TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 13th Day of August 2024

PRESENT:

Thiru M.Chandrasekar .... Chairman

Thiru K.Venkatesan .... Member

and

Thiru B.Mohan .... Member (Legal)

D.R.P. No. 18 of 2023

M/s. Sri Gomathy Mills Private Limited,
Main Road, Viravanallur,
Tirunelveli – 627426 … Petitioner

Thiru.S.P.Parthasarathy,
Advocate from the Petitioner

Vs.

1. The Chief Engineer-NCES,
   Tamil Nadu Generation and Distribution
   Corporation Ltd, (TANGEDCO)
   2nd Floor, 144, Anna Salai,
   Chennai – 600002.

2. Chief Financial Controller/Revenue,
   Tamil Nadu Generation and Distribution
   Corporation Ltd, (TANGEDCO)
   2nd Floor, 144, Anna Salai,
   Chennai – 600002.

3. The Superintending Engineer,
   TANGEDCO,
   Tirunelveli Electricity Distribution Circle,
   Tirunelveli.

4. The Superintending Engineer,
   TANGEDCO,
   Theni Electricity Distribution Circle/North,
   Theni.

5. M/s.Gomathy Powers India Private Limited,
9, Agasthiar East Street,
Ambasamudram,
Tirunelveli – 627 401. …. Respondents

Thiru.N.Kumanan and
Thiru.A.P.Venkatachalapathy,
Standing Counsel for TANGEDCO

This Dispute Resolution Petition stands preferred by the Petitioner M/s.Sri Gomathy Mills Private Limited., with a prayer to quash the impugned demand notice dated 10.03.2023 for Rs.1,03,99,280/- and the BOAD Audit Slip No.28 dated 01.08.2019 as illegal, arbitrary, without authority and contrary to the Wind Tariff Orders issued by this Hon'ble Commission and pass appropriate orders in the interest of Justice.

This matter coming up for final hearing before the Commission on 25-07-2024 in the presence of Advocates from Thiru.S.P.Parthasarathy, Advocate for the Petitioner and Thiru.Richardson Wilson, Senior Advocate assisted by the Standing Counsel for the Respondents Thiru.N.Kumanan and Thiru.A.P.Venkatachalapathy and upon hearing the submission made by the counsel for the petitioner and the respondents, on perusal of the material records and relevant provisions of law and having stood up for consideration till this date, this Commission passes the following

ORDER

1. Contention of the petitioner :-

1.1. The 5th Respondent M/s.Sri Gomathy Powers India P Ltd., is an SPV owning 2 WEG Nos.T23 & T27 coming under the 4th Respondent, and it is a petitioner's Group concern. The said WEGs are operating under Group Captive Scheme as provided under

the Electricity Act 2003 and the Open Access Regulations framed by this Hon'ble Commission from time to time.

1.2. The Petitioner has filed this DRP seeking a direction to the Respondents to give adjustment of the banked energy available in the Group Captive Generator's common account, maintained in the generation end EDC, against the consumption of its captive users upto 31st March of the respective years without any restrictions and to treat the unutilized banked energy available after 31st March of the respective year alone for encashment at 75% of the relevant tariff rate as per the Wind Tariff Orders issued by the Commission and pass, such other or further orders, as deemed fit, in the circumstances stated above and accordingly, render justice.

1.3. With respect to wind energy generators, according to various Wind Tariff Orders issued by the Regulatory Commission and respective Energy Wheeling Agreements, if wind energy is not utilized fully during a month, the balance of it, will be transferred to a banking account on payment of banking charges by units and accordingly, during the lean seasons of wind energy, such banked energy is allowed to be redrawn from the banking account for adjustment against the consumption of the captive consumers. Further the unutilized banked wind energy at the end of the financial year i.e. 31st March, is entitled for encashment at the rate of 75% of the relevant feed-in tariff rate as sale to the Respondents. In the matter of Group Captive Generators where the generators are supplying power to Group Captive Users, such banking arrangement is regulated by way of common banking account in the generation end and the allotment from the common

banking account will be done by the Generator based on the availability and demand among the captive users.

1.4. While so, due to financial burden and the continuing financial impact, the 5th Respondent had sold one of the Wind Mill bearing WEG.HT.SC.No.T-27 on 23.09.2017 to M/s.Senthil Hatcheries. Till September/2017 the energy generated in the petitioner's WEG Nos.T-23 & T-27 was getting captive adjusted in Petitioner's HTSC No.4 coming under the 3rd Respondent and surplus energy after adjustment was kept in the common banking account of WEG Nos.T-23 & T-27. In this regard as on 30.11.2017 a quantum of tune of 32,14,011units was lying in the common banking account of the 5th Respondent bearing WEG Nos.T-23 & T-27 which was also confirmed by the 3rd Respondent vide his letter dated 23.12.2017. Thus, as on 23.12.2017 the Petitioner's Group Concern i.e., 5th Respondent had 32,14,011units in common banking account of WEG No.T-23 & T-27 and the units in the banking account are eligible for adjustment against the industrial consumption of its captive users i.e., in the Petitioner's HTSC No.4 up to 31stMarch 2018 for the financial year 2017-18. The unutilized banked energy after 31.03.2018 will be encashed at 75% of the relevant tariff rate.

1.5. The banked units of 32,14,011 units in the Petitioner's Group Concern i.e., the 5th Respondent were allotted to the Petitioner's HTSC No.4 from 11/2017 to 03/2018. The 3rd Respondent has allowed the adjustments after collecting the necessary OA charges including banking charges in kind and also raised the CC bills for the months of 11/2017 to 03/2018. The Petitioner has also paid the same without any default or difficulty.

1.6. While the facts being so, to the sudden shock and surprise the 3rd Respondent issued a show cause notice dated 20.11.2019 for a sum of Rs.1,40,36,007/- towards alleged ineligible adjustment of banking units for the back period from 11/2017 to 03/2018 on the ground that from 11/2017 the Petitioner is not eligible for adjusting the energy which was already banked in the common banking account of the Petitioner's group concern i.e., the 5th Respondent which is illegal, arbitrary, without authority of law, against the orders of TNERC and therefore, liable to be set aside.

1.7. On perusal of the show cause notice dated 20.11.2019 and the working sheets attached to it, it could be seen that the 3rd Respondent has relied on certain Audit Slips and based on the same, the CC bills for the period 11/2017 to 03/2018 has been reworked. The Tirunelveli EDC has raised CC bills for the period 11/2017 to 03/2018 and petitioner paid the same without any default. From the working sheets attached to the show cause notice dated 20.11.2019 it could be clearly seen that the present demand has been raised based on some BOAB Audit Slips. On perusal of the show cause notice it could be seen the 3rd Respondent has deliberately not attached or served the copy of the audit slips which is referred to in show cause notice with respect to the period 11/2017 to 03/2018. On further perusal of the show cause notice, it could be seen, that audit slips have been, only internally circulated between the officers of TANGEDECO and none of the internal communications/audit slips referred in the show cause notice was communicated to the Petitioner.

1.8. Being aggrieved by the show cause notice dated 20.11.2019, the petitioner raised objections vide its letter dated 19.12.2019 through registered post. The petitioner

approached the 3rd Respondent in person to explain that the 3rd Respondent has not provided the copy of the audit slip nor provided any opportunity to the petitioner before issuing the demand notice threatening to include the same in the CC bills. The Petitioner vide RTI Application dated 28.12.2019 sought for a copy of the audit slip which is referred in the show cause notice dated 20.11.2019. But the 3rd Respondent vide reply dated 30.01.2020 has refused to give the copy of the audit objection which is illegal, arbitrary and against the principles of natural justice. Subsequently, the Hon'ble High Court in W.P.(MD).No.3039 of 2023 dated 16.02.2023 was pleased to give directions to the respondents to give a copy of the audit objection based on which the demand dated 20.11.2019 has been raised. Based on the Order of the Hon'ble Court the copy of the audit objection No.23 dated 01.08.2019 and the impugned clarification issued by the 2nd Respondent dated 21.12.02022 were provided to the Petitioner.

1.9. The 2nd Respondent's Clarification memo dated 21.12.2022 and the consequential demand dated 10.03.2023 of the 3rd Respondent towards alleged short levy of energy charges for the period 11/2017 to 03/2018 is against the orders of the Commission in D.R.P.No.8 of 2009 dated 26.08.2009 and the Wind Tariff Order No.3 of 2016 dated 31.03.2016. The stand of TANGEDCO in the impugned demand notices that from 11/2017 the petitioner is not eligible for adjusting the energy which was already wheeled & banked in the WEG NO.T23 & T27 before 11/2017 is illegal, arbitrary, without authority of law, against the Tariff Orders issued by the 1st Respondent and therefore, liable to be set aside.

1.10. The clarification issued by the 2nd Respondent is according to his own whims and fancies and not supported by any provisions of law. The 2nd Respondent has attempted to go beyond the statutory powers and functions as provided Electricity act 2003 by providing his own interpretation without the authority of law and therefore, it is arbitrary and amounts to administrative excess and needs to be set aside totally.

1.11. In pursuance of the impugned Audit Slip no.28 dated 01.08.2019 and the consequential clarification letter dated 21.12.2022 the respondents have relied on certain circulars dated 19.07.2016 & 31.03.2017 issued by the 1st Respondent. None of the above circulars in the matter of adjustment of wind energy has been approved by the Commission and there is no statutory backing to such circulars till date. Hence the circulars issued by the 1st and 2nd Respondent, in the guise of implementing the Traiff Orders issued this Hon'ble Commission, is without authority of law, without jurisdiction and liable to be setaside.

1.12. The Commission in various orders have held that TANGEDCO cannot issue any unilateral circulars without the approval of TNERC. Some of the orders are as follows:-

a) M.P.No.42/2008 dated 28.11.2008
b) Suo-Motu Proceedings No.1 of 2009
c) M.P.No.10 of 2012 dated 28.09.2012
d) D.R.P.No.19 of 2013 dated19.01.2015
e) S.M.P.No. 1 of 2014 dated 31.03.2016

From all the above narrated facts, the circular memos issued by the TANGEDCO, is clearly illegal, arbitrary and without the approval of the TNERC. Hence the demand raised based on such illegal circulars is illegal, arbitrary and liable to be dropped.

1.13. The Commission in D.R.P.No.8 of 2008 dated 26.08.2009 has held as follows:-

> *"5.5 Wheeling is a facility available to any generator. In this particular case, the captive generator, namely the petitioner, initially executed an agreement with the TNEB for wheeling the wind energy from his six generating service connections to consumption service connection 1594. He later changed the consumption service connection to 1803. The agreement for banking is between the captive generator and the distribution licensee. In this particular case, the petitioner is a captive generator and TNEB is the distribution licensee. The petitioner is entitled to bank this surplus energy and consume it under any captive service connection or encash it at the end of the financial year as per the supplement agreement executed with TNEB during August 2007 and September 2007 read with Order No.3 dated 15.05.2006 of the Commission"*

In the above order the Commission has held that wheeling is a facility available to any captive generator and the agreement for banking is between the captive generator and the Distribution Licensee. It has been further held that the captive generator is entitled to bank his surplus energy and consume it under any captive service connection or encash it at the end of the financial year as per the Tariff Orders of the Commission. TANGEDCO was further directed to transfer the balance unutilized units available in one HT Service to other HT Service on the account of change in utilization point. Hence impugned demand noticed stating that the petitioner is not eligible to adjust the banked energy as on 11/2017 in WEG NO.T27 is illegal, arbitrary, without authority of law, against the Orders issued by the Commission in DRP No.8 of 2009 and hence liable to be set aside.

1.14. The Petitioner's group concern i.e., the 5th Respondent has not sold his company or all the WEGs owned by it under Theni EDC or came out of the existing agreement with TANGEDCO entirely. Also the Generator has paid all the Open Access charges month wise to TANGEDCO for their both WEGs' capacity and it has sold one no of WEG out of its two WEGs and the generated energy as on that date is due only to the Company, not to the particular WEG.HT.SC. If there is any pending arrear or arising from the WEG it would also be claimed from that Company, not from the WEG.HT.SC. Hence the owner of the banked units available as on WEG the date of sale of is Gomathy Powers India Pvt. Ltd and hence it cannot be denied the adjustment with its existing captive consumers.

1.15. The 1stRespondent CE/NCES vide circular memo dated 25.06.2015, and in line with the Wind Tariff Orders issued by the Commission, has directed that the banking account has to be maintained at the generation end EDC and if a captive user go out of the wheeling agreement in middle of the year due to name transfer/change in utility, the unadjusted banked units to its his credit is to returned to the generating end EDC and added to the existing banking account. It has been further instructed that as like current month generation the banked units as also should be allocated to the consumers as per to the request of the generator and unutilized banked energy as the end of the financial year will be encashed at the generating end. However, the respondent have not deliberately considered the Circular dated 25.06.2015.

1.16. The method of calculation in the impugned demand notice dated 10.03.2023 by the 3rd Respondent is contrary to the orders issued by the Commission in M.P.No.14 of 2017 and circular memo issued by the 1st Respondent dated 01.09.2012. The 1st Respondent in its circular dated 01.09.2012 has stated as follows:-

(xiii) Adjustment Priority:-

(b)if a consumer wheeled energy for adjustment from more than one windmill, which is commissioned in different dates, the priority for first adjustment shall be given to the wind mill commissioned in later date. The energy generated from the windmill commissioned in earlier date shall be adjusted in last.

Above adjustment priority in memo dated 01.09.2012 was upheld by the Commission in M.P.No.14 of 2017 dated 30.03.2021. From the above it clear that the if a captive consumer wheels energy for adjustment from more than one windmill, commissioned on different dates attracting different tariffs, the priority of adjustment shall be from the windmill commissioned in later date and the energy generated from the wind mill commissioned in earlier date shall be adjusted last. In the present case the details of the WEG Nos.T23 & T27 are as follows:-

WEG No.	Commissioning date
T27	31.01.2011
T23	30.09.2010

Hence as per the the orders issued by the Commission in M.P.No.14 of 2017 and circular memo issued by the 1st Respondent dated 01.09.2012, the energy generated

from WEG No.T27 commissioned on 31.01.2011 has to be adjusted first and the energy generated from WEG No.T23 has to be adjusted next. However in the 3rd Respondent in the working sheets attached to the impugned demand notice dated 10.03.2023 has illegally adjusted the energy generated from WEG No.T23 first and the energy generated from WEG No.T27 next which has forced the energy generated in T27 to be taken to banking account and consequently treated as not eligible for adjustment after 09/2017. Hence the impugned demand notice has to set aside on this ground alone for non-application of mind and as being contrary to the orders passed by the Commission in M.P.No.14 of 2017 and circular memo issued by the 1st Respondent dated 01.09.2012.

1.17. The 3rd Respondent in the impugned notice has stated that due to the allotment and consequential adjustment of the banked energy in WEG No.T27 against the consumption of the Petitioner's HTSC No.4 from 09/2017 to 03/2018, the TANGEDCO is put to revenue loss. Such stand of the Respondent is arbitrary and illegal. For effecting the adjustment of the banked energy from the common banking account from 09/2017 to 03/2018, the Respondent has collected the Open Access Charges including banking charges. For effecting adjustment of the energy from common banking account also the Petitioner has paid the necessary charges and therefore, the Respondent, TANGEDCO is not put to any loss as alleged.

1.18. The Respondents are trying to achieve indirectly what he cannot achieve directly. The Respondents are attempting to subvert the Orders and circulars issued by the 2nd

Respondent on the order of the 1st Respondent CME/TANGEDCO. Such conduct on the part of the 4thRespondent is contumacious, arbitrary and unreasonable.

1.19. The 1st Respondent being an instrumentality of the 'State' and the Respondents 2 to 4 being officers under the 1st Respondent cannot behave in such unconstitutional and arbitrary manner. The State and its officers are required to perform their duties in accordance with the rules and regulations and cannot depart from the same in such manner and they cannot misrepresent or attempt to mislead the Hon'ble Court in any manner.

1.20. The Petitioner has made out a prime facie case and the balance of convenience is in favour of the Petitioner. The 3rdRespondent has included the impugned amount in the Petitioner's CC bill dated 08.09.2023 and the Petitioner is put to threat of disconnection if the said amount is not paid on or before 29.09.2023. Therefore, unless the interim orders are passed, the Respondent would disconnect the service connection. On the other hand, no prejudice would be caused to the Respondents by the grant of such interim orders.

2. Counter affidavit filed by the second respondent :-

2.1. The above petition is neither maintainable in law nor on facts. The petitioner, being a consumer of electricity, if aggrieved by the method of adjustment of wind energy, should have availed the alternative remedy of filing petition before the Consumer Grievance Redressal Forum [CGRF] and TN Electricity Ombudsman established and

functioning under section 42 of the Electricity Act, 2003, as held by the Hon'ble Supreme Court in ***Maharastra State Electricity Distribution Co, Ltd-vs-Lloyds Steel Industries Ltd reported in AIR 2008 SC1402***. In the said case, the Hon'ble Supreme Court has held that State Commissions do not have the power to decide disputes between consumers and distribution licensees. Further, the impugned demand was issued based on the Tariff Order and regulation in force issued by the Commission. Therefore, the petition is liable to be dismissed in limine.

2.2. Without prejudice to the above contention the case it is submitted as follows:

2.3. The petitioner has HT service connection in Tirunelveli Electricity Distribution Circle (EDC) in HT.SC.No.04. The 5th respondent has two Wind Energy Generators (WEGs) in the Theni EDC bearing Nos.WES-RE1-T 23 and WES-RE1-T 27. Both WEGs executed an Energy Wheeling Agreement on 25.08.2014 to wheel the wind energy to M/s. Sri Gomathi Mills P Ltd, HT.SC.No.4 and other 12 captive users. While so, one M/s. Senthil Hatcheries purchased the wind energy generator WES-RE1-T 27, pertaining to Theni EDC of 5th Respondent and executed fresh Energy Wheeling Agreement on 12.07.2017 to the wheel the energy to its HT.SC.No.282 and HT.SC.NO.303, coming under Tiruppur EDC. Pursuant to the above, and based on the request of the 5th respondent, the unutilized banked energy of 32,14,011 units available at the end of Nov 2017 in the Tirunelveli EDC in respect of the wind group (T23 and T27) were returned back to the Theni EDC vide Lr.No.SE/TEDC/TIN/AO/REV /AAO /AS /HT /F.WEG /D.768 /17 dt.23.12.2017 and the said unutilized banked energy was allotted to Group Captive

consumers under Tirunelveli EDC and other EDCs for the period from 11/ 2017 to 03/2018.

2.4. M/s. Senthil Hatcheries had purchased one out of two wind energy generator from the 5th respondent viz. WES-RE1-T 27, pertaining to Theni EDC as early as in July 2017.Hence, the banked units lying in said wind energy generator is not eligible for re-allotment to the captive users of wind energy generator of WES-RE1-T 23, even though the captive users of both WEGs are same. In this regard, the banked units of 32,14,011 which was remaining as on 11/2017, pertains to the both the WEGs (T23 and T27) and the same was affirmed by the Superintending Engineer/Tirunelveli EDC/Tirunelveli in this letter dated 23.12.2017. Hence, the banked units relating to WES-RE1-T 23 and WES-RE1-T 27 had to be ascertained separately from 12.07.2017 onwards. From 12.07.2017, only the banked units relating to WES-RE1-T 23 are eligible for re-allotment. It is needless to say that banked units relating to WES-RE1-T 27 are not eligible for re-allotment due to change in ownership since M/s. Senthil Hatcheries had purchased the wind energy generator WES-RE1-T 27 and executed a new Energy Wheeling Agreement on 12.07.2017 to the wheel the energy to its HT.SC.No.282 and HT.SC.NO.303, coming under Tiruppur EDC. While doing so, the previous EWA dated 25.08.2014 entered between the petitioner and WEG-T27 of 5th Respondent stood terminated. Therefore, the petitioner has lost the right to avail open access for wheeling and adjustment of banked energy under Electricity Act, 2003 from the WEG T27. Therefore, the impugned demand notice is in order.

a) The relevant Section 49 of the Electricity Act, 2003 is reproduced below:

Section 49. (Agreement with respect to supply or purchase of electricity):

"Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers, notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them."

The Commission has allowed open access to certain consumers under section 42, and such consumers, may enter into an agreement with any person for supply or purchase of electricity and therefore, the Energy Wheeling Agreement [EWA] is necessary in the instant the case. But the petitioner herein has no EWA and therefore has lost the right to avail open access for wheeling and adjustment of banked energy under Electricity Act, 2003 from the WEG T27.

b) The Commission issued Tariff Order.No.3 dated 15.05.2006 in accordance with the powers conferred by section 181 read with section 61(h),86(1)(e) of the Electricity Act,2003, in the matter and allied issues in respect of Non-Conventional Energy Sources Based Generating Plants and Non- Conventional Energy Sources Based Co-Generation Plants wherein the relevant clause is reproduced below:

10.11. Energy Wheeling Agreement (EWA) :-

The NCES generators/third party buyer of power and the concerned distribution licensee shall sign an EWA for the purpose of wheeling of power from the NCES generators to the third party buyer of CGP power. It

is not intended that the Commission would approve EWA or each NCES generator individually. The distribution licensee shall draft EWA taking cognizance of the energy wheeling principles elaborated in this order.

The tenure of the EWA shall be same as that of the EPA signed with the CGP holder/third party buyer of CGP power.

The distribution licensee should execute the EWA within 1-month from the date of submission of application with all relevant details for such agreement by the NCES generators or the third party purchaser of power, as the case may be.

From the above, it may be seen that the NCES generators/third party buyer of power and the concerned distribution licensee shall sign an EWA for the purpose of wheeling of power from the NCES generators to the third party buyer of CGP power. Therefore, the petitioner herein has no EWA and therefore has lost the right to avail open access for wheeling and adjustment of banked energy under Electricity Act, 2003 from the WEG T27.

c) The Commission had issued Power Procurement from New and Renewable Sources of Energy Regulations, 2008 on 08.02.2008 in accordance with the powers conferred by section 61(h),86(1)(e) and 181 of the Electricity Act,2003, the clause of the same is reproduced below:

7. <u>Energy Purchase Agreement (EPA) and Energy</u>

<u>Wheeling Agreement (EWA):-</u>

The format of the Energy Purchase Agreement (EPA) and Energy Wheeling Agreement (EWA) shall be evolved by the Commission after discussion with the generators and the distribution licensee. Before 10th of succeeding month, the licensee/generator shall furnish the list of Energy Purchase Agreements executed during the preceding month and pay applicable fees as stipulated in the Tamil Nadu Electricity Regulatory

Commission's fees and Fines Regulations, 2004. The distribution licensees/STU shall sign an Energy Wheeling Agreement taking cognizance of the energy wheeling principles elaborated in the general or special tariff order.

From the above, it may be seen that the distribution licensees/STU shall sign an Energy Wheeling Agreement taking into account the provisons elaborated in the general or special tariff order. The petitioner, has to enter into the Energy Wheeling Agreement [EWA]. In the instant the case, the petitioner herein has no EWA and thus, has lost the right to avail open access for wheeling and adjustment of banked energy under Electricity Act, 2003 from the WEG T27.

d) The Commission had issued Grid Connectivity and Intra-State Open Access Regulations, 2014 in accordance with the powers conferred by section 181 of the Electricity Act,2003, the relevant clause is reproduced below:

8. Processing of Application and Grant of connectivity to distribution system for a generating station :

xxx

(5).The applicant shall sign a connectivity agreement with the distribution licensee where connectivity is being granted.

(6).The grant of connectivity shall not entitle an applicant to interchange any power with the grid unless it obtains long-term open access, medium-term open access or short term open access, as the case may be in accordance with the provisions of these regulations

Provided that any interchange of power with the grid without any type of valid open access shall be violation of these regulations and shall be dealt with in accordance with section 142 of the Electricity Act, 2003.

From the above, it may be seen that the applicant shall sign a connectivity agreement with the distribution licensee where connectivity is being granted. The grant of connectivity shall not entitle an applicant to interchange any power with the grid unless it obtains long-term open access, medium-term open access or short term open access, as the case may be in accordance with the provisions of these regulations. In the instant case, the petitioner not only has not entered into EWA during the dispute period, but also not obtained open access approval from the 1st respondent herein during the dispute period thereby the petitioner interchange of power with the grid without valid open access shall be violation of these regulations and shall be dealt with in accordance with section 142 of the Electricity Act, 2003.

e) The Commission issued the first Tariff Order on 15.05.2006, in the matter and allied issues in respect of Non-Conventional Energy Sources Based Generating Plants and Non- Conventional Energy Sources Based Co-Generation Plants. The dispute period of this petition is covered under the Comprehensive Wind Energy Tariff Order No.3 of 2016 dated 31.03.2016, wherein the relevant clause of Banking is reproduced below:

10. Issues related to open access:

Xxx

10.11. Banking period and Charges:-

xxx

10.11.6. The Commission decides to continue with the provision of banking in this order also. The banking period shall be for a period of twelve months commencing from 1st April and ends on 31st March of the following year. The energy generated during April shall be adjusted against consumption in April and the balance if any shall be reckoned as

the banked energy. The generation in May shall be first adjusted against the consumption in May. If the consumption exceeds the generation during May, the energy available in the banking shall be drawn to the required extent. If the consumption during May is less than the generation during May, the balance shall be added to the banked energy. This procedure shall be repeated every month".

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

The above banking provision and adjustment of banked energy under wheeling category shall be applicable when the Wind Energy Generator has entered into the EWA with the Distribution licensee. In the instant case, the petitioner not only has not entered into EWA during the dispute period, but also not obtained open access approval from the 1st respondent herein during the dispute period thereby the petitioner is not eligible for adjustment of banked energy.

f) The relevant portion of the Circular. Memo dated 19.07.2016 and 31.03.2017 which related to the present case is reproduced below:

xxx

x. In case Name Transfer of WEG in the middle of the year, as the agreement with the previous owner is terminated for the unutilized banked energy as on the date of termination agreement will be paid at 75% of the relevant purchase rate only to that generator. The above unutilized banked energy can't be transferred to the new owner (or) to his captive consumers (or) to the captive consumers of previous owner who is having some other WEGs in some other EDC (or) to any other third party.

The Hon'ble High Court of Madras passed an order on 17.08.2021 in W.P.No.8634 of 2019 and other the relevant portion of the same is reproduced below:

xxx

35. The above order has absolutely no relevance to the facts of the present batch of cases since almost all the cases pertains to the energy wheeling agreements entered into during the period 01-04-2016 to 31-03-2017 and the adjustment has been done as per the Circular Memo dated 19-07-2016, which was in force during the relevant point of time. Ground 'e' is answered accordingly.

36. The facts of the present case will also attract the principles of promissory estoppal. The 2nd respondent who issued the Circular Memo on the approval and order of the 1st respondent, had given an assurance to all group captive consumers, who entered into an energy wheeling agreement during the period from 01-04-2016 to 31-03-2017, the manner in which the banking of wind energy, maintenance of banking account and adjustment of banked wind energy for captive use will be dealt with. This was acted upon by TANGEDCO and the captive users and bills were raised accordingly and payments were also made. The captive users had also arranged their affairs in line with the Circular Memo in force. The captive users cannot at a later point of time be informed that their current consumption bills are revised by relying upon a subsequent Circular Memo and superseded letters of the 3rd respondent and such an action on the part of the 4th respondent is certainly vitiated by the principles of promissory estoppal.

37.It is also noticed that in some of the writ petitions viz., W.P.Nos.11294 and 34444 of 2019, it pertains to the period prior to 01-04-2016, wherein, the bills are sought to be revised through the impugned proceedings bills issued by the 4th respondent. In all these cases, the 2nd respondent's Circular Memo dated 25-06-2015, was in force and it was implemented by the 4th respondent in letter and spirit and adjustments were permitted accordingly. None of the reasons cited by the 4th respondent in the impugned proceedings through which the bills are sought to be revised, will justify the demand. Therefore, the demand made by the 4th respondent whereby, a concluded payment is sought to be revived, cannot be sustained.

38. In the light of the above discussion, this Court is of the considered view that the demand made by the 4th respondent from the petitioners, by

virtue of the respective impugned letter is held to be unsustainable in law and accordingly, all the impugned letters are quashed.

39. In the result, all the writ petitions are allowed and if any payments have been made by any of the petitioner on the basis of the impugned letter issued by the 4th respondent, the same is liable to be reimbursed or in the alternative adjusted in the future bills. Any consequential benefits to which the petitioners are entitled to, if any, will ensure in their favour by virtue of quashing the impugned letters issued by the 4th respondent.

*40. All the writ petitions are allowed with the above directions. No costs. Consequently, all the connected mis*cellaneous petitions are closed.''

Thus, the above order of the Hon'ble High Court is applicable only for such of those Wind Energy Captive Generators who have entered into the revised Energy Wheeling Agreements during the period between 01-04-2016 and 31-03-2017 and the adjustment has been done as per the Circular Memo dated 19-07-2016, which was in force during the relevant period. However, with effect from 01.04.2017, the Circular Memo dated 30/31.07.2017 is in force. The relevant portion of the circular memos are reproduced below:

x. In case Name Transfer of WEG in the middle of the year, as the agreement with the previous owner is terminated for the unutilized banked energy as on the date of termination agreement will be paid at 75% of the relevant purchase rate only to that generator. The above unutilized banked energy can't be transferred to the new owner (or) to his captive consumers (or) to the captive consumers of previous owner who is having some other WEGs in some other EDC (or) to any other third party.

In this connection, the above Circular Memo dated 30/31.07.2017 issued by the 1st respondent is applicable to the present petition. In the instant case, the petitioner not

only has not entered into EWA during the dispute period, but also not obtained open access approval from the 1st respondent herein during the dispute period thereby the petitioner is not eligible for adjustment of banked energy.

g) The Commission passed an order on 05.10.2023 in D.R.P.No.1 of 2023, the relevant portion of the same is reproduced below:

> ***5.Findings of the Commission:-***
>
> *xxx*
>
> *5.6. It is seen that the stand of the respondent is that after the exit of a member of a captive group, the banked units can be allotted only to the existing users and not to the new user who has entered into a fresh EWA.*
>
> *5.7. We have considered over earlier order dated 26-08-2009 passed in D.R.P. No.8 of 2009 in the matter of M/s. Mirra&Mirra Industries which is relied upon by the petitioner. It is true that the Commission gave the option to either adjust the unutilised bank energy against the new service connection or encash the energy unutilised as on 30-06-2008 at 75% of the purchase rate. The following portion of the order would be relevant:-*
>
> *"5.6 The Commission in its Order dated 22-5-2008 passed in M.P. Nos. 6, 11, 12 etc. of 2008 extended the banking period for all wind energy generators by three months upto 30-6-2008. In terms of that Order, the petitioner had the option of adjusting the unutilized*
>
> *banked energy between 1-4-2008 and 30-6-2008 against the new service connection or encash the energy unutilized as on 30-6-2008 at 75% of the purchase rate."*
>
> *However, we cannot stick to the same decision in the light of the decision rendered by the Hon'ble High Court of Madras which is a constitutional court. Two decisions of the Hon'ble High Court of Madras which have been placed before us are important in deciding the present case.*
>
> *5.8. Coming to the first decision of the Hon'ble High Court of Madras in WP(MD) No.6221 of 2018, we find that the stand of the petitioner that the*

orders passed therein is a case of voluntary encashment of unutilised banked energy is unacceptable. The following portions of the order is reproduced below.

"4. The respondents have also filed counter affidavit wherein it is stated as follows:

Based on the above instructions, the banked energy prior to revised Energy Wheeling Agreement dated.26.09.2017 has not been allotted to the new captive user, M/s. Shree Renga Polymers, HT. SC. No.121, however, the said banked energy is being allotted to existing captive user i.e. M/s. Obli Granites, HT.SC.No.127 of Salem EDC, who is the captive user in the old agreement as well as newly executed Energy Wheeling Agreement upto end of the Financial year. Further, in this connection, it is most relevant to mention that the energy generated from the date of execution of revised Energy Wheeling Agreement dated.26.09.2017 is being allotted to the new captive user M/s. Shree Renga Polymers, HT. Sc. No. 121 up to end of the Financial year. The unutilized energy at the end of the financial year may be encashed at the rate of 75% of the relevant purchase tariff. The payment will be released after verification of Captive Generating Plant status as per the Rule-3 of Electricity Rules, 2005.

5. In view of the said stand taken by the respondents, the respondents are directed to adjust banked energy to the existing captive users prior to the agreement or the respondents shall pay 75% of the cost of the energy to the petitioners in respect of new captive users as per the agreement. The release of the amount will be made after verification of the captive generation plant as per Rule-5 of the Electricity Rules-2005."

5.9. The petitioner is incorrect in stating that the Hon'ble High Court decided the matter based on voluntary consent without going into the merits. The order nowhere states that it is a consent order. On the other hand, it is seen that the order has been passed after consideration of adversarial claims. Hence, we are of the view that the order passed by the Commission in M/s. Mirra and Mirra Industries can no longer survive after the interpretation of the constitutional court in W.P. (M.D.) No. 6221 of 2018 in the matter of the rights of the parties to adjustment of energy

especially in a case where a new entrant seeks to enforce the right of the existing constituent of captive arrangement.

5.10. The order clearly directs that the respondents herein shall pay 75% of the cost of energy as per the agreement and adjust the banked energy to the existing captive users. Hence, we find that the order of the Hon'ble High Court has settled the issue which is before us and hence we need not consider the issue afresh.

5.11. Coming to another decision of Hon'ble High Court in WP.No.8634 of 2019, the decision delivered in WP(MD)No.6221 of 2018 came up for discussion in W.P.No.8634 of 2019 and order was passed only after consideration of the same. The Hon'ble High Court considered the same issue and drew a clear cut distinction between the wheeling agreement entered before the period 01.04.2016 to 31.03.2017 and entered thereafter and quashed only the demand in respect of agreement entered between 01.04.2016 to 31.03.2017 and allowed the WPs. This means, the circulars issued on 31.03.2017 and 03.10.2017 can be effective from 01.04.2017. This means that the right of the new entrant who has executed the fresh wheeling agreement is no longer res integra and well settled.

5.12. In the light of the categorical pronouncement made by our Hon'ble High Court, Madras vide orders passed in W.P. (M.D.) No. 6221 of 2018 and W.P. No. 8634 of 2019, this Commission decides that the unutilized energy cannot be allotted to the new entrant into the captive scheme with regard to the agreements entered after 01-04-2017 and only 75% encashment can be allowed. To avoid any ambiguity in this order, this Commission clarifies that the petitioner is at liberty to utilize the undrawn energy for the period upto 01-04-2017 in line with the order dated 26-08-2009 passed by this Commission in D.R.P. No. 8 of 2009 in the case of M/s. Mirra and Mirra Industries. Petition ordered accordingly with no order as to cost.

From the above it is clear that the petitioner is at liberty to utilize the undrawn energy for the period upto 01.04.2017 in line with the order dated 26.08.2009 passed by the Commission in D.R.P.No.8 of 2009 in the case of M/s. Mirra and Mirra. Herein the

dispute period is after 01.04.2017 and hence, the contention of the petitioner that in accordance with order of the Commission in D.R.P.No.8 of 2009 dated 26.08.2009, the captive generator is entitled to bank his surplus energy and consume it under any captive service connection or encash it at the end of the financial year as per the Tariff Order of the Commission is untenable. Hence, the petition is neither maintainable in law nor on facts. The petition filed by the petitioner herein is liable to be rejected as devoid of any merit.

2.5. If there is any excessive collection of open access charges it is for the 5th Respondent to make necessary application and work out its remedy in accordance with law.

2.6. The dispute period in the instant petition is 11/2017 to 03/2018. During that period the Circular Memo dated 30/31.07.2017 was in force. The relevant portion is reproduced below:

> x. In case Name Transfer of WEG in the middle of the year, as the agreement with the previous owner is terminated for the unutilized banked energy as on the date of termination agreement will be paid at 75% of the relevant purchase rate only to that generator. The above unutilized banked energy can't be transferred to the new owner (or) to his captive consumers (or) to the captive consumers of previous owner who is having some other WEGs in some other EDC (or) to any other third party.

The above Circular Memo dated 30/31.07.2017 issued by the 1st respondent is applicable to the present case. In the instant case, the petitioner not only has not entered into EWA during the dispute period, but also not obtained open access approval from the 1st respondent herein during the dispute period thereby the petitioner is not

eligible for adjustment of banked energy. Hence, the contention of the petitioner that the respondent has deliberately not considered the Circular dated 25.06.2015 is untenable.

2.7. Also, the contention of the petitioner that the demand notice dated 10.03.2023 is contrary to the entire scheme of Open Access under Group Captive which is guaranteed under Section 9 and 42 of the Electricity Act, 2003 is a misconceived one.

2.8. During the dispute period the billing was done as per billing procedure of the Commission. The Member/ Generation had issued detailed working instructions in order to implement the Commission's Order.No.3 dated.15.05.2006 vide circular dated.11.12.2007 wherein the relevant portion of the same us reproduced below:-

> "II).5. If the Wind Energy wheeled for one (or) more than one HT service at wheeling end from more than one Wind Electric Generator and Wind Electric Generators were commissioned before 15.05.2006 and after 15.05.2006, the higher tariff units have to be adjusted first. For the payment of unutilized banked energy, the lower tariff rate has to be paid to the Generator at Generating end.--"

From the above, it can be seen that while wheeling the power from more than one Wind Electric Generator towards the adjustment in one HT service, the adjustment has to be done in the descending order of the wind tariff (i.e)., the higher tariff units have to be adjusted first. This procedure was followed from 2006 onwards. In the instant case, the date of Commissioning and power purchase tariff of the WEGs is stated as follows:

WEG	Commissioning date	Tariff
T27	31.01.2011	Rs.3.39
T23	30.09.2010	Rs.3.39

Herein, the tariff rate for the above mentioned WEGs is Rs.3.39/- and hence adjustment done by the Distribution i.e., adjusting T-23 first and then T-27 next is in order and same was accepted by the petitioner all this while. Now after lapse of 6 years, the petitioner has claimed that T 27 has to be adjusted first and T 23 adjusted next. Such a contention is an afterthought and in any case is barred by limitation as it is beyond the period of 3 years since the first such adjustment. In this connection, it is most relevant to mention that the above procedure as stated supra was challenged before the Hon'ble TNERC in M.P.No.14 of 2017 by requesting a procedure on the priority of adjustment of wind energy when there are several machines with the same captive consumers owned by a Company with different commissioning dates considering the overall dictum of "First come, First served" and other provisions of the Electricity Act 2003 or to leave the option to CGP owners. In this connection, the Commission passed an order on 30.03.2021 wherein it upheld the adjustment of wind energy to the effect that if the Wind Energy wheeled for one (or) more than one HT service at wheeling end from more than one Wind Electric Generator and Wind Electric Generators were commissioned before 15.05.2006 and after 15.05.2006, the higher tariff units have to be adjusted first. For the payment of unutilized banked energy, the lower tariff rate has to be paid to the Generator at Generating end. Hence, the claim of the petitioner that the priority of adjustment shall be from the wind mill commissioned in later date and the energy generated from the wind mill commissioned in earlier date shall be adjusted last is not legally sustainable and also misleading.

2.9. In this connection, it is also relevant to mention that the Commission order in para 9.11 in I A No.1 of 2019 in D.R.P. No.12 of 2019 and D.R.P. No.12 of 2019 dated 15.12.2020 has, inter alia, stated as under.

> " 9.11. In this connection, it is pertinent to mention that any monetary claim should be made within a period of three years from the date on which cause of action arose. In view of the above position, the claims for O&M charges for the period of three years prior to the date of issue of such notices of demand mentioned above (i.e. 22.03.2019 and 31.05.2019) clearly barred by limitation."

By applying the same principle, the claim of the petitioner is barred by limitation.

2.11. This petition is neither maintainable in law nor on facts. Inasmuch as the main petition itself is not maintainable, the Interim petition has also to be dismissed. By dismissing the same, no prejudice will be caused to the petitioner.

3. Findings of the Commission:

3.1. Having considered the rival submissions and after perusing the relevant material records, the issue which arises for consideration is whether the energy generated in WEG HTSC No.T27 is eligible for adjustment against the industrial consumption of the captive users i.e., HTSC No.4 of the petitioner herein. In order to appreciate the facts of the case much better, let us set out a brief background of the case leading to the filing of this petition.

3.2. As seen from the letter dated 24.02.2023 of the petitioner to the SE/Tirunelveli, TANGEDCO, the fifth respondent herein is a Special Purpose Vehicle by name and style

M/s.Gomathy Power India Pvt. Limited engaged in generation of Wind Energy from two wind mills bearing Nos.HTSC Nos.T-23 & T-27 coming under Theni EDC and supplying such wind power to Group Captive Users of HTSC No.4 of the petitioner herein coming under the Tirunelveli EDC. It is understood that due to financial burden, the fifth respondent, namely, M/s.Gomathy Powers India Limited sold one of the said wind mills, namely, HTSC No.T-27 to M/s.Senthil Hatcheries. Prior to the sale, the power generated from HTSC T.27 at Theni EDC was getting captively adjusted in HTSC No.4 of the petitioner coming under Tirunelveli and the surplus energy after adjustment was being kept in the common banking account of WEG HTSC Nos.T-23 & T-27.

3.3. It is the case of the petitioner that banked units of 32,14,011 in the banking account of T-23 & T-27 were allotted to HTSC No.4 from 11/2017 to 03/2018 and that Tirunelveli EDC also allowed the adjustments initially only to retract the same in view of the audit observations. Consequently, the respondent has conveyed its decision to the petitioner based on the observation to the effect that M/s.Senthil Hatcheries having purchased the WES-REI-T-27 pertaining to Theni EDC from the petitioner, only the banked units relating to T-23 is eligible for adjustments at Tirunelveli EDC even though the captive users of both T-23 and T-27 are same. The reason, as seen from the exchange of correspondences, from SE, Tirunelveli to the petitioner is that in case of name transfer of WEG in the middle of the year, as the agreement between previous owner is terminated for the EWA wise, unutilized banked energy as on the date of termination of the agreement will be paid at the 75% of the relevant purchase rate and

the unutilized banked energy cannot be transferred to the new owner or his captive consumers or to the captive consumers of the previous owners who is having some other WEGs in some other EDCs or any other EDC. It is further seen from letter dated 10.03.2023 of the SE/TANGEDCO to the petitioner herein that the decision to reverse the adjustment is based on CE/NCES, TANGEDCO's circular dated 19.07.2016 and 31.03.2017 in the matter of adjustment in regard to group captive consumption. The relevant portion of the same is re-produced below;

" **Procedure for WEGs with Group Captive Consumers and adjustment categories**

(x) In the case of Name Transfer of WEG in the middle of the year, as the agreement with the previous owner is terminated, for the EWA – wise unutilized banked energy as on the date of termination of the agreement will be paid at 75% of the relevant purchase rate only to that generator. The above unutilized banked energy can't be transferred to the new owner (o) to his captive consumers (or) to the captive consumers of previous owner who is having some other WEGs in some other EDC (or) to any other third party."

3.4. It is further seen that the respondent has arrived at a conclusion that since the banked units of 3214011 consists of the generations both T-23 & T-27 at Theni, the units generated from T-27 has to be ascertained separately from 12-7-2017 so as to make only the generated units from T-23 eligible for re-allotment. The SE/Tirunelveli EDC has also made it clear that the banked units relating to T-27 is not eligible for re-allotment.

3.5. The question before us is of two fold (a) whether the circular dated 19.07.2016 of the SE/NCES is valid given the fact that it has been issued by him on his own without

seeking the approval of the Commission. (b) whether the view held by the CE/NCES, that the name transfer of WEG in the middle of the year would disentitle the new owner or its captive consumers of the previous owner from utilizing the banked energy standing to the credit of the WEG is sustainable. On the issue (a), though we have reservations on the unilateral issue of circular by CE/NCES on his own, considering the importance of the issue, we are not inclined to examine the validity of the circular in terms of the authority of the CE/NCES to issue the circular but rather proceed to give quietus to the issue by deciding the entitlement of the subsequent transferee of WEG which is the issue (b) framed above.

3.6. It is to be observed here that the decision of the Commission in M/s.Mirra and Mirra in D.R.P.No.8 of 2009 upheld the right of the captive users to utilize the unutilized energy in a different service connection. However, the present case is a distinct one, in the sense, there is a complete transfer of ownership of a service connection, namely, T-27 to M/s.Senthil Hatcheries. In view of the same, it cannot be said that the decision rendered in M/s.Mirra and Mirra squarely applies to the case on hand. In fact, we notice that in reply dated 10.03.2003 of SE/TANGEDCO, Tirunelveli to the petitioner, it has been clearly explained that the order dated 26.08.2009 in D.R.P.No.8 of 2009 in M/s.Mirra and Mirra is not applicable to the petitioner for the reason that in the said case the entire case of WEG remained the same after change of utility unlike the petitioner's case where one of the machines namely, T-27 has been sold to another party i.e.

M/s.Senthil Hatcheries and fresh agreement has been executed with TANGEDCO. The view held by the SE/TANGEDCO, Tirunelveli in this regard, in our view, is a correct one.

3.7. It is to be noted that the sale of WEG has resulted in change of the legal obligations which is evident from the signing of fresh agreement. It is plain on record that a sale has taken place in favour of M/s.Senthil Hatcheries in regard to T-27 and new rights and obligations have been created and once such rights and obligations have been assigned to a new entrant, it cannot be contended that the rights enjoyed by the erstwhile owner stands automatically transferred to the new entrant and hence there is hardly any scope for claim with regard to the rights enjoyed by the predecessor. Hence, we have no hesitation in holding that M/s.Senthil Hatcheries, which is the subsequent transferee, has no rights to claim the unutilized banked units standing to the credit of the petitioner in T-27, or for that matter anyone else except the same owner either in the same point or at a different point. This is for the reason that the rights and obligations attached to the energy wheeling agreement ceases once a fresh agreement is executed and rightly a stand was taken by the respondent not to permit the transfer of unutilized banked energy to the new owner or its consumers. Accordingly, the main issue is decided. However, there arises another issue with regard to banked units of both T-23 & T-27 which are in a clubbed form as of now. It is necessary to segregate them so as to enable the petitioner to seamlessly utilize the unutilized banked units relating to T-23. Hence, it is decided by the Commission that the respondent shall segregate and ascertain the units standing to the credit of T-27 exactly from the common units standing

to the credit of both T-23 and T-27 and permit adjustment of unutilized units from T-23 alone.

3.8. In view of the foregoing discussions, we conclude that the demand notice is in order as it relates to incorrect adjustment of unutilized units pertaining to T-27 and consequential demand of Rs.1,03,99,280 arising out of such incorrect adjustment of units pertaining to HTSC T27. Hence, no case arises for quashing the impugned notice issued by the 3rd respondent or BAOB audit slip No.28 dated 1.8.2019 which is the basis for the impugned notice.

In the result, the petition is dismissed. Parties shall bear respective costs.

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission