

**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.80 of 2014**

M/s. VTX Industries Limited  
10/400, Palghat Road  
Kuniamuthur  
Coimbatore – 641 008  
Represented by its AVP – Finance & Accounts  
R.Venkatesan

... Petitioner  
(Thiru.N.L. Rajah,  
Senior Advocate for the Petitioner)

Vs

1. TANGEDCO  
Rep by its Chief Engineer / PPP  
144, Anna Salai,  
Chennai – 600 002.
2. The Superintending Engineer  
TANGEDCO  
Tirunelveli EDC  
Tirunelveli.

.... Respondents  
(Thiru.M.Gopinathan  
Standing Counsel for the Respondents)

**Dates of hearing : 30.10.2018; 13.08.2019; 17.09.2019;  
22.10.2019; 26.11.2019; 11.02.2020;  
21.07.2020; 18.08.2020 & 25.08.2020**

**Date of order : 08-12-2020**

## **ORDER**

The D.R.P. No.80 of 2014 came up for final hearing before the Commission on 25.08.2020. The Commission upon perusing the affidavit filed by the petitioner, counter affidavit filed by the respondent and all other connected records and after hearing both parties passes the following:-

## **ORDER**

### **1. Prayer in D.R.P.No.80 of 2014:-**

The Prayer of the Petitioner is to set aside the order No. Lr. No.SE/ TEDC/ TIN/AO/REV/AS/WM/D.NO.5766/2013 dated 26-06-2013 and direct the Respondents not to levy "Cross Subsidy Charges" and other charges as per the Electricity Rules 2005 under Section 9 read with Clause (8) of the Section 2 of the Electricity Act, 2003 for not consuming minimum 51% of the aggregate wind turbine generated by the Petitioner and falling short of requisite 51% by only 2.13% due to heavy load shedding resorted to by the Respondent and further direct the Respondent to pay the petitioner a sum of Rs.53,16,634/- (Rupees fifty three lakhs sixteen thousand and six hundred and thirty four only) raised by petitioner vide invoice No.5 dated 19-6-2013 along with interest of Rs.11,29,785/- at the rate of 15% p.a. from the date of invoice till the date of actual realization of the amount.

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

The Petitioner has filed this Petition seeking directions directing the Respondent not to levy "Cross Subsidy Charges" and other charges as per the Electricity Rules, 2005 under Section 9 read with Clause (8) of the Section 2 of the Act for not consuming minimum 51% of the aggregate wind turbine generated by the

Petitioner and falling short of requisite 51% by only 2.13% since the same has been caused due to heavy load shedding during these periods.

### **3. Contentions of the Petitioner:**

3.1. The Petitioner is both a generator and consumer under the Group Captive System Power where power is generated by a captive power plant and is then consumed by group entities.

3.2. The Petitioner has three VESTAS Wind Turbine Generators of 1650 KVA capacity each situated at Alankinaru, Thirumalapuram, Valliyur, Thirunelveli - 627117, which generate power.

3.3. Out of three VESTAS Wind Turbine Generators of 1650 KVA capacity each, power generated from the two wind turbines generators namely HTSC No.2249 and HTSC No.2300 is used by the one of the manufacturing facilities of the VTX Industries Limited the Petitioner herein situated at Pollachi having HTSC No.7 coming under Udumalpet, EDC. In respect of the wind energy generated by us, on account of the regulations in force 51% have to be consumed by the group entities to avoid levy of cross subsidy surcharge. This is being done under the Group Captive system where surplus power is allowed to be banked.

3.4. During the period pertaining to 1<sup>st</sup> April 2012 to 31<sup>st</sup> March, 2014 the Petitioner herein had generated 37,00,432 units from the two wind turbines namely HTSC No.2249 and HTSC No.2300.

3.5. In respect of the same the Petitioner received the balance banked unit

statement from the Respondent vide Lr. No.SE/UEDC/UDT/DFC/AO/Rev./HTSC.7/ dated 06.2013 stating that 18,33,322 units is the balance banked energy as on 31.03.2013.This meant that the Petitioner has not utilized 18,33,322 units of energy.

3.6. During the period pertaining to 1<sup>st</sup>April 2012 to 31<sup>st</sup> March, 2014 the Petitioner could consume only 18,96,000 units out of 37,00,432 generated by the wind generator.

3.7. After receipt of banked unit statement from the Udumalpet EDC for the period pertaining to 1<sup>st</sup>April 2012 to 31<sup>st</sup>March 2013, the Petitioner raised an invoice No.5 on 19.06.2013 for 18,33,222 units at Rs.2.90 per unit amounting to a sum of Rs.53,16,634/- (Rupees Fifty Three Lakhs Sixteen Thousand Six Hundred and Thirty Four only) .This amount has not yet been paid by the Respondent.

3.8. The 18,96,000 units consumed amounts to only 48.87% and unfortunately falls short of minimum 51% wind turbine power to be consumed to avoid “Cross Subsidy Charges” by 2.13% as per the Electricity Rules 2005 under Section 9 read with Clause (8) of the Section 2of the Electricity Act, 2003 . The Petitioner stat&that-4hey could not utilize the minimum required 51% due to heavy load shedding during this period and fell short of reaching the minimum requirement by 2.13%.Therefore the failure to consume is on account of factor sole attributable to the Respondent.

3.9. Meanwhile the Superintending Engineer, TirunelveliEDC, Tirunelveli the Second Respondent herein vide his letter bearing No.Lr.SE/TEDC/TIN/AO/REV/AS/WM/D.No.5766/2013 dated 26.06.2013 has informed the Superintending Engineer, Udumalaipet EDC, Udumalaipettai to treat the energy adjusted from the wind generation as a third party sale as per the Electricity Rules 2005 under Section 9 read with Clause (8) of the Section 2 of the Act and levy Cross subsidy surcharge applicable to that category in addition to transmission charges,wheeling charges, scheduling and system operating charges, reactivepower charges etc.)

3.10. The Supply feeders to the Petitioners factory wereforced to shut off due to load shedding for the following number of hours even though both the wind turbines were generating power. Due to which the Petitioner was unable to consume the minimum required 51% of power generated by the Wind turbines to avoid "Cross Subsidy Charges" for no fault of theirs.

MONTHS	Number of interruptions	Hours	Minutes
April -2012	138	228	15
May-2012	63	79	40
June -2012	88	106	05
July-2012	57	65	02
August-2012	101	137	25

September-2012	128	209	30
October-2012	152	231	40
November-2012	175	294	50
December-2012	156	253	35
January-2013	96	143	40
February-2013	91	162	25
March -2013	148	214	35
<b>Total power failure hours in the year 2012-2013</b>	<b>Number of interruptions - 1393</b>	<b>Hours- 2126</b>	<b>Minutes – 42</b>

3.11. During 1<sup>st</sup>April 2012 to 31<sup>st</sup> March 2013 there has been total of 1393 interruptions of power supply due to loadshedding and the power was cut for a total of 2126 hours and 42 minutes which in turn has badly affected the Petitioner and the Petitioner could utilize only 48.87% of the power generated out of the minimum 51% required to avoid "Cross Subsidy Charges" and thus fell short by 2.13%

3.12. During 1<sup>st</sup>April 2012 to 31<sup>st</sup>March 2013 the Petitioner had not purchased any outside power through Intra State Open Access or through Power exchange, therefore there could not be any question of imposition of cross subsidy surcharge.

3.13. The Petitioner completely relied upon the power supplied by the Respondent and the power generated by the wind turbine of the Petitioner only and had not

purchased any outside power hence the Petitioner should not be penalized. The Respondent cannot penalize the Petitioner for their own mistake of heavy untimely load shedding and try to make further gains by imposing cross subsidy charges and other charges on the Petitioner.

#### **4. Contentions of the Respondents:-**

4.1. The averments made in the Petition filed by the Petitioner herein are denied as false and baseless except those that are specifically admitted.

4.2. The Electricity Act, 2003 define 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"

4.3. The Cross Subsidy Surcharge is the payment of the tariff charges for availing open access by the subsidizing Consumer of 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. The National Electricity Policy reads as follows:

“PART VI

DISTRIBUTION OF ELECTRICITY

PROVISIONS WITH RESPECT TO DISTRIBUTION LICENSEES

4.2 Duties of distribution licensees and open access:

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

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

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

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

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

*(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee*



*other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access*

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

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

#### 5.4 DISTRIBUTION

XXXXX

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

*5.4.5 The Electricity Act 2003 enables competing generating companies and trading licensees, besides the area distribution licensees, to sell electricity to consumers when open access in distribution is introduced by the State Electricity Regulatory Commissions. As required by the Act, the SERCs shall notify regulations by June 2005 that would enable open access to distribution networks in terms of sub-section 2 of section 42 which stipulates that such open access would be allowed, not later than five years from 27th January 2004 to consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one mega watt. Section 49 of the Act provides that such*

*consumers who have been allowed open access under section 42 may enter into agreement with any person for supply of electricity on such terms and conditions, including tariff, as may be agreed upon by them. While making regulations for open access in distribution, the SERC5 will also determine wheeling charges and cross-subsidy surcharge as required under section 42 of the Act.*

## ***5.8 FINANCING POWER SECTOR PROGRAMMES INCLUDING PRIVATE SECTOR PARTICIPATION***

***XXXXX***

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

Further the State Commission had issued Open Access Regulation 2014 which

reads as follows:

“CHAPTER 5  
OPEN ACCESS CHARGES

20. Transmission Charges. -

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

*xxxx*

21. Scheduling and system operation charges. -

*Scheduling and system operation charges shall be payable by the Open Access customers at the following rates:*

*xxxx*

22. Wheeling Charges

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

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

*(c) In case intra state transmission system or distribution system is used by an open access customer in addition to inter-state transmission system, transmission charges and wheeling charges as fixed and approved by the Commission shall be payable for use of intra-state system in addition to payment of transmission charges for inter-state transmission.*

2.3 Cross subsidy surcharge:

*(1) If open access facility is availed of by subsidizing consumer of a Distribution Licensee, then such consumer, in addition to transmission and/or wheeling charges, shall pay cross subsidy*

*surcharge as determined by the Commission. Cross subsidy surcharge determined on Per Unit basis shall be payable, on monthly basis, by the open access customers based on the actual energy drawn during the month through open access. The amount of surcharge shall be paid to the distribution licensee of the area of supply from whom the consumer was availing supply before seeking open access.”*

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

4.5. The Central Government issued rules for requirements of Captive Generating Plant and the same is called the Electricity Rules -2005 which is as follows:

**"3. Requirements of Captive Generating Plant:**

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

(a) in case of a power plant -

- (i) not less than twenty six percent of the ownership is held by the captive user(s), and
- (ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is

consumed for the captive use:

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the 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 conditionscontained 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 maintained and in case the minimum percentage of captive is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company.

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

- a. "Annual Basis" shall be determined based on a financial year;
- b. "Captive User" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;
- c. "Ownership" in relation to a generating station or power plant, set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;
- d. "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity."

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

4.7. 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-----“.

4.8. In accordance with above, the wind energy generator is eligible encashment at rate of 75% of normal purchase rate for the unutilized portion of captive energy banked. Further, it is most relevant to mention the subsequently, the Commission issued Tariff order.No.1 of 2009 date: 20.03.2009, Tariff Order.No.6 of 2012 dated. 31.07.2012 and Tariff Order.No.3 dated 31-03-2016 in connection with Wind energy, wherein it is stated 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 measure the Generator is eligible at 100% of the normal purchase rate.

4.9. 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”

4.10. 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 from the levy of cross subsidy surcharge for such captive transactions. Similarly, if the twin rules 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 -- consumption by the User(s) will attract levy of Cross Subsidy Surcharge. Consequently, TANGEDCO will be entitled to recover such amount of Cross subsidy Surcharge. Therefore, TANGEDCO

has to verify CGP status of the Wind energy generator whether they had fulfilled the twin rules of the electricity Rules -2005 before the payment of encashment of the unutilized banked after the said captive consumption.

4.11. TANGEDCO issued clarification vide letter dated. 30.05.2015 in the matter of Encashment of unutilized energy of Wind energy generator namely M/s. Eveready Spinning Mills (P) Limited, Theni Electricity Distribution Circle encashment of Tariff rate at 75% / 100% due to enforcement of R&C measures, the relevant portion of the clarification is as below:

“xxxx

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

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

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

3.3. The regulation 8.2.14 of the Order No.6 of 201 dt.31.07.2012

(Comprehensive Tariff Order on Wind energy) is as follows:

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

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

Month	Power cut Details	
	No. of Times	Hours
Apr 2012	[Supply effected from 20.04.2012]	
May 2012	66	281.10
June 2012	<b>75</b>	115.30
- July 2012		59.05
Aug 2012	94	148.00
Sep 2012	135	201.05
Oct 2012	119	188.05
Nov 2012	14	3.35
Dec 2012	6	9.40
Jan 2013	14	18.55
Feb 2013	27	49.00
Mar 2013	22	40.15
<b>Total</b>	<b>621.00</b>	<b>1113.00</b>

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 TANGED CO has permitted the captive users to use their captive power over and above the quota demand up to the sanctioned demand from 07.09.2010.

3.5. Under the said factual position, it may be concluded that the Restrictions and Control measures may not restrict the captive users to consume their wind captive power. Therefore, the above WEG is eligible for encashing the unutilized energy at the end of the banking period only at 75% of the relevant tariff during the financial year 2012-13. Further, in this regard, it is relevant to mention that the captive user of the said WEG has obtained the dedicated feeder on 17.10.2012. On obtaining the dedicated feeder, the captive user run their industry without supply interruption on consumption of captive wind power. Therefore, the said WEG is eligible for encashing the unutilized energy at the end of the banking period at 75% of the relevant tariff from the financial year 2013-14 onwards in accordance with the Commission order dated 07.09.2010 and the contention of the BOAS audit and A. G Audit is correct.

3.6. At this juncture, it is stated that the dedicated feeder captive user of the WEG is eligible for encashing the unutilized energy at the end of the banking period only at 75% of the relevant tariff from the respective financial year, since Restriction and Control measures does not restrict the captive user to consume their captive power in any manner. Similarly, the common feeder captive user of the WEG is eligible

for encashing the unutilized energy at the end of the banking period at full value of the relevant tariff for the respective financial year subject to the condition that a supply interruption/power cut in respect of the captive user is 20% and more in banking period cycle when prevailing R&C measures. On the other hand, a supply Interruption is below 20%in respect of the mixed feeder captive user, the mixed feeder captive user of the WEG is eligible encashing the unutilized energy at the end of the banking period only at of the relevant tariff when prevailing R&C measures.

4.12. In accordance with the above circular, a supply interruption within 20% in respect of the mixed fee where captive user is connected, then such the mixed feeder captive user a WEG is eligible for encashing the unutilized energy at the end of banking period at 75% of the relevant tariff during R&C period. The case hand, the petitioner admitted that the power cut hours is 2126 i.e., 24% which is beyond 20%.

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

4.14. In the regulation 38 of the Distribution Code and the clause 4 of chapter 7 of the Grid Code is extracted below:

"38. RESTRICTIONS ON USE OF ELECTRICITY: [Tamil Nadu Electricity Distribution Code]

The consumer shall curtail, stagger, restrict, regulate or altogether cease to use electricity when so directed by the Licensee, if the power position or any other emergency in the Licensee's power system or as per the directives of SLD/ SSLDC warrants such a course of action. The Licensee shall not be responsible for any loss or inconvenience caused to the consumer as a result of such

curtailment, staggering, restriction, regulation or cessation of use of electricity. Notwithstanding anything contained in- any agreement/ undertaking executed by a consumer with the Licensee or in the tariff applicable to him, the consumer shall restrict the use of electricity in terms of his/her maximum demand and/ or energy consumption in the manner and for the period as may be specified in any order that may be made by the Licensee on the instructions of State Government or the Commission.

*(4) Demand Control [Grids Code]*

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

- i. Power drawing entities shall endeavor to restrict their net drawal from the Grid to within their respective drawalschedules whenever the system frequency is below 49.5 Hz. When the frequency falls below 49.0 Hz., requisite load shedding (manual) shall be carried out to curtail the 'over drawal. Such load shedding shall be pre planned for each level of under frequency.
- ii. Further, in case of certain contingencies and / or threat to system security, the SLDC may direct the SSLDCs and other sub stations to decrease its drawal by a certain quantum. Such directions shall immediately be acted upon.
- iii. Each distribution licensee shall make arrangements that will enable manual demand disconnection to take place, as instructed by the SLDC / SSLDC, under normal and / or contingent conditions. The measures taken to reduce the entities' drawal from the Grid shall not be withdrawn as long as the frequency / voltage remains at a low level, unless specifically permitted by the SLDC / SSLDC”.

4.15. On a conjoint reading of regulation 38 of Distribution Code & clause 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 discontinue the sub-load dispatch centre, and other substation to decrease its draw 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.

4.16. In the case on hand, the petitioner has HT service connection vide HT.SC.No.7, pertaining to the Udumalpet EDC, the said service connection has captively consumed the energy generated from their own wind mill HT.SC.No.2249, HT.SC.No.2300 at Tirunelveli EDC. It has been admitted by the petitioner that during the financial year 2012-13, the petitioner has not fulfilled consumption criteria which is one of the twin Rule 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 its supply of electricity by a generating company. In such cases disqualification, Cross Subsidy Surcharge has to be levied for the entire adjusted units/consumed by the Users treating such consumption as though was supplied by the respective Generating Plant, since proviso 2 of Section of the Electricity Act, 2003 clearly states that surcharge is not to be levied or in case of Captive Consumption. As per Rule 3(2) of the Electricity Rules, it obligation of the captive users to ensure that the consumption by the captive users at the percentages mentioned in Rule 3(1) (a) and (b) are maintained before seeking the payment of encashment of

the unutilized banked energy after captive consumption. Hence, the petition is neither maintainable in law nor on facts.

4.17. As regards the averments contained in the petition are concerned, it is respectfully submitted that the petitioner has not fulfilled the consumption criteria. Therefore, the petitioner has lost its captive status thereby the captive user of the petitioner is liable to pay Cross .Subsidy Surcharge for the adjusted units during the said Financial Year. In this regard, the relevant portions of the order of the Hon'ble Appeal No.33 of 2012 are as follows:

"30. To Sum Up:

(a) Rule 3 of Electricity Rules-2005 specifically prescribes that two conditions are to be satisfied by the power plant to be qualified as a captive power plant. If any one 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 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-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."

4.18. In view of the above order, the contention of the petition that during the



period 2012-13 there was acute power shortage and the TANGEDCO was forced to implement frequent load shedding scheduled and unscheduled, and during 1st April 2012 to 31<sup>st</sup> March 2013 there has been total of 1393 interruptions of power supply due to load shedding and the power was cut for a total of 2126 hours and 42 minutes which in turn has badly affected the petitioner and the petitioner utilize only 48.87% of the power generated out of the minimum 51% required to avoid Cross Subsidy Surcharges and thus fell short by 2.13%, is not a sustainable one. Further, as per the Hon'ble APTEL Judgment in Appeal No.33 of 2012, the Commission cannot relax the requirement of consumption of not less than 51% of the electricity generated from the Petitioner's power plant for captive use which is not permissible under law, since the State Commission does not have any powers to relax the provisions of the Electricity Rules-2005. Therefore, the captive user of the petitioner has to pay the Cross Subsidy Surcharge for the adjusted Units during said Financial years before releasing the payment for surplus wind energy.

4.19. In view of the facts and circumstances of the case on hand and position of law as stated above, the petitioner has no prima facie case to further pursue the above Petition. Therefore, the petitioner is not entitled any relief as prayed for in the above petition. The balance of convenience is clearly in favour of the respondents herein. Hence, the above petition is liable to be dismissed. By dismissing the same, no prejudice will be caused to the petitioner as the levy of Cross Subsidy Surcharge is legitimate one in accordance with Section 42 of the Electricity Act, 2003.

## **5. Findings of the Commission:**

5.1 The Petitioner prayed to set aside the order No. Lr. No.SE/ TEDC/ TIN/AO/REV//AS/WM/D.NO.5766/2013 dated 26-06-2013 and direct the Respondents not to levy "Cross Subsidy Charges" and other charges as per the Electricity Rules 2005 under Section 9 read with Clause (8) of the Section 2 of the Electricity Act, 2003 for not consuming minimum 51% of the aggregate wind turbine generated by the Petitioner and falling short of requisite 51% by only 2.13% due to heavy load shedding resorted to by the Respondent and further direct the Respondent to pay the petitioner a sum of Rs.53,16,634/- (Rupees fifty three lakhs sixteen thousand and six hundred and thirty four only) raised by petitioner vide invoice No.5 dated 19-6-2013 along with interest of Rs.11,29,785/- at the rate of 15% p.a. from the date of invoice till the date of actual realization of the amount.

5.2. The Counter affidavit has been filed by the 1<sup>st</sup> Respondent on 26.11.2019. In the- hearing held on 11-02-2020, the Petitioner was directed to file the reply on the- counter filed by the Respondent. However, in the hearing held on But as stated by, the counsel for the petitioner has submitted that the petitioner company has been closed and since there is no instruction from the client,orders may be passed based on available records. Further, in the hearing held on 25-08-2020, the advocate appearing for the petitioner has submitted that the company is under liquidation and no instruction has been received from his client. Moreover no one has impleaded on the liquidator side to take up the matter further. In view of this, pleadings were not completed before this forum.

5.3. The Registry is directed to serve a copy of this order to the official liquidator of the petitioner company through the counsel-on-record for the petitioner. In view of the above, the petition is dismissed for non-prosecution by the petitioner, with a liberty to the liquidator to file a fresh petition if he so desire.

Ordered accordingly.

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

(Sd.....)  
**(Dr.T.PrabhakaraRao)**  
Member

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

//True Copy //

(Sd.....)  
**Secretary**  
**Tamil Nadu Electricity**  
**Regulatory Commission**