

**TAMIL NADU ELECTRICITY REGULATORY COMMISSION**  
**(Constituted under section 82 (1) of the Electricity Act, 2003)**  
**(Central Act 36 of 2003)**

**PRESENT:-**

**Thiru.S.Nagalsamy** ..... Member

and

**Thiru.G.Rajagopal** ..... Member

**M.P.No.11 of 2013**

Subhashri Bio Energies Private Limited  
67, Goundampalayam  
Kumaramangalam P.O.  
Tiruvhengode – Namakkal – 637 205.

... Petitioner  
Thiru R.S.Pandiyaraj  
(Advocate for Petitioner)

Vs

1. The Chairman  
Tamil Nadu Generation and  
Distribution Corporation  
144, Anna Salai  
Chennai – 600 002.
2. The Chief Engineer – NCES  
Tamil Nadu Generation and  
Distribution Corporation  
144, Anna Salai  
Chennai – 600 002.
3. The Superintending Engineer  
Namakkal Electricity Distribution Circle  
Tamil Nadu Generation and Distribution Corporation  
Namakkal.

....Respondents  
Thiru P.H.Vinod Pandian  
(Standing Counsel for the Respondents)

**Dates of hearing :** 13-09-2013, 29-01-2014 and 04-03-2014  
and 17-04-2014

**Date of order :** 19-01-2015

The above M.P.No.11 of 2013 came up for final hearing before the Commission on 17-04-2014. The Commission upon perusing the above petition and the connected records and after hearing both sides passes the following order:-

### **ORDER**

#### **1. Prayer of the Petitioner:-**

The prayer of the Petitioner in M.P.No.11 of 2013 is to direct the TANGEDCO to bill the power drawn by the biogas plant of the Petitioner under HT Tariff I A.

#### **2. Facts of the Case:-**

M/s.Subhashri Bio Energies Private Limited, the Petitioner in the above Miscellaneous Petition is a Generator of electricity using bio-gas derived from poultry litter by Bio-methanation process. Generation was commissioned on 05-05-2006. The generator started with 2.5 M.W. which was subsequently enhanced to 3.76 M.W. The entire power generated by the Petitioner is supplied to the TANGEDCO under a Power Purchase Agreement (PPA) dated 21-02-2005. The Petitioner has filed the present petition challenging the billing of the power including start-up power drawn from the grid under tariff other than HT Tariff I-A.

#### **3. Contention of the Petitioner:-**

3.1. The Petitioner herein has installed 2.5 MW Bio Gas based power plant, later enhanced to 3.76 MW (from Poultry litter by Biomethanation process) at 67, Goundampalayam, Kumaramangalam P.O., Tiruchengode Taluk, Namakkal District. The power plant has been commissioned on 05-05-2006. The Petitioner entered into PPA with the Superintending Engineer Namakkal Electricity Distribution Circle

(earlier under the jurisdiction of Mettur Electricity Distribution Circle) on 21-02-2005 for supply of surplus power to TANGEDCO (erstwhile TNEB).

3.2. The power purchase tariff for Petitioner's power plant is regulated by B.P. (F.B.) No.59 dated 11-04-2000. In the above said B.P. Power Purchase tariff of Rs.2.73 per unit for the year 2000-2001 with 5% annual escalation upto 2010 has been fixed stating such tariff should not exceed 90% of the HT tariff. Accordingly Rs.3.15 per kWh is being paid by the TANGEDCO from 2003-2004 till date. The petition filed by the TANGEDCO before the Commission in P.P.A.No.9 of 2011 with the prayer for fixation of power purchase tariff for further period of agreement beyond 01-04-2010, it is yet to be disposed of.

3.3. The Petitioner entered into the PPA with TANGEDCO (erstwhile TNEB) on 21-02-2005 on which date, both biomass and biogas power plants were treated in the same group of biomass power plants by the TANGEDCO. Hence the Petitioner entered into PPA applicable for biomass power plants. As per clause 10 (a) (i) of the said PPA, power drawn for start-up purpose has to be billed under HT Tariff I and as per clause 10 (a) (ii) the power drawn for maintenance works, trial run of equipments, water works etc. has to be billed under HT Tariff III.

3.4. TANGEDCO when approached for the implementation of the above PPA categorically directed that the entire quantum of power drawn from the grid has to be billed under HT Tariff III, which is in violation of clause 10 (a) (i), of the PPA.

3.5. From the date of commissioning of the Petitioner's power plant, TANGEDCO has been in the practice of billing the entire power drawn by the Power

Plant under HT Tariff III upto August 2012 in violation of clause 10 (a) (i) of the PPA. For the period from September 2012 to till date, TANGEDCO has been billing at the rate of Rs.9.50 per unit plus Rs.300 per KVA as demand charges which is also in violation of the agreed terms of the PPA. It is therefore implying that the Petitioner is entitled for “the amount in excess” of Tariff I A being collected by TANGEDCO.

3.6. Clause 8.2.5.3 (a) of Tariff Order No.8 of 2012, under the heading of “Grid availability charges,” read as follows:-

*“If a generator is an open access customer, the startup power shall be provided by the Distribution Licensee for a period of 42 days in a year, subject to the limitation of demand not exceeding 15% of the capacity of the generator. The generator shall pay the distribution licensee at the rate applicable for temporary supply of that voltage category”.*

3.7. Clause 8.2 under the heading of “Related issues” read as follows:-

*“The following are the issues related to power generation, transmission, wheeling and consumption for biomass based power plants.*

- a. Transmission and wheeling charges.*
  - b. Cross subsidy charge.*
  - c. CDM benefits.*
  - d. Reactive power charges.*
  - e. Grid availability charges.*
  - f. Adjustment of energy generated.*
  - g. Scheduling and system operation charges.*
  - h. Application fees and Agreement fees.*
  - i. Billing and payment.*
  - j. Payment security and security deposit.*
  - k. Power factor.*
  - l. Metering*
  - m. Connectivity and evacuation of power.*
  - n. Energy purchase and wheeling agreement.*
  - o. Scheduling of power.*
  - p. Tariff review period / control period.*
- The above charges / terms are applicable to all biomass based power generating plants irrespective of their year of installation”.*

3.8. As per clause 8.2 of Tariff Order No.8 of 2012 dated 31-07-2012 issued by the Commission, the start-up power charge as specified in clause 8.2.5.3 is applicable for Petitioner’s power plant. As per the above clause, the temporary

supply of that voltage category is applicable for billing of start-up power for biomass plants covered under open access system and the same tariff is not applicable for generators of biomass plants not covered under open access system.

3.9. The Petitioner's power plant is not covered under open access system, since the entire power is being supplied to the Distribution Licensee (i.e.) TANGEDCO and the plant is also availing power supply from TANGEDCO for its use while not in operation. In view of the above said reason, start-up power charges as specified in the Commission's Order No.8 of 2012 could not be made applicable for Petitioner's power plant.

3.10. The Commission has passed Order No.8 of 2012 for "Biomass" power plants, working on rankine cycle, the technology of which is completely different from the principles of operation of biogas power plants.

3.11. The principle of operation of biogas involves preparing bio-substrate with water, homogenizing the contents of the digesters towards production of bio-methane to be converted to electricity, and disposing the used substrate. All these operations are continuous in nature involving daily and regular drawal of power from the grid irrespective of power being exported. The power drawn from the grid is for the sole purpose of production of bio-methane and generation of electricity and industrial in nature, implying its similarity to industrial units. Hence, the concept of "Dual Tariff" does not arise. Hence it would be appropriate to bill the power drawn by the Petitioner's biogas plant from TANGEDCO under HT Industrial Tariff I A.

#### 4. Contention of the Respondent:-

4.1. The proposal of the Petitioner M/s. Subhashri Bio Energies Private Limited for establishment of 2.5 MW Biomass power plant at Goundampalayam, Kumaramangalam, Tiruchengode Taluk, Namakkal District had been noted on record vide CE/NCES's letter dated 25-07-2003.

4.2. The Petitioner had entered into PPA on 21-02-2005 with the SE / Namakkal EDC for supplying power to the TANGEDCO at the rate fixed in B.P. (F.B.) No.59, dated 11-04-2000. The duration of PPA is 15 years from the date of agreement or the useful life period of the plant, whichever is less.

4.3. In B.P. (F.B.) No. 59, dated 11-04-2000, the power purchase tariff applicable for Biomass power plants was fixed at Rs.2.73 per unit effective from 01-04-2000 with 5% annual escalation, over the previous year rate, for a period of nine years upto the year 2010. The price so fixed shall not exceed 90% of the prevailing HT Tariff-I rate applicable for the industrial consumers which may get revised from time to time.

4.4. Para (ii) of the above B.P. read as follows:-

*“The above purchase price shall be reviewed after ten years during the year 2010. Till such review is made and a new rate is finalized, the tenth year rate will be continued to be paid if the power generating company continue to supply its surplus power to TNEB”.*

The following power purchase tariff is being adopted by TANGEDCO:-

Sl.No.	Year	Power Purchase Tariff
1	2000-2001	Rs.2.73 per unit
2	2001-2002	Rs.2.87 per unit
3	2002-2003	Rs.3.01 per unit
4	2003-2004	Rs.3.15 per unit

5	2004-2005	Rs.3.15 per unit
6	2005-2006	Rs.3.15 per unit
7	2006-2007	Rs.3.15 per unit
8	2007-2008	Rs.3.15 per unit
9	2008-2009	Rs.3.15 per unit
10	2009-2010	Rs.3.15 per unit
11	2010-2011	Rs.3.15 per unit
12	2011-2012	Rs.3.15 per unit
13	2012-2013	Rs.3.15 per unit
14	2013 to till date	Rs.3.15 per unit

Such escalated rate has been freezed at Rs.3.15 per unit in the year 2003-2004 because of reaching 90% of the HT Industrial Tariff of Rs.3.50 per unit and the same rate is continued for payment till date. The Petitioner's power plant has been commissioned on 05-05-2006 and generated power is being exported to the grid.

4.5. TANGEDCO filed a petition in P.P.A.P.No.9 of 2011 before the Commission seeking approval for fixation of power purchase tariff for Bio-mass power plants commissioned based on PPA entered prior to 15-05-2006, including Petitioner's power plant for the remaining period of the agreement. The above petition has been admitted and partly heard and is yet to be disposed off.

4.6. Clause 10 (a) of the PPA dated 21-02-2005 read as follows:-

*“(a) (i) Drawal of power from Board's grid as recorded by the import meter shall be charged at Board's HT Tariff-I rate applicable for industrial consumers. Maximum demand charges shall be levied based on tariff notified by the TNERC. Penal and other surcharges shall be levied as per the notified tariff conditions if the sanctioned demand is exceeded or power is availed during peak load hours as the case may be or as per conditions imposed from time to time by the Board & TNERC.*

*(ii) Power drawn from the TNEB grid for the purpose of Bio-mass (from poultry droppings by Biomethanation process) based on power plant maintenance works, trial run of equipments, water works etc. shall be charged*

*under Board's HT Tariff-III including M.D. charges based on tariff Notified by the TNERC from time to time."*

4.7. The power drawn for Petitioner's power plant for startup purpose has to be billed under HT Tariff-I (industrial tariff) and the power drawn for maintenance, trial run and watering works has to be billed under HT Tariff-III (commercial tariff) i.e. two part tariff of energy charges plus demand charges.

4.8. Clause 8.2.5.3 (a) of TNERC Order No.8 of 2012 dated 31-07-2012 read as follows:-

*"If a generator is an open access customer, the startup power shall be provided by the Distribution Licensee for a maximum period of 42 days in a year subject to the limitation of demand not exceeding 15% of the capacity of the generator. The generator shall pay the distribution licensee at the rate applicable for temporary supply of that voltage category".*

4.9. The Commission issued Tariff Order No.8 of 2012 dated 31-07-2012 "Comprehensive Tariff Order for Biomass based Power Plants". Clause 8.2 of the Tariff Order enlist the "**Related Issues**" to power generation, transmission, wheeling and consumption from Biomass based power plants. All charges / terms are applicable to all biomass based power generating plants irrespective of their year of installation.

4.10. Order No.8 of 2012 has been implemented by TANGEDCO in full shape. Working instructions were issued vide Lr.No.CFC/FC/DFC/AAO.HT/AS.3/D.No.126/13, dated 07-09-2013. Clause (14) of the above circular read as follows:-

*"Further, all the Superintending Engineers are requested to fix the sanctioned demand along with assigning the service connection number (wherever not fixed) in respect of the all the generators (Fossil fuel ; Biomass; Bagasse). Such service shall be billed under HT Tariff V (temporary supply) under two*

*part system (i.e. demand charges and energy charges separately) as per the TNERC Order No.1 of 2013 dated 20-06-2013 with effect from 21-06-2013 in respect of the conventional fuel based generators and from 01-08-2012 onwards in respect of the Non-Conventional generators as per Order No.7 and Order No.8 dated 31-07-2012 respectively”.*

4.11. In order to comply with Order No.8 of 2012, the start-up power drawn by the Petitioner’s 2.5 MW bio-mass power plant is being billed under HT Tariff V (temporary supply) under two part system (i.e. demand charges and energy charges separately) for the period from 01-08-2012.

4.12. Under section 2 (15) of the Electricity Act, 2003, the “consumer” is defined as follows:

*(15) “consumer” means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be.*

Similarly, the National Tariff Policy with regard to start-up power provided to the generators describes as follows:-

*“8.5.6. In case of outages of generator supplying to a consumer on open access, standby arrangements should be provided by the licensee on the payment of tariff for temporary connection to that consumer category as specified by the Appropriate Commission”.*

Further, the Tariff Order No.1 dated 20-06-2013 provides as follows:-

**“A6:Tariff Schedule**

**Tariff for High Tension supply consumers**

**6.1. General provisions applicable for High Tension Supply**

x x x x x

vii **Billable Demand:** *In case of HT Consumers, maximum Demand Charges for any month will be levied on the kVA demand actually recorded in that month or 90% of the contracted demand whichever is higher.*

*Provided, that whenever the restriction and control measures are in force, the billable demand in case of two part tariff for any month will be the actual recorded maximum demand or 90% of demand quota, as fixed from time to time through restriction and control measures, whichever is higher.*

X X X X X

**6.8. High Tension Tariff V:**

Tariff Category	Tariff	
	Demand Charge in Rs/kVA/month	Energy charge in paise per kWh (Unit)
High Tension Tariff V	300	950

X X X X

*c) This tariff is also applicable to start-up power provided to generators. The generators are eligible to get start-up power under this tariff after declaration of CoD. The demand shall be limited to 10% of the highest capacity of the generating unit of the generating station or the percentage auxiliary consumption as specified in the regulation, whichever is less. The supply shall be restricted to 42 days in a year. Drawal of power for a day or part thereof shall be accounted as a day for this purpose. Power factor compensation charges are not applicable for startup power.”*

4.13. As per the tariff order of the TNERC, the tariff for HT services has been fixed at two-part tariff system (viz) demand charges and energy charges. The demand charges are the fixed charges component and the energy charges are the charges for the actual energy supplied. Hence, the demand charges are payable when no electricity was consumed by the consumer (i.e.) the demand charges alone will have to be charged and no component of energy charges could be added as there was no consumption. Further, they are also required to pay for the capacity available to them (whether or not they are using that capacity) at all times. The

“demand charge” is defined as a charge that “is determined using the maximum (or “peak demand”) occurring during the monthly billing period”. The demand charge is billed as a fixed rate calculated on per kVA (kilovolt-ampere) basis. This charge is based on the premise that industrial / commercial consumers and other large users of electricity who require even brief peaks of power from the grid should pay a share of the infrastructure and maintenance costs associated with the capacity to provide that power when needed. If the consumer uses that capacity at any given time during the monthly billing cycle, they are charged for that capacity during the entire billing cycle.

4.14. The Commission has envisaged the two part system so as to recover the full demand charges / fixed charges relating to providing all infrastructure facilities in accordance with section 45 (3) (a) as well as tying up of the generator capacity. In this connection, the Appellate Tribunal for Electricity in Appeal No.130 of 2005 dated 10-07-2006 has held as follows:-

*“In our view, the rationale and relevance of Monthly Minimum charges is well established in the electricity industry. It is to be recognized that when a consumer is connected to a system, the utility has to provide or keep in readiness certain capacity of the system to serve the consumer. Machine capacity, transmission system, certain work force and supervisory staff is kept on the job of monitoring the system, attending to emergency, restoring the supply in the event of outage, routine and periodic maintenance, meter reading, billing, bill delivery, defraying administrative expenses not directly related to the consumption of energy. This element of the fixed charges, as an accepted practice, is recovered through the mechanism of demand charges”.*

4.15. The demand charges could be taken as fixed charges for the purpose of clause (a) sub-section (3) of section 45 of the Act. Hence, the Licensee /

TANGEDCO to recover the demand charges, may claim the fixed / demand charges. The general theory in the electricity industry is that the demand charges reflect the utilities' fixed costs of providing a given level of power availability to the consumer, and energy charges reflect the variable portion of those costs as the customer actually uses that power availability.

4.16. In case of outages of generator supplying to a consumer on open access, the utility has to provide or keep in readiness certain capacity of the system to serve the consumer around the year. When the captive power plant is not generating power, the licensee is obliged to provide power supply to the generator for start-up. During this period, no wheeling charge is recoverable, as the captive generator is not injecting any power. The fixed charges payable to other generating stations for procurement of power from the market to meet such contingency will devolve on the licensee. Therefore, it will have to pay demand charges based on its sanctioned demand as per the tariff order in force. Hence, the contention of the Petitioner is against provisions contained in the section 45 (3) of the Electricity Act,2003, National Tariff Policy and the Commission's orders.

4.17. The Commission issued the Tariff Order No.1 of 2012 on 30-03-2012. In the order, the Commission has not specified to collect the single charge (energy charges and energy equated demand charges) from the consumers who draws power from the distribution licensee for start-up as provided in the Order No.2 dated 15-05-2006. In this regard, it is pertinent to note relevant events as follows:-

*“The TANGEDCO filed a review petition to the Order No.1 of 2012 dated 30-03-2012 before the Commission. In the review petition, the TANGEDCO submitted the following:-*

*“3.3.4 At the time of filing petition there is no separate category of temporary supply and hence it was prayed to fix energy charges plus the energy equated demand charges applicable to HT commercial tariff as Grid Availability charges. The Commission in Tariff Order dated 30-03-2012 approved the separate tariff category for HT temporary supply.*

*3.3.5. Hence, it is prayed to fix Rs.10.45 per unit as grid availability charges which is energy charges plus energy equated demand charges applicable to HT temporary supply.”*

4.18. The Commission disposed the above review petition in R.P.No.2 of 2012 and issued the order on 04-12-2012. In clause 6.16 of the order, the Commission referred to the following paragraph of Tariff Policy with regard to grid availability charges:-

*“8.5.6 In case of outages of generator supplying to a consumer on open access, standby arrangements should be provided by the licensee on the payment of tariff for temporary connection to that consumer category as specified by the Appropriate Commission.”*

In accordance with the mandate of tariff policy, the Commission has determined separate tariff for temporary connection according to which an open access consumer will be charged for the standby arrangements provided by the generator in case of outage. Therefore, the Commission does not find any merit in the argument of the Petitioner and the Commission has already determined the tariff for temporary connection in accordance with tariff policy.”

4.19. The Commission has determined separate tariff for temporary connection according to which an open access consumer will be charged for the standby arrangements provided by the generator in case of outages.

4.20. The above regulations are statutory in character and the TANGEDCO being the Distribution Licensee is bound to implement the same. In fact, the provisions of the said order also bind the Petitioner. Further, the Commission has issued tariff order after considering the views of the State Advisory Committee in meeting held on 27-01-2012 and also after considering suggestions and objections received from the public during the public hearings held on 30-01-2012, 02-02-2012, 06-02-2012 and 10-02-2012 as per sub-section (3) of section 64 of the said Act. In view of the above, none of the averments raised in the above petition are maintainable.

4.21. M/s.Bio-mass Power Producers Association, Tamil Nadu had filed a petition in M.P.No.2 of 2013 in W.P.No.26553/2013 before the Madras High Court with the following prayer:

*“To grant an order of interim stay of all further proceedings pursuant to the impugned instruction of the second Respondent (CFC/Revenue TANGEDCO) in letter No.CFC/FC/DFC/AAO.HT/AS.3/D.No.126/13, dated 07-09-2013 (working instructions for startup power charges of HT temporary supply of two part tariff of Rs.9.50 per unit plus Rs.300/- per KVA with effect from 01-08-2012).”*

The High Court in order dated 26-09-2013 issued the following directions:-

*“The members of the Petitioner’s Association shall pay 50% of the amount to be demanded by the Respondents on the basis of comprehensive tariff order for Bio-mass, with effect from 01-08-2012 and shall continue to do so until further orders.”*

In continuation to the above, approximately 60 generators have obtained similar orders and the necessary counter affidavits have been filed by TANGEDCO and the case has not yet been posted for hearing.

4.22. Clause (14) of PPA reads as follows:-

*“The power generating company agrees that the Board shall have the right to vary from time to time, the tariff, policy on banking and wheeling and terms and conditions of this agreement by special or general proceedings and the conditions relating to generation of electricity through Bio mass (from poultry droppings by Bio methanation process) and such other variations ordered by TNERC and TNEB shall be binding on the company”.*

. As per the said provisions of the PPA and as per the provisions made in clause 8.5.6 of the National Tariff Policy and as per clause 8.2 of Tariff Order No.8 of 2012 and Tariff Order dated 20-06-2013, the Petitioner Company is bound to pay to TANGEDCO, HT temporary supply two part tariff of energy charges of Rs.9.50 per unit and Rs.300 per KVA for the period from 01-08-2012 onwards towards start-up power for their power plant. The Commission may be pleased to dismiss M.P.No.11 of 2013 as devoid of any merits.

#### **5. Additional Contentions of the Petitioner in the Rejoinder:-**

5.1. The Respondent TANGEDCO has been charging the entire quantum of power drawn from the TANGEDCO grid under HT Tariff III till August 2012 and under HT Tariff V from September 2012 to till date which is wholly arbitrary, illegal and contrary to law and also amounts to re-fixation of tariff which is *exfacie* illegal and liable to be set aside.

5.2. The Respondent has admitted that the start-up power for the Petitioner's power plant has to be billed under HT Tariff I (industrial tariff) as per clause 10 (a) (i) of the PPA dated 21-02-2005 and only the power drawn for the purpose of maintenance, trial run and watering purpose has to be billed under HT Tariff III (commercial tariff) as per clause 10 (a) (ii) of the PPA. But contrary to the above averment, the Respondents have been charging the Petitioner under HT Tariff III

(commercial tariff) even after the Petitioners power plant has been commissioned and synchronized successfully i.e. from 05-05-2006. This act of the Respondent is clearly contrary to the agreement dated 21-02-2005.

5.3. It is clear from the letter dated 11-05-2006 issued by the Superintending Engineer, Mettur that the Petitioner's power plant has been commissioned on 05-05-2006 and synchronized in the dedicated 22KV feeder to Unjanai 110/22 KV SS. Being well aware that the Petitioner's power plant has been commissioned successfully the Respondent vide the letter dated 20-06-2006 has informed that the power drawal from the TNEB grid by the Petitioner would be charged only under HT Tariff III (commercial tariff) as per clause 10 (a) (ii) of the PPA. Further, the Respondent has threatened and arm twisted the Petitioner by stating that only on the payment of the import bill under HT Tariff III, the Petitioner's export bill will be processed for payment and BPSC at 1.5% per month will be levied until the Petitioner pays under HT Tariff III which is wholly arbitrary and contrary to law and also amounts to re-fixation of tariff which is *exfacie* illegal.

5.4. Clause 10(a)(ii) of the PPA i.e. HT Tariff III including MD charges will be attracted only in case of power drawal from the Respondent grid by the Petitioner for the purpose of maintenance works, trial run, water works etc., alone. Whereas in the present case, eventhough the Petitioner has started injecting power from 05-05-2006, the Respondents have been illegally charging the Petitioner under HT Tariff III (commercial tariff) till August, 2012 and it clearly shows that the stand adopted by the Respondent is wholly unreasonable and not in any way aimed at the development of the non-conventional energy generators. Such a stand adopted by the Respondent is very harsh to generators like the Petitioner.

5.5. The Respondent has heavily relied on the working instructions dated 07-09-2013 issued by the second Respondent which states that the generator's services shall be billed under HT Tariff V as per the TNERC Order No.1 of 2013 with effect from 21-06-2013 in respect of conventional fuel based generators and with effect from 01-08-2012 onwards in respect of non-conventional generators as per Order No.7 and Order No.8 of 2012. Even assuming, without admitting that the memo dated 07-09-2013 issued by the second Respondent is correct, it would be right and proper only with effect from 01-08-2012 and not prior to it. But in the present case the Respondent has been illegally charging the Petitioner (eventhough the Petitioner has started injecting power from 05-05-2006) under HT Tariff III till August, 2012 for drawal of power from the TNEB grid for startup purpose which is wholly arbitrary, illegal and contrary to law and also amounts to re-fixation of tariff which is *exfacie* illegal.

5.6. The Respondents at para 14 to 22 of their counter has mentioned that in order to comply with the orders of this Commission in Order No.8 of 2012 the start-up power drawn by the Petitioner has been billed under HT Tariff V from 01-08-2012 and the circular memo dated 07-09-2013 is in line with orders of this Commission which is denied as false and misleading. The Respondent has in effect sought to re-fix the rate fixed by the Commission in its orders, which is clearly without jurisdiction and contrary to the provisions of the Electricity Act, 2003 and the Regulations for the reasons as follows.

5.7. After the enactment of the Electricity Act, 2003, the power to determine the tariff payable by the distribution licensee to a generator came to be vested with the

Commission. In Tamil Nadu, the tariff payable to the Distribution Licensee by the WEGs, biomass based generators and bagasse based co-generators came to be determined, for the first time, through issue of general Tariff Order No.3 of 2006 issued by the TNERC (hereinafter referred to as the "First Tariff Order") which was made applicable to all future and renewal of existing contractors / agreements for the Non-Conventional Energy Sources based generating plants / co-generation plants. The said Tariff Order saved the existing contracts and agreements signed prior to 15-05-2006 between the generators and the Distribution Licensee but however provided for option to the generators to the Distribution Licensee to mutually re-negotiate the existing agreements / contracts, if any in line with the said order even before the expiry of the contracts. It is pertinent to state that the Petitioner has not exercised the said option and accordingly the sale and purchase of electricity by the Petitioner to and from TNEB continues to be governed by the PPA dated 21-02-2005.

5.8. The Commission has also decided upon certain other ancillary issues, one of such issues being Grid support / Grid Availability charges. In this regard, the Commission gave a direction that the said charges in the case of biomass based co-generators shall be in accordance with the Order No.2 of 2006 dated 15-05-2006 which is applicable and covers the entire gamut of charges payable by open access customers such as wheeling, transmission, banking charges etc. It is therefore submitted that the Grid Availability Charges is applicable only in respect of Open Access customers as observed in para 5.22.1 and 5.22.3 of Order No.2 of 2006 dated 15-05-2006.

5.9. Regulation 1 (3) of the Power Procurement from New and Renewable Sources of Energy Regulation, 2008 reads as under-

*“These regulations shall apply to all new and Renewable source based generating plants including co-generation plants located within the State of Tamil Nadu for which Power Purchase Agreement / Contracts were signed on or after 15-05-2006 / the contracts and the agreements between new and renewable sources based generators and the Distribution Licensees signed prior to 15-05-2006 would continue to remain in force. However, the Generators and the Distribution Licensee shall have the option to mutually re-negotiate the agreements / contracts signed prior to 15-05-2006 in line with these Regulations even before the expiry of the agreements / contracts. Any renewable of the said contract / agreement / new contracts / agreements shall be in line with these regulations”.*

5.10. Upon expiry of the term of tariff orders issued in 2006, the tariff payable by the Distribution Licensee to biomass based power plant came to be re-determined by the Commission in Order No.2 of 2009 dated 27-04-2009 (hereinafter referred to as the “Second Tariff Order”). The said order also dealt with the issues of Grid Availability Charges, which continued with the same provisions as was decided in the 2006 Order. While so, the Commission came up with a further Tariff Order No.8 of 2012 dated 31-07-2012 (hereinafter referred to as the “Third Tariff Order”) which determined tariff payable to biomass based power plants set up on or after 01-08-2012. The relevant portions of the Third Tariff Order dealing with the Grid Availability Charges are extracted below:-

**“Start-up Power**

*“If a generator is an open access customer, the startup power shall be provided by the Distribution Licensee for a maximum period of 42 days in a year, subject to the limitation of demand not exceeding 15% of the capacity of the generator. The generator shall pay the distribution licensee at the rate applicable for temporary supply of that voltage category.”*

5.11. The Grid Availability Charges specified under the Third Tariff Order is applicable only in the following two circumstances viz. (a) the generator is an Open Access Customer and (b) the start-up power is provided to such generator by the Distribution Licensee for a maximum period of 42 days in a year, subject to the limitation of demand not exceeding 15% of his capacity. Under these circumstances, the Commission has directed that the rate payable for such start-up power shall be at the rate applicable for temporary supply of that voltage category.

5.12. From the combined reading of the first, second and third tariff orders, it is clear that Grid Availability Charges is applicable only in respect of start-up power provided to generators who are Open Access Customers and on temporary basis. The Petitioner is not an Open Access Customer as it has entered into PPA with TNEB for supply of the entire power generated by it. In addition the import of power is not of a temporary nature inasmuch as the Petitioner has been importing power during its entire process of power generation as required under the biomethanation process.

5.13. The Commission for the first time introduced a new schedule of tariff viz. Tariff-V vide its detailed Tariff Order No.1 of 2012 to cover temporary supply for construction and for other temporary purposes. While issuing the circular dated 07-09-2013, the second Respondent has taken a conjoint reading of provisions of the third Tariff Order dealing with Grid Availability Charges and Order No.1 of 2013 prescribing a separate tariff schedule for temporary power and accordingly started charging Tariff –V on power supplied to the Petitioner from 01-08-2012.

5.14. The cost of Rs.17,20,400/- towards a permanent interface line between the Petitioner's inter-connection point and the nearest Distribution Licensee grid was paid by the Petitioner. Hence, the temporary supply rate charged, which is currently in vogue / practice by the Distribution Licensee is not applicable. The supply of power as per the terms of the agreement entered into between the Petitioner and the 1<sup>st</sup> Respondent, in terms of which the Petitioner is entitled to import power under HT Tariff I A and hence it is unjust to charge for the said power as if it were temporary supply.

5.15. The Petitioner was surprised to receive bills from the Respondents from the months of September, 2012 under HT-V Tariff for startup power for their generation plant of the Petitioner. The Petitioner has been paying the aforesaid amount under protest since the Respondent has already threatened and arm twisted the Petitioner by stating that only on the payment of the import bill the Petitioner's export bill will be processed for payment and BPSC at 1.5% per month will be levied until the Petitioner pays under HT Tariff III / V. The tariff chargeable for the power is governed by the provisions of the PPA entered into between the Petitioner and the 1<sup>st</sup> Respondent, which is currently in force. The tariff chargeable for import power is only at HT – IA tariff and HT – III tariff for power consumed during maintenance works, trial run, water works etc. The Petitioner is not an Open Access Customer and the entire power generated by the Petitioner is supplied to the 1<sup>st</sup> Respondent in terms of the said PPA. The Petitioner is entitled for refund of the differential tariff between HT IA and HT III / HT V.

5.16. The Commission being the authority for fixation of tariff, the Respondents ought to have approached the Commission for any clarifications regarding the tariff

orders. The exercise undertaken by the 2<sup>nd</sup> Respondent of giving a new meaning to the tariff orders is clearly excessive and contrary to law. The memo dated 07-09-2013 of the 2<sup>nd</sup> Respondent and the consequential bills issued by the 3<sup>rd</sup> Respondent are clearly in contravention of the provisions of the Act and the applicable Regulations and orders of the Commission.

5.17. Under the guise of giving effect to the Tariff Orders, the 2<sup>nd</sup> Respondent is trying to illegally collect excess amounts from the Petitioner drawing power under the permanent arrangement. The 2<sup>nd</sup> Respondent has given a total go by to the said tariff order as also the earlier procedure adopted for biomass based power plants. By the impugned instructions, the 2<sup>nd</sup> Respondent has in effect sought to re-fix the rate fixed by the Commission, which is clearly without jurisdiction and contrary to the provisions of the Electricity Act, 2003 and the regulations. The issuance of the memo dated 07-09-2013 is a clear case of arbitrariness.

5.19. The second Respondent's Memo dated 07-09-2013 instructing all the Superintending Engineers of TANGEDCO to bill all generators availing power (start-up, maintenance etc.) from 01-08-2012, under HT-V Tariff as determined by the Respondent, is wholly arbitrary, illegal and contrary to law. The terms of an order issued by the Commission can be altered or revised only by the Commission itself or by the Appellate Tribunal. The Respondents are only required to implement the orders of the Commission and cannot on their own make any change in the terms of the order. Hence, the memo directing levy of HT-V tariff for availing power amounts to re-fixation of tariff which is *ex facie* illegal.

5.20. The Memo dated 07-09-2013 has the effect of abrogating the contractual provisions of the PPA entered into between the Petitioner and the 1<sup>st</sup> Respondent in terms of which the tariff payable for import power has been settled. Further, it is contrary to the Electricity Act, 2003, the Tariff Regulations and Tariff Orders issued by the Commission, and the National Tariff Policy. The Memo has been issued in an arbitrary manner without understanding the true and real purport of the applicable regulations and the tariff orders passed by this Commission. Any action taken pursuant to the unlawful memo dated 07-09-2013 will be clearly contrary to the tariff orders passed by this Commission and agreements entered into between the Petitioner and the 1<sup>st</sup> Respondent which are protected by the tariff orders and the regulations of the Commission.

5.21. The Memo dated 07-09-2013 has been challenged before the Hon'ble High Court of Madras in W.P.No.26553 of 2013 by some other Association and the Hon'ble Court was pleased to grant interim stay of the operation of the said memo. Hence, it is pertinent to mention that the validity of the said unlawful memo is sub-judice before the Hon'ble High Court of Madras.

5.22. The contentions raised by the Respondent in the Counter Affidavit are therefore, unsustainable, baseless and unreasonable and therefore it requires no consideration at all and accordingly the reliefs prayed for by the Petitioner may be granted by allowing the petition with retrospective effect for the power drawn by the biogas plant of the Petitioner from May 2006.

## **6. Findings of the Commission:-**

6.1. The prayer of the petitioner is to direct the TANGEDCO to bill the power drawn by the biogas plant of the petitioner under HT Tariff IA.

6.2. The petitioner entered into power purchase agreement with the TANGEDCO (erstwhile TNEB) on 21-02-2005 to sell his power generated from his poultry litter based biogas power plant of 3.76 MW. The petitioner reported that he is not an open access customer but selling his entire power generated from his biogas plant to the respondent. The power plant was commissioned on 05-05-2006. In this case, the prayer of the petitioner is limited to the tariff for the power drawn by the petitioner's power plant from the TANGEDCO. The relevant clause of the PPA dated 21-02-2005 is reproduced below.

*10. a) (i) Drawal of power from Board's grid as recorded by the import meter shall be charged at Board's H.T. Tariff I rate applicable for industrial consumers. Maximum Demand Charges shall be charged based on tariff notified by the TNERC. Penal and other surcharges shall be levied as per the notified tariff conditions if the sanctioned demand is exceeded or power is availed during peak load hours as the case may be or as per conditions imposed from time to time by the Board & TNERC.*

*(ii) Power drawn from the TNEB grid for the purpose of Biomass (from poultry droppings by Biomethanation process) based on power plant maintenance works, trial run of equipments, water works etc., shall be charged under Board's H.T. Tariff – III including M.D. Charges based on tariff notified by the TNERC from time to time.*

6.3. Regarding the principle of operation of his plant, the petitioner submitted that his biogas plant involves preparing bio-substrate with water, homogenizing the contents of the digesters towards production of bio-methane to be converted to electricity and disposing the used substrate. All these operations are continuous in nature involving daily and regular drawal of power from the grid irrespective of power being exported. The power drawn from the grid is for the sole purpose of production

of bio-methane and generation of electricity and industrial in nature, implying its similarity to industrial units. Hence the concept of "Dual Tariff" does not arise. Hence it would be only appropriate to bill the power drawn by the petitioner's biogas power plant from TANGEDCO under H.T Industrial Tariff (Tariff IA). Regarding the tariff for the power drawn by the petitioner, the respondent has further clarified that the power drawn by petitioner's power plant for startup purpose has to be billed under HT Tariff I (Industrial Tariff) and the power drawn for maintenance, trial run and watering purpose have to be billed under HT Tariff III (Commercial Tariff). The respondent has further clarified that two part tariff of energy charges plus demand charges would apply.

6.4. Preparation of fuel is part and parcel of the start-up activities in a generating station. Both the parties have declared that the plant was commissioned on 05-05-2006. After the commissioning, the generator is eligible to get start up supply. It is not known why the distribution licensee fixed two different tariffs applicable for consumers namely HT Tariff I and HT Tariff III for the start-up supply of the petitioner. Supply drawn for trial run of equipment as mentioned in the PPA before the commissioning of generating plant could not be construed as start-up supply. In that case the TANGEDCO can fix applicable tariff for that category of consumer. But the supply drawn for the purpose of preparation of fuel including watering, plant maintenance including trial runs of equipments after the commissioning could be construed only as start-up supply.

6.5. The Commission was established in the year 1999. The Electricity Act 2003 came into force on 10-06-2003. But the PPA signed between the petitioner and respondent on 21-02-2005 has no mandatory approval issued by the Commission.

In a similar case, the observations of Hon'ble APTEL in its Order dated 26-07-2011 on Appeal No.125 of 2010 is reproduced below:

20. *Tamil Nadu Electricity Regulatory Commission was established in the year 1999. The Respondent TNEB approved Permanent BP (FB) no 59 on 11.04.2000 fixing the price payable for procurement of power from Non-conventional Sources of Energy Power Plant. TNEB entered in to PPA with the 1st Appellant on 15.3.2004 and with the 2nd Appellant on 20.6.2002 respectively. From these facts it is evident that these transactions took place after establishment of the State Commission. It was, therefore, incumbent on TNEB and the Appellants generating companies to get the PPAs approved from the State Commission. Admittedly this had not been done.*
21. *In the absence of mandatory approval of the State Commission, the PPAs cannot be held as valid and binding on any of the parties.*
22. *We are at loss to understand the attitude of TNEB towards the State Commission, a Statutory Body established under 1998 Act and adopted under 2003 Act.*
23. *We are constrained to deprecate the action of TNEB in undermining the authority of the State Commission. We are equally surprised that State Commission also had not taken note of this fact while dealing with the petitions of the Appellants in DPR no. 3 of 2009 and DPR No 4 of 2009.*

In light of the above judgment of the APTEL, in the absence of mandatory approval of the State Commission, the PPA signed on 21-05-2005 between the parties of this case cannot be held as valid. Therefore the Commission has to decide the issue raised in this case afresh and in consistent with the decision taken by the Commission already on such issues.

6.6. As discussed supra, the prayer of the petitioner is limited to fixing of tariff for the supply drawn from the TANGEDCO for use at his generating plant. Regarding the start-up power, the Commission fixed a tariff of 621.81 paise per unit in its Order No.2 dated 15-05-2006. The start-up power tariff has been revised by the Commission in its retail tariff orders issued during 2012 and in 2013. Such tariff is generally applicable for Fossil Fuel Based Open Access customers. In the case of

generators using New and Renewable Energy Sources, the Commission fixes the start-up power tariff based on specific requirement of such renewable energy generators. In the Order on purchase of power from Non-conventional Energy Sources (NCES) based generating plants issued by the Commission on 15-05-2006, for the NCES generators selling power to the distribution licensee, the Commission adopted the principle of raising the bill for the net energy supplied by the generators after adjusting to the start-up power. In the comprehensive Wind Order issued by the Commission on 20-03-2009, the Commission specified that since the outage of the generator and providing start up power to the licensee is a routine and frequent necessity for the wind energy generators, the start-up power shall be dealt with under unit to unit adjustment basis. The Commission in its Order dated 12-09-2014 on “Comprehensive Tariff Order on Solar Energy” ordered that the drawal of startup power by solar generators shall be adjusted against the generated energy considering its special nature. In the revised open access regulation issued by the Commission during 2014, it is specified that incase of renewable power generator, the Commission may add / vary / delete certain criteria for the start-up power. The relevant Regulation 25 is reproduced below:

**25. Charges for Startup Power Supplied by the Distribution Licensee.**

- (1) The generators connected with the state grid are eligible to get start up power after declaration of CoD. The demand shall be limited to 10% of the highest capacity of the generating unit of the generating station or the percentage of auxiliary consumption as specified in the Commission’s Tariff Regulations, whichever is less. The supply shall be restricted to 42 days in a financial year. Drawal of power for a day or part thereof shall be accounted as a day for this purpose. Power factor compensation charges are not applicable for start-up power. The generator shall pay the Distribution Licensee for the supply of startup power at the rates as specified by the Commission in its Tariff Order issued from time to time. Start-up supply beyond 42 days in a financial year may be provided by the Distribution Licensee at the rate of one and half times of the normal rate as specified by the Commission. However, no start up supply shall be provided beyond 120 days in a financial year. In case of new and renewable energy based generator, the Commission may add/vary/delete certain criteria in the specific order issued for that category of new and renewable energy based generation. In*

*case of Independent Power Producer (IPP), start-up power transactions shall be governed by this regulation only if it is not covered by the Power Purchase Agreement.*

6.7. Since the petitioner's generating plant is a renewable energy plant, the Commission has to follow a principle taking into account the specific requirement of start-up power of the petitioner. The petitioner is selling his entire power to the TANGEDCO. The petitioner has reported that drawing of power from the grid for the preparation of biomethane fuel is a continuous process which requires drawal of power from the licensee irrespective of power being exported to the grid. The respondent has not made any observations on the above statement of the petitioner. In as much as the petitioner's plant is using renewable energy sources, selling his entire generated power to distribution licensee and the drawing of startup power from the grid is frequent or continuous, it is prudent that the petitioner shall be permitted to adjust the start-up power in the energy injected into the grid by the petitioner's generator. We approve this logic in this case, in line with the principle adopted by the Commission for start-up power in its earlier orders issued on renewable power. It is also in consistent with Tamil Nadu Electricity Regulatory Commission Grid Connectivity and Intra- State Open Access Regulations, 2014.

6.8. Having decided on the tariff for the start-up power, the next question is to decide on the date of applicability of this Order. The petitioner has sought for relief from May 2006. The PPA was signed on 21-02-2005 but the petition was filed only on 22-05-2013 after the lapse of eight years. The petitioner disowned his rights for a long time. The principle of delay and latches will apply. The principle approved for the adjustment of start-up power in this Order would be applicable from the date of filing of petition with the Commission (i.e) on 22-05-2013. The TANGEDCO is

directed to revise the bill for start-up power from the above date and settle the start-up power charges account of the petitioner within three months of the issue of this order.

**7. Appeal:-**

An appeal against this order shall lie before the Appellate Tribunal for Electricity under section 111 of the Electricity Act, 2003 within a period of 45 days from the date of receipt of a copy of this order by the aggrieved person.

(Sd.....)  
**(G.Rajagopal)**  
**Member**

(Sd.....)  
**(S.Nagalsamy)**  
**Member**

/ True Copy /

Secretary  
Tamil Nadu Electricity  
Regulatory Commission