

TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 7th Day of May 2024

PRESENT:

Thiru M.Chandrasekar Chairman
Thiru K.Venkatesan Member
and
Thiru B.Mohan Member (Legal)
M.P. No. 15 of 2023

M/s. Khivraj Motors Private Limited
Represented by its Director,
Mr. Bharat Kumar Chordia
Old No.617, New No.418,
“Bharat Kumar Bhavan”
Anna Salai,
Chennai – 600 006.

..... Petitioner
Thiru Rahul Balaji
Advocate for the Petitioner

Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO),
Represented by its Chief Engineer – NCES,
2nd Floor, 144 Anna Salai,
Chennai – 600 002.
2. Chief Financial Controller (General)
TANGEDCO,
7th Floor, 144 Anna Salai,
Chennai – 600 002.
3. Ministry of New and Renewable Energy
Represented by its Secretary
Block-14, CGO Complex
Lodhi Road, New Delhi – 110 003, India.

... Respondents 1 & 2
Thiru N.Kumanan and
Thiru A.P.Venkatachalapathy,
Standing Counsel for TANGEDCO

.... 3rd Respondent

This Miscellaneous Petition stands preferred by the Petitioner M/s.Khivraj Motors Pvt. Ltd. with a prayer to exercise its regulatory powers in furtherance of the judgment of the Hon'ble Appellate Tribunal for Electricity in Appeal No. 195 of 2018 dated 28.01.2021 with regard to banking and the recommendations made by the 3rd respondent vide Office Memorandum F.No.238/25/2020-GRID SOLAR dated 16.04.2020 and direct Rollover of banked electricity from Open Access Renewable Wind Energy Generating Plants of the Petitioner under Captive Category of FY 2020-21 and FY 2021-22 to FY 2022-23 and FY 2023-24 and set out the manner and methodology for its implementation and pass such further or other orders as this Commission may deem fit and proper in the facts and circumstances of the case and thus render justice.

This petition coming up for final hearing on 08-03-2024 in the presence of Thiru Rahul Balaji, Advocate for the Petitioner and Tvl. N.Kumanan and A.P.Venkatachalapathy, Standing Counsel for the 1st and 2nd Respondent and on consideration of the submissions made by the Counsel for the Petitioner and the Respondents, this Commission passes the following:

ORDER

1. Contentions of the Petitioner:-

1.1. The present petition is seeking for appropriate directions with respect to implementation of the recommendations made by the 3rd respondent to the 1st Respondent with regards to Rollover of banked electricity from Open Access Renewable Energy Generating Stations under Captive Category of FY 2020-21 and FY 2021-22 to FY

2022-23 and FY 2023-24. In this regard, the Petitioner also sent representations dated 12.05.2022 and 24.06.2022 to the CFC, TANGEDCO, however, no response has been received in respect of the same.

1.2. The petitioner is a part of the Khivraj Group which has spread its activities in diversified fields like Automobile Sector, Real Estates, Renewable Energy Sector (Green Field Operations), Infrastructural activities and IT Park etc. The petitioner has set up its wind mills at Tirunelveli, Theni, Udumalpet, and Tuticorin in Tamil Nadu which is connected to the Electricity Distribution Circle. The details of the Petitioner's HT Service Connections is set out herein below:

Petitioner's Units	Location	Capacity (MW)	HTSC No.	EDC
KMPL	Tenkasi	0.750	683	Tirunelveli
KMPL	Tenkasi	0.750	684	Tirunelveli
KMPL	Tenkasi	0.750	772	Tirunelveli
KMPL	Tirunelveli	1.650	1545	Tirunelveli
KMPL	Tuticorin	2.00	338	Tuticorin
KMPL	Udumalpet	1.65	1885 (Now 917)	Udumalpet
KMPL	Theni	0.850	GA2T50(Now 79)	Theni
KMPL	Theni	0.850	GA2T50(Now 83)	Theni
KMPL	Tirunelveli	0.800	1737	Tirunelveli

1.3. The issue of banking and the costs involved therein and the requirement to consider data and arrive at such costs has been authoritatively pronounced by the Hon'ble APTEL in Appeal No.195 of 2018 dated 28.1.2021. On an examination of the information available, TANGEDCO would suffer no loss by the Rollover and if at all will only benefit. Moreover, unlike Solar generators, wind generators have the specific right of banking. The

Commission in a similar petition filed by the Indian Wind Power Association in M.P. No. 20 of 2021, categorically held as follows:

"The unutilised banked energy as on 31.3.2020 of each consumer may be Compared with the unutilised banked energy as on 31.3.2021. If the unutilized banked energy as on 31.3.2021 is higher than the quantity banked in FY 2019-20, rollover of banked energy to the extent of the difference in the quantum of FY 20 and FY 21 may be permitted for adjustment excluding peak hours i.e adjustment of energy may be permitted during normal and off-peak hours, for the period from the date of this order to 31.3.2022."

1.4. The nationwide lockdown imposed by the Government of India caused by the pandemic due to the Coronavirus, the IT Industry as a whole, including the Petitioner has been severely affected. In fact, most of the industries and commercial establishments were in a complete shutdown. Even despite the lifting of certain restrictions, the issues plaguing the IT sector continued and only after around March 2022 did IT industry limp back to normalcy. Further, even to this day, the IT industry is forced to work from home during the past 2 years. During this entire period, in view of the Must Run status granted to Wind Power, the electricity continued to be generated and fed into the grid. It is pertinent to state that at no point in time was any directive issued by the Commission, TANTRANSCO or TANGEDCO to shut down generation by reliance upon any of the statutory or regulatory provisions. In fact, the continued generation and absorption of wind power was entirely in consonance with the statutory and regulatory framework. The issue that therefore arises is the manner in which the electricity generated and that remains banked is to be utilised.

1.5. The petitioner owns Wind Power Plants, inter-alia, under captive category through Intra State Open Access System in Tamil Nadu. The WEGs are established under either Renewable Energy Certificate (REC) Scheme or Non-REC Scheme. Because of the lockdown, the Renewable Energy Generating station under Captive category through Intra State Open Access System in Tamil Nadu is unable to captively consume generated wind power completely.

1.6. That WEGS due to their very nature are Must Run under the Grid Code and apart from that have to be operated continuously since they generate power through a renewable source and cannot be shut down, Further, no backdown instructions on grounds of any grid issues were issued by the SLDC, which monitors and regulates the entire power generation and injection in the State thus allowing for the wind power generated to be fed into the grid in a manner permitted under law and the Regulations.

1.7. The 3rd respondent, aware of the widespread difficulties that would be faced by those in the Renewable Energy Sector, has sought to alleviate the concerns of the Petitioner vide its Office Memorandum F.No.283/25/2020-GRID SOLAR dated 16.04.2020. The 3rd respondent clarified that the pre-existing Office Memorandum No. 283/20/2020-GRID SOLAR dated 4th April 2020, clarifying that the "Must Run status of Renewable Energy (RE) remains unchanged during the COVID-19 Lockdown period and that the Renewable Energy must not be curtailed but for security reasons.

1.8. Further, the Office Memorandum stated as follows, namely that:

"Due to nationwide lock-down in the wake of COVID-19, industries and commercial establishments using electricity generated directly as well as through banking, from Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale, are running their operations at their lowest and consequently their demand of electricity has reduced to minimum since mid March 20. Due to this, the generated and banked units in previous months could not be utilized by such consumers. The lapse of such banked units or purchase thereof at APPC rate would severely affect the profitability of both the developers and consumers associated with such Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations. This situation is likely to continue for another few months (FY 20-21) till the pandemic is controlled and the industrial production and commercial footfalls return to normal."

1.9. The Memorandum further recommends the various Power/Energy Departments including the 1st Respondent to consider permitting Rollover of banked electricity (from Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale) of FY 2019-20 and FY 2020-21 to EY 2021-22, However, despite the issuance of the Office Memorandum on 16.04.2020, till date no steps have been taken by the 1st Respondent to implement the recommendations issued by the 3rd respondent.

1.10. Due to the inaction of the 1st Respondent, the Petitioner will be severely affected. If they are unable to roll over the banked units, huge financial commitments to banks and financial institutions will be unable to be honoured, since the units generated have either been lapsed or been deemed to be injected in the grid and payment at 75% for unutilised

units after collection of banking charges would lead to unjust enrichment for the TANGEDCO and severe loss for the petitioner.

1.11. The issue highlighted and foreseen by the 3rd respondent indeed happened. Due to outbreak of Covid-19 in March 2020, Government of India and Tamil Nadu have imposed lot of restrictions in the movement of Men, Material and supply of Goods and Services. It is also ordered for complete shutdown of all Industrial activities for about 2 (Two) months. These restrictions were lifted in phased manner and still further restrictions continued for free movement of men and materials till December, 2021.

1.12. The details of the restrictions are documented in the Government Orders themselves. As a matter of example it would be pertinent to state that.

a. General Lock down started & stopped industrial production from 25.03.2020. Thereafter, consequent to 3 modifications, the Government permitted only on 31.05.2020 resumption of 100% operations. However, with respect to the IT industry, the employees had already left to their hometown and are in fact, still working from home to this day. This aspect has been wet documented in newspaper reports.

b. G.O.(Ms.) No.172, dt 25.03.2020 – Industrial establishment closure with exception to production units, which require continuous process after obtaining

required permission from the State Government, Revenue and Disaster Management Department.

c. Letter No: 5/Pri.Secy-Inds-COVID/ 2020 dated 07.04.2020 whereunder State Government gave permission to commence production during lock down subject to conditions based on GO 172- 25.03.2020, Dept of Industries and Commerce, Govt of Tamil Nadu.

d. Letter No:5/Pri.Secy-Inds-COVID/2020 dated 07.04.2020-State Govt withdrew the permission issued on 07.04.2020, Dept of Industries and Commerce, Govt. of Tamil Nadu.

e. G.O.(Ms.) No.262 Revenue and Disaster Management Department - dated 31.05.2020 provided Permission to the IT/ITES industries to operate with a strength of 20% subject to a maximum of 40 persons only.

f. Thereafter various restrictions were imposed from time to time in various areas and on movement of goods, men and materials which continued to disrupt and delay the resumption of industries and when industries were able to start, they could not do so fully.

g. Generation was specifically exempted from restrictions. This together with the fact that there was no directive of any nature to stop generation as electricity generation, specifically using renewable energy is a national asset which cannot be wasted, allowed for generation which could be utilised by the TANGEDCO during a difficult period. The generators in the State thus came to their rescue.

h. While so the continuous challenges through the 2nd and 3rd waves of Covid, continue to wreak havoc on the IT industry in the State and the industry is faced with more and more challenges. During such time, a just and equitable approach protecting interest of all stake holders is essential.

1.13. With the continuous operation of captive windmills, the energy generated for the windmills for which wind banking is provided got accumulated and maximum possible consumption is made during lean wind season. However, due to reduced consumption during the periods when lock-down was imposed, the wind units generated are accumulated in banking. Even though, partial recovery happened in most of the Industries, lot of energy consuming Industries have not yet reached their normal level of operation. Especially, Industries like IT/ITES, Textiles, Foundries, Steel and Hospitality are not yet able to consume their own generated power due to various restrictions, With the restrictions on travel and non-availability of proper public transports during the lockdown, most of the labour force did not turn up to work. In addition, restrictions on operation of AC and restriction on persons to assemble in public places, etc. resulted very lesser energy consumption in the IT industries. This unforeseen situation resulted excess wind units getting lapsed on 31st March 2021 and on 31st March, 2022.

1.14. Regarding the quantum of the lapsed units accumulated due to Pandemic as on 31st March 2021 and 31st March 2022 for the reasons explained hereinbefore, the following table gives the clear picture and is easily verifiable.

Total Balance Banking Details FY 2018-2019

Sl. No.	Name of the Company	100% Banking Balance Units	75% Banking Units Billed to TANGEDCO	Total MW	Name of the EDC	Installed District
1.	KMPL	1649337	1237002.75	4.7	Tirunelvell EDC	Tenkasi
2.	KA IPL	704374	528280.5	1.9	Tirunelveli EDC	Tirunelveli

Total Balance Banking Details FY 2020- 2021

Sl. No.	Name of the Company	100% Banking Balance Units	75% Banking Units Billed to TANGEDCO	Total MW	Name of the EDC	Installed District
1.	KMPL	3762888	2822166	5.3	Tirunelvell EDC	Tenkasi
2.	KMPL	1298819	974114.25	2	Tuticorin EDC	Tuticorin
3.	KMPL	1420162	1065121.5	1.65	Udumalpet EDC	Udumalpet
4.	KMPL	888001	666000.75	1.7	Theni EDC	Theni
5.	KTPL	696001	522000.75	1.2	Tirunelveli EDC	Tirunelveli
6.	KA IPL	1297641	973230.75	2	Tuticorin EDC	Tuticorin

Total Balance Banking Details FY 2021- 2022

Sl. No.	Name of the Company	100% Banking Balance Units	75% Banking Units Billed to TANGEDCO	Total MW	Name of the EDC	Installed District
1.	KMPL	1198847	899135.25	2.4	Tirunelvell EDC	Tenkasi
2.	KMPL	1257282	942961.5	2	Tuticorin EDC	Tuticorin

3.	KMPL	1268175	951131.25	1.65	Udumalpet EDC	Udumalpet
4.	KMPL	507661	380745.75	0.85	Theni EDC	Theni
5.	KTPL	1511	1133.25	0.66	Tirunelveli EDC	Tirunelveli
6.	KA IPL	21831	16373.25	2	Tuticorin EDC	Tuticorin

The above table clearly shows that the unused banked units in large quantities have accumulated as on 31st March 2021 and 31st March 2022 to the tune of 4255307 units, due to the pandemic, whereas it was almost nil as on 31st March 2020 and very negligible as on 31st March 2019. Similar details with respect to the members of the Indian Wind Power Association were submitted to the Commission in support of the following observation made by the Commission In its order on M.P. No. 17 of 2020 dated 08.12.2020.

"7.16 The case itself has been filed prematurely as it is only at the end of the financial year would one know the actual status of energy banked and unutilized for the wind energy generators."

1.15. Section 86 (1)(e) of The Electricity Act, 2003 provides as follows:

"86 (1) The State Commission shall discharge the following functions, namely:-

.....

(e) "Promote Cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also to specify, for purchase of electricity from Such sources, a percentage of the total consumption of electricity in the area of a distribution licensee".

1.16. According to the above, the State Electricity Regulatory Commission (SERC) is mandated to promote the Renewable Energy (RE), issue the regulations for grid

connectivity and sale of RE Power to the distribution utility, CPP or open access consumer. Any instruction issued by SERC shall have to be followed by respective agencies for promoting the RE Power in the State.

1.17. Further, The National Electricity Policy as extracted below provides that the renewable Energy potential should be exploited fully to create additional power capacity and private participation should be encouraged by providing necessary promotional measures.

"5.2.20 Feasible potential of non-conventional energy resources, mainly small hydro, wind and bio-mass would also need to be exploited fully to create additional power generation capacity. With a view to increase the overall share of non-conventional energy sources in the electricity mix, efforts will be made to encourage private sector participation through suitable promotional measures."

1.18. Similarly, The Central Electricity Regulatory Commission has also stipulated in clause 5.2 (u) of the CERC (Indian Electricity Grid Code), (Regulations), 2010 that Solar Generators should be treated as "MUST RUN" plants. It directs System Operator (RLDC/SLDC) to make all efforts to evacuate all available solar power and treat them as "MUST RUN plants. The scheduled generation can only be curtailed under circumstances of Grid security and in consideration to safety of any equipment or personnel. The relevant clause as mentioned in CERC (Indian Electricity Grid Code), (Regulations), 2010 is as below:

"5.2 (u) Special requirements for Solar/ wind generators

System operator (SLDC/ RLDC) shall make all efforts to evacuate the available solar and wind power and treat as a must-run station. However, System operator may instruct the solar /wind generator to back down generation on

consideration of grid security or safety of any equipment or personnel is endangered and Solar/ wind generator shall comply with the same. For this, Data Acquisition System facility shall be provided for transfer of information to concerned SLDC and RLDC"

TANGEDCO has benefited from utilising the power generated by such sources during the lockdown.

1.19. Furthermore, such rollover has been done even in the past by the Commission. As a matter of example, when consumers were disabled from utilising the renewable wind power during R&C measures that were in force in Tamil Nadu during 2008 onwards, the Commission specifically allowed for rollover of the banked energy and allowed it to be utilised over 5 months in the next year. This situation is similar where the consumption of the generated units is not capable of being done due to governmental directives. Force Majeure is a principle specifically recognized in this regard. The Commission had in the earlier order considered the pandemic effects on the "Distribution Licensee" and the "WEGs". No doubt, both the parties including the consumers are affected. The WEGs are, however, not claiming the energy they have lost or rejected by the SLDC due to the poor demand of the grid during the Pandemic.

1.20. The Petitioner is only seeking for directives to the Distribution Licensee with regard to the energy actually supplied by the WEGs and consumed (sold) by the Distribution Licensee at the average sales revenue of Rs.5.80 per unit (2017-18) as per the 2017 tariff orders of the Commission. The TANGEDCO is only a gainer and it may be

directed to provide the average sales revenue for the relevant period which would only show that it is much higher than the unit cost of wind generators which they are entitled to consume and not be paid a miniscule portion for such generation that too after collection of banking charges and reduction of 25%. Due to the Pandemic, the Distribution Licensee has lost its revenue due to poor demand and the Petitioner lost their generation due to poor intake of the grid and both the parties have been affected/suffered in that aspect. But the Petitioner is not claiming the energy which has been lost due to poor demand of the grid. The Petitioner is claiming only the energy which was actually absorbed by the Distribution Licensee during the pandemic and already sold to the consumers at the average billing rate of Rs 5.80 per unit. The only relief sought by the Petitioner is the extension of recovery period or the Banking period and it is for the units already sold by the Distribution Licensee received from the Petitioner.

1.21. As would be evident from the ruling of the Hon'ble APTEL where there has been a clear rejection of the stand on banking being impacted by the paying of fixed cost by Distribution Licensee to its thermal power suppliers. Fixed cost to thermal generators is as per their PPA and whether they absorbed power from its thermal power suppliers or not, the Distribution Licensee has to pay the fixed Cost to them in any event. WEGs are no way responsible for this loss. It is independent of wind power and it cannot be related to wind power.

1.22. Further, it is the express stand of the petitioner that there is no regulatory or factual basis in view of the developments of 2020-2021 that there would be devolving of the

expenses on the consumers since the Petitioner is claiming the energy which they have actually supplied to the Distribution Licensee.

1.23. The Petitioner is not asking any compensation/money from the Distribution Licensee for their purported loss. While returning the unit to WEGs/its user, the loss to TANGEDCO can occur only if their cost of purchase of energy from the other supplier is more during Pandemic. The Petitioner is already paying the banking Charges for such difference in cost. In case of any increase of power purchase of Distribution Licensee during the extension of Banking Period, the same can be examined on the basis of verifiable data to be submitted by the TANGEDCO. The data of the past years shows that there is in fact no additional cost that will be incurred.

1.24. In regard to the above, the Hon'ble APTEL in Maharashtra State Electricity Distribution Company Limited -vs- Maharashtra Electricity Regulatory Commission, Appeal No. 59 of 2013 dated 01.08.2014; 2014 SCC Online APTEL 166 has succinctly described as under:

"Banking of wind energy is an essential feature to enable commercial viability of a wind energy generator supplying power to a consumer, captive or otherwise, through open access. The quantum of generation at the wind energy generator varies during the time of the day and season to season from nil to full capacity and does not match with the load profile of the consumer. The generation of wind energy generator in excess of the load of the open access consumer in a metering time block is fed into the grid and consumed by the Distribution Licensee. Various State Commissions have provided different type banking facilities to the wind energy generators to discharge their function of promotion of renewable sources of energy under the Electricity Act, 2003 under which the Surplus energy injected by the wind energy generator and utilized by the Distribution Licensee is considered as banked energy which is supplied back to the consumer during the period when the wind energy generation is less than

the demand of the open access Consumer in the same Financial Year. Different models for levy of banking charges and payment for the unutilized energy by the open access consumer at the end of the Financial Year by the Distribution Licensee exist in various States.”

1.25. In terms of the above, the banking facility availed by the Wind Power Projects have to be considered with reference to (a) when the generated units injected by the project are not fully consumed; and (b) when the non-consumed units as per (a) above are repatriated for consumption at the later period.

1.26. In the above, at stage (a) the units of electricity not consumed by the captive User or the third-party purchaser are retained and used by TANGEDCO for its purposes of maintaining supply to its consumers without the necessity to pay any amount to the wind power developer. There are therefore, no adverse financial implications at this stage to TANGEDCO. In fact, at this stage TANGEDCO will save on variable or energy charge as it can back down conventional generation and avoid payment of energy or variable charges, to the extent of the banked energy from the Wind Power Project. Therefore, there is a financial gain to TANGEDCO. There are, however, no implications to TANGEDCO on account of fixed charges payable to conventional generators as per the long-term contracts with them, whose generation is backed down as the fixed charges are payable whether or not the electricity is scheduled from such generator. Therefore, there is a financial gain to TANGEDCO. There are however no implications on account of allowing banking of units generated by wind power projects. Further, it is to be seen if for the relevant period there was any substantial costs involved. It is now clear from data for the

balance period that the TANGEDCO had in subsequent months scheduled substantial power from thermal generators to whom it pays fixed charges. Fixed Charges, in any event, are calculated on an annualized basis and when the data in that regard would be seen, it would clearly demonstrate that there were no additional costs by way of fixed charges payable to thermal generators.

1.27. Further, at stage (b) the banked units are repatriated. The TANGEDCO will therefore, requisite or schedule more power from the conventional generator whose units were otherwise not fully scheduled. The implication on account of such scheduling is again only on variable or energy charge payment. As mentioned in stage (a) there is again no implications to TANGEDCO on account of fixed charges payable to conventional generators whose generation is scheduled, as such fixed charges are payable whether or not the electricity is scheduled from such generator. Thus, there will be nil implications in regard to fixed charges on account of allowing banking of units generated by wind power projects and subsequent utilization by rollover, The only implication to be considered is the difference between the energy or variable charges saved in the stage (a) and energy or variable charges paid in stage (b).

1.28. The saving in variable charges on account of banking resulting in backing down of thermal power generation, due to availability of wind power and incurring of additional variable charges on account of the need to repatriate banked energy is to be logically determined with reference to the above, multiplied by the quantum of energy banked. The

net financial implication to TANGEDCO is also required to be determined by factoring the banking charges. The banking charge is being collected by TANGEDCO at 14% and this would translate to Rs.0.68 per unit, based on average power purchase cost of TANGEDCO. This is a gain to TANGEDCO which is much more adequate than any possible loss in providing banking.

1.29. The Hon'ble APTEL in the appeal concerning the Tariff order of the Commission which withdrew banking had clearly held that any decision with regard to banking and such aspects ought to be done in a scientific manner. The TANGEDCO consistently puts forth plea of alleged difficulties or costs being incurred by it and also incorrectly claims that there is an impact on consumer interest, without providing any details. It is therefore only appropriate that claim of the TANGEDCO is verified on the basis of hard data rather than conjectures and surmises and the actual data is directed to be produced. The data would also enable the Commission to arrive at an appropriate decision on the merits. In order to facilitate the same, the petitioner is also seeking for appropriate interim directions to direct TANGEDCO to produce the records. Such data is in any event required to be produced before a Regulator and is already part of the directions of the Hon'ble APTEL.

1.30. That Renewable Energy potential must be exploited fully and that the only way to do so would require that the banked units are allowed to be rolled over for the next Financial Year, Further, if not permitted to do so, the existing developer would be losing the interest to invest in the state of Tamil Nadu and the State also cannot achieve its

objective of increasing wind capacity in the State. Moreover, the State is wasting its natural resource. Therefore, the Commission may be pleased to direct the 1st Respondent to Rollover of banked electricity from Open Access Renewable Wind Energy Generating Stations under Captive Category of FY 2020-21 and FY 2021-22 to FY 2022-23 and FY 2023-24.

2. Counter Affidavit filed on behalf of the Respondent:-

2.1. The petitioner herein has filed the present Miscellaneous Petition under Section 86(1)(e) read with Regulation 9 of TNERC Power Procurement from New and Renewable Sources of Energy Regulations, 2008 read with Regulation 16(1) & 50 of the TNERC– Conduct of Business Regulations 2004 seeking directions from the Commission :

- (i) To Exercise its regulatory powers in furtherance of the judgment of the Hon'ble Appellate Tribunal for Electricity in Appeal No.195 of 2018 dated 28.01.2021 with regard to banking and
- (ii) The recommendations made by the 3rd respondent vide Office Memorandum F.No.283/25/2020-GRID SOLAR dated 16.04.2020 and
- (iii) Direct the Respondents for allowing Rollover of banked electricity from Open Access Renewable Wind Energy Generating Plants of the Petitioner under Captive Category of FY 2020-21 and FY 2021-22 to FY 2022-23 and FY 2023-24 and
- (iv) Set out the manner and methodology for its implementation.

2.2. Presently, the applicable tariff order on generation and banking of wind energy

passed by the Commission is the Tariff Order No. 6 of 2018 dated 13.04.2018 wherein the Commission has categorically laid down the following with respect to the Banking of energy:

"10.1. 15. The energy generated during April shall be adjusted against consumption in April and the balance if any shall be reckoned as the banked energy. The generation in May shall be first adjusted against the consumption in May. If the consumption exceeds the generation during May, the energy available in the banking shall be drawn to the required extent. If the consumption during May is less than the generation during May the balance shall be added to the banked energy. This procedure shall be repeated every month.

10.11.7 Unutilized energy as on 31st March every year may be encashed at the rate of 75% of the respective applicable wind energy tariff rate fixed by the Commission.

10.11.9 The WEGs have requested to consider purchase of unutilised energy for the generators under REC scheme at APPC rates and to permit banking of energy. This issue has also been dealt in RA No.6 of 2013 and Commission has passed orders to extend one year banking facility to WEGs under REC scheme and encashment of unutilized units at 75% of the applicable rate for REC Users. Therefore, the Commission extends one year banking period to the WEGs under REC scheme. The unutilized energy may be encashed at 75% of the applicable rates notified by the Commission in the orders issued on pooled cost of power purchase under Renewable Energy Power Purchase Obligations, 2010"

2.3. It is clear that the Commission has clearly laid down the manner and methodology for handling the unutilized energy pending as on 31st March every year.

2.4. The 1st Respondent facilitates open access approvals to the developers for the establishment of utility scale wind power plants under REC scheme as well as under non-REC scheme i.e. as per the preferential tariff order issued by the Commission with the following options as detailed below:

- 1) REC Scheme: a) Sale to Board and
 b) Third party sale
 c) Captive use

- 2) Non-REC scheme :a) Captive use or self-consumption and
 b) Third party sale

2.5. In third party sale, the balance energy, if any, after their Consumption shall get lapsed under REC scheme and non-REC scheme. Therefore, there is no banking facility in respect of wind energy for Third party sale for both REC and Non - REC scheme due to which the open access (captive use) wind developers shall sell their un-utilized generated energy within the billing period as detailed above. Resultantly, there shall be no energy and monetary loss to the Petitioner.

2.6. Since the unutilized energy has to be paid by the 1st Respondent at 75% of the applicable tariff in respect of non-REC and REC open access Consumers, the Petitioner cannot claim any loss in any imaginable situation. Since the Petitioner is not incurring any loss in the present scenario, there arises no need for any roll over of the banked energy.

2.7. The sole reason for which the Commission vide Order dated 28.12.2021 in MP No. 20 of 2021 had allowed the rollover of banked energy to the extent of the difference in the quantum of FY 20 and FY 21 for adjustment excluding peak hours was that the Commission had taken note of the GO Ms. 262 (Revenue and Disaster Management (DM-11) Department) dated 31.05.2020 wherein the Government of Tamil Nadu permitted 100% work force, the industries could not function to their full capacity as most of the work

force had left the place. However, for the FY 2021-22 to FY 2022-23, there were no restrictions with regard to COVID-19 pandemic which would have led to reduced demand. In fact, due to resumption of industrial sectors, demand has normalized.

2.8. The 3rd Respondent had issued an OM bearing F.No. 283/20/2020-GRID SOLAR (ii) wherein it was clarified that the Renewable Energy Generating Stations have been granted 'must-run' status and such Status of 'Must Run' would remain unchanged during the period of lockdown.

2.9. It is not only the Petitioner which was affected solely due to the nationwide lockdown imposed by the Government of India caused by the pandemic due to Corona Virus but also the DISCOMs such as the Respondent herein which have been facing heavy revenue loss during the pandemic. The TANGEDCO in order to abide by the "Must Run" status of the Wind Energy Generator granted by the 3rd Respondent, has kept its own power generation at idle status for ensuring that the RE generation could be evacuated at the maximum even though when it was causing the Respondent heavy financial and generation capacity loss.

2.10. As admitted by the petitioner, most of the industries and commercial establishment were in a complete shutdown due to covid lockdown period. TANGEDCO is one among the organization which was put into heavy financial loss by keeping the huge capital investment in other than RE generation in idle condition. Also, the financial losses are not

only for the wind generators, but there are even other sectors which met huge financial losses not only in India all over the World.

2.11. Due to the lockdown, TANGEDCO also was not able to realize revenue from the other higher tariff consumers except domestic and agriculture and further had to incur costs since it had to curtail its generation from conventional resources.

2.12. The Petitioner's reliance upon the order passed by the Hon'ble APTEL in Appeal No. 195 of 2018 is misplaced as the primary issue therein was with respect to the issue of dispensation of banking facilities altogether. The order did not approve any roll over of the banked units of electricity in the subsequent FYs. That in fact, the Hon'ble APTEL had categorically observed that the Regulatory Commissions are under a statutory mandate to strike a balance between the interests of the distribution licensee and the wind energy generators in order to achieve the statutory object of the encouraging the renewable sources of power. However, such goals cannot be achieved by knee-jerk reactions or whimsical or arbitrary unreasoned orders. The relevant paras are extracted herein below:

"5. The distribution Licensee TANGEDC is in appeal before us (Appeal No.406 of 2019) being aggrieved because, in its submission, the banking facility is proving financially detrimental to its and interest and deserves to be done away with, it is also pressing for increase in cross subsidy from 50% to 100% (Instead of 60% as granted by the Commission).

89.....

We agree and so reiterate what was observed in Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission (supra) that "banking facility should not be at the cost of other consumers of the

Distribution Licensee" There is possibility that the banking facility is resulting in difficulties for the distribution licensee on account of "must run" nature of wind power, it consequently causing some instability of grid and compelling the licensee to ask its other sources (thermal) to back down, and in the bargain constrained to compensate the latter. All that we are highlighting here is that the Regulatory Commissions are under a statutory mandate to adopt such measures wherein balance is struck and the legislative objective of encouraging environmentally benign sources is pursued even while larger consumer interest of availability of quality economical electricity is protected. These targets, it is clear, are to be aimed at by minimising the possibility of one interest group feeding at the cost of the other. These goals cannot be achieved by knee-jerk reactions, or whimsical or arbitrary unreasoned orders, not the least without the aid of scientific data analysis of costs involved for all stakeholders"

2.13. The Commission cannot pass such orders allowing for rollover of banked energy units when there is no loss to the Petitioner. It is pertinent to note herein that the Hon'ble APTEL's observations regarding the scientific data analysis of costs involved were only made with respect to the entire banking mechanism as presently there is a regulatory vacuum. However, such observations cannot be relied upon by the Petitioner when seeking orders for rollover as the question of roll over of banked energy stands on a different footing.

2.14. The order passed by the Hon'ble APTEL in Appeal No. 195 of 2018, dated 28.01.2021 has been challenged by the 1st Respondent before the Hon'ble Supreme Court of India vide Civil Appeal No. 2202 to 2205 of 2021. The Hon'ble Supreme Court, vide interim order dated 01.10.2021, directed that the recovery, if any, on the basis of impugned order shall not be affected from the appellant.

2.15. The Petitioner presently has fourteen WEGs operating in the State of Tamil Nadu which are situated in different districts and are regulated by separate Energy Wheeling Agreements.

2.16. The Energy Wheeling Agreements executed by the Petitioner expressly contains clauses which specify that such adjustment shall be done within the banking period. The relevant clauses are reproduced herein below:

"4. Adjustment of Energy Generated and Wheeled

c. This adjustment shall be done within the banking period (Wherever the Wind Energy Generator has opted for banking)

7. Charges:

b. Banking Charges:

(iv) The Banking period commences on 1 April and ends on 31st March of the following year"

2.17. The Petitioner is seeking directions which are beyond the scope of PPA terms and conditions since under Clauses 4(c) and 7(b)(iv) do not envisage carry over i.e. roll over. Therefore, the Commission cannot grant such orders which are not envisaged i.e. are beyond the terms of the PPA which was entered by the parties with mutual consent. The Petitioner, as a power producer, has the freedom of contract either to accept the terms offered by the 1st Respondent or not before the PPA was entered into. However, such freedom is extinguished after the PPA was executed.

2.18. The Hon'ble Supreme Court in Gujarat Urja Vikas Nigamn Limited vs. EMCO Limited and Anr. (2016) 11 SCC 182 has held that the terms of the PPA have a binding effect and the terms of the PPA are to be strictly followed in their entirety. The relevant paras are reproduced hereunder:

"37. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the first respondent as a power producer has the freedom of contract either to accept the price offered by the appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.

38. The first respondent knowing fully well entered into the PPA in question which expressly stipulated under Article 5.2 that "the tariff is determined by the Hon'ble Commission vide tariff order for solar based power project dated 29-1-2010."

2.19. The Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited vs. Solar Semiconductor Power Company (India) Pvt Ltd and Anr. (2017) 16 SCC 498 has opined that the State Commission in its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the distribution licensee and ultimately the Consumers. That it was further held that the parties are bound to the terms of the PPA entered by mutual consent. The relevant extract is reproduced herein below:

"60. In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between GUVNL and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties. As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs 15 per unit for twelve years, the first respondent should commission the solar PV power project before 31-12-2011. It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of GUVNL and ultimately the

rights of the consumers to whom the electricity is supplied, the Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of GUVNL and ultimately the Consumers.

68.....

Respondent 1 is bound by the terms and conditions of PPA entered into between the Respondent 1 and the Appellant by mutual consent and that the State Commission was not right in exercising its inherent Jurisdiction by extending the first control period beyond its due date and thereby substituting its view in the PPA, which is essentially matter of contract between the parties."

2.20. Similar issue came up before the Hon'ble APTEL in M/s Fortune Five Hydel Projects Pvt Ltd. vs. Karnataka Electricity Regulatory Commission 2019 SCC Online APTEL 51 wherein the Karnataka Electricity Regulatory Commission had issued order reducing the banking period for the Non-REC route based RE Projects, opting for wheeling from the existing one year to six months. One of the issues for consideration before the Hon'ble APTEL was that whether the impugned order passed by the Karnataka Electricity Regulatory Commission modifying the terms and conditions of banking arrangements and concluded contracts, retrospectively, is sustainable in law? In answer, the Hon'ble APTEL opined that it is a settled principle of law that once a contract is signed, the parties to it are bound by its terms and conditions and therefore the terms of Wheeling and Banking Agreement are beyond the regulatory control of the Respondent Commission and cannot be amended during the currency of the agreement.

2.21. Any order seeking rollover of the banked energy would be in violation of the clauses 4(c) and 7(b) (iv) of the existing Energy Wheeling Agreements and is outside the purview of the Commission as it would alter the terms and conditions of Energy Wheeling Agreements executed by the parties.

2.22. The Office Memorandum dated 04.05.2020 titled as F.No. 283/20/2020-GRID SOLAR is only directory in nature and not mandatory. Rollover of banked energy was directed was because the generated and banked units in previous months could not be utilized by such consumers and such lapse of such banked units or purchase thereof at APPC rate would severely affect the profitability of both the developers and consumers associated with such Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations. Furthermore, the situation was likely to continue for another few months (FY 20-21) until the pandemic is controlled and the industrial production and footfalls return to normal. The operative part of the OM only asks the DISCOMs of Andhra Pradesh, Karnataka and Tamil Nadu to consider permitting Rollover of banked energy and hence, the OM dated 16.04.2020 is only directory in nature and not mandatory. The operative clause of the OM dated 04.05.2020 is reproduced hereunder:

"4. Accordingly, the undersigned is directed to convey to Power/Energy Departments and DISCOMS of Andhra Pradesh, Karnataka and Tamil Nadu that they may consider permitting Rollover of banked electricity (from Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale) of FY 2019-20 and FY 2020-21 to FY 2021-22"

2.23. The OM dated 16.04.2020 is only directory in nature and not mandatory due to the use of the word "may". It is well settled that the word "may" is directory in nature. The expression "may consider permitting" used in the OM dated 16.04.2020 only confers discretion to consider permitting rollover of banked electricity. The said expression does not bind the 1st Respondent to permit rollover of banked electricity.

2.24. The Hon'ble Supreme Court in the case of Vidarbha Industries Power Limited vs. Axis Bank Limited (2022) 8 SCC 352 while interpreting the use of expression "may" in Section 7(5)(a) of the Insolvency and Bankruptcy Code, 2016 had held that the legislature by using the expression "may" in section 7(5)(a) intended the said section to be discretionary. Therefore, the use of expression "may" in the OM dated 16.04.2020 is only discretionary and is not binding upon the 1st Respondent.

2.25. There is no justification on part of the Petitioner to seek rollover of banked energy units to FY 2020-21 and FY 2021-22 to FY 2022-23 and FY 2023-24 when the demand of electricity has recovered and the COVID-19 pandemic has officially ended. If the Petitioner relies upon the OM dated 04.05.2020, rollover of banked units upto FY 2022-23 and FY 2023-24 is still not possible as the OM does not envisage for the same.

2.26. The Petitioner is bound by Clauses 4(c) and 7(b)(iv) of the Energy Wheeling Agreement and furthermore, any prayer seeking rollover of the excess energy units for FY 2020-21 and FY 2021-22 to FY 2022-23 and FY 2023-24 would alter the terms of agreements. If the Commission issues any such orders, it would amount to altering the terms and conditions of the agreement and would be in violation of the orders passed by the Hon'ble Supreme Court and APTEL.

2.27. Not only the petitioner is affected due to nationwide lockdown imposed by the

Government of India caused by the pandemic due to Coronavirus, but also the DISCOM's are also facing heavy revenue loss during this pandemic period. The 1st Respondent has evacuated maximum RE generation keeping its own generation idle at heavy financial loss. Hence, further considering the rollover of wind energy from open access renewable energy generators under captive and third-party sale for the FY 2020 21 & FY 2021-22 to FY 2022-23 & FY 2023-24 for all categories of wind energy generators will further hamper the financial conditions of the 1st Respondent.

2.28. The Commission, having regulatory functions, has to strike a balance between interests of the distribution licensee and the wind energy generators. Any order permitting such rollover of banked energy would encourage other wind energy generators to file similar petitions before the Commission and it would bring a substantial damage to the financial conditions of the 1st Respondent. The petition is liable to be rejected as the Petitioner is not incurring any loss in the present scenario, and there arises no need or any rollover of the banked energy.

3. Written Submission filed by the Respondent No.1 and 2:

3.1. The respondent, in addition to the averments already made in the counter affidavit, has made the following averments in the written submission.

3.2. The Honble Supreme Court in the following cases has interpreted the use of expression "may" and held that it is discretionary in nature:

a. In *Chinnamarkathian and Anr. vs. Ayyavoo and others* (1982) 1 SCC 159, wherein the Hon'ble Supreme Court while interpreting the Section 3(4)(a)&(b) of the Madras (now Tamil Nadu Cultivating Tenants Protection Act, 1955) had held that usage of the expression "may" is used to grant a discretionary power to the RDO.

b. In *Brahampal alias Sammay and Anr. vs. National Insurance Company* (2021) 6 SCC 512 wherein the Hon'ble Supreme Court while interpreting Section 173 of the Motor Vehicles Act, 1988 had held that the word "may" in Section 173 of the Act, conferred sufficient discretionary powers upon the Court to entertain even beyond the period of ninety days. The word "may" is not a word of compulsion. It is an enabling word and it only confers capacity, power or authority and implies discretion.

3.3. The Petitioner has not taken any prudent steps to sell the surplus energy in the open market or to their shareholders (having 26% stake) and could have mitigated the loss, if any, during the steps to sell the surplus energy in the open market or to their shareholders relevant financial year. Therefore, when other generators have successfully encashed their excess energy during the relevant period, the Petitioner cannot claim a differential treatment and seek for a rollover.

3.4. There is no provision under the Electricity Act, 2023 which states that the instructions

by the Central Government are binding on the Distribution Licensees such as 1st and 2nd Respondent.

3.5. The Petitioner has failed to show any evidence or justification to seek rollover of banked energy units to FY 2020-21 and FY 2021-22 to FY 2022-23 and FY 2023-24 when the demand of electricity has recovered and the COVID-19 pandemic has officially ended. Even the lockdown restrictions were removed in a staggered manner.

3.6. 1st and 2nd Respondents have faced heavy revenue losses during this pandemic period. Furthermore, 1st and 2nd Respondents have evacuated maximum RE generation keeping their own generation idle at heavy financial loss. Therefore, any further rollover of unutilized banked energy would worsen the financial conditions of the respondent.

4. Findings of the Commission:-

4.1. The petition has been filed praying for rollover of banked energy for the wind energy generating stations under captive category for FY 2020-21 and FY 2021-22 to FY 2022-23 and FY 2023-24 and to set out the manner and methodology for its implementation and pass such further orders as deemed fit.

4.2. In earlier petitions filed in M.P No.16 of 2020 and M.P No.17 of 2020 seeking rollover of banked energy, Commission dismissed the petition observing that both the petitioners and TANGEDCO are affected parties due to the pandemic caused by Covid 19,

and that the case itself has been filed prematurely as it is only at the end of the financial year would one know the actual status of energy banked and unutilized, Commission issued the following orders:

“In view of the foregoing discussions and in as much as the Distribution Licensee’s revenues also have been affected by the pandemic, Commission decides that there shall be no carry forward of banked energy in the case of WEGs and Solar generators under REC/ non REC scheme to the subsequent financial years/months, as the case maybe. Banking charges as notified in the tariff orders for wind energy shall be applicable.”

4.3. The petitioner relies on the Office memoranda issued by the Ministry of New and Renewable Energy dt.1.4.2020, 16.4.2020 that stressed on no change in the MUST RUN status of wind and solar power plants during the period of lock down and the advisory to the States of Andhra Pradesh, Karnataka and Tamil Nadu that they may consider permitting rollover of banked electricity (from Solar PV Rooftop projects and Open Access Renewable Energy generating stations under Captive and Third – Party sale) for FY 2019-20 and FY 2020-21 to FY 2021-22. Though the State Government permitted 100% operation of industries on 31.5.2020, it took 2 to 3 months to get the entire workforce to run the industry.

4.4. TANGEDCO contends that the OM dt.16.04.2020 is only directory in nature and not mandatory due to the use of the word “may”. It only confers discretion to consider permitting rollover of banked electricity and does not bind the Respondent to permit rollover of banked electricity. After adjustment of energy, the balance unutilised energy is paid at 75% of applicable tariff to the petitioner and hence the petitioner is not at loss. The

Energy Wheeling Agreement has a clause to the effect that „no carry over is allowed beyond the banking period“ and unutilized banked energy has to be encashed at 75% of the tariff. During the pandemic, TANGEDCO too has faced severe losses and hence the petition is not maintainable.

4.5. Since a question has arisen on the maintainability of the petition, it is dealt with in the first instance.

4.6. Banking for a period of twelve months and encashment of unutilized banked energy has been in vogue from the date of the first tariff order for wind power issued by the Commission on 15.5.2006. The petitioners have contended that when the consumers were disabled from utilising banked energy during the enforcement of Restriction & Control measures, Commission allowed rollover of banked energy to the next 5 months. The petitioners have further stated that the situation is a Force Majeure condition and the WEGs are only seeking a direction for adjustment of the energy generated by them into TANGEDCO's grid which has been sold by TANGEDCO. This is a case where banked energy could not be consumed due to the circumstances beyond the control of the petitioner. Therefore, contest on maintainability of the petition by TANGEDCO fails.

4.7. The petitioners have prayed for rollover of banked energy of 2020-21 to 2023-24 in consideration of the Judgement in A.No.195 of 2018 dt.28.1.2021 wherein the withdrawal of banking facility for new WEGs, third party open access consumers ordered in the tariff order for wind power dt.13.4.2018 was set aside. Hugestakes being involved, the above said Judgment of Hon'ble APTEL has been contested by the TANGEDCO and by the

Commission before the Hon'ble Supreme Court of India. Status quo is maintained on the provisions in the wind tariff order No.6 of 2018.

4.8. Banking of 12 months is available to all WEGs commissioned prior to 1.4.2018. Roll over of banked energy arises only in the case of WEGs commissioned prior to 1.4.2018.

4.9. For the FY 2020-21, the Government of Tamil Nadu permitted working of industries with 100% workforce in the G.O Ms.262 (Revenue and Disaster Management (DM-II) Department) dt.31.5.2020. The petitioner contends that though GoTN permitted 100% work force, the industries could not function to their full capacity as most of the work force had left the place.

4.10. However, the fact that both TANGEDCO and the petitioners had to face losses during the pandemic cannot be overlooked. While the industries had to face the brunt of non-availability of sufficient work force and fluctuations in production, TANGEDCO had to deal with integration of RE generation to the grid keeping their own generation idle. Further TANGEDCO has forgone the maximum demand charges to the extent of 70 to 80% by collecting only 20% of the Demand charges during the Covid 19 pandemic.

4.11. The Commission in D.R.P. No.22 of 2020 also has permitted adjustment of unutilized banked energy based on following the order dated 28-12-2021 passed in M.P. No. 20 of 2021:-

“After detailed examination of the data of banked energy and unutilized energy, Commission decides as follows:

The unutilised banked energy as on 31.3.2020 of each consumer may be compared with the unutilised banked energy as on 31.3.2021. If the unutilized banked energy as on 31.3.2021 is

higher than the quantity banked in FY 2019- 20, roll over of banked energy to the extent of the difference in the quantum of FY 20 and FY 21 may be permitted for adjustment excluding peak hours i.e adjustment of energy may be permitted during normal and off-peak hours, for the period from the date of this order to 31.3.2022.”

4.12. The Respondent contention with respect to FY 2022-23 and FY 2023-24 that there was no restrictions w.r.t COVID-19 pandemic which would have led to reduced demand and there is no justification on the part of the petitioner to seek rollover of banked energy for that period is upheld by the commission.

In the result, in regard to roll over sought for by the petitioner covering the financial year 2022-2023 to 2023-2024 is dismissed. However, in regard to the roll over sought for by the petitioner for the other period set out in the petition, the following order is passed:-

“The unutilised banked energy as on 31.3.2020 of each consumer may be compared with the unutilised banked energy as on 31.3.2021. If the unutilized banked energy as on 31.3.2021 is higher than the quantity banked in FY 2019- 20, roll over of banked energy to the extent of the difference in the quantum of FY 20 and FY 21 may be permitted for adjustment excluding peak hours i.e adjustment of energy may be permitted during normal and off-peak hours, for the period from 28-12-2021 to 31.3.2022.”

Parties directed to bear their respective costs. Petition is disposed of in the above terms.

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

(Sd.....)
Member

(Sd.....)
Chairman

/True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**