TAMIL NADU ELECTRICITY REGULATORY COMMISSION

(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru.M.Chandrasekar **.... Chairman**

Dr.T.Prabhakara Rao **…. Member**

and

Thiru.K.Venkatasamy **…. Member (Legal)**

D.R.P. No.67 of 2014

Arulmozhi Spinning Mills Pvt. Ltd.
Vilathikulam
H.T.211/Tuticorin EDC
Registered Office
19-B, Ethel Harvey Road
Sattur – 626 203
Virudhunagar District … Petitioner
(Thiru.R.S.Pandiyaraj
Advocate for the Petitioner)

Vs.

1. The Superintending Engineer
   Tirunelveli EDC
   TANGEDCO.

2. The Superintending Engineer
   Tuticorin EDC
   TANGEDCO

3. The Chairman
   TANGEDCO
   Chennai.

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

Dates of hearing : **16-10-2018; 31-01-2019; 24-09-2019; 22-10-2019; 26-11-2019; 28-01-2020 and 11-02-2020**

Date of order : **22-09-2020**

The D.R.P. No.67 of 2014came up for final hearing before the Commission on 11-02-2020 and the Commission upon perusing the petition and connected records and after hearing the submissions of both sides passes the following:-

ORDER

1. Prayer in D.R.P. No.67 of 2014:-

The prayer of the petitioner in this D.R.P. No.67 of 2014 is to direct the respondent to make payment of cash equivalent to the unutilized banked energy without insisting for 51% utilisation of the generated units for captive consumption.

2. Facts of the Case:-

This petition has been filed to direct the respondent to make payment of cash equivalent for unutilized banked energy refused by Superintending Engineer/Tirunelveli EDC on the grounds of not fulfilling 51% of energy generated and utilized in our own industry.

3. Contentions of the Petitioner:-

3.1. The petitioner's HT Industry at Tuticorin EDC having SC.No.211 is utilising the energy generated from his own wind mill HTSC No.2152 at Tirunelveli EDC. The Wind mill is 100% owned by the Industry during the period 2011-12.

3.2. After preferring complaint with CGRF Tirunelveli and Electricity Ombudsman at Chennai,a reply was received rejecting his claim on the ground that the industry and licensee are bound to approach the Commission for adjudication of the dispute.

3.3. During the period 2011-12 there was acute power shortage and the TANGEDCO was forced to implement frequent load shedding scheduled and unscheduled. From the particulars obtained from Tuticorin, EDC MRT,a total of 1218.48 Hour power was not supplied by TANGEDCO. Further to peak hour restrictions and power holidays were declared by TANGEDCO and also due to frequent announced and unannounced power cuts, and implementation of 20% to 30% and 40% power cut, the petitioner could not obtain the 51 % total power generated. The consumption of 51% of energy generated shall be met only when there is no load shedding. Though the petitioner's wind mill had generated powerwas not allowed to utilize at petitioner's end due to frequent load shedding. This had resulted in not consuming the 51 % as stipulated in the agreement and Act.

3.4. The petitioner's request was rejected only on the ground that they had utilized only 40.95%of units generated by his wind mill which is less than 51% as stipulated. While rejecting the request, the Superintending Engineer, Tirunelveli had not taken into consideration the load shedding period of 1218.48 hours and blindly followed the Act only.

3.5. The Act does not discuss the rules to be adopted during power cuts, R & C load shedding. In the absence of specific rules in the Act during R & C and power cut and load shedding periods rejecting the claim for CGP status is against natural justice.

4. Contentions of the Respondent:-

TANGEDCO in its counter filed on 22-10-2019 has submitted as follows:-

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

> " xxx
>
> 2 (8) "Captive Generating Plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such co-operative society or association.
>
> xxx"

4.2. The Cross Subsidy Surcharge is the payment of the tariff charges for availing Open Access by the subsidizing consumers of the Distribution Licensee, i.e. when they seek to purchase power from sources other than Distribution Licensee as provided for in the Electricity Act, 2003, National Electricity Policy and also Open Access Regulations, 2014 of State Electricity Regulatory Commission.

4.3. In exercise of powers conferred by section 176 of the Electricity Act, 2003 (Act 36 of 2003), the Central Government issued rules for requirements of Captive Generating Plant and the same is called the Electricity Rules – 2005 which provide as follows:-

"3. Requirements of Captive Generating Plant:

(1) No power plant shall qualify as a "captive generating plant" under section 9 read with clause (8) of section 2 of the Act unless –

(a) in case of a power plant-

(i) not less than twenty - six percent of the ownership is held by the captive user(s), and

(ii) not less than fifty - onepercent of the aggregate electricitygenerated in such plant, determined on an annual basis, is consumed for the captive use:

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

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

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

Explanation:-

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

(2) the equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Illustration: In a generating station with two units of 50 MW each namely Units A and B, one unit of 50 MW namely Unit A may be identified as the Captive Generating Plant. The captive users shall hold not less than thirteen percent of the equity shares in the company (being the twenty–six percent,proportionate to Unit A of 50 MW) and not less than fifty-one percent of

the electricity generated in Unit A determined on an annual basis is to be consumed by the captive users.

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

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

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

(b) "Captive User" shall mean the end user of the electricitygenerated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;

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

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

From the above, it can be understood that the twin rules of Ownership and Consumption have to be satisfied as per the Electricity Rules-2005 in order to qualify as a Captive Generating Plant. If the status of a Captive generating plant is

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

4.4. In respect of wind energy generators, the Commission had passed an order on 15.05.2006 vide Order.No.3 on Purchase of Power from NCES based generating plants, the relevant portion which held as follows:

xxx

10.4. Banking:

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

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

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

xxx

10.15. Billing and Payment to NCES generator by Distribution licensee:

In case of captive use, the distribution licensee shall raise the bill after accounting for the net energy supplied at the end of each monthly billing cycle. Meter reading should be taken on the same day at NCES generator end and captive user/third party purchaser end. The generation at generator end shall be communicated to all the circles of the captive users/third party purchaser within 2 days so as to facilitate for matching generation with consumption in the same billing month. This adjustment will be done on slot to slot basis taking into account the (i) Peak (ii) Off peak and (iii) normal generation / consumption within monthly billing cycle / banking period. No carry over is allowed for the next month in case of firm power supply. In case of infirm power, no carry over is allowed beyond the banking period. Excess generation in a monthly billing cycle / banking cycle can be sold to the Licensee at the rate fixed by the Commission ----------".

4.5. In accordance with above, the wind energy generator is eligible for encashment at rate of 75% of normal purchase rate for the unutilized portion of captive energy banked. Further, it is most relevant to mention that subsequently, the Commission issued Tariff Order.No.1 of 2009 dated 20.03.2009, Tariff Order.

No.6 of 2012 dated.31.07.2012 and Tariff OrderNo.3 dated31.03.2016 in connection with Wind energy, wherein it is stated that the existing practice of banking facility and unutilized captive banked energy is to be purchased by the TANGEDCO at 75% of the normal purchase rate. However, when TANGEDCO implemented Restrictions and Control measures, the Generator is eligible at 100% of the normal purchase rate.

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

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

4.7. In accordance with the above clause of the Energy Wheeling Agreement, TANGEDCO and wind energy captive generator shall be bound by the provisions contained in the Electricity Act, 2003. Therefore, in accordance with Section 42 of the Electricity Act, 2003, the Wind Energy Captive generator wheels the energy to their captive users and exempted cross subsidy surcharge for such captive transactions. Similarly, if, the twin rules of the Rule-3 of the Electricity Rules - 2005 are not maintained by the captive users and captive generator, the Captive status of the Generating Plant will be lost and the entire electricity generated shall be

treated as if it is a supply of electricity by generating company thereby the entire energy adjusted against HT consumption by the User(s) will attract levy of Cross Subsidy Surcharge. Consequently, TANGEDCO will be entitled to recover such amount of Cross Subsidy Surcharge.

4.8. TANGEDCO issued clarification vide letter dated 30-05-2015 in the matter of encashment of unutilized energy of wind energy, wherein encashment of tariff rate was incurred from 75% to 100% due to enforcement of R & C measures.

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

4.10. The petitioner has HT service connection vide HTSC.No.211, pertaining to the Tuticorin EDC. The said service connection is captively consumed the energy generated from their own wind mill H.T.SC.No.2152 at Tirunelveli EDC. It is admitted by the petitioner that during the financial year 2011-12, the petitioner has not fulfilled consumption criteria which are one of the twin Rules of rule-3 of Electricity Rules-2005. Therefore, the petitioner's Captive Generating Plant lost its captive status. If the status of a Captive generating plant is lost due to any one of

the reasons (or) for both the reasons, the entire electricity generated from such plant in year shall be treated as if it is a supply of electricity by a generating company. In such cases of disqualification, Cross Subsidy Surcharge has to be levied for the entire adjusted units/consumed by the Users treating such consumption as though it was supplied by the respective Generating Plant, since proviso 2 of Section 42 of the Electricity Act,2003 clearly states that surcharge is not to be levied only in case of Captive Consumption.

4.11. The Appellate Tribunal for Electricity ordered in Appeal No.33 of 2012 held as follows:

"30.To Sum Up:

(a) Rule 3 of Electricity Rules-2005specifically prescribes that two conditions are to be satisfied by the power plant to be qualified as a captive power plant. If anyone of those conditions is not fulfilled, the captive power plant will lose its status and become a generating plant. Hence, the State Commission does not ave any powers to relax the provisions of the Electricity Rules-2005.

(b) In the present case, the Appellant could not satisfy one of the conditions of Rule-3 vizconsumption of 51% of the annual aggregate electricity generated by its power plant for captive use during the year 2009-10 due to breakdown in its Steel Plant. Therefore, the power generation from its power plant shall be treated as if it is a supply of electricity by a generating company as per Rule 3 (2) of the Electricity Rules-2005. The State Commission does not have any power to

relax the requirement of consumption of not less than 51% of the electricity generated from the Appellant's power plant for captive use."

4.12. In accordance with the above order, the contention of the petition that during the period 2011-12 there was acute power shortage and the TANGEDCO was forced to implement frequent load shedding scheduled and unscheduled. From the particulars obtained from the Tuticorin MRT a total of 1218.48 hour power was not supplied by TANGEDCO. Further, peak hour restriction and power holidays declared by TANGEDCO and also frequent announced and unannounced power cuts, and implementation of 20% to 30% and 40% power cut they cannot attain the 51% of energy generated shall be met onlywhen there is no load shedding. Though their wind mill has generated power they were not allowed to utilize at their end due to frequent load shedding. This has resulted in not consuming the 51% as stipulated in the agreement and act is not sustainable one. Per contra, if the Commission is considered, the pleadings of the petitioner that due to load shedding the petitioner has not fulfilled of 51% consumption, then it may be termed as the Commission relaxed the requirement of consumption of not less than 51% of the electricity generated from the Petitioner's power plant for captive use which is not permissible under law, since the State Commission does not have any powers to relax the provisions of the Electricity Rules-2005.Therefore, the captive user of the petitioner has to pay the Cross Subsidy Surcharge for the adjusted units during said Financial years before releasing the payment for surplus wind energy.

5. Written Submission filed by the Petitioner:-

5.1. The present petition was filed challenging the arbitrary and illegal action of the Respondent TANGEDCO which effectively denies payment towards encashment of the Petitioner's unutilized banked energy of 2,80,763Units for the period 01.04.2011 to 31.03.2012 on the untenable claim that the petitioner has failed to consume 51 % of the generation during the relevant time. Such stand is wholly illegal in as much as, the consumption itself could not be achieved only due to the restriction & control measures, prolonged unscheduled power cuts and load shedding imposed by the Respondent TANGEDCO on the Petitioner during the entire year 2011-2012.

5.2. The petitioner has been filed to direct the Respondent TANGEDCO to pay Rs.8,14,213/- towards the cost of the unutilized banked units (at 100% full value) for 2,80,763Units as on 31.03.2012 along with interest at 1 % per month from the respective due date to the date of payment. The present petition is being filed in order to redress the grievance of the Petitioner, as an energy generator in the State of Tamil Nadu, who had been seriously discriminated by TANGEDCO to find one way or the other to refuse/delay payments for the energy supplied even though there is no fault on the part of the Petitioner. It is submitted that on one hand the Respondent TANGEDCO is resorting to heavy load shedding by preventing the Petitioner from consumption their own wind energy and on the other hand not giving payment of the unutilized wind energy at the end of the financial year on the ground of non-fulfilment of 51 % norms is unreasonable and unjust.

5.3. From 2008 onwards, the Respondent TANGEDCO (then Tamil Nadu Electricity Board) has been facing severe shortage of power with a significant gap between the power requirement within the State and the capacity of the sole licensee within the State i.e., Tamil Nadu Electricity Board to supply. The Government of Tamil Nadu, in exercise of their powers under section 38 of the Electricity Supply Code, had vide directions dated 22-10-2008 issued directions imposing restrictions on the consumption of power by High Tension consumers. These directions imposed a cut of 40% on H.T. Industrial and Commercial Consumers. The Respondent TANGEDCO approached the Commission for approval of the R&C measures with effect from 01.11.2008 and after following the statutory procedure, this Commission issued order dated 28.11.2008 in M.P.No.42 of 2008 imposing restrictions and control measures in power supply within the State to HT consumers such as the Petitioner. Consequently the Respondent TANGEDCO imposed 40% demand and energy cut on the base demand and base consumption from 01-11-2008 onwards by fixing quota with peak hour restrictions. It is pertinent to mention here that such restriction and controlmeasures in supply of power to HT Consumers such as the Petitioner was in force till 15-06-2015.

5.4 Apart from the R&C measures imposed at 40% demand and energy cut on the basedemand and base consumption by fixing quota with peak hour restrictions the Respondent TANGEDCO illegally imposed unscheduled power cuts/load shedding upto 10 hours a day. It is important to note that while granting approval for the R&C control measures in the order dated 28.11.2008 in M.P.No.42 of 2008 this Commission has not approved such unscheduled power cuts/load shedding.

The situation was such that the consumer will never know when the grid will be put off or on during a particular day, affecting the entire consumption pattern of the Petitioner in its industry.

5.5. Even after such banking adjustments are provided, there remained large quantities of energy at the banking account as unutilized at the end of the banking period on 31stMarch due to scheduled and unscheduled load shedding each day enforced by the Respondent TANGEDCO. Accordingly in subsequent Tariff Orders this Commission in Order No.1 of 2009 dated 20.03.2009 decided that suchunutilized banked energy are eligible for encashment at 75% during normal occasions and 100% during a period by which restriction and control measures are enforced.

5.6. The above position as how to allow encashment of the unutilized banked energy as on31st March this Commission had again reconfirmed by a subsequent order issued on 31.07.2012.

5.7. The orders of this Commission setting out various terms and conditions towards captive consumption of wind energy are being converted in to an Energy Wheeling Agreement and all the terms and conditions are being provided in the agreement and accordingly, the wheeling, banking, adjustment and other such matters are being regulated through this agreement between the Respondent TANGEDCO and the Wine Energy Generators like those of the petitioner. The petitioner states that terms of the applicable tariff orders and regulations, it is

entitled to receive the payments for the unutilized banked units at the end of each financial year.

5.8. The very accumulation of units in banking is owing to the fact that the petitioner has been unable to utilize the full generated units due to various policies and practices of TANGEDCO, unscheduled load shedding and imposition of R&C measures etc. It is also noteworthy to mention herein that in case of any payment delay from TANGEDCO to the generator, interest at 1% per month is payable in terms of the Tariff Orders and the judgments of the State Commission (TNERC) as upheld by the APTEL, New Delhi and as confirmed by the Supreme Court in Civil Appeal No(s).4859-4860/2015 order dated 16-12-2016.

5.9. The Petitioner had raised an invoice for encashment of unutilized banked units of 280763Units @Rs.2.90/- for the year 2011-12 vide claim dated 19-07-2012 at the applicable tariff value at theappropriate time with the Respondent TANGEDCO towards a sum of Rs.8,14,213/-. However, both despite the Tariff Orders issued by the Commission and also as per the terms of the Agreement executed between the Petitioner and the Officials of the Respondent, no payment has been made till today.

5.10. The Respondent TANGEDCO has issued a letter dated 05.08.2013 to the Petitioner stating that theunutilized banking invoices for the period 2011-12 will not be processed for encashment since the Petitioner has not consumed 51 % of the annual generation and is liable to pay cross subsidy surcharge. It is pertinent to

mention here that the Respondent TANGEDCO himself in letter dated 05.08.2013 mentioned that levy of cross subsidy surcharge to petitioner for the alleged non-compliance of 51 % norms is leviable only from 15.06.2006 to 26.02.2009 and from 11.07.2012 and on the other hand the Respondent intentionally fails to consider that in the present case of the Petitioner the period is 01.04.2011 to 31.03.2012 which squarely falls within the period when cross subsidy surcharge is not leviable. It is submitted that such action of the Respondent TANGEDCO is illegal, unfair and unsustainable in law.

5.11. The Respondent TANGEDCO in its letter dated 05.08.2013 has alleged that on verifying the norms of the Captive Generating plant for the year April 2011-12 the captive user i.e., the Petitioner, has not fulfilled the condition of consumption of not less than 51 % of the aggregate electricity generated through its wind energy generators during the said period and accordingly, declared that the petitioner is not falling under the definition of captive generating plant which stand, is totally illegal, arbitrary, without jurisdiction and authority of law and in violation of principles of natural justice.

5.12. Since the Respondent TANGEDCO (then TNEB) was not in a position to supply electricity, it did not take any steps for levy of cross subsidy surcharges but on the other hand, it approached this Commission for considering suspension of cross subsidy surcharge as per section 42 (2) of the Electricity Act, 2003. A perusal of the order dated 05-12-2008 passed by this Commission in M.P .No.43 of 2008 reveals that the prayer of the TNEB itself was for temporary relinquishment of the

right to levy Cross Subsidy Surcharge for a period of six months or till the situation improves and R & C measures are withdrawn. This request of the TNEB was accepted by the Commission, observing in any case, that for relinquishment of a right to levy Cross Subsidy Surcharge no permission is necessary.

5.13. From December 2008 till November, 2010, the Respondent TANGEDCO had not levied, demanded or collected Cross Subsidy Surcharge, However, on 26-11-2010, the Respondent TANGEDCO issued a communication bearing Lr.No.Dir/F/FC/ R/D.No.l10/ by which the Director/Finance of the Respondent TANGEDCOdirected all its Superintending Engineers to collect Cross Subsidy Surcharge. The same came to be challenged before the Court by several consumers. During the pendency of the Writ Petition several Associations representing the interests of the industries in Tamil Nadu called on the Hon'ble Deputy Chief Minister of Tamil Nadu and requested him to intervene and resolve the several problems that industries were facing on account of the actions of the Respondent. On 27-01-2011, the Hon'ble Deputy Chief Minister of Tamil Nadu convened a Meeting to resolve the issues faced by the consumers. In the said meeting several important decisions were taken, In so far as the issue relating to Cross Subsidy Surcharge, the following were agreed upon:

"(iii) Cross subsidy / surcharges:

It was agreed that the cross subsidy / surcharges shall not be levied till the power cut is lifted."

5.14. During the pendency of the Writ Petitions, an Amended Circular in Circular Memo No.Dir/O/SE/LD&GO/E1/ABT/Finterstate/D3144/11dated 08-02-2011was issued by the Respondent,which read as follows :-

"In continuation of the already issued circular memo vide reference (1) and (2) cited above it is stated that

For the HT consumers who purchase power up to their sanctioned demand from power exchanges, traders and generators, the relevant cross subsidy surcharge as per clause 6.5 of TNERC order No.2 dt.15.05.2006 are temporarily waived until Restriction & Control measures are lifted.

All S.Es/EDC are requested to adhere the above instructions strictly with immediate effect. "

5.15. In view of the above Amended Circular dated 08-02-2011 issued by the Respondent, the demand of Cross Subsidy Surcharge was set aside by the Hon'ble High Court and vide Order dated 17-02-2011, this Hon'ble High Court directed the TANGEDCO/TNEB authorities to adjust the amount, if any, paid by the HT Consumer towards Cross Subsidy Surcharge, in the future current consumption bills.

5.16. The Respondent TANGECO cannot levy cross subsidysurcharge on the Petitioner for the alleged non-fulfilment of 51 % norms when the petitioner was prevented from consuming his own wind energy during relevant period i.e., 01.04.2011 to 31.03.2012 due to R&C measures in force and the illegal unscheduled power cut/load shedding enforced by TANGEDCO.

5.17. During the course of arguments before this Commission on 11-02-2020, the Respondent relied on two circulars dated 11.07.2014 and 07.07.2018 which are irrelevant as the Respondent TANGEDCO cannot nullify or supersede the order issued by Tamil Nadu Government which waived the levy of cross subsidy surcharge with effect from 27.02.2009 to 10.07.2012 due to implementation of Restriction and control measures.

5.18. The Respondent has admitted that around 1218.48 hours of load shedding, apart from the Peak hour restriction was enforced on the petitioner thereby preventing the Petitioner from consuming their own wind energy. The total number of hours is 8760hours (i.e.365days x 24hours) and hence 13.90% (i.e. 1218 hours) of unscheduled power cut has been enforced on the Petitioner. Apart from the above unscheduled load shedding of 1218.48 hours they have enforced regional wise power holidays / power shut downs during the relevant period.

5.19. The Respondent has prevented the petitioner from consuming his entire energy as available at his credit. The above norms are applicable and proper in the normal circumstances when there is no scheduled and unscheduled power cut / tripping enforced. But in this case, where there is enormous scheduled and unscheduled load shedding during almost every day the Petitioner is prevented from consuming their own energy generated and injected in to the grid by their wind mills, it is not fair on the part of the Respondent to allege that the Petitioner has not fulfilled the condition of minimum consumption of not less than 51% of the

aggregate electricity generated from their own captive wind energy generators and consequently to order levy of cross subsidy surcharge.

5.20. Before making an analysis whether the captive consumer has consumed atleast 51% of the energy generated by his own CGP, the total number of hours in the year by which load shedding was enforced, should also be taken into consideration and accordingly to that extent, the percentage of load shedding during the year i.e. 13.9% should be added to 40.95% of consumption which comes upto 54.85% which is above the 51% norms. Therefore, enforcing load shedding on one side and thereby preventing the captive consumer from consuming his own energy and on the other side to conclude that the consumer has not consumer 51% of the annual generation is totally unfair and unsustainable in law.

5.21. Despite this clear statutory mandate to make payment to the petitioner over the unutilized banked wind energy for the reason of allowing to get it accumulated due to the enforcement of R&C measures by the Respondents, the respondents have started now citing Rule 3 of the Indian Electricity Rules, 2005 and on that pretext that 51% of the energy generated was not captively consumed, have now,started to reject the encashment amount payable to the Petitioner towards the encashment of unutilized banked wind energy as on March,2012. This stand is clearly contrary to the express provisions of the Indian Electricity Rules, the relevant portion of which has been extracted below:

"Rule 3 (2) - It shall be the obligation of the captive users to ensure that the

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

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

5.23. The stipulation under the 2005 Rules states that “in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company”. This merely means that instead of captive consumption, the power would be treated as one pertaining to open access with certain consequences. In fact, the State Commission has also clarified this issue and as the position stands today, even in the event that the 51% consumption norm is not satisfied, the additional charges recoverable from the captive consumer due to non-fulfilment of norms is only the cross subsidy surcharges – in addition to transmission, wheeling charges etc. However, by arm twisting the petitioner through enforcement of R&C measures and load shedding, the Respondents have made him not to consume the minimum consumption of 51 %. The Rules are made considering not such situations. Therefore, the Rules are to be taken for consideration only for a normal

circumstance where, there was no enforcement of R&C measures and load shedding.

5.24. By issuance of G.O. Ms.No. 10 dated 27-02-2009 of Energy (C3), the petitioner was mandated to generate maximum energy from his windmills without any stoppages in order to support the grid during thepower scarce period. Hence, the petitioner has to generate at the maximum capacity of its captive power plants and at the same time, was disabled from drawing his own power from the generation. As the petitioner, could not reduce or restrict the generation due to governmental mandate existed at that time, the generation was full. However, due to not allowing him to consume the entire energy generated, due to the enforced load shedding, the petitioner was forced to consume only less. If the Government has not provided the directions to generate maximum energy,the petitioner has every right to stop the WEGs from generating power and it would have rendered for a lower generation and that would have further rendered to make the petitioner eligible for minimum 51% consumption because of the low generation and corresponding consumption which could be able to be achieved by the petitioner. Hence, the petitioner was compelled to generate more power and at the same time, he was not allowed to consume all his own power due to the R&C measures and continuous scheduled and unscheduled load shedding coupled with tripping.

5.25. 1f no restrictions are made against the petitioner, he would have consumed all the powergenerated from his windmills and would not have failed to consume

this minimum extent and would not have rendered himself review for the eligibility of captive consumption.

5.26. It is settled position of law that no authority can be allowed to take advantage of its own wrong. The duty to supply power on request is sacrosanct under section 42 of the Electricity Act, 2003 and the respondent TANGEDCO has been cast with an obligation to supply electricity. Without fulfilment of this duty no corresponding benefits such as cross subsidy can be claimed by the respondent. Therefore, a purposive interpretation has to be given to the provisions of the statue to remove any manifest absurdity and to prevent unjust results.

5.27. The question as to whether a consumer is liable to pay cross subsidy surcharge to the Distribution licensee for availing power under open accesseven when the Distribution licensee was not in a position to supply power and imposed power cuts on the consumer during the period when open access is obtained as been squarely answered by the Hon'ble APTEL in order dated 01.08.2014 in Appeal No.38 of2013.

5.28. It is submitted that in perusal and complete reading TNERC's Distribution Standards of Performance Regulations 2004 there is no provision of allowing supply interruption of 20%. The Respondent TANGEDCO has sought to rely on a non-existing provision under the TNERC Standards of Performance Regulations, 2004.

5.29. Regulations 12 provides for interruption and restorations of supply by the licensee for reasons of testing or forced outage or maintenance, temporarily discontinue of supply for such period and planned shut down for improvement/periodical maintenance of distribution network by giving advance notice in this behalf through local newspapers. In the present case load shedding1218.48 hours, apart from the Peak hour restriction and regional wise power holidays/power shut downs during the relevantperiod cannot be brought under the said Regulations which is completely for a different purpose.

5.30. The Respondent has relied on the order dated 15.09.2014 in M.P.No.17 of 2013 batch to state that considering the norms fixed by the Commission in the standard of Performance Regulation and other practical conditions, a supply interruption of 20% and more in a billing cycle banking period has to be taken as longer duration. In this regard it is submitted that the order dated 15.09.2014 in M.P .No.17 of 2013 batch is an interim order which subsequently modified/reversed in the final order dated 22.02.2019. Further the issue involved in M.P.No.17 of 2013 batch is with respect to fixation of quota and consequential levy of excess demand charges which has no relevance to the present case. It is pertinent to mention here that against the final order dated 22 02 2020 appeal has been filed before the Hon'ble APTEL in DFR No.1584 of 2019 and the Hon'ble APTEL has granted interim orders dated 27.05.2019 in batch of appeal before it.

5.31. Enforcing load shedding on one side and thereby preventing the captive consumer from consuming his own energy and on the other side to conclude that

the consumer has not consumed 51% of the annual generation is totally unfair and unsustainable in law. By having prevented the petitioner from consuming his own energy due to the enforcement of load shedding / tripping for 1218.48 hours in 2011-12, quoting Rule 3 and disqualifying the petitioner for his eligibility to be a captive consumer is totally unfair and not sustainable to law.

6. Written Submissions filed by TANGEDCO:-

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

6.2. In respect of wind energy generators, the Commission had passed an order on 15.05.2006 vide Order.No.3 on Purchase of Power from NCES based generating plants, the relevant portion which held as follows:

xxx

10.4. Banking:

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

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

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

xxx

10.15. Billing and Payment to NCES generator by Distribution licensee:

In case of captive use, the distribution licensee shall raise the bill after accounting for the net energy supplied at the end of each monthly billing cycle. Meter reading should be taken on the same day at NCES generator end and captive user/third party purchaser end. The generation at generator end shall be communicated to all the circles of the captive users/third party purchaser within 2 days so as to facilitate for matching generation with consumption in the same billing month. This adjustment will be done on slot to slot basis taking into account the (i) Peak (ii) Off peak and (iii) normal generation / consumption within monthly billing cycle / banking period. No carry over is allowed for the next month in case of firm power supply. In case of infirm power, no carry over is allowed beyond the banking period. Excess generation in a monthly billing cycle / banking cycle can be sold to the Licensee at the rate fixed by the Commission ----------".

6.3. The wind energy generator is thus eligible for encashment at rate of 75% of normal purchase rate for the unutilized portion of captive energy banked. Further, it is most relevant to mention that subsequently, the Commission issued Tariff Order.No.1 of 2009 dated 20.03.2009, Tariff Order. No.6 of 2012 dated.31.07.2012 and Tariff OrderNo.3 dated31.03.2016 in connection with Wind energy, wherein it is stated that the existing practice of banking facility and unutilized captive banked energy is to be purchased by the TANGEDCO at 75% of the normal purchase rate. However, when TANGEDCO implemented Restrictions and Control measures, the Generator is eligible at 100% of the normal purchase rate.

6.4. In accordance with the above clause of the Energy Wheeling Agreement, TANGEDCO and wind energy captive generator shall be bound by the provisions contained in the Electricity Act, 2003. Therefore, in accordance with section 42 of the Electricity Act, 2003, the Wind Energy Captive generator wheels the energy to their captive users and exempted cross subsidy surcharge for such captive transactions. Similarly, if. the twin rules of the Rule-3 of the Electricity Rules - 2005 are not satisfied by the captive users and captive generators, the Captive status of the Generating Plant would be lost and the entire electricity generated shall be treated as if it is a supply of electricity by generating company thereby the entire energy adjusted against HT consumption by the User(s) will attract levy of Cross Subsidy Surcharge. Consequently, TANGEDCO will be entitled to recover such amount of Cross Subsidy Surcharge. Therefore, it is the obligation of TANGEDCO to identify the verify if wind energy captive generators had fulfilled the twin rules of

the Electricity Rules-2005 before encashment of the unutilized banked captive consumption.

6.5. TANGEDCO issued clarification vide letter dated 30-05-2015 in the matter of encashment of unutilized energy of wind energy generator encashment of tariff rate from 75% to 100% due to enforcement of R & C measures, the relevant portion which held as follows:-

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

6.6. Based on the above order, the CE/Commercial had issued instructions to the circles vide Memo No.CE/Comml/EE/DSM/AEE1/F.Power Cut/D.358/2010, dated 17-09-2010 wherein it has been stated that at present the wind mill generators have already been permitted to use their full wind mill generation up to the sanctioned demand without any restriction and CPP's consumers may also permitted to use full wheeled energy without any cut.

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

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

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

Month	Power Cut Details	
	No. of Times	Hours
April 2012	{Supply effected from 20,04.2012}	
May 2012	66	281.10
June 2012	75	115.30
July 2012	49	59.05
August 2012	94	148.00
September 2012	135	201.05
October 2012	119	188.05
November 2012	14	3.35
December 2012	6	9.40
January 2013	14	18.55
February 2013	27	49.00
March 2013	22	40.15
Total	621	1113.00

In this connection, the Commission has ordered dated 15. 09.2014 in M.P.No.17 of 2013 and other batch, the relevant portion reads that considering the norms fixed by the Commission in the Standard of Performance Regulation and

other practical conditions, a supply interruption of 20% and more in a billing cycle can be considered as a "longer duration. " Herein, instead of billing cycle banking period has to be taken. In this case, the actual power availability hours during the financial year is 8760 hrs [365x24] On the other hand, a supply interruption during the said financial year is 1113 hrs. Therefore, the percentage of supply interruption is 12.7% against the power actually availability hours which below 20% in the banking period cycle thereby it cannot be considered as longer duration by considering the norms fixed by the Commission in the Standard of Performance Regulation. Furthermore TANGEDCO has permitted the captive users to use their captive power over and above the quota demand up to the sanctioned demand from 07.09.2010.

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

and A.G Audit is correct

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

6.11. In accordance with the above circular a supply interruption is below 20% in respect of the mixed feeder captive user, the mixed feeder captive user of the WEG is eligible for encashing the unutilized energy at the end of the banking period only at 75% of the relevant tariff when prevailing R&C measures. The case on hand, the petitioner admitted that the power the power cut hours is 1218.48 i.e 13.9%. Hence, the petitioner is eligible only 75% of the purchase tariff in connection with payment of surplus energy. The aforesaid circular was challenged by TASMA and others and obtained interim Injunction vide W.P.(MD).No.17091 of 2015 and the case is pending before the Hon'ble High Court of Madras Madurai Bench.

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

"38. RESTRICTIONS ON USE OEELECTRICITY:

The consumer shall curtail, stagger,.restrict, regulate or altogether cease to use electricity when so directed by the Licensee/ if the power position or any other emergency in the licensees power system or as per the directives of SLDC / SSLDC warrants such a course of action. The Licensee shall not be responsible for any loss or inconvenience caused to the consumer as a result of such curtailment, staggering, restriction, regulation or cessation of use of electricity. Notwithstanding anything contained in any agreement / undertaking executed by a consumer with the Licensee or in the tariff applicable to him, the consumer shall restrict the use of electricity in terms of his / her maximum demand and / or energy consumption in the manner and for the period as may be specified in any order that may be made by the Licensee on the instructions of State Government or the Commission."

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

6.14. It is admitted by the petitioner that during the Financial year 2011-12, the petitioner has not fulfilled consumption criteria which is one of the twin Rules of Rule-3 of Electricity Rules-2005. Therefore, the petitioner's Captive Generating Plant lost its captive status. If the status of a Captive generating plant is lost due to anyone of the reasons (or) for both the reasons, the entire electricity generated from such plant in year shall be treated as if is a supply of electricity by a generating company. In such cases of disqualification, Cross Subsidy Surcharge has to be levied for the entire adjusted units/consumed by the Users treating such consumption as though it was supplied by a Generating Plant, since proviso 2 of Section 42 of the Electricity Act,2003 dearly exempts levy of surcharge only in case of Captive Consumption. Therefore, it is the obligation of TANGEDCO to verify if the wind energy captive generators had fulfilled the Twin rules of the Electricity Rules-2005 before the payment of encashment of the unutilized banked captive consumption. Hence, the petition is neither maintainable in law nor on facts.

6.15. The petitioner has not fulfilled the consumption criteria. Therefore, the petitioner lost its captive status rendering the petitioner liable to pay Cross Subsidy Surcharge for the adjusted units during the said Financial Year. In this regard, the Appellate Tribunal for Electricity Ordered in A.No.33 of 2012, the relevant portion which held as follows:

"30. To Sum UP:

(a) Rule 3 of Electricity l\ules-2005 specifically prescribes that two conditions are to be satisfied by the power plant to be qualified as a

captive power plant. If anyone of those conditions is not fulfilled, the captive power plant will lose its status and become a generating plant. Hence, the State Commission doesnot have any powers to relax the provisions of the Electricity Rules-2005.

(b) In the present case, the Appellant could not satisfy one of the conditions of Rule-3 viz consumption of 51% of the annual aggregate electricity generated by its power plant for captive use during the year 2009-10 due to breakdown in its Steel Plant Therefore, the power generation from its power plant shall be treated as if it is a supply of electricity by a generating company as per Rule 3(2) of the Electricity Rules-200S. The State Commission does not have any power to relax the requirement of consumption of not less than 51 % of the electricity generated from the Appellant's power plant for captive use."

6.16. The contention of the petitioner is that during the period 2011-12 there wasacute power shortage and that TANGEDCO was forced to implement frequent load shedding scheduled and unscheduled. From the particulars obtained from the Tuticorin MRT a total of 1218.48 hour power was not supplied by TANGEDCO. Further, peak hour restriction and power holidays declared by TANGEDCO and also frequent announced and unannounced power cuts, and implementation of 20% to 30% and 40% power cut they cannot attain consumption of 51 % of energy generated which could be met only when there is no load shedding. According to them, though their wind mill has generated power they were not allowed to utilize at their end due to frequent load shedding. This has resulted in not consuming the

51% as stipulated in the agreement and act according to them, the stand of the petitioner that due to load shedding the petitioner has not fulfilled 51% consumption, and therefore, the Commission should relax the requirement of consumption of not less than 51% of the electricity generated from thePetitioner's power plant for captive use is not tenable in law, since the State Commission does not have any powers to relax the provisions of the Electricity Rules-2005.Therefore, the petitioner has to pay Cross Subsidy Surcharge for the adjusted units during said Financial years before releasing the payment for surplus wind energy and the reliance on the order of APTEL in the Punjab matter which has not become final by virtue of a Civil Appeal being pending before the Hon'ble Supreme Court.

6.17. The petitioner stated that Cross Subsidy Surcharge stood waived for the said period based on the circular dated. 03.09.2012 which is not acceptable. TANGEDCO has waived the Cross Subsidy Charge in respect of the third party power purchased by the HT consumer. Further, the above circular dated.03.09.2012 has been modified by way of issuance of circular dated.l1.07.2014.Subsequently even that circular dated.l1.07.2014 has also been partially modified vide circular TANGEDCO Memo.No.CFC/REV /DFC/ REV/ AAO.HT /AS.3 /D.No.426 /18, dated.07.07.2018. Hence, the contention of the petitioner that TANGEDCO also waived the levy of Cross Subsidy Surcharge for the period from 27.02.2009 to 10.07.2012 due to implement of Restrictions and Control measures is a misconceived one

6.18. The captive user / third party users were permitted to utilize their energy over and above the quota demand upto their sanctioned demand. Hence, the

contention of the petitioner that they were unable to utilize their energy due to restriction and control measures is not acceptable one.

6.19. The Commission passed an order on 03.11.2011 in M.P.No.21 of 2011 in the matter of captive norms verification in terms of the Electricity Rules-2005, and held that if the two conditions (i) & (ii) above are not fulfilled, the power plant shall not qualify as a captive generating plant By the Petitioner's own admission, they have not consumed the minimum stipulated requirement of 51% of the energy generated. In view of this, the generating plant of the petitioner cannot be treated as a captive generating plant Hence, the petition is dismissed at the admission stage.

6.20. The above order of the Commission is squarely applicable to the present case, since the above order was issued during the period Restriction and Control measures were in force. Therefore, petitioner lost its captive status due to the reason that the petitioner has not fulfilled 51% consumption criteria as per the Electricity Rules, 2005 thereby the petitioner is liable to pay the cross subsidy surcharge. In this connection, it is most to relevant to mention that the Government issued notification waiving levy of Cross Subsidy Surcharge in G.O.(Ms) No.10, Energy Department dated. 27.02.2009, which reads as follows:-

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

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

12. The Hon'ble Appellate Tribunal for Electricity passed judgment on 01.08.2014 in Appeal,No.38 of 2013, the relevant portion which held as follows:

" xxx

44. Summary of our finding:

(i) This Tribunal in a number of judgments had held that cross subsidy surcharge is a compensatory charge and the logic behind the provision for cross subsidy is that but for the open access, the consumer would have taken electric supply form the Distribution Licensee and in the result the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy for certain other categories of consumers, which are subsidized.

(ii) Hon'ble Supreme Court in the matter of SesaSterlite Ltd. has held that Cross Subsidy Surcharge ("CSS") is payable by the consumer when it decides not to take supply from the Distribution Licensee but takes from other sources. CSS is a compensation to the Distribution Licensee in view of the fact that but for the Open Access the consumer would pay tariff applicable for supply which would include

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

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

(iv) If the consumers do not procure power from the market through open access under conditions of power cuts and shut down their plants, no energy will be consumed by them and no charges will be collected by the Distribution Licensee for the period of power cut and hence no cross subsidy would be available from the charges of such subsidising consumers to thesubsidized consumers. Therefore, if during the period of power restriction/power cuts, the consumer procures power from the market to continue its production instead of closing it-down, no financial loss will be caused to the Distribution

Licensee. Hence no compensation in the form of cross subsidy surcharge is leviable.

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

(vi) Imposition of cross subsidy surcharge when the consumers have been forced to procure power through open access due to power restrictions/cuts imposed by the Distribution Licensee is in contravention to objectives and the provisions of the Act, National Electricity Policy and Tariff Policy and the dictum laid down by this Tribunal and Hon'ble Supreme Court which provides that the Cross

Subsidy Surcharge is a compensatory charge. It strikes at the basic objective of the Electricity Act to encourage open access to promote competition.

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

Xxx"

The above judgment is applicable to HT consumers who purchased power through open market, i.e third party user and not for captive users who are liable to pay Cross Subsidy Surcharge due to Captive Status loss. Hence, the above Judgment is not applicable to the present case.

7. Hearing held on 11-02-2020:-

In the hearing held on 11-02-2020, the Counsel for the petitioner is directed to file Written Submission within a week.

8. Findings of the Commission:-

8.1. The petition has been filed to

(a) direct the respondent to make the payment of cash equivalent to the unutilized banked energy without insisting for 51% utilization of the generated units for captive consumption.

(b) direct the Respondent TANGEDCO to pay Rs.8,14,213/- towards the charges for unutilized banked units of 2,80,763 as on 31.3.2012 along with interest at 1% per month from the respective due date to the date of payment.

(c) that consumption of 51% against the generation during the period 2011-2012 could not be achieved only due to the Restriction & Control measure, prolonged unscheduled power cuts and load shedding imposed by the Respondent.

8.2. The Commission is not inclined to accept the stand of the Respondent that the Cross Subsidy Surcharge for the adjusted units during the period in question is required to be collected necessarily before releasing of payment for surplus energy available at the end of the year. We are of the view that the payment for the unutilized energy and collection of Cross Subsidy Surcharge are two different issues which cannot be interlinked as they operate on different spheres. The payment for the unutilized banked energy purely arises out of supply of energy by a generator to a distribution licensee and it is governed by the relevant Tariff Order. However, the collection of Cross Subsidy Surcharge arises out of failure to adhere to the Electricity Rules, 2005 and stands on a different footing. Hence, we find that there is no reason to interlink these two issues. Insofar as the present petition is concerned, the grievance of the petitioner is that the payments have not been made for the unutilized energy and hence the issue cannot travel beyond the same and it has to confine itself to the fact whether payments have been made by the licensee or not. On perusal of the records, we find that no such payment has been made for unutilized banked energy and the same is withheld on account of the

issue of Cross Subsidy Surcharge. We are to observe here that it is not appropriate to withhold the payment due on unutilized banked energy on such ground of non-payment of Cross Subsidy Surcharge. In such circumstances, we order that the payment for the unutilized banked energy in full as prayed for along with interest @ 1% per month to be released within 30 days time. With these observations and directions, the petition is allowed.

ORDER:-

In view of the above findings, the petition is allowed as above.

(K.Venkatasamy)	(Dr.T.Prabhakara Rao)	(M.Chandrasekar)
Member (Legal)	**Member**	**Chairman**