

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

PRESENT:-

| | | |
|----------------------|------|----------|
| Thiru.S.Akshayakumar | | Chairman |
| Thiru.G.Rajagopal | | Member |
| and | | |
| Dr.T.Prabhakara Rao | | Member |

M.P.No.22 of 2016

Simran Wind Project Limited
2F & 3F, North Block
Park Plaza, 71 Park Street
Kolkatta 700 016.

... Petitioner
(Thiru Ragul Balaji,
Counsel for Petitioner)

Vs.

Tamil Nadu Generation and Distribution Corporation
(TANGEDCO)
Rep. by its Chairman and Managing Director
NPKRR Maligai, No.144, Anna Salai
Chennai – 600 002.

.....Respondent
(Thiru M.Gopinathan,
Standing Counsel for the Respondent)

Dates of hearing: 27-09-2016, 26-10-2016 and
09-12-2016

Date of Order: 28-04-2017

The M.P.No.22 of 2016 came up for final hearing on 09-12-2016. The Commission upon perusal of the Petition and connected records and after hearing the submissions of both parties hereby makes the following:

ORDER

1. Prayer of the Petitioner:

The prayer of the Petitioner in M.P.No.22 of 2016 is to issue appropriate directions in compliance with the judgment of the Hon'ble High Court of Judicature at

Madras in its judgment dated 15-07-2016 in W.P. No.22097 of 2013 and consequently direct the Respondent to comply with the same in a time bound manner and to pass any further or other order as the Commission may deem fit in the facts and circumstances of the case.

2. Facts of the Case:-

The Commission has issued a Notification in TNERC/RPO/19/3, dated 21-01-2013 amending the TNERC (Renewable Energy Purchase Obligations) Regulations, 2010 so as to cap the Pooled cost of power purchase at 75% of the Preferential Tariff fixed by the Commission to that category or subcategory of NCES generators. The said amendment has been challenged by the Petitioner. While upholding the Commission's power to amend the said Regulations, the Hon'ble High Court directed the Petitioner to approach the TNERC for consideration of his prayer that the implementation of the said amendment has to be postponed till such time when the pooled cost of Power Purchase exceeds the Preferential Tariff fixed by the Commission for NCES generators. Accordingly, the present Miscellaneous Petition has been filed by the Petitioner.

3. Contentions of the Petitioner:-

3.1. The present petition is being filed in furtherance of the directions issued by the Hon'ble High Court in its judgment dated 15.7.2016 in W.P.No.22097 of 2013. The Writ Petition challenged the amendment as notified in the Gazette on 19-06-2013 wherein the Commission amended the definition of the 'Pooled Cost of Power Purchase, (hereinafter referred to as "APPC") as contained in S.2(h) of the TNERC (Renewable Energy Purchase Obligation) Regulations, 2010 as follows:-

"(h) 'Pooled cost of power purchase' means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self-generation in the previous year from all the long-term energy suppliers, but excluding those based on liquid fuel, purchase from traders, short-term purchases and renewable energy sources subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category/sub category of NCES generators."

3.2. The Explanatory Statement to the said amendment sets out that in the long run, Pooled Cost of Power Purchase may exceed the preferential tariff fixed by the Commission for renewable energy due to escalation of conventional fuel cost and it is prudent that a limit has to be fixed for arriving at the reasonable Pooled Cost of Power Purchase. Therefore, it is proposed to amend the said regulation.

3.3. The Hon'ble High Court while upholding the amendment that was impugned granted a relief that is set forth in para 31 of the said judgment as follows:

"31. The next contention of the petitioner is that the actual need has not arrived for the 1st Respondent to effect the notification as the APPC has not breached the preferential tariff. However, this court finds force in the submission of the counsel for the petitioner that considering the object to introduce the cap, the need to implement cap has not arrived. The impugned notification has been enacted in public interest to prevent the generators to unjustly enrich themselves, in the event of the preferential tariff falling below the APPC. Therefore, this court is of the view that the notification can be implemented with effect from the date of such breach as notified by the TNERC. Therefore, granting liberty to the petitioners to move the TNERC for appropriate directions"

3.4. Pursuant to the above orders of the Hon'ble High Court, the Petitioner has filed the present Miscellaneous Petition with the prayer as specified in para 1 above.

3.5. The Commission in its affidavit filed on 18th April 2016 has mentioned pooled cost of power purchase and preferential tariff for the years 2013-14 and 2014-15 as under.

| Year | Pooled Cost of Power Purchase (Rs./Unit) | Preferential Tariff (Rs./Unit) |
|---------|--|--------------------------------|
| 2013-14 | 3.11 | 3.96 |
| 2014-15 | 3.38 | 3.96 |

Further, vide Tariff Order No.TNERC/M.O.4-4/E/RPO dated 07-03-2016, the Commission has specified *the Pooled Cost of Power Purchase payable by the TANGEDCO for the year 2015-16 as Rs.3.35 per unit*” against preferential tariff of Rs.3.96/Unit.

3.6. It is evident from the above that till date the APPC has not breached the preferential tariff. Therefore, as and when such a breach takes place, the Commission may notify the said date of breach for the amendment to become effective. Till such time, the Petitioner is entitled to the payment for the power supplied to the Respondent at the APPC rate. Thus as per the ruling of the Hon'ble High Court, the implementation of the Amendment dated 19-06-2013 would stand postponed to such date when the APPC would breach the preferential tariff.

4. Contentions of the Respondent:-

4.1. In its counter affidavit dated 26-10-2016, TANGEDCO has stated as follows:-

4.2. The Hon'ble CERC has introduced the REC scheme in 2010. During that time, the preferential tariff rates already in force were Rs.2.75, Rs.2.90 and Rs.3.39 per unit as the case may be. The Average Pooled Purchase Cost (APPC) rate was Rs.2.37 per unit. As the preferential tariff rates are fixed for the entire agreement period of 20 years, the TANGEDCO insisted the APPC rate also to be fixed for the entire agreement period of 20 years.

4.3. The Petitioner filed M.P.No.16 of 2011 before the TNERC and stated that, the REC projects have to be paid with the APPC rate that is determined by the Commission every year. The TANGEDCO has argued for the following issues before the Commission:-

- (i) The APPC rate is a negotiable one.
- (ii) Fixed APPC rate of the year to be fixed one for 20 years.
- (iii) APPC rate should not cross the prevailing preferential tariff rate of Rs.2.75 per unit.

4.4. The Commission vide its order dated 22.03.2012 in the said M.P.No.16 of 2011 for the first two issues, stated that, the APPC rate determined by the TNERC to be paid and to be paid with every year rate and for the third issue of APPC rate crossing preferential, the Commission has stated that the issue requested by the TANGEDCO will be addressed at appropriate time. The extract of the order is produced below:

"The Commission however recognizes the views raised by TANGEDCO with regard to the fact that the average pooled cost of power purchase may after a period of time go beyond the preferential tariff fixed by the Commission. Further, the TANGEDCO has contended that what cannot be achieved directly cannot be achieved indirectly. There is merit in the arguments of TANGEDCO in this regard. The Commission would take appropriate action to link the average pooled cost of power purchase vis-a-vis the preferential tariff for renewable energy so that there is no undue enrichment of renewable energy generators at the cost of distribution licensee / all other consumers in the State."

4.5. The very basic reason to request the TNERC to put control over APPC rate is, around 3000 MW of wind projects are under Rs.2.75 rate. When the REC generator comes in 2011 and gets over and above Rs.2.75 in 2 to 3 years in 2013-14, it is a discourage to the 3000 MW wind generators. Moreover, if the above generators opt for preferential tariff to REC scheme, they can get the higher APPC rate than their already received preferential tariff rate of Rs.2.75 per unit.

4.6. In 2011-12 the APPC rate was Rs.2.37, in 2012-13 it was Rs.2.54 but when it is worked out for the year 2013-14, as there was a possibility of crossing the preferential tariff rate of Rs.2.75, as requested by the TANGEDCO, the Commission took an initiative to control the APPC rate called for the comments in 2012 itself for amending the TNERC RPO Regulations, 2010. After analyzing the comments, the Commission put a cap of 75% on the preferential tariff rate. Subsequently, the Commission vide its order dated 15.07.2013, has fixed the APPC rate at Rs.3.11 (or) 75% of the preferential tariff rate of the NCES generator to that category (or) subcategory whichever is less. Since the APPC rate of Rs.3.11 per unit crossed the prevailing preferential tariff rate of Rs.2.75, the corresponding year preferential tariff rate Rs.3.51 per unit is taken to put the 75% cap. Since the 75% of Rs.3.51 is Rs.2.63 is less than Rs.3.11, the TANGEDCO accepted the rate and paying to the REC generators.

4.7. The petitioner now compares the rates of the APPC rate of a year with the corresponding year preferential tariff rate and approached this Commission allegedly as per the liberty granted by the Hon'ble High Court of Madras in its order dated 15.07.2016 in W.P.No.22097 of 2013 and stated that the petitioner is entitled for the actual APPC rate. The year wise APPC rate and Preferential Tariff rate is given below:

The year wise APPC rate

| Year | Average Pooled Purchase Cost |
|---------|------------------------------|
| 2012-13 | Rs.2.54 |
| 2013-14 | Rs.3.11 |
| 2014-15 | Rs.3.38 |
| 2015-16 | Rs.3.35 |

The year wise preferential tariff rate

| Year | Preferential Tariff Rate |
|----------------|------------------------------------|
| Before 2006 | Rs.2.75 |
| 2006-2008 | Rs.2.90 |
| 2009-7/ 2012 | Rs.3.39 |
| 8/2012 to 2013 | with AD-Rs.3.53 without AD-Rs.3.96 |
| 2013-14 | with AD-Rs.3.53 without AD-Rs.3.96 |
| 2014-15 | with AD-Rs.3.53 without AD-Rs.3.96 |
| 2015-16 | with AD-Rs.3.53 without AD-Rs.3.96 |

4.8. The Commission nowhere stated that, the APPC rate of a year is to be compared with the preferential tariff rate of the same year to ascertain whether the APPC rates crosses the preferential tariff rate. As the issue started in 2011 that, the APPC rate increased from Rs.2.37 to Rs.2.54 and as there is a possibility to cross the existing prevailing preferential tariff rate of Rs.2.75, TANGEDCO requested the Commission to have a control over the APPC rate. The purpose of cap is, the APPC rate and the money value of component should be lower than the preferential tariff rate. As stated by the Petitioner, if the APPC rate is not crossed the component should be lower than the preferential tariff rate. As stated by the petitioner, if the APPC rate is not crossed the preferential tariff rate, there is no necessity to the Commission to take the action in 2012 and amend the regulation in 2013. As of now the APPC rate of Rs.3.11, Rs.3.38 & Rs.3.35 has crossed and is higher than the preferential tariff rate of Rs.2.75, the 75% cap has come into force from 2013-14 onwards.

4.9. Any project (or) Equipment is subject to depreciation. It is left to the generator to claim depreciation (or) not. Hence for calculating the APPC rate, the depreciated value of tariff has to be taken for putting 75% cap. With AD benefit tariff is Rs.3.53 as

per RA.No. 6 of 2013, so 75% cap to be put on is $Rs.3.53 \times 0.75 = Rs.2.65/-$, so the rate to be given is Rs.2.65/- for the years from 2013 to 2016, as follows:

| Year | APPC Rate | 75% of Preferential Tariff rate |
|---------|-----------|---------------------------------|
| 2013-14 | Rs.3.11 | Rs.2.65 |
| 2014-15 | Rs.3.38 | Rs.2.65 |
| 2015-16 | Rs.3.35 | Rs.2.65 |

4.10. It is submitted that, as of now not only the issue of the petitioner, but also other issues have arisen due to various developmental activities in the RE sector:

(i) The Hon'ble Supreme Court of India in its Order dated 13.05.2015 in Civil Appeal No.4417 of 2015 in the case of Hindustan Zinc Ltd. Vs Rajasthan Electricity Regulatory Commission, mandated the RPO target and upheld the regulation of Rajasthan ERC that the captive consumers and the open access consumers are also duty bound to fulfill the RPO target fixed on them:

Now based on the above Hon'ble Supreme Court's order, the Gujarat ERC on 01-07-2015 has amended the regulations to the effect that the consumers of captive generating plants and the open access consumers are also obligated entity. Similarly, the Odisha ERC has issued orders on 17.08.2015 in case No.59/2014 that the consumers of captive generating plants and the open access consumers are also obligated entity. Similarly, the Karnataka ERC has issued orders on 04.08.2015 that the consumers of captive generating plants and the open access consumers are also obligated entity. Similarly, the other States also started implementing the Hon'ble Supreme Court's order and taken action for compliance and floated tenders for purchase of RE power.

The Hon'ble High Court of Madras in the order dated 15.07.2016 in W.P.No.22097 of 2013 has also recorded that REC market will gain momentum due

to the activities on the climate change and sustainable development. The extract of the recordings is furnished below:

“Also it was contended that the REC can be sold at higher rate is far from truth and huge stocks of REC remain unsold. Again, this court cannot venture into the reasons regarding the unviability of the REC in the market. This court taking judicial note of the happenings in the world regarding, the climate change and the need for sustainable development, could only see a continuing market for environment component or carbon credit throughout the world.”

The petitioner may also propose new projects under REC and migrate from their preferential scheme to REC scheme.

(ii) The Hon'ble CERC vide its amendment to the REC Regulations 2010, dated 28.03.2016 has stopped the REC benefit to the new captive scheme projects after 01.04.2016 and stated that, the REC CGP projects commissioned between 29.09.2010 and 31.03.2016 are only eligible for REC trading. The extract of the Statement of Reasons dated 28.03.2016 is furnished below:

“4.3.9. Considering the above and with due regard to safeguard investments made consequent upon the REC framework, the Commission has decided to retain provisions of participation for trading under REC framework, for only those CGPs who have made the investment decision after considering the REC regulations. The Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) (First Amendment) Regulations, 2010 issued on 29th September, 2010 provided the framework to allow CGPs to participate in REC framework. This date of, 29th September 2010, shall be considered as the cut-off date as it was only after the issuance of the First Amendment, the CGPs were made eligible for participation in REC framework. Additionally, if by 31st March 2016, some projects are commissioned that were contemplating registration under REC, the Commission is allowing 3 months for them to register with Central Agency.

Thus, to summarize:

(a) The CGPs having date of commissioning on or after 29th September 2010 and already registered with Central Agency under REC framework before 30th June 2016 shall be eligible for REC issuance and dealing in any of the power exchanges.

(b) The CGPs meeting any of the following conditions, i.e. (i) having date of commissioning prior to 29th September 2010 or after 31st March 2016 (ii) not registered with Central Agency before 30th June 2016, shall not be eligible to participate in the REC framework. The Commission is of the view that

withdrawing the benefit of REC Scheme to these CGPs would not amount to any reversal of policy or regulation as investments by these CGPs were made prior to the issuance of REC regulations or after this amendment, as applicable.”

Thus, the Commission has decided not to extend REC benefit to the RE based CGPs commissioned after 31.3.2016. In other words, RE based CGPs set up after 31st March, 2016 shall not be eligible for issuance and dealing in RECs.

As the CGPs are getting extra benefit by REC trading, the Hon'ble CERC stopped REC to CGP categories.

(iii) While the position stands so in the electricity sector in India, the Commission vide its order dated 31.03.2016 in RA.No.6 of 2013 and Tariff Order on wind energy No.3 dated 31.03.2016 has extended the banking facility to the REC captive generators and ordered the unutilized banked energy at the financial year is to be paid at 75% of the APPC rate. The payment to the unutilized banked energy is extra benefit given to the REC captive in addition to the REC trading, which burden the TANGEDCO and the general public.

(iv) Now due to the regulatory compliance such as LVRT, HVRT, Harmonies, Forecasting, etc. the capital cost of WEG has been increased. So there is possibility of corresponding increase in the preferential tariff.

The forbearance price has been derived based on the highest difference between cost of generation i.e. preferential RE tariff and the average power purchase cost. As such, if the preferential tariff is increased, there will be increase in forbearance price.

The Forbearance and Floor Price for 2010 to 2012 and 2012 to 2017 is furnished below:

Suo Motu Petition No.99/2010, order dated 01.06.2010

| Price | Non-Solar (Rs./Mwh) | Non-Solar (Rs/Mwh) |
|-------------------|---------------------|--------------------|
| Forbearance Price | 3,900 | 17,000 |
| Floor Price | 1,500 | 12,000 |

Suo Motu Petition No.142/2011, order dated 23.08.2011

| Price | Non-Solar (Rs./Mwh) | Non-Solar (Rs/Mwh) |
|-------------------|---------------------|--------------------|
| Forbearance Price | 3,300 | 13,400 |
| Floor Price | 1,500 | 9,300 |

4.11. For a REC project, the project cost is recovered through trading of REC Certificate as well. The Hon'ble CERC has already ordered that, REC scheme is an alternate method to recover the cost. The extract of the Hon'ble CERC is furnished below:-

“The Commission has further clarified that the REC mechanism aimed at promoting additional investment in the renewable energy projects and to provide an alternative mode to the RE generators for recovery of their costs.”

4.12. As such, when the APPC rate is added with REC market rate with minimum floor price, which will be far higher than the preferential tariff rate. So, floor price, which will be far higher than the preferential tariff rate. So, there is a possibility of large number of migration of preferential tariff to REC scheme. If an existing preferential tariff generator with PPA of Rs.2.75 & 2.90 tariff rate, migrate to REC scheme, at present the APPC rate to be given is Rs.3.35, next year will be Rs.3.75 and even with the minimum floor price, he will get Rs.3.35+Rs.1.50= Rs.4.85, which is far higher than the basic preferential tariff of Rs.2.75 and also much higher than the latest preferential tariff rate of Rs.3.70, which cannot be permitted. So, there is a necessity arises to fix a separate APPC rate for the 3 categories (i) existing REC scheme (ii) new REC projects (iii) migrating categories (i) existing REC scheme (ii) new REC projects (iii) migrating projects.

14.12.1. For existing REC WEGs

For the existing REC WEGs, as the APPC rate crossed Rs.2.75 the preferential tariff rate, the APPC rate is, actual APPC rate of the year (or) the 75% of the preferential tariff of the corresponding year whichever is less.

14.12.2. For new projects

For new projects, the APPC rate is, the actual APPC rate of the year (or) average of the all the preferential tariff rates whichever is less.

14.12.3. Migration

For migration projects, for the first 10 years the actual APPC rate or the 75% preferential tariff of the corresponding year whichever is less is to be limited to the level of the preferential tariff rate already received. From 11th year, the APPC rate may be actual APPC rate (or) 75% of the preferential tariff of the corresponding year whichever is less.

4.13. The petitioner admitted in the High Court that, "the investment cost in cases of renewable energy is high even though comparing to other sources, its availability throughout the year is low. Therefore, the pricing is based on Feed in Tariffs mechanism, whereby the gap between the conventional energy price and renewable energy price is bridged. The Tariff Policy, 2006 and section 86 (1) of the Act enabled the appropriate Commissions to fix the minimum purchase of electricity from renewable energy sources. The preferential tariffs are determined by the SERCs."

4.14. As such on every year the TANGEDCO is mandated to achieve the RPO target fixed by the Commission only by purchasing the wind energy under preferential tariff scheme not from the electrical component of wind generation

under REC scheme from the petitioner or new or migrated generator. Hence, the TANGEDCO has the great obligation to safeguard the interest of the public while procuring power from generators for supplying to the public.

4.15. The Commission itself in the High Court stated that considering the consumer interest the cap has been fixed and such a cap has been fixed only to prevent the generators under REC scheme claiming more tariff than preferential tariff. So, in the absence of cap, the purchase price of the electrical component would go up and would have to be passed on to the consumers. Pointing out the necessity and contending that the capping will only augur the petitioners to gain more revenue because of the sale of the REC in open power exchange, the learned senior counsel elaborated from the statistics submitted before this court that without the cap on the preferential tariff while computing APPC, the same would result in unjust enrichment to generators and in public interest, exercising its power under section 61(d), the cap has been fixed.

4.16. The Hon'ble High Court stated that "from the explanation to the amendment, it is evident that the cap has been fixed to eschew the APPC from exceeding the preferential tariff. The said amendment has been brought into force, to safeguard the consumer's interest as envisaged under section 61(d) of the Act and also at the same time, to balance the procurement cost of purchase price of electricity component. Therefore, this court is of the view that the amendment is neither vague nor arbitrary and therefore there is no violation of Articles 14 and 19 of the Constitution. This court is again of the view that when the power to fix the tariff under sections 61, 62, 86 and 181 vests with the Respondent, it is open to them to impose any restriction for the fixation of APPC."

4.17. Regulation 8 of the RPO Regulation 2010 provides the power for the Commission to review, add, amend or alter the regulations. As APPC rate order for the year 2016-17 has not been issued, it is appropriate time that, the Commission may consider to take initiative to amend the RPO regulations.

4.18. The Hon'ble High Court has stated that, "the regulations framed exercising the powers under the Electricity Act have the same force as that of a statute. It is a policy decision, of course, in public interest. By operation of law, the rights created to a party under agreement can be annulled. The powers of the CERC under section 79 are administrative and the powers under section 178 are legislative. Also, by exercising the legislative powers, the contractual terms can be overridden. The powers of the State commission under section 181 is pari-material to that of the Central Commission under section 178. Further, the judgment also clearly spells that the role of the Regulatory Commission is twin folds, namely, (1) decision making and (2) specifying terms and conditions for determination of tariff. Therefore, the Commission would have the power not only to determine the tariff but also to impose conditions". Further the Hon'ble CERC itself stated in the High court that, from the objects and reasons dated 10.07.2013 the tariff for electricity component should not be higher than the preferential price, the amendment was issued.

4.19. Now it would be appropriate to address the issues relating to the REC scheme. As the Commission has extended the banking facility to REC scheme and ordered to pay 75% for the APPC rate to the unutilized banked energy, not only on the APPC rate but also on the unutilized banked energy, the TANGEDCO burdened and ultimately the general public will have to suffer.

The year wise capacity addition and installed capacity from 2010, the REC starting period

| Sl. No. | Year | Installed Capacity in MW | |
|---------|----------------|--------------------------|-----------|
| | | During Year | Cum Total |
| 1 | Upto 2010 | | 4889.765 |
| 2 | 2010-2011 | 997.400 | 5887.165 |
| 3 | 2011-2012 | 1083.460 | 6970.625 |
| 4 | 2012-2013 | 174.600 | 7145.225 |
| 5 | 2013-2014 | 107.380 | 7252.605 |
| 6 | 2014-2015 | 186.250 | 7438.855 |
| 7 | 2015-2016 | 158.850 | 7597.705 |
| 8 | 2016-2017(Aug) | 44.900 | 7642.605 |

4.20. The total installed capacity of wind as on 30.09.2016 is 7600 MW. Out of 7600 MW around 1000 MW is under REC Scheme and out of 1000 MW, 420 MW is under captive mode. The balance 6600 MW is under preferential mode, and out of which around 4600 MW is under captive mode. As the Hon'ble CERC vide its CERC REC Regulations, 2010, fourth amendment dated 28-03-2016 has curtailed the REC scheme to the prospective captive generators, the Commission may reconsider the issue of 75% payment to unutilized banked energy for REC scheme and requested to treat it as lapsed. So, that the TANGEDCO and the general public relieved of from the additional burden.

4.21. As the Commission has the power to amend its RPO Regulations further, so that the developmental changes can be brought in, to suit the need of the hour. Thereby the interest of the TANGEDCO, petitioner/generator and the general public can be safeguarded and a standard procedure can be derived.

4.22. During the fourth amendment of the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) (Fourth Amendment)

Regulations, 2015 dated 28.03.2016, the petitioner requested the Hon'ble CERC to stop the REC trading benefit to CGP, since they have been adequately compensated through Tariff. The extract of the Statement of Reasons dated 28-03-2016 is furnished below:-

“The Amendment rightly considers self-consumption as the ground to determine eligibility of RE generators under REC. This avoids the case where a generator is not having CGP but is having self-consumption. Further as per the National Electricity Policy, the CGPs are given a favourable treatment with respect to tariff for supply of power. Thus CGPs cannot be granted additional benefit for the trade of environmental component in form of REC. We therefore support the proposed amendments by the Hon'ble Commission to exclude CGPs and RE generators having self-consumption from the REC mechanism. (Simran Wind Project Limited)”

Similarly, as the petitioner is adequately compensated through the REC trading, the APPC rate cannot be given as such, it may be paid at 75% of the preferential tariff rate.

4.23. The procurement of power by a distribution licensee should have a value and a purpose and expenditure to procure that power should be reasonable. The procurement of power from a private parties and exchanges even at high cost has the purpose to meet out the shortage of power. But purchase of Petitioner power at higher cost does not have any purpose, since it cannot be taken for the account of RPO target. As such making an expenditure to procure purposeless, increasing trend rated REC power at high cost is not reasonable and it will affect the general public. It is seen that the APPC rate and preferential tariff is going on increasing trend. Under this condition, there is a possibility and TANGEDCO may think twice to stop the new and migrated project under REC scheme and purchase power from them.

4.24. It is submitted that the Courts have consistently held that the Regulatory Commissions under the Electricity Act, 2003 are the statutory, technical bodies, the fixation of tariff is legislative character and the same should be left to such statutory bodies. As stated already, the Hon'ble High Court, Madras, in WP No.22097 of 2013 has also upheld the powers of this Commission and without actually going into the merit of the case, has remanded the matter to this Commission. Therefore, if, on a thorough analysis of the entire issue in detail with reference to the statutory provisions including the National Electricity Policy, following the established procedures and prudent practice in the electricity sector in India with due regard to the pleadings of the respondents that the APCC rate has exceeded the preferential tariff during the year 2013 itself, this Commission arrives to a conclusion that the APCC charges has breached the preferential tariff, it may be open and appropriate for this Commission to pass an order that the amendment to the RPO Regulations would be effective from 15.07.2013, the date notified in the Government Gazettee. In this case, as stated already, the APPC has breached and as such there is no need for postponement and also there is no statutory provisions to postpone the regulations already came into force and implemented. However, the Petitioner, on an isolated reading of the directions of the Hon'ble High Court, Madras, has filed the above petition based on the incidental observations only. In other words, there is no bar for this Commission to go into the merit of the case and to come to a definite conclusion.

4.25. It is requested the Commission to consider to amend the RPO Regulations, 2010 for addressing the following issues as well:-

- (i) For the existing REC WEGs, as the APPC rate crossed Rs.2.75 the prevailing preferential tariff rate, the APPC rate may be actual APPC

rate of the year (or) the 75% of the preferential tariff of the corresponding year whichever is less.

- (ii) For new projects, the APPC rate may be the actual APPC rate of the year (or) average of the all the preferential tariff rates whichever is less.
- (iii) For migration projects, for the first 10 years, the actual APPC rate or the 75% preferential tariff of the corresponding year whichever is less may be to be limited to the level of the preferential tariff rate already received. From 11th year, the APPC rate may be actual APPC rate (or) 75% of the preferential tariff of the corresponding year whichever is less.
- (iv) For the existing REC wheeling projects, the unutilized banked energy at the end of final year may be treated as lapsed.

5. Written Submissions filed by the Petitioner:-

5.1. As per the directions of the Commission, the Petitioner has filed this Written Submission on 23-12-2016. The petition has been filed in furtherance of the directions issued by the Hon'ble High Court in its judgment dated 15-07-2016 in W.P.No.22097 of 2013. The Commission was a party to the said proceedings. The Writ Petition challenged the amendment as notified in the Gazette on 19.6.2013 wherein this Commission amended the definition of the 'Pooled Cost of Power Purchase as contained in S.2(h) of the TNERC (Renewable Energy Purchase Obligation) Regulations, 2010 by addition of the highlighted words:-

"(h) 'Pooled cost of power purchase' means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self-generation in the previous year from all the long-term energy suppliers, but excluding those based on liquid fuel, purchase from traders, short-term purchases and renewable energy sources subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category / sub category of NCES generators."

The Explanatory Statement to the amendment sets out that

"In the long run, Pooled Cost of Power Purchase may exceed the preferential tariff fixed by the Commission for renewable energy due to escalation of Conventional fuel cost. It is prudent that a limit has to be fixed for arriving at the reasonable Pooled cost of Power Purchase. Therefore, it is proposed to amend the said regulation."

5.2. The Hon'ble High Court while upholding the amendment that was impugned granted a relief that is set forth in para 31 of the said judgment as follows:

"31. The next contention of the petitioner is that the actual need has not arrived for the 1st respondent to effect the notification as the APPPC has not breached the preferential tariff. However, this court finds force in the submission of the counsel for the petitioner that considering the object to introduce the cap, the need to implement cap has not arrived. The impugned notification has been enacted in public interest to prevent the generators to unjustly enrich themselves, in the event of the preferential tariff falling below the APPC. Therefore, this court is of the view that the notification can be implemented with effect from the date of such breach as notified by the TNERC. Therefore, granting liberty to the petitioners to move the TNERC for appropriate directions"

5.3. It is submitted that the judgment of the Hon'ble High Court, Madras is clear and categorical in its findings and consequential directions. It is also settled principle in law that a judgment has to be read in its entirety and given effect. The attempt by TANGEDCO to read it in a dis-jointed manner and refer to it selectively is untenable. The specific findings and directions issued are clear and this Commission is to implement such binding directions. In *Ramesh Chand Daga v. Rameshwari Bai*, (2006) 4 SCC 772 at page 777 the Hon'ble Supreme Court reiterated that

"Construction of the judgment:

19. A judgment, as is well known, is not to be read as a statute. A judgment, it is trite, must be construed upon reading the same as a whole. For the said purpose the attendant circumstances may also be taken into consideration. (Islamic Academy of Education v. State of Karnataka [(2003) 6 SCC 697], Zee Telefilms Ltd. v. Union of India [(2006) 4 SCC 649: JT (2006) 2 SC 8] and P.S. Sathappan v. Andhra Bank Ltd. [(2004) 11 SCC 672])"

5.4. It is clear that the Hon'ble High Court, Madras, has held that the notification has been enacted in public interest to prevent the generators from unjustly enriching themselves, in the event of the preferential tariff falling below the APPC. It was in this context that the Hon'ble High Court was of the view that the notification can be implemented with effect from the date of such breach as notified by the Hon'ble TNERC and granted liberty to the petitioner to move this Hon'ble Commission for appropriate directions. If, indeed, the breach had already occurred as claimed by the TANGEDCO, issuance of further consequential direction would have never found a place in the judgment. Furthermore, the Hon'ble High Court has specifically held that "..... this court finds force in the submission of the counsel for the petitioner that considering the object to introduce the cap, the need to implement cap has not arrived." Thus the Hon'ble High Court while upholding the power of the Commission has held that in view of the object sought to be achieved, the breach not having occurred yet, the need to implement the cap has not arrived. The Commission is therefore to notify the date when the Amendment would take effect, as and when the breach occurs, in the future

5.5. In this regard, it has been stated that the stand of the Commission as set out in the affidavit dated 18.04.2016 filed before the Hon'ble High Court which forms the basis of the judgment specifically set out in para 10 that the ceiling at 75% of preferential tariff was fixed only because it was felt that in the long run, the pooled cost of power purchase would exceed the preferential tariff fixed for renewable energy due to escalation in the cost of conventional fuel. After setting out the pooled cost of power under preferential tariff for the respective periods in para 11 of the same affidavit, the Commission noted that the need for the amendment was because of the price of coal was also at an increasing trend during the years 2011-13. The

factual position that was presented and all parties were in agreement with, was that the APPC rate had not breached the Preferential Tariff Rate. TANGEOCO's submission before the Commission that the APPC rate had already breached the Preferential Tariff rate, by comparison of the Preferential Tariff of the oldest Commissioned WEGs is untenable since the REC Scheme itself is a 2010 Scheme. This is evident from the Commission's affidavit filed before the Hon'ble High Court.

5.6. The consequential relief by way of appropriate directions as ordered by the Hon'ble High Court, Madras, is to be granted by the Commission by issuance of orders, in the form of a direction to the TANGEOCO to pay the APPC price to REC generators, for the entire period and till such time as the TNERC notifies the date of breach in future, from which date, the notification setting out the amendments fixing a cap is to be implemented.

6. Written Submission filed by the Respondent on 26-12-2016:-

6.1. The issue that arises in the M.P. for determination by the Commission is whether the condition for giving effect to the amendment to clause (h) of sub regulation (1) of Regulation 2 of the TNERC (Renewable Energy Purchase Obligation) Regulations, 2010 made by Notification dated 21-01-2013 has happened.

6.2. By the Notification No.TNERC/RPO/19/3, dated 21-01-2013, the definition of "Pooled Cost of Power Purchase" was amended as under:-

"Pooled cost of power purchase" means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self-generation in the previous year from all the long term energy suppliers, but excluding those based on liquid fuel, purchase from traders, short-term purchases and renewable energy sources subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category / sub category of NCES generators."

6.3. The challenge to the vires of the amendment:-

The Writ petitions were filed before the Hon'ble High Court, Madras for a declaration that the notification dated 21.01.2013 and all consequential orders including order dated 15.07.2013 were arbitrary, illegal and ultra vires the powers of the Commission, Electricity Act and applicable CERC Regulations. The Hon'ble High Court while rejecting the challenge that the regulations framed by the Commission have to be in consonance with that of CERC held that section 86(1)(b) gave unfettered power to determine the price of power purchase within the State and sections 181(2)(d) and (2f) empowered the State Commissions to fix and prescribe the conditions for such fixation. While observing that the object of introducing the amendment was to safeguard the consumer's interest and to balance the procurement cost of purchase price of electricity component, the Hon'ble High Court held as under:

"22. It is also pertinent to mention here that the original definition of APPC under the TNERC Regulations itself was different from that of the regulations of the CERC. However, the same was not challenged. Now the present amendment has been introduced to put a cap at 75%. The present amendment has been brought into force after hearing the stake holders, which again is not in dispute and therefore is in conformity with the procedure contemplated under section 64. The draft notification was published as contemplated under section 181(3) of the Act and objections were called for from the public. The same were examined by the expert body and only then the amendment has been approved and the notification published The said amendment has been brought into force to safeguard the consumer's interest as envisaged under S.61(d) of the Act" and also at the same time, to balance the procurement cost of purchase price of electricity component"

6.4. While rejecting the contention that the Commission did not have the power to fix a cap, the Hon'ble High Court in para 24 of the order held:

"24.....When the power to fix the tariff under sections 61, 62, 86 and 181 vests with the 1st respondent, it is open to them to impose any restriction for the fixation of APPC. The object of leaving the function to the SERCs is because, they would be best suited to determine the escalation in prices of fuel etc. within the respective States."

6.5. It was thus held in para 30 of the order this Commission was well within its right to deviate from its earlier notification.

“As regards the contention that the actual need to give effect to the notification had not arrived, the Hon'ble High Court did not decide this issue but granted liberty to the petitioners to move the Commission for appropriate directions. The writ petitions were dismissed with this liberty. The Hon'ble High Court was of the view "that the notification can be implemented with effect from the date of such breach as notified by the TNERC.”

6.6. Has the event contemplated by the Notification dated 21-01-2013 happened:-

The CERC (Terms and Conditions for Recognition and Issue of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 provide for the development of market in power from non-renewable energy sources by issuance of transferable and saleable credit certificates. As per the REC scheme, the electricity component was to be paid at APPC and the environmental component was permitted to be traded in power exchange to any obligated entity. The Electrical component to be paid with the Average Pooled Purchase Cost (APPC) rate of the distribution Licensee is determined by the State Commission each year. It was with a view to safeguarding the consumer's interest and balance the procurement cost of purchase price of electrical component that the amendment was introduced thereby fixing a cap.

The Commission by Order TNERC/MO. 4-2/E/ RPO dated 15.07.2013 after taking into account the amended definition of "Pooled cost of Power purchase" has specified the Pooled cost of Power purchase payable by TANGEDCO for the year 2013-14 as Rs.3.11 per unit subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category/sub category of NCES generators i.e Rs.3.11 per unit or 75% of the preferential tariff fixed by the Commission to that category/ sub category of NCES generators whichever is less. The order dated

15.07.2013 was also the subject matter of challenge. In para 31 of the order, the Hon'ble High Court has held as under:

"Hence for all the reasons stated above, the challenge to the notification dated 21.01.2013 fails. In view of the fact that the order dated 15-07-2013 fixing the preferential tariff at Rs.3.11 has been passed in exercising the rights under the Act and the Regulations and following the proceedings dated 21-01-2013, the challenge to the same would also fail."

6.7. Thus the Hon'ble High Court has upheld the order dated 15-07-2013. Every year thereafter, similar orders are being passed by this Commission, the last being TNERC/MO4-4/E/RPO, dated 07-03-2016. Thus the orders passed by the Commission after taking into account the amendment have been specifying the pooled cost of power purchase subject to a maximum of 75% of the preferential tariff to that category / sub category of NCES generators whichever is less. Thus the point of breach is 75% of the preferential tariff and not 100% as claimed by the Petitioner. Viewed thus it will be seen that the breach has occurred as the price specified in the order of this Commission itself provides the condition for application of the order, namely either the Pooled Cost of Power Purchase or 75% of the preferential tariff fixed by the Commission to that category / sub category of NCES generators whichever is less.

7. Rejoinder filed on behalf of the Petitioner:-

7.1. The counter affidavit filed on behalf of the respondent and deny the claims and contents of the same. At the outset, it would be pertinent to state that the subject matter of the present petition is the direction issued by the Hon'ble High Court wherein the Hon'ble High Court specifically held as follows:-

".....However, this Court finds force in the submissions of the Counsel for the petitioner that considering the object to introduce the cap, the need to implement cap has not arrived. The impugned notification has been enacted in public interest to prevent the generators to unjustly enrich themselves, in

the event of the preferential tariff falling below the APPC. Therefore, this court is of the view that the notification can be implemented with effect from the date of such breach as notified by the TNERC”

7.2. From a reading of the above judgment and directions, it is evident that the Hon'ble High Court has rendered a clear finding that

- a. the need to implement the cap, the subject matter of the amendment, has not arrived.
- b. Further, the implementation of the notification has been directed by the Hon'ble High Court to be postponed to such date when the breach occurs, i.e. the date when the preferential tariff falling below APPC.
- c. The Commission has been directed to notify when such breach occurs, from which date the amendment would become operational.

7.3. The Hon'ble High Court which considered the submissions and the prevailing APPC and Preferential tariff Rates has held in clear terms that the breach has not occurred. While so, and despite such clear directions, the respondent has sought to file a counter running to 12 pages that seeks to make submissions which are in essence a deliberate misreading of the Judgment of the Hon'ble High Court. Furthermore, the Respondent has sought to re-argue the issue on merits which is impermissible and has also sought issuance of certain directions which have no relevance to the present proceedings.

7.4. The fundamental premise of the respondent appears to be that the APPC rate of Rs.3.11 per unit has crossed the prevailing preferential tariff rate of Rs.2.75 per unit. Such a claim reveals a deliberate and incorrect stand in respect of the ruling of the Hon'ble High Court which has specifically held in clear terms when the APPC rate has, till date, not breached the preferential tariff rate. The respondent cannot seek to re-argue the issue as it is seeking to do by way of counter affidavit. The contents of the counter affidavit from paras 2 to 12 seek to, in substance, re-argue the matter before the Commission which is impermissible. The Petitioner is

therefore not seeking to enter upon responding to the claims contained therein, except to state that the Respondent cannot seek to make submissions contrary to the express ruling of the Hon'ble High Court. It would be suffice to state that the Hon'ble High Court having specifically held that APPC rate has not breached the preferential tariff rate, the Commission may be pleased to notify in future the coming into effect of the amendment as and when such breach takes place.

7.5. In so far as contents of paras 13 to 19 of the counter are concerned, the same are completely outside the scope of the petition filed by the petitioner herein inasmuch as the Respondent seeks for certain further amendments that the respondent wishes to the RPO Regulations, 2010. It is not necessary to deal with the claims and contents therein except to state that TANGEDCO will have to file appropriate petition in this regard, if so advised and the same cannot be the subject matter of the present proceedings.

7.6. The Commission may therefore issue such consequential directions to the effect that the effective date of the coming into force of the amendment would be notified when the event of breach occurs. Till such time the Respondent is liable to make payment of the APPC rates as notified from time to time by this Commission, in full.

8. Findings of the Commission:-

8.1. The present petition is filed pursuant to the directions of the Hon'ble High Court in its judgment dt.15.07.2016 in W.P No.22097 of 2013 and W.P No.32576 of 2013. The said writ petitions challenged the amendment issued by the Commission to the definition of "Pooled Cost of Power Purchase" (hereinafter referred as "APPC")

contained in regulation 2(h) of the TNERC (Renewable Energy Purchase Obligation) Regulations, 2010 vide Notification No. TNERC/RPO/19/3, dt.21.01.2013 and the consequential order passed in Order No. TNERC/M.04-2/E/RPO, dt.15.07.2013 notifying the pooled cost for the year 2013-14.

8.2. The Hon'ble High Court, while upholding the amendment issued vide notification Dt. 21.01.2013 as well as the consequential order passed vide order No. 4-2 dt.15.07.2013 granted liberty to the petitioner to move this Commission for appropriate directions in the matter of APPC observing as follows:

“31. The next contention of the petitioner is that the actual need has not arrived for the 1st respondent to effect the notification as the APPC has not breached the preferential tariff. However, this court finds force in the submission of the counsel for the petitioner that considering the object to introduce the cap, the need to implement cap has not arrived. The impugned notification has been enacted in public interest to prevent the generators to unjustly enrich themselves, in the event of the preferential tariff falling below the APPPC. Therefore, this court is of the view that the notification can be implemented with effect from the date of such breach as notified by the TNERC. Therefore, granting liberty to the petitioners to move the TNERC for appropriate directions, the writ petitions are dismissed. No costs.”

8.3. The petitioner has contended that the import of the order of the High Court is that until such time the APPC breached the preferential tariff, the amendment of the Commission imposing a ceiling of APPC @ 75% of preferential tariff cannot take effect and such breach having not taken place, the implementation of the regulation has to be postponed. To substantiate the point, the petitioner has compared the Pooled Cost of Power purchase rates notified for the years 2013-14 and 2014-15 which were Rs.3.11 per unit and Rs.3.38 per unit respectively with the preferential tariff fixed for the said period which was Rs.3.96 per unit. The respondent TANGEDCO, on the other hand, has filed a counter affidavit wherein material facts

which were not argued before the High Court, were sought to be raised and in the course pointed out that APPC rates during 2011-12,2012-13 were Rs.2.37 per unit and Rs,2.54 per unit respectively and the APPC rate of Rs.3.11 per unit fixed for the year 2013-14 exceeded the basic preferential tariff rate of Rs.2.75 per unit fixed for the wind energy generators. The contentions of the respondent are broadly as follows:-

- (a) The APPC has already breached the preferential tariff applicable to the Non-conventional Sources category to which the petitioner belongs.
- (b) There is no provision for postponing the regulations already in force.
- (c) The petition of the petitioner is based on the incidental observations of the High Court .
- (d) There is no bar on this Commission to go into the merits of the case.
- (e) The Regulatory Commissions under the Electricity Act, 2003 are Statutory Technical Bodies and fixation of tariff being legislative in character, it should be left only to such statutory bodies.
- (f) The Hon'ble CERC vide its amendment to its REC regulations 2010, issued on 28.03.2016 has stopped REC benefit to RE CGP projects commissioned after 1.04.2016.
- (g) If existing preferential scheme generators with tariffs Rs.2.75 and 2.90 migrate to REC scheme, even with the minimum floor price of REC of Rs.1.50, added to the APPC price of Rs.3.35 would get a tariff of Rs.4.85 which is much higher than the preferential rates of Rs.2.75 and Rs.2.90 per unit.
- (h) To issue amendment to the RPO regulations,2010 notifying rates to be adopted for various categories of generators viz. existing REC generators, new projects, migration schemes.

8.4. We have carefully considered the submissions of both sides. As far as this petition is concerned, we are primarily concerned with the question of issuing appropriate directions in this matter as directed by the Hon'ble High Court and as such the only issue to be determined is as to whether the APPC rate has breached the Preferential Rate.

8.5. Although various contentions have been advanced by the respondent, we find that the crux of the issue lies only with regard to the fact whether the APPC, (Average Pooled Power Purchase Cost), exceeded the preferential tariff determined by the Commission. Hence, we are not discussing other issues raised by the Respondent and the only issue before the Commission is the implementation of the orders of the Hon'ble High Court by issuing appropriate directions in the matter.

8.6. The respondents in its initial submissions highlighted the fact that the APPC rates issued from 2013-14 onwards i.e Rs.3.11 for 2013-14, Rs.3.38 for 2014-15, Rs.3.35 for 2015-16 and they have crossed the basic preferential tariff rate of Rs.2.75 applicable to the wind energy generators and therefore the breach has occurred when the APPC of 2013-14 was notified.

8.7. The Respondent in its counter affidavit has contended as follows:-

“But the Petitioner now compares the rates of the APPC rate of a year with the corresponding year preferential tariff rate and approached the Commission allegedly as per the liberty granted by the Hon'ble High Court of Madras in order dated 15-07-2016 in W.P.No.22097 of 2013 and stated that the Petitioner is entitled for the actual APPC rate. The year wise APPC rate and Preferential Tariff rate is given below:-

The year-wise APPC rate

| Year | Average Pooled Purchase Cost |
|---------|------------------------------|
| 2012-13 | Rs.2.54 |
| 2013-14 | Rs.3.11 |
| 2014-15 | Rs.3.38 |
| 2015-16 | Rs.3.35 |

The year-wise Preferential Tariff rate

| Year | Preferential Tariff Rate |
|----------------|--------------------------------------|
| Before 2006 | Rs.2.75 |
| 2006-2008 | Rs.2.90 |
| 2009-7/2012 | Rs.3.39 |
| 8/2012 to 2013 | with AD-Rs.3.53 / Without AD-Rs.3.96 |
| 2013-14 | with AD-Rs.3.53 / Without AD-Rs.3.96 |
| 2014-15 | with AD-Rs.3.53 / Without AD-Rs.3.96 |
| 2015-16 | with AD-Rs.3.53 / Without AD-Rs.3.96 |

The Commission nowhere stated that, the APPC rate of a year is to be compared with the Preferential Tariff Rate of the same year to ascertain whether the APPC rate crosses the Preferential Tariff Rate. As the issue started in 2011 that, the APPC rate increased from Rs.2.37 to Rs.2.54 and as there was a possibility to cross the existing prevailing preferential tariff rate of Rs.2.75/-, TANGEDCO requested the Commission to have a control over the APPC rate. The purpose of cap is, the APPC rate and the money value of component should be lower than the Preferential Tariff Rate. As stated by the Petitioner, if the APPC rate is not crossed the Preferential Tariff Rate, there is no necessity to the Commission to take the action in 2012 and amend the regulation in 2013. As of now the APPC rate of Rs.3.11, Rs.3.38 & Rs.3.35 has crossed and is higher than the Preferential Tariff rate of Rs.2.75, the 75% cap has come into force from 2013-14 onwards.

Any project (or) equipment is subject to depreciation. It is left to the generator to claim depreciation (or) not. Hence, for calculating the APPC rate, the depreciated value of tariff has to be taken for putting 75% cap. The 'with AD benefit' tariff is Rs.3.53 as per RA No.6 of 2013, so 75% cap to be put on $Rs.3.53 \times 0.75 = Rs.2.65$, so the rate to be given is Rs.2.65 for the years from 2013 to 2016, as follows:-

| <i>Year</i> | <i>APPC Rate</i> | <i>75% of Preferential Tariff Rate</i> |
|----------------|------------------|--|
| <i>2013-14</i> | <i>Rs.3.11</i> | <i>Rs.2.65</i> |
| <i>2014-15</i> | <i>Rs.3.38</i> | <i>Rs.2.65</i> |
| <i>2015-16</i> | <i>Rs.3.35</i> | <i>Rs.2.65</i> |

8.8. Thus, the respondent, TANGEDCO, in its written submission on the contention that the actual need to give effect to the notification has not arrived, has stated that the Hon'ble High Court did not decide the issue but only granted liberty to the petitioners to move the Commission for appropriate directions. On the breach of preferential tariff, the Respondent has contended that the point of breach is 75% of the preferential tariff and not 100% as claimed by the petitioner and that the breach has occurred as the price specified in the Order of the Commission itself provides the condition for application of the order.

8.9. Interestingly, the counsel for the petitioner during the hearing last held by the Commission admitted the fact of APPC for the year 2013-14 breaching of the basic preferential tariff for wind energy of Rs.2.75 per unit but sought for applicability of APPC rate to the petitioners wind mills commissioned during 2011 by contending that the APPC rates did not breach the preferential tariff of Rs.3.39 per unit applicable to the petitioners wind mills, fixed in the Order No.3 of 2009 dt.20.03.2009, the control period of which was applicable until 31.07.2012. However, in the written submissions, petitioner has sought a direction to TANGEDCO to pay the APPC price to the generators under REC scheme indicating that it is evident from Commission's affidavit that the ceiling of 75% was fixed only because in the long run the APPC would exceed the preferential tariff and comparison of preferential tariff of the oldest machines is untenable since the REC scheme is a

2010 scheme. It may be possible that for a particular generator the APPC rate may not have breached the Preferential tariff applicable to such class of generators. But the Regulations being general in nature and applicable to all concerned entities, a particular entity cannot be excluded from its purview.

8.10. To understand the concept of APPC and preferential rate, it is essential to conceptualize the issue. There are three categories of wind energy generators, namely- (i) wind energy generators who are supplying the entire energy generated by them to the DISCOM at the preferential tariff fixed by the Commission; (ii) wind energy generators who are wheeling the energy generated by them to their captive end for the use of the captive units/third party purchase by paying the wheeling / transmission charges to the utility; and (iii) wind energy generators supplying the energy generated by them to the DISCOM at APPC rate and trading Renewable Energy Certificates. That is, selling the green component being the Renewable Energy Certificates through the Power Exchange. Thus the RE generators have options of selling the energy generated to the distribution licensee at the preferential tariff rate fixed by the Commission, use the energy for captive use/sell to third parties or participate in the REC scheme.

8.11. The energy generated by the Renewable Energy Generator under REC scheme, WEG herein, has two components, one being the electricity component and the other being the environmental attribute/green component. The electricity component can be sold to local distribution utilities at the APPC rate which in effect is a price of conventional electricity and the environmental attribute can be sold through exchanges in the form of Renewable Energy Certificates(RECs) which are purchased by utilities of other States that are not rich in renewable energy to meet

their Renewable energy Purchase Obligation(RPO) and also by other obligated entities to meet their RPO. The electricity component can also be sold through traders, to open access consumers or through power exchanges at a mutually agreed price.

8.12. In the case of energy sold to the DISCOMS that meets its RPO through purchase at preferential rates, the tariff is fixed through the tariff determination process that takes into account all financial and operational parameters as prescribed in the Power Procurement of New and Renewable Sources of Energy Regulations. Sale of electricity component of the RE generator is in accordance with the definition of 'Pooled Cost of Power Purchase' defined in the Commission's Renewable energy Purchase obligation. The APPC rate arrived as per the definition of Pooled cost in the RPO regulations by taking into account the power purchase cost of various sources excluding that of liquid fuel, purchase through traders, renewable energy short term purchase is in effect the price of conventional power, is generally less than the preferential tariff and is so fixed because the price is only for the electrical component of energy generated by the RE generator under REC scheme.

8.13. The wind energy generators availing preferential rate tariff enter into a Power Purchase Agreement (PPA) with the Distribution licensee for the sale of entire energy generated by them at preferential tariff. The PPA is for a period of 20 years. For the entire period of 20 years, the tariff i.e. preferential tariff at which the RE generator sells energy is constant.

8.14. On the contrary, the RE generator under REC scheme who supplies energy to the distribution licensee gets his tariff at the various APPC rates fixed during the contract period. The APPC price is not constant as can be seen from the prices fixed for the years 2011-12,2012-13,2013-14,2014-15,2015-16 which are Rs.2.37, Rs.2.54, Rs.3.11,Rs.3.38,Rs.3.35 respectively. This APPC price depends much on the price of fuel which is largely coal. The APPC rate of Rs.3.11 per unit determined in the Order dt.15.07.2013, consequent to the notification of the amendment to the definition of Pooled Cost of Power Purchase vide notification No. TNERC/RPO/19-3,dt. 21.01.2013 and notified in Gazette dt.21.06.2013, very well crossed the preferential tariff rate of Rs.2.75 per unit fixed for a category of the wind energy generators.

8.15. Had the APPC rate been left unchecked, the RE generator commissioned, say, during the control period of the Order No.3 dt.20.03.2009 would get a tariff of Rs.3.39 per unit throughout the contract period of 20 years which is a tariff determined considering all financial and operational parameters ensuring rate of return to the generator whereas the RE generator commissioned during the same control period but opted for REC scheme would be getting paid initially at Rs.2.54 per unit and subsequently at rates of Rs.3.11,Rs.3.38 etc. for the electrical component sells environmental attribute, which energy the distribution licensee cannot account for the purpose of RPO after incurring high expenditure.

8.16. It is in this context, the Commission felt that the APPC rate, which ought to be lesser than the preferential rate of tariff, would cross the preferential tariff over a period of time and to put an end to this anomaly, the Commission has fixed the cap of 75% of the preferential tariff for the APPC rate. It is to be noted that what is to be

compared is the APPC rate prevailing in the current years and the preferential tariff in respect of the generators entering their respective contract on the same period and the preferential tariff and APPC rate of every year should not be compared.

8.17. In the Explanatory Statement to the notification issued by the Commission on 19-06-2013, the Commission has not stated that APPC rate has exceeded the preferential tariff of any particular year and what has been indicated therein was the Commission's apprehension that APPC rate may exceed the preferential rate. In other words, the object has been to fix the cap the APPC at 75% of the preferential tariff and not to fix such cap as and when the APPC rate actually exceeds preferential rate. Incidentally, the APPC rate of Rs.3.11 per unit arrived for the year 2013-14 exceeded the preferential tariff of Rs.2.75 per unit fixed for a category of generators. The TNERC (RPO) Regulations, 2010 is applicable to all entities covered under these regulations and hence the Petitioner alone cannot be excluded from its purview.

8.18. Further, the prayer of the Petitioner is to issue appropriate directions in compliance with the judgment of the Hon'ble High Court in its judgment dated 15-07-2016 in W.P.No.22097 of 2013 and to comply the same in a time bound measure. During the hearing on a specific query from the Commission as to what direction has to be given to the Licensee by the Commission, the learned Counsel for the Petitioner has stated that direction has to be given to the Respondent to postpone the implementation of the impugned amendment till the APPC rate fixed by the Commission for a year exceeds the preferential tariff fixed for the year. The learned Counsel for the Petitioner has not put forth anything on the questions as to whether direction could be issued by the Commission against the provisions of the

regulations. We are of the view that direction cannot be issued to the Licensee to postpone the implementation of the regulations when the regulation is in force much so when factually the APPC rate (Rs.3.11) exceeded in the year 2013-14 itself over the preferential tariff of Rs.2.75.

8.19. In the result, we hold that the APPC rate has crossed the Preferential Rate on the date of issue of the impugned notification dated 21-01-2013 and the petition is accordingly dismissed. No cost.

9. 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)
(Dr.T.Prabhakara Rao)
Member

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

(Sd.....)
(S.Akshayakumar)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission