grid for the purpose of selling to the Distribution Licensee

It is not intended that the Commission would approve EPA for each CGP holder individually. Distribution Licensee shall draft EPA taking cognizance of the Tariff provisions and EPA related principles elaborated in this Order.

A short tenure such as 1 year for Firm power purchase agreement considered to be inadequate for CGPs to provide investment / financial related details to the lending agencies/ institutions while seeking financial assistance. Therefore, the Distribution Licensee should sign and EPA for a minimum of 3 years and maximum period of 5 years, with the CGP Holders, for both 'Firm' as well as 'Infirm' power purchase from CGP.

From the above provisions of the Tariff order any sort of energy (Firm/Infirm) is to be purchased by the Distribution Licensee by entering into EPA. It means that there was a clear requirement of contractual agreement between Captive thermal generator and TANGEDCO.

4.4.2. In this connection, it is most relevant to mention that the Commission has passed an order on 23.02.2016 in P.P.A.P. No.9 of 2013 in connection with payment of surplus units pumped into grid by the M/s. Kamachi Sponge & Power Corporation Ltd , wherein the relevant portion which held as follows:-

xxxx

5.12. The Hon'ble TNERC in its order dated.15.09.2014 made in P.P.A.P.No.1 of 2013 (M/s. Cauvery Power Generation Chennai Pvt Ltd Vs. TANGEDCO and others observed as follows:-

> *"6.13. While TANTRANSCO is the authority concerned with transmission of electricity, TANGEDCO is concerned with the purchase of electricity from the generators..... Mere request on the part of the petitioner to sell the infirm power generated during the period of testing and commissioning to the Respondents will not create an obligation on the part of the Respondents to pay.*
>
> *6.14. The Commission concludes that the petitioner is not entitled to claim payment for whatever infirm power injected into the grid by the petitioner Generator from 17.10.2012 to 25.10.2012 without getting express approval from the TANGEDCO.*

5.13. Therefore in the present case, the entire energy pumped by the petitioner during the periods ----- is unauthorized and therefore Commission is not inclined to direct the Respondent to make payment for the unauthorized injection of power by the petitioner.

4.4.3. In continuation to the above and M/s. Kamachi Sponge & Power Corporation Ltd has filed appeal before the Hon'ble ATE vide A.No.120 of 2016 and the Hon'ble ATE upheld the TNERC's order dated 23.02.2016 in P.P.A.P.No.9 of 2013, the relevant portion which held as follows:

xxx

..... Here we would like to mention that each entity created under the Electricity Act, 2003 has a clear defined role. In the Judgment till TANGEDCO conveyed its consent to purchase infirm power. In the Judgment dated30.05.2016 in A.No.68 of 2014 this Tribunal has disallowed the payment by Respondent (TANGEDCO) towards injection of power from COD of the Appellant [M/s. OPG Power Generation Pvt Ltd. till approval of third party sales by TANTRANSCO as the energy was injected to the grid without the consent/knowledge of the distribution licensee and SLDC The crux of these two judgments is also that a generator cannot pump electricity into the grid without having consent/ contractual agreement with the distribution licensee and without the approval/scheduling of the power by the

SLDC. Injection of such energy by a generator is not entitled for any payments.

4.4.4. From the above, it is observed that as far as thermal generators and all other generators are concerned [except solar and wind energy generators], generator cannot pump electricity into the grid without having consent/ contractual agreement with the distribution licensee and without the approval/ scheduling of the power by the SLDC Injection of such energy by a generator is not entitled for any payments.

4.4.5. In respect of wind energy generators, the Hon'ble TNERC had passed an order on 15.05.2006 vide Order. No. 3 on Purchase of Power from NCES based generating plants, wherein it has been specified the wind energy generator is eligible for encashment at rate of 75% of normal purchase rate for the unutilized portion of banked energy. The same benefit has also been extended in further wind orders vide Order No.1 of 2009, dt.20.03.2009, Tariff order No.6 of 2012 dt. 31.07.2012 and Tariff order No.3, dt.31.03.2016 and there is no scheduling for wind energy.

4.4.6. In this connection, it is most relevant to mention that the Hon'ble Commission had issued Comprehensive Tariff Order on Wind Energy vide Order No.1 of 2009 dated 20.03.2009, the relevant portion which held as follows:-

8.2. Banking:-

xxx

8.2.2. The banking charges shall be realized every month less the consumption of the captive users/third party sale.

xxxx

From the above, it could be observed that banking facility is applicable wind energy wheeled under captive category as well as third party category.

4.4.7. Further, in this connection, it is most relevant to mention that the Hon'ble TNERC in its order dated 02.03.2011 in DRP.No.8 of 2010 had passed an order in connection with banked units and encashment of banked units, the relevant portion which held as follows:

xxx

6.2. As regards the petitioner's plea on lapsing of banked units and encashment of the banked units of the generators M/s. Lakshmi Electricals Drives Ltd and M/s. Lakshmi Control Systems Ltd. the generators would be governed by their respective agreement with the TNEB.

In accordance with above order lapsing of banked units and encashment of the banked units of the wind energy generators would be governed by their respective Energy Wheeling Agreement with the TNEB. This position was settled by the State Commission.

4.4.8. While fact being so, it is stated that instructions had been issued that 3rdparty power does not have banking facility vide Technical Branch Proceeding

CMD No.71 dated.28.12.2010. Based on the above, the instructions with regard to banking in respect of the wind energy generators who lost captive status had been issued vide Lr.No.CFC/ FC/REV/AAO.HT/D.419/2014 dt.11.07.2014, the relevant portion which held as follows:

"xxxx it has been instructed that in the event of a generator losing his captive status in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company. In other words, it is to be treated as energy from a 3rd party supply. The 3rd party power does not have banking provision as per reference 3rd cited In view of losing captive status, the HT bills of the captive consumers of the said financial year have to be revised every month by taking only the current month generation for adjustment. i.e. the unutilized energy remaining after adjustment has to be lapsed at that month itself. The Cross Subsidy Surcharges is to be levied on the energy adjusted during the financial year from such sources. Further, if any banking charges were collected during the financial year, it shall be refunded to the consumer."

4.4.9. In continuation to the above, the Hon'ble State Commission has ordered in D.R.P.No.19 of 2013, dated.19.01.2015, the relevant portion which held as follows:

"xxx

5.7

xxxx

We order that the TANGEDCO shall first adjust the wheeled energy generated from the petitioner's WEG under REC scheme which has an adjustment or banking period one month and then adjust the energy generated from other captive/third party generators which have a banking period of one year.xxx"

From the above, it could be observed that banking facility is applicable wind energy wheeled under captive category and third party category.

4.4.10. Further, it is most relevant to mention that the Hon'ble Appellate Tribunal for Electricity, New Delhi had passed many orders in connection with Captive Norms verification in accordance with Electricity Rules -2005, however, the relevant portion of one of the order dt18.02.2013 in Appeal.No.33 of 2012 in connection Captive Norms in accordance with Electricity Rules-2005, which held as follows:

"xxxx

19. The above decision lays down the following dictums:

(a) One who is unable to fulfil the twin requirements of Rule-3, is not permitted under the law to have exemption from payment of cross subsidy surcharge. ----------"

From the above, it is clear that one who is unable to fulfil the twin requirements of Rule -3 of Electricity Rule -2005, is not permitted under the law to have exemption from payment of cross subsidy surcharge only in accordance with the Section 42 of the Electricity 2003. Further, it is most relevant to mention that only difference between the captive use and third party use is if energy wheeled under captive category, the Cross Subsidy Surcharge doesn't arise. On the other

hand, if energy wheeled under third party category Cross Subsidy Surcharge will arise in accordance with the Electricity Ace 2003, State Commission s order and Hon'ble Appellate Tribunal Orders as stated above.

4.4.11. In this connection, it is most relevant to mention that in accordance with the Energy Wheeling Agreements and also the wind energy tariff orders dated 15.05.2006, 20.03.2009, 31.07.2012 and 31.03.2016 the Wind Energy Generator has provision that the unutilized portion of the banked energy if any shall be purchased by the licensee at the rate of 75% of the normal purchase rate at end of the financial year and hence, the Wind Energy Generator is eligible for getting payment for unutilized portion of banked energy as mentioned above at the rate of 75% of the normal purchase.

Further, it is most relevant to mention that there is no provision in the Energy Wheeling Agreement that if the Captive Wind Energy Generator has lost Captive status, the Banking Provision will be withdrawn and the wind energy generator is not eligible for the payment of unutilized banked units for the financial year. Therefore, the contention of the letter dated. 11.07.2014 which is the consequential order of Technical Branch's Proceeding CMD No. 71 dated. 28.12.2010 that in view of losing captive status in respect of the WEGs, the HT bills of the captive consumers of the said financial year have to be revised every month by taking only the current month generation for adjustment i. e. the unutilized energy remaining after adjustment has to be lapsed at that month itself. The Cross Subsidy Surcharges is to be levied on the energy adjusted during the financial year from such sources. Further, if any banking charges were collected during the financial year, it shall be refunded to the consumer is not sustainable one and also inconsistent with the Hon'ble Commission's Wind Energy Tariff order and other relevant order.

4.4.12. In such factual circumstances, a modified clarification has been issued with regard to the wind energy generator those who have not fulfilled the twin rules of the Electricity Rules-2005 vide Memo.No.CFC/REV/FC/REV/AS.3/ REV/D.320/17, dated.24.02.2017, the relevant portion which held as follows:

"xxxxx

It is stated that in accordance with Rule, 3 of the Electricity Rules-2005, the Captive Generating Plant has lost their captive status during the financial years since one of the twin rules for requirement of Captive Generating Plant i. e not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for captive use, is not satisfied by the said Generating Plant. Therefore, the Cross Subsidy Surcharge has to be levied on the captive user for the energy adjusted from above Generating Plant. In this case, the Generating Plant has lost their CGP status for the above financial years andalso energy has been adjusted in the above Generating plant is 123409 units and hence the Cross Subsidy Surcharge has to be levied for the above adjusted units financial year wise, since one who is unable to fulfil the twin requirements of Rule-3 of Electricity Rules -2005, is not permitted under the law to have exemption from payment of cross subsidy surcharge. Further, it is stated that balance of 5064693 units, of the

respective Generating Plant has to be treated as per their terms of the Energy Wheeling Agreements

3.5. In this case, in accordance with the Energy Wheeling Agreements, the Wind Energy Generator has provision that the unutilized portion of the banked energy if any shall be purchased by the licensee at the rate of 75% of the normal purchase rate and hence, the above generator is eligible for getting payment for unutilized portion of banked energy as mentioned above at the rate of 75% of the normal purchase. The correctness of the calculation details such as unutilized banked energy etc should be checked at the User end circle, where the banking was maintained, before arranging for payment "

In accordance with the above fadual circumstances, it is most relevant to state that Lr.No. CFC/FC/REV/AAO.HT/D.419/2014, dated 11.07.2014 has partially modified by way of issuing Memo. No. CFC/REV/FC/ REV / AS. 3/REV/D.320/17, dt24.02.2017. In this connection, it is most relevant to mention that the letter dated.24.02.2017 is not challenged. On the other hand, the letter dated 11.07.2014 has been challenged before the Hon'ble High Court of Madras and also the Tamil Nadu Electricity Regulatory Commission. Moreover, detailed illustrations have been issued for verification of the Captive Generating Plant status vide letter dated. 15.03.2017, 18.03.2017 that and the same has been challenged vide WP.No.10497 of 2017 and others batch with regard to whether TANGEDCO has got the jurisdiction to verify the Captive Generating Plant Status. Further, a show cause notices issued for levying Cross Subsidy Surcharge based on the letter dated 15.03.2017 in connection with the Captive Users those who have not furnished relevant documents so as to verify the Captive Generating Plant status for the Financial Years 2014-15, 2015-16 and 2016-17.

4.4.13. Under such Circumstances, the case on hand, that the relevant clause of the Energy Wheeling Agreement executed by M/s.Jain Irrigation Systems Ltd. which read as follows:

xxxxx

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 user.

(2) 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. Unutilized energy at the end of the financial year may be encashed at the rate of 75% of the relevant purchase tariff.

xxxx

In accordance with the above clause of Energy Wheeling Agreements, it is provided that the unutilized portion of the banked energy if any shall be purchased by the licensee at the rate of 75% of the normal purchase rate and hence, the above generator is eligible for getting payment for unutilized portion of banked energy as mentioned above at the rate of 75% of the normal purchase rate. In this case, the Generating Plant has lost their CGP status for the above financial year due to reasons that one of the twin rules of Rule -3 of Electricity Rules -2005 for the financial year 2012-13 i.e 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 and hence the Cross Subsidy Surcharge has to be levied for the adjusted units for the said financial year, since one who is unable to fulfil the twin requirements of Rule-3 of Electricity Rules -2005, is not permitted under the law to have exemption from payment of cross subsidy surcharge. Further, it is stated that balance of unutilized banked energy for the financial year 2012-13 of 4766238 units, of the respective Generating Plant has to be treated as per their terms of the Energy Wheeling Agreements i.e the unutilized portion of the banked energy if any shall be purchased by the licensee at the rate of 75% of the normal purchase rate. Similarly, the above generator has to pay the all the open access charges. Therefore, AG audit objection is in order; on the other hand BOAB audit objection is not sustainable one.

4.4.14. Further, all the Superintending Engineers of Distribution Circles are hereby instructed that any similar issue is pending based on the letter dated11.07.2014 at circle by way of Audit or any petition filed in any legal forum, the demand already made based on the letter dateci.11.07.2014 may be modified as stated above and the same may be informed to Audit and petitioner respectively. xxx"

In accordance with the above circular, if the CGP lost his captive status the Cross Subsidy Surcharge only has to be levied for the adjusted units from the captive users.

4.15. The regulation 38 of the Distribution Code and the clause 4 of chapter 7 of the Grid Code, the same are extracted below for perusal:-

"38. Restrictions on use of electricity: (Tamil Nadu Electricity Distribution Code):-

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. Demand Control [Grid Code]

Demand control is concerned with the provisions to be made by SLDC to ensure the reduction of demand in the event of insufficient generating capacity, and transfers from external interconnections being not available to meet demand, or in the event of breakdown or operating problems (such as frequency, voltage levels or thermal overloads) on any part of the Grid. Towards this end the following requirements shall be complied with:

i. Power drawing entities shall endeavor to restrict their net drawal from the Grid to within their respective drawal schedules whenever the system frequency is below 49.5 Hz. When the frequency falls below 49.0 Hz., requisite load shedding (manual) shall be carried out to curtail the over drawal. Such load shedding shall be pre planned for each level of under frequency.

ii. Further, in case of certain contingencies and / or threat to system security, the SLDC may direct the SSLDCs and other sub stations to decrease its drawal by a certain quantum. Such directions shall immediately be acted upon.

iii. Each distribution licensee shall make arrangements that will enable manual demand disconnection to take place, as instructed by the SLDC/SSLDC, under normal and / or contingent conditions. The measures taken to reduce the entities'drawal from the Grid shall not be withdrawn as long as the frequency / voltage remains at a low level, unless specifically permitted by the SLDC/SSLDC."

4.16. On a conjoint reading of regulation 38 of Distribution Code & clause 4 of the Chapter 7 of Grid Code, it is noted that in case of certain contingencies and or threat to system security, the State Load Dispatch Centre may direct the sub- load dispatch centre, and other substation to decrease its drawal by certain quantum. The licensee shall not be responsible for any loss or inconvenience caused to the consumer as a result of curtailment, staggering, regulation or cessation to use of electricity due to grid security.

4.17. In the case on hand, the petitioner has HT service connection vide HT.SC.No.74, pertaining to the Perambalur EDC, the said service connection has captively consumed the energy generated from their own wind mill HT.SC.No.2249, HT.SC.No.250,336 at Tirunelveli EDC. It has been admitted by the petitioner that

during the financial year 2010-11, the petitioner has not fulfilled consumption criteria which is one of the twin Rules of Rule-3 of Electricity Rules-2005. Therefore, the petitioner's Captive Generating Plant lost its captive status. If the status of a Captive generating plant is lost due to anyone of the reasons (or) for both the reasons, the entire electricity generated from such plant in year shall be treated as it is a supply of electricity by a generating company. In such cases of disqualification, Cross Subsidy Surcharge has to be levied for the entire adjusted units/consumed by the Users treating such consumption as though it was supplied by the respective Generating Plant, since proviso 2 of Section 42 of the Electricity Act,2003 clearly states that surcharge is not to be levied only in case of Captive Consumption. As per Rule 3(2) of the Electricity Rules, it is obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in Rule 3(1) (a) and (b) are maintained before seeking the payment of encashment of the unutilized banked energy after captive consumption. Hence, the petition is neither maintainable in law nor on facts.

4.18. The circular dated 03.09.2012 has been modified by way of impugned circular dated. 11.07.2014 and subsequently, the impugned circular herein has also been modified vide circular TANGEDCO Memo.No.CFC/ REV/ DFC/REV/AAO.HT/ AS.3/D.No.426/18, dated. 07.07.2018. Hence, the contention of the petitioner that TANGEDCO also waived the levy of Cross Subsidy Surcharge for the period from 27.02.2009 to 10.07.2012 due to implement of Restrictions and Control measures and the banking period of the petitioner falls under this period i.e. April 2010 to March 2011 is misconceived one.

4.19. The Commission ordered in Comprehensive Wind Energy Tariff Order dated.20.03.2009 as follows:-

> *" xxx*
> *8.4 Cross subsidy surcharge:*
> *At present order No.2 dated 15-5-2006 of the Commission prescribes the rates of cross subsidy surcharge. The rate varies from 97 paise to Rs.3.02 paise per unit depending on the category of the consumer and the voltage level. The State Electricity Regulatory Commissions of Maharashtra/ Uttar Pradesh and Andhra Pradesh have done away with cross subsidy surcharge altogether. Gujarat State Electricity Regulatory Commission has proposed in their recent concept paper exemption of renewable energy sources from cross subsidy surcharge. The TNEB has chosen to relinquish temporarily, since November 2008/ the cross subsidy surcharge leviable in terms of Order No.2 of the Commission. The TNEB has opposed preferential treatment for wind energy generators in the matter of cross subsidy surcharge. The Commission believes that it is time for Tamil Nadu to make a beginning in this respect and therefore, the Commission decides to levy 50% of the cross subsidy surcharge for wind energy generators.*
> *xxx"*

4.20. Therefore, the contention of the petitioner that there would be no Cross Subsidy Surcharge for wind is not acceptable one.

4.21. The Commission passed an order vide S.M.P.No.1 of 2009 dated.28.10.2009, wherein the relevant portion is as follows:

> *"xxx*
>
> *16. After taking into account the submissions made by both the parties/ the Commission directs as follows:*
>
> *(1) xxxx*
>
> *(7) The High Court has directed that the banked energy to the credit of the wind energy generator as on 31.03.2009 shall not lapse. Accordingly, we direct that any surplus banked energy remaining unadjusted on 31. 04.2009 would be eligible for encashment at the rate of Rs.3.50 per unit, which is the current tariff for industrial consumers. This is because the captive consumers were prevented from utilizing the banked energy adequately between 01.12.2008 and 30.04.2009."*
>
> *xxx*

15. Energy which remains unutilized as on 31.03.2010 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

xxx

Aggrieved over the above Order, TANGEDCO filed Appeal No.53 of 2010 before the Hon'ble Appellate Tribunal for Electricity. The said Appeal was dismissed by the Hon'ble APTEL vide its Order dated.21.09.2011, wherein it held as follows:

"27. Summary of Our Findings;-

(a) The State Commission arrived at the figure of Rs.3.50 per unit for one period and Rs.3.39 per unit for the another period in order to prevent unjust enrichment by the Appellant through adoption of dubious methods and partially compensate the captive consumers for loss suffered as a consequence. The rate, at which the Electricity Board charged its HT consumers under Industrial Tariff, was Rs.3.50 per unit. The State Commission by the impugned order ensured that the Appellant did not unjustly benefit out of its tactics by directing return of the money calculated at the rate of Rs.3.50 per unit and Rs.3.39 per unit.

(b) The impugned order does not amount to a tariff order. This order was passed under the peculiar circumstances as explained above.

(c) The State Commission did not fix the rate of Rs.3.50 per unit or Rs.3.39 per unit as a tariff but it only directed the payment of compensation in exercise of its specifically conferred inherent judicial powers under Regulation 48 and while dealing with the dispute between a Generator and a Licensee as a provided for under section 86 (f) of the Act.

The utilisation of the entire banked power was not the captive consumer's fault. Therefore, there is nothing wrong in invoking the suo-motu powers conferred under Regulation 16 and directed the payment by fixing a rate by way of payment of compensation.

(d) The concept of "banking" was evolved by the State Commission which is in line with the provisions of the Act, 2003, National Electricity Policy and the National Tariff Policy. Therefore, the impugned order promotes the object of the Act/Rules and the purpose it serves. It would be impossible to set-up the Wind Energy Units without the banking facilities due to the very characteristics of wind power generation. It was only because of the promises made by the Government and the Appellant in respect of Wind Power Generation which included the concept of banking, the wind generators set-up their facilities by incurring heavy expenditure. Therefore, the Appellant is estopped from making claims contrary thereto.

(e) The State Commission in the impugned order struck down the two memos dated 4.8.2009 and 21.8.2009 holding that they are not valid and as

they are contrary to the orders passed by the State Commission on 28.11.2008. In that context; the State Commission directed that the surplus banked energy remained unadjusted would be liable for encashment at Rs.3.50 per unit or Rs.3.39 per unit. Admittedly, the findings with reference to memos and its consequent quashing have not been challenged in this Appeal. The Appellant has merely challenged the encashment at the rate of Rs.3.50 per unit or Rs.3.39 per unit. This order is only consequential order in pursuance of the findings that memos are not valid in law. Further, State Commission, pointing out various factors correctly found that the Appellant adopted all sorts of tactics to delay the implementation of the order of the Commission and to prevent the Wind Energy Generators using the banked energy and fixed the rate by way of compensation by invoking the inherent powers. Therefore, the impugned order cannot be said to be enhancement of tariff through a tariff order."

4.22. The above order is applicable for the unadjusted energy remains as on 30-04-2009 and 31-03-2010 respectively. Therefore, the claim of industrial tariff rate for the unadjusted energy as on 30.03.2011 is not acceptable one. Per contra, the petitioner is eligible only at 75% purchase tariff as fixed by the Commission in the respective wind energy tariff order.

4.23. The contention of the petitioner that during the year 2010-11 there was acute power shortage and the TANGEDCO was forced to implement frequent load shedding scheduled, which in turn has badly affected the petitioner and the petitioner utilize only 43 % of the power generated out of the minimum 51% required to avoid Cross Subsidy Surcharges and thus fell short by 7%, is not a sustainable one. Further, as per the Hon'ble APTEL Judgment in A.No.33 of 2012, the TNERC cannot relax the requirement of consumption of not less than 51% of the electricity generated from the Petitioner's power plant for captive use which is not permissible under law, since the State Commission does not have any powers

to relax the provisions of the Electricity Rules, 2005. Therefore, the captive user of the petitioner has to pay the Cross Subsidy Surcharge for the adjusted units during said Financial years before releasing the payment for surplus wind energy.

5. Written Submission filed by the Petitioner:-

5.1. The instant petition is filed challenging the arbitrary and illegal order of the 3rd Respondent in Lr. No.CFC/FCI/REV/AAO/HT/D.419/2014 dated 11.07.2014 on the basis of which it is evident that the petitioner's dues are not being paid for the last 3 years. The said actions on the part of the Respondents, which effectively deny payments towards encashment of its banked units on the untenable claim that the petitioner has failed to consume 51% of the generation during the relevant time, are wholly illegal in as much as, the consumption itself could not be achieved only due to the unscheduled power cuts imposed by the Respondent.

5.2. Before setting out the contentions of the Petitioner, the key dates and events in respect of the present dispute are set out herein below:

Sl. No.	Date	Particulars of Event
1	15-05-2006	Order No.3 issued by this Commission permitting one year banking period for the WEGs with 5% banking charges.
2	01-11-2008	Restriction and Control measures are in force from this date onwards and are still continuing.
3	28-11-2008	Order issued by this Commission after a statutory procedure in M.P. No. 42 of 2008 where it was specifically observed that the electricity supplied by Wind power producers came to the rescue of the TNEB and if wind energy captive users are prevented from utilising the banked energy generated by them, it would be grossly unjust.
4	24-12-2008	Order passed by this Commission in RP No.2 of 2008 seeking a review of the earlier order.

5	27-02-2009	G.O.Ms. No. 10 issued by the Government of Tamil Nadu required some of the WEGs to operate at maximum plant load factor and were also barred from selling power outside the State of Tamil Nadu.
6	20-03-2009	Tariff Order No.1 issued by the Commission
7	30-03-2009	Orders passed by the Hon'ble Madras High Court in WP No. 30890 of 2008
8	19-05-2009	Orders passed by the Hon'ble Madras High Court in WP No. 8366 of 2009
9	28-10-2009	Order passed by this Commission in Suo Moto Proceedings No.1 of 2009 severely reprimanded the arbitrary actions of the Respondent board and issued directions as to the correct manner of imposition of restrictions
10	29-07-2010	Petitioner de-merged its cement and sugar business approved vide order of the Hon'ble High Court.
11	02-09-2010	Energy Purchase Agreement entered into between the Petitioner and TNEB for selling power to TNEB.
12	31-03-2011	Petitioner raised invoices for the period April 2010 to September 2010 for the sale of unutilised banked units of 96,87,591. Amount due on the said date was Rs.2,66,40,875/0
13	21-09-2011	Order of the Hon'ble APTEL dismissing the Respondent's appeal against the Suo Moto Proceedings No. 1 of 2009.
14	28-09-2011	Letter from SE, Perambalur confirming that invoices dated 31-03-2011.
15	30-03-2012	Tariff Order No. 1 of 2012 issued by this Commission
16	01-06-2012	TANGEDCO's letter approving rename of the Petitioner's Company
17	31-07-2012	Tariff Order No.6 of 2012 issued by this Commission
18	03-09-2012	Circular No. CFC/FC/REV/AAOIFT/D.578/2012 issued by the Chief Financial Controller, TANOEDCO, Chennai, instructing the distribution circles that whenever the COP have not complied with the COP required of meeting minimum requirement of 26% equity and 51 % consumption instead of generated energy as sale to Board Cross Subsidy Charges may be collected for the period 15.06.2006 to 11.07.2012 at the applicable rate.

19	18-02-2013	The Hon'ble APTEL's Order in A. No. 33 of 2012
20	11-07-2014	Letter of the 3rd Respondent in Lr.No. CFC/FC/ REV/AAO/HT/D.4I9/12014 on which basis of which it is evident that the Petitioner's dues are not being paid.
21	04-08-2014	Petitioner issued a communication calling upon the Respondent to make the payment.
22	30-05-2015	TANOEDCO's letter in the matter of encashment of unutilised of wind energy.
23	07-07-2018	TANOEDCO's letter in the matter of encashment of unutilised of wind energy

5.3. The impugned clarification issued by the 3rd Respondent and the failure to make payment towards banked units are wholly arbitrary, illegal, violative of the provisions of the Electricity Act, 2003 and regulations frame by this Commission and without the approval of this Commission and is therefore liable to be set aside.

5.4. The impugned clarification and the failure to make payment towards bank units which is on the purported basis that the petitioner has not fulfilled the condition of consumption of not less than 51 % of the aggregate electricity generated in the petitioner’s wind energy generator during the period is without any basis and to ignore the fundamental fact that inability to consume was due to the very act of the respondents in preventing wheeling of the generators of the petitioner and therefore the impugned clarification is illegal, arbitrary and without jurisdiction besides being without authority of law and in violation of the principles of natural justice. The petitioner had to operate its plant by using power from their captive thermal power plant.

5.5. The impugned clarification which withdraws the banking facility to captive generators such as the petitioner requires the approval of this Commission and this has not been approved by this Commission. As such, the impugned action is liable to be set aside as being without authority of law.

5.6. The fundamental flaw in the entire case of the Respondents is that if 51% consumption is not maintained, cross subsidy will automatically be charged. This stand defies all logic. This is a case of a Captive Wind generator and the power generated is banked and drawn back by the wind generator. 100% ownership and 100% of the consumption is by the same entity. There is no 3rd party sale involved and there is no other consumer since what is not consumed is purchased by the Distribution Licensee, that too at 75% value. Thus 100% of the generated and Consumed energy is by the same entity. What is not consumed is purchased by the Distribution Licensee in terms of the Tariff Order, therefore there is no failure to adhere to the requirements as no 3rd party or any other consumer consumes the power. Cross Subsidy surcharge by its very nature is to compensate the Distribution Licensee where a consumer consumes power from a 3rd party, where the consumer is admitted consuming power from its own plant and had been unable to draw the banked energy due to grid position or any other reason and where the Tariff Order itself prescribes purchase of such units by distribution licensee at a discount, the petitioner cannot be proceeded with for Cross Subsidy Surcharge. In any event due to the circumstances at that time and the fact that CSS cannot be levied during R&C measures, for the relevant period no CSS can be levied.

5.7. The impugned clarification is liable to be set aside in as much as while making an analysis where a captive consumer has consumed at least 51 % of the energy generated by his own generator, the total number of hours in a year during which load shedding was enforced ought to have been taken into account and accordingly to that extent the minimum percentage prescribe for eligibility for captive consumption needs to be adjusted. It would be wholly arbitrary and illegal to impose load shedding on the one hand and thus preventing the captive consumer from consuming his own energy and on the other hand without making any adjustment for such load shedding, make mathematical calculations and conclude that the consumer is not a captive consumer as it has failed to comply with the 51% consumption criteria on an annualised basis.

5.8. The impugned actions of the respondents are wholly arbitrary and illegal in as much as under the Electricity Rules 2005, failure to comply with the consumption requirement would only result in the sale being treated as a sale by a generator thereby entailing for additional payment of cross subsidy surcharge, which aspect has already been covered by a circular of the 3rd respondent. The regulation tariff order or agreement nor provides that where the consumer had been prevented due to load shedding, the benefit of banking would be withdrawn.

5.9. The impugned action of the 3rd respondent in issuing the clarification and the 4th respondent making a demand or wholly arbitrary and illegal in as much as after making the payment of the bank units, the respondents are estopped from claiming refund of the said sums. The petitioner submits that in any event, if any coercive action is to be taken, same should have been done only following the

principles of natural justice and after issuance of notice. In the instant case, the impugned action is sought to be taken in flagrant violation of principles of natural justice and the impugned action is therefore liable to be set aside.

5.10. The impugned actions of the respondents are in any event wholly arbitrary and illegal during the existence of restriction and control measures. It would be relevant to state that the scheduled and unscheduled load shedding existed 10 hours per day where the petitioner's consumption HTSC is located. It is stated that where there is both scheduled and unscheduled power cuts imposed thereby taking away the ability of the consumers to consume generated units, the impugned action renders itself liable to he set aside.

5.11. The petitioner states that as per G.O. Ms. No. 10 dated 29-02-2009, the generating stations operating in the State of Tamil Nadu, including WEGs such as some of the members of the IWPA, were required to operate at maximum plant load factor and were also barred from selling power outside the State of Tamil Nadu. It is elementary principle of law that the organs of the state have to act in a fair manner. It therefore follows that for any energy generated by the petitioner and have been injected into the grid, if such energy has not been utilised by the petitioner, then the TANGEDCO must pay for it as the unutilised energy is used by them.

5.12. It is pertinent to state that during the restriction and control measures, the non-consumption of units is not the fault of the Petitioner and therefore, the

question of losing CGP status and lapsing of units does not arise and the TANGEDCO is liable to pay for banked units.

5.13. Cross subsidy contemplates the involvement of a third-party sale, where the entire power is only captively consumed. The Petition submits that when the sale is to a DISCOM, question of cross subsidy does not arise. There can never be a case where DISC OM takes the units and still levies cross subsidy. The petitioner states that this has been affirmed by the Hon'ble APTEL in MIs. Steel Furnace Association of India vs. PSERC and Anr. Appeal No.38 of2013 in its Order dated 01.08.2014 at para 31:

> *"31. In the present case, the consumers have not optedfor open access voluntarily but have been forced to procure power through open access from the short-term market as a result of failure of the Distribution Licensee to meet its obligation to supply and due to imposition of restrictions/power cuts on them. When the Distribution Licensee has failed to procure adequate power to meet its obligation to supply to the consumers who in turn have been forced to procure power through open access, there cannot be any question of any loss to the Distribution Licensee and levy of cross subsidy surcharge for the same. This is because 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 ....*
>
> *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. "

5.14. The Petitioner further states that imposition of such cross subsidy surcharge is in contravention to objectives and the provisions of the Electricity Act and National Electricity Policy. A reading of section 42 of the Electricity Act would lead to a conclusion that a Distribution Licensee cannot benefit from the levy of cross subsidy charge under section 42 (2) when it has failed to discharge its duty towards consumers under section 42(1) and has not suffered financial loss due to availing of open access by the consumer.

5.15. The Petitioner's case can be distinguished from the MIs. Super Springs Private Limited vs. TANGEDCO and Ors. In D.R.P. No.6 of2015. In the latter case, the petitioner withdrew the case stating that the prayer became infructuous and file a separate petition for cross subsidy surcharge. It is submitted that the prayer became infructuous was the submission of the Petitioner therein and not the determination of this Commission. Therefore, there was no order as to whether the prayer has in fact become infructuous. In the present case, the ruling on merits is required.

6. Written Submission filed by Respondents:-

6.1. The respondent has filed a Written Submission which mostly consists of the averments already made in the counter affidavit. However, the following additional averments have been made in the Written Submission. It is stated that the Commission passed an order on 03-11-2011 in M.P. No. 21 of 2011 in the matter of

captive norms verification in terms of the Electricity Rules, 2005 during the Restriction and Measures, the relevant portion is held as follows:-

ORDER

Delay condoned. The Commission heard the learned counsel for the petitioner. The counsel admits that the captive consumption has been less than 51% of generated energy which is the limit laid down in clause 3 of the Electricity Rules, 2005 for treating the generation plant as a captive generation plant. The counsel further pleads that the Electricity Rules 2005, more particularly Rule 3 of the said Rules would not apply to generating plants owned by a single owner such as the petitioner. We are unable to accept this interpretation of the Electricity Rule, 2005. All the three wind mills of the petitioner were set up in 2008-09 much after the commencement of the Electricity Rules, 2005 and therefore, the said Rules will apply in-toto to the petitioner's plants. Rule 3 of the Electricity Rules, 2005 (vide GSR 379 (E), dated 8-6-2005) is extracted 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: ".

In view of this Rule, if the two conditions (i) & (ii) above are not fulfilled, the power plant shall not qualify as a captive generating plant. By the Petitioner's own admission, they have not consumed the minimum stipulated requirement of 51 % of the energy generated. In view of this, the generating plant of the petitioner cannot be treated as a captive generating plant. Hence, the petition is dismissed at the admission stage.

6.2. The above order of the Commission is squarely applicable to the present case, since the above order was issued during the period Restriction and Control measures were in force. Therefore, the petitioner lost its captive status due to the reason that the petitioner has not fulfilled 51% consumption criteria as per the Electricity Rules, 2005 thereby the petitioner is liable to pay the Cross Subsidy Surcharge. In this connection, it is most to relevant to mention that the Government

issued notification waiving levy of Cross Subsidy Surcharge in G.O.(Ms) No.10, Energy Department dated 27.02.2009, which reads as follows:-

> *"*
> *xxxx*
> *In view of the prevailing shortages, the Government has also taken the step of permitting private power producers in the State to avail of open access to sell tradable surplus power generated by them to any HT consumers within the State. As a special measure, keeping in view the restrictions already imposed on such consumers, it has also been decided to temporarily waive cross subsidy surcharges which would be collectable from such consumers under normal circumstances.*
> *xxxx"*

6.3. In accordance with the above G.O. the Cross Subsidy Surcharge was waived only for third party user and the same was not waived for those captive users who are liable to pay Cross Subsidy Surcharge due to loss of Captive Status. Hence, the contention of the petitioner that the above G.O is applicable for captive user is a misleading one.

6.4. The Hon'ble Appellate Tribunal for Electricity passed judgment on 01-08-2014 in Appeal No. 38 of 2013, the relevant portion which held as follows:-

> *"44. <u>Summary of our findings:</u>*
>
> *(i) This Tribunal in a number of judgments has held that cross subsidy surcharge is a compensatory charge and the logic behind the provision for cross subsidy is that but for the open access, the consumer would have taken electric supply from the Distribution Licensee and in the result the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy for certain other categories of consumers, which are subsidized.*
>
> *(ii) Hon'ble Supreme Court in the matter of Sesa Sterlite Ltd. has held that Cross Subsidy Surcharge ("CSS") is payable by the consumer when it decides not to take supply from the Distribution Licensee but takes from other sources. CSS is a compensation to the Distribution Licensee in view of the fact that but for the Open Access the consumer would pay tariff applicable for supply which would include an element of cross subsidy. Such*

cross subsidy surcharge has to be paid as determined by the State Commission even if the line of the Distribution Licensee is not used by the open access consumer.

(iii) In the present case the members of the Appellant Association have not opted for open access voluntarily but have been forced to procure power through open access from the short term market as a result of failure of the Distribution Licensee to meet its obligation to supply and due to imposition of restriction/power cuts on them. When the Distribution Licensee has failed to procure adequate power to meet its obligation and the consumers have been forced to procure power on their own through open access there cannot be the question of any loss to the Distribution Licensee and levy of cross subsidy surcharge for the same.

(iv) If the consumers do not procure power from the market through open access under conditions of power cuts and shut down their plants, 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 subsidising consumers to the subsidized consumers. 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.

(v) When the members of the Appellant are able to procure power form short term market it indicates a situation where the power is available in the market for meeting the demand of these consumers. The same power could have been procured by the Distribution Licensee from the short term market to meet its obligation to supply to the consumers and avoiding imposition of power restriction/power cuts on them. If the consumers who have procured power in open access from short term market are asked to pay cross subsidy surcharge on such drawal of power to the Distribution Licensee, it would result in rewarding Distribution Licensee for failure to meet its obligation to supply power to its consumers and penalizing consumers for no fault of theirs. In other words it will be beneficial for the Distribution Licensee to impose power cuts on the consumers and recover the Cross Subsidy charge without carrying its duty assigned under Electricity Act to meet the full demand of the consumers by making arrangements to procure adequate power.

(vi) Imposition of cross subsidy surcharge when the consumers have been forced to procure power through open access due to power restrictions/cuts imposed by the Distribution Licensee is in contravention to objectives and the provisions of the Act, National Electricity Policy and Tariff Policy and the dictum laid down by this Tribunal and Hon'ble Supreme Court which provides that the Cross Subsidy Surcharge is a compensatory charge. It strikes at the basic objective of the Electricity Act to encourage open access to promote competition.

(vii) Accordingly, we direct the State Commission to pass consequential order that no cross subsidy charge would be levied on power available with consumers through open access to the extent of restrictions/power cuts imposed by the Distribution Licensee. This finding given in this judgment has to be construed as judgment in rem and this will be applicable to all open access consumers."

6.5. The above judgment is applicable to HT consumer those who have purchased power through open market, i.e. third party user, not for captive user those who are liable to pay Cross Subsidy Surcharge due to captive status lost of their captive generator. Hence, the above judgment is not applicable to the present case, since herein the petitioner is liable to pay cross subsidy surcharge due to Captive Status lost for not fulfilled the consumption criteria as per the Electricity Rules, 2005. Hence, the petitioner is liable to pay Cross Subsidy Surcharge. Therefore, the contention of the petitioner, the above order is applicable to the present case is misconceived one.

6.6. The Hon'ble Supreme Court of India in C.A.No.18506-18507 of 2017 held as follows:

"xxx
12. The prescription that at least 51% electricity generation should be used for the purpose of his own use, as has been provided in Rule 3 (l)(a)(ii) of the Rules of 2005, cannot be said to be arbitrary in any manner. In case, for certain months generating plant has to be closed for any reason or for non-compliance of the provisions or for any deficiency, the prescription of consumption of 51% on yearly bas is takes care of such closure 16 as well. The calculation is provided to be on an annual basis. Thus, provision is quite reasonable, and it cannot be said to be ultravires to the Act and fulfils purpose of the provisions of the Act, and no reading down of provision is called for as prayed. In case, due to force-measure any generating plant has been closed for a certain period, provision of consumption to be seen in annual perspective takes care of such exigency also.
xxxx "

6.7. In accordance with the above Judgment that in case, for certain months generating plant has to be closed for any reason or for non-compliance of the provisions or for any deficiency, the prescription of consumption of 51% on yearly basis takes care of such closure 16 as well. The averment of the petitioner that it has not fulfilled consumption criteria as per the Electricity Rules,2005 due to implementation of Restriction and Control measures by TANGEDCO is misconceived and cannot be maintained. Therefore, the petitioner is liable to pay Cross Subsidy Surcharge for adjusted units during the said Financial Years.

7. Findings of the Commission:-

7.1. The Petitioner, M/s.Dalmia Bharat Sugar and Industries Limited, have their Wind energy generation plants at Kanyakumari and Tirunelveli with a total capacity of 16.525 MW. Out of which the petitioner had Energy wheeling agreement in WEG.HT.No.2249, 250, 336 of Tirunelveli EDC, the power generated from these windmills were being adjusted in the petitioner's user end HT service No.74 (M/s.Dalmia cement Bharat Limited) situated in Perambalur Electricity Distribution Circle of TANGEDCO.

7.2. The petitioner states that, the invoice has been raised by the petitioner for the sale of unutilised banked energy of 96,87,591 units as on 31-03-2011 for the period from April 2010 to September 2010 as below:

Year	Net Generation (Units)	Consumption (Units)	%	Unutilized Banked its (net of Commission) (Units)	Refund (in Rs.)
31-03-2011	1,76,90,620	76,34,100	43%	96,87,591	2,66,40,875

The invoice of Rs.2,66,40,875 for 96,87,591 units at the rate of Rs.2.75 / Unit was not paid by the TANGEDCO for the reason that the petitioner failed to satisfy one of the conditions of Rule - 3 of the Electricity Rules 2005 i.e., 51% of the annual aggregate electricity generated by its plant. In this connection, the petitioner has challenged the 3rd respondent's clarification dated 11-07-2014 and sought to set aside the same, based on which the invoices for payment for unutilised banked units were not allowed and prayed for payment of the dues towards unutilised banked units as per the Energy Wheeling Agreement alongwith the interest for the delay in payment as upheld by the Hon'ble APTEL in *the Chairman/TNEB & Anr. Vs Indian Wind Power Association & Ors. In Appeal No.11 of 2012 dated 17.4.2012*".

7.3. The petitioner further states that, the 3rd Respondent (TANGEDCO) clarified in its internal communication dated 11.07.2014 as follows -*" …it is stated that in the event of a generator losing his captive status in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company. In other words it is to be treated as energy from a 3rd party supply. The 3rd party power does not have banking provision as per reference 3rd cited. In view of losing captive status, the HT bills of the captive consumers of the said financial year have to be revised every month by taking only the current month generation for adjustment i.e., the unutilised energy remaining after adjustment has to be lapsed at that month itself. The Cross subsidy surcharges is to be levied on the energy adjusted during the financial year …"*. In this impugned clarification the respondent withdrawn the

banking facility to captive generators, and according to this decision the payment for unutilised banked energy was not made by the Respondent.

7.4. The petitioner also contended that the 51% consumption against aggregate generation could not be achieved not only due to scheduled load shedding but unscheduled power cuts imposed from 10 to 15 hours per day in its user end by the Respondent. As a matter of fact, the respondents restricted the petitioner from using the wind power generated by them or banked by them, during load shedding (both scheduled and unscheduled) period. In as much as while making CGP verification, during the period in question i.e., 2010, the total number of hours in a year during which load shedding was enforced ought to have been taken into account and accordingly to that extent the minimum percentage prescribe for eligibility for captive consumption needs to be adjusted. It is arbitrary and illegal to impose load shedding on the one hand and thus preventing the captive consumer from consuming his own generation & banked energy and on the other hand without making any adjustment for such load shedding hours. As per G.O.Ms.No.10 dated 29-02-2009, the generating stations operating in the State of Tamil Nadu, WEGs were required to operate at maximum plant load factor, but on the other side barred from selling power outside the State of Tamil Nadu. In view of this, during the R&C measures period, the non consumption of units is not due to the fault of the Petitioner and hence the question of losing of CGP status does not arise.

7.5. The Respondent, on the other hand, contends that under the provisions of the Electricity Act, 2003 the Captive Generating Plant has been defined under section 2 (8) as follows:-

" xxx

2. (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.

xxx"

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 called the Electricity Rules, 2005, the relevant portion of which are 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: …"

xxxx xxxx xxxx

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

xxxx xxxx xxxx"

It may be seen from the above 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. If the status of a Captive Generating Plant is lost due to any one of the conditions (or) both, the entire electricity generated from such plant in the year shall be treated as if is a supply of electricity by a generating company. In such cases of disqualification, the Cross Subsidy Surcharge has to be levied for the entire adjusted units / consumed by the users treating such consumption as though it was supplied by the respective Generating Plant, since proviso 2 of section 42 of the Electricity Act, 2003 clearly states that surcharge is not to be levied only in case of captive consumption. Therefore, it is stated that the respondent has to verify the Captive Generating Plant status in order to decide on the levy of Cross Subsidy Surcharge towards providing Open Access under captive category in accordance with the Electricity Rules, 2005.

7.6. Further it is also stated by the respondent that **i**n respect of wind energy generators, the Commission had passed an order on 15-05-2006 vide Order No. 3 on purchase of power from NCES based generating plants, the relevant portion which is as follows:-

"10.4 Banking

As followed by most of the other States, the Commission retains the existing practice of one year (from April to March) banking period of TNEB, for the NCES based wind electric generators. However, for the biomass and bagasse based cogen generators, banking provisions shall not apply.

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
xxxx"

In accordance with above, the wind energy generator is eligible for encashment at rate of 75% of normal purchase rate for the surplus energy remains at the end of the financial year. Thereafter, the Commission issued Tariff Order No.1 of 2009 dated 20-03-2009, Tariff Order No. 6 of 2012 dated 31-07-2012 and Tariff Order No. 3 dated 31-03-2016 in connection with Wind energy, wherein it is stated that the existing practice of banking facility and unutilized captive banked energy is to be purchased by the TANGEDCO at 75% of the normal purchase rate. However, when TANGEDCO is implementing Restrictions and Control measures, the generator is eligible to encash the unutilized energy at 100% of the normal purchase rate.

7.7. The counsel of the Respondent has argued that the generation of wind energy and adjustment is not on a real time basis. The energy generated during a month on daily basis is aggregated and sorted slot wise. Similarly, consumption is also aggregated and sorted into slot wise in a billing month. Hence the question of preventing of WEGs from consuming their power may not arise.

7.8. It is affirmed from the submissions of the respondent that the impugned circular Lr.No.CFC/FC/Rev/AAO/HT/D.419/2014, Dt. 11-07-2014 has been modified with a revised circular issued by the Respondent vide Memo.No.CFC/Rev/DFC/Rev/AAO. HT/AS.3/D.426/18, Dated 07-07-2018 in which it has stated that in case any Captive Generating Plant has failed to fulfil the Rule 3 of the Electricity Rules 2005 in a financial year the Cross Subsidy surcharge shall be levied on the quantum of energy adjusted and the remaining unutilised banked energy, if any, shall be purchased by the licensee at the rate of 75% of the normal purchase rate.

7.9. Having considered rival submission, in our view, the claim made by the petitioner towards unutilised banked energy is to be honoured by the respondent on the basis of directions of the Commission under Para 8.2 of the Wind Tariff Order No.1 of 2009 dated 20-03-2009. Since the unutilised banked energy pertaining to the period Financial year 2010-11, i.e., the period when Restrictions and Control measures imposed by the Government of Tamil Nadu were in force, we have no hesitation to hold that the petitioner is entitled for the claim of full value of eligible wind tariff. The following perhaps of the said order are extracted below.

> ***"8.2 Banking***
>
> *xxxx xxxx xxxx*
>
> *8.2.2. … 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. ….*"

7.10. As stated by the both the parties, during the period from 4/2010 to 9/2010 the petitioner was able to utilise the wheeled power to the extent of 76,34,100 units against the generation of 1,76,90,620 units i.e., 43% and the petitioner had 96,87,591 units in its account as unutilised banked units. The petitioner thus forcefully argued that it was not able to fulfil the 51% consumption against aggregate electricity generation, only because of severe load shedding of 10 – 15 hours in a day, which fact was not rebutted by the Respondents in their counter.

7.11.1. It is an admitted fact that the petitioner being a Captive generating plant has to fulfil the following requirements as stipulated under Rule-3 of the Electricity Rules 2005 which reads 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:"***

Though there is no doubt on the point that the above requirement has to be fulfilled by the petitioner, it also follows that the petitioner must have been allowed to consume its aggregate generation. It is to be noted that the petitioner has only arrangement to wheel the power from Tirunelveli EDC to the User end circle i.e., Perambalur EDC and had no dedicated arrangement to get the power directly from the generating station to its user HT service connection. Hence, practically when the HT service is connected through Distribution feeders which are subject to normal scheduled/unscheduled load shedding, the petitioner could not have been expected to consume energy as required under the said Rules.

7.11.2. Under section 38 of the Tamil Nadu Electricity Distribution Code 2004, the Government of Tamil Nadu vide Letter No. (Ms) No.121, Energy dated

22-10-2008, announced the restriction in usage of power supply in the State and 40% power cut on Base demand and Base energy was imposed on HT consumers with effect from 01-11-2008 in order to manage the power situation in the State of Tamil Nadu. 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.

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.

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

"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.

7.11.4. 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 the power cut imposed on HT services.

7.11.5. 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 so 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 case was of Cross subsidy surcharge levied on the power procured from third party sources, Hon'ble APTEL clearly expounded on the extent and scope of the Electricity Rules to hold that the Distribution licensee shall not earn revenue from the consumers when the consumers are put to hardships due to power restrictions / power cut in the State.

7.11.6. The respondent referred to the Order of Hon'ble Supreme Court of India in C.A.No.18506-18507 of 2017 in Monnet Ispat & Energy Ltd., Vs Union of India & Others, which in our view cannot be applied to the case on hand, since the case are not identical in nature. The relevant portion of the Order are as below -

"10. It was submitted by Mr. C.U. Singh, learned Senior counsel and Mr. Devashish Bharuka, learned Advocate-on-Record, appearing for the appellants that, the definition of captive generating plant, provided in Section 2(8) of the Act of 2003, does not contemplate the restriction, as has been imposed under Rule 3(1)(a)(ii) of the Rules of 2005. It was also submitted that since there were some unforeseen circumstances, the generating plant had to be closed down on certain directions

having been issued by concerned authorities; as such, it was not possible to enable consumption as provided in the said rule

xxxx xxxx xxxx xxxx

12. The prescription that at least 51% electricity generation should be used for the purpose of "his own use", as has been provided in Rule 3 (1)(a)(ii) of the Rules of 2005, cannot be said to be arbitrary in any manner. In case, for certain months generating plant has to be closed for any reason or for non-compliance of the provisions or for any deficiency, the prescription of consumption of 51% on yearly basis takes care of such closure as well. The calculation is provided to be on an annual basis. Thus, provision is quite reasonable, and it cannot be said to be ultravires to the Act and fulfills purpose of the provisions of the Act, and no reading down of provision is called for as prayed. In case, due to force-measure any generating plant has been closed for a certain period, provision of consumption to be seen in annual perspective takes care of such exigency also.

It is to be seen that the issue in the above case arose due to the closure of the Captive generating plant for certain period on the direction of their authorities, whereas in the present case the power usage restrictions i.e., power cut and Scheduled/unscheduled load shedding were imposed by the State of Tamil Nadu / TANGEDCO by way of a Government Order, which reduced the required 51% consumption by the CGP plant against its aggregate generation

7.11.7. 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, a consumer cannot be penalised.

7.11.8. In a recently decided issue of similar nature, the Commission in its order dt 17.08.2021 in D.R.P.no.18 of 2013 filed by M/s.ITC Limited, wherein the said

petitioner also did not fulfil the Rule 3 of the Electricity Rules 2005 during the year 2009-2010 when the R&C measures were in vogue, the Commission expressed the same view taking into account of the factual Power quota restrictions and load shedding imposed by the Government / TANGEDCO on consumers. Therefore we find no reason to differ from the said earlier order.

7.11.9. More importantly, we would like to emphasize that Rule 3(1)(a) which stipulates a power plant to satisfy both the conditions prescribed thereon to qualify as a “Captive generating plant” is applicable under normal circumstances i.e., when the distribution/transmission grid is open to the captive users 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. In view of the same, we find no merit in strict adherence to all conditions under Rule 3 of the Electricity Rules 2005 for a captive generating plant when there are stringent conditions imposing disability from consuming power.

7.11.10. With the above findings, we direct the respondent to make payment towards the unutilised banked energy as on 31-03-2011 in line with the above directions within a period of 30 days from the date of this Order along with interest @ 1% per month till the date of payment.

In the result, the Petition is allowed.

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission