

**TAMIL NADU ELECTRICITY REGULATORY COMMISSION**

**Order of the Commission dated this the 09<sup>th</sup> Day of July 2024**

**PRESENT:**

Thiru M.Chandrasekar .... Chairman  
Thiru K.Venkatesan .... Member  
and  
Thiru B.Mohan .... Member (Legal)

**D.R.P. No. 12 of 2022**

M/s. The Tata Power Company Limited  
Registered Office at:  
Bombay House 24, Homi Street  
Fort, Mumbai  
Maharashtra - 400 001.

... Petitioner  
Mr.Shri Venkatesh, Mr.Suhael Buttan &  
Mr. Nikunj Bhatnagar,  
Advocate from M/s. SKV Law Offices

**Vs.**

1. Tamil Nadu Generation and Distribution Corporation Ltd., (TANGEDCO),  
Through Chairman cum Managing Director  
6<sup>th</sup> Floor, TANTRANSCO Building  
144, Anna Salai, Chennai – 600 002.
2. The Chief Engineer  
Non-Conventional Energy Sources  
TANGEDCO  
144, Anna Salai, Chennai – 600 002.
3. The Superintending Engineer  
Udumalpet Electricity Distribution Circle  
Eripalayam, Tirupur Road  
Udumalpet – 642 126.

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

This Miscellaneous Petition stands preferred by the Petitioner The Tata Power Company Limited, Maharashtra with a prayer to admit the present Petition and direct TANGEDCO to make payment of Rs.53.72 Crores in favour of the Petitioner as the differential amount including interest for wrongfully fixing the rate at 75% of the preferential tariff rates even for the years where the APPC rates did not breach the preferential tariff rates and pass such other and further order(s) as the Commission may deem fit in the fact and circumstances of the present case

This matter coming up for final hearing before the Commission on 02-05-2024 in the presence of Advocates from M/s. SKV Law Offices, Advocate for the Petitioner and Thiru.N.Kumanan and A.P.Venkatachalapathy, Standing counsel for the Respondents 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. Contentions of the Petitioner :-**

1.1. The instant petition is being filed on behalf of M/s. The Tata Power Company Limited ("TPCL" / "Petitioner") under section 86 (1) (e) and section 86 (1) (f) of the Electricity Act, 2003 ("the Act") seeking a direction against Tamil Nadu Generation and Distribution Corporation Ltd. ("TANGEDCO") to pay an amount of Rs.30 crores in terms of the order dated 19-01-2022 passed by the Commission in D.R.P. No. 07 of 2021 tilted as M/s. Grace Infrastructure Pvt. Ltd. Vs. TANGEDCO and others ("Grace Infra

Judgment”) towards the energy supplied by the petitioner to TANGEDCO during the period FY 2012-13 to FY 2017-18.

1.2. The said amount is being claimed as per differential claim towards the Average Power Purchase Cost ("APPC") rate which has been applied by TANGEDCO for the period FY 2012-13 to FY 2017-18 vis-a-vis the APPC rate which is applicable as per the amendment of the Tamil Nadu Electricity Regulations, 2010. (RPO Regulations, 2010") as well as the Orders passed by the Commission.

1.3. Pursuant to the Commission's Grace Infra Judgment, the Petitioner checked the accounts and discovered that the same treatment as that to the Wind Energy Generator in D.R.P. 7 of 2021 as well as Appeal No. 232 of 2017 was meted out to the Petitioner herein as well, i.e. even for the years during which the APPC had not breached the Preferential Tariff, the Petitioner, instead of being charged at the full APPC, is being charged at 75% of the Preferential Tariff.

1.4. Accordingly, on 10.03.2022, the Petitioner issued an Invoice letter to TANGEDCO seeking release of the differential amount of Rs.26.20 Crores for the period FY 2012-13 to FY 2017-18. In fact, the Petitioner along with the Invoice, even provided a detailed Statement of Accounts demonstrating the differential claim of Rs.26.20 Crores and as to how TANGEDCO has wrongly applied the APPC rate. However, upon verification it was discovered that the differential amount is Rs.30 Crores instead of Rs.26.20 Crores.

1.5. Till date, there has been no response from TANGEDCO. Hence, the Petitioner is constrained to approach the Commission.

1.6. The Petitioner, i.e., TPCL is a generating company within the meaning of Section 2(28) of the Act and a wind energy generator. The Petitioner owns and operates 49.5 MW Wind Power Projects in the state of Tamil Nadu under the Renewable Energy Certificate (REC") scheme. The power from the said Wind Power Projects is being supplied to TANGEDCO under various Energy Purchase Agreements ("EPAs").

1.7. The Respondent No.1, i.e., TANGEDCO (through Chairman cum Managing Director), is a Distribution Licensee/ State Utility operating in the state of Tamil Nadu. The Petitioner has entered into EPAs with TANGEDCO for off take of energy generated from the petitioner's 49.5 MW windmill projects.

1.8. On 07.12.2010, the Commission, in exercise of its powers conferred under Section 181 read with read with Sections 61, 66 and 86(1)(e) of the Act notified the RPO Regulations, 2010. On 28.12.2010, the Commission, in exercise of its powers conferred under Section 86(1)(e) of the Electricity Act passed an order on Pooled Cost of Power Purchase by TANGEDCO for the year 2009-10. By way of the said Order, the Commission held as follows:

- (a) The Pooled Cost of Power Purchase by the TANGEDCO for the year 2009-10 as Rs.2.37 per unit.
- (b) The Pooled Cost of Power was to remain in force beyond three years if no new rate is notified by 31.03.2011.

1.9. In consonance with the order dated 28.12.2010 passed by the Commission, the Petitioner and TANGEDCO entered into 33 EPAs between 05.08.2011 to 31.12.2011 under the REC scheme for supply of power. To mention herein that all the 33 EPAs are *pari materia* to each other. For ease of reference, the details of the 33 EPAs are tabulated hereunder:

<b>S.NO.</b>	<b>EPA DATE</b>	<b>DETAILS OF EPA</b>
1.	05.08.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at S.F. No. 571/A(P) of Gudimangalam Villagel Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 05.08.2011.
2.	05.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 392(P), 394 of Kondampatty Village, Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 05.08.2011.
3.	05.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 224(P) of Veethampatty Village, Madathukulam Taluk; Tirupur District, Tamil Nadu, commissioned on 05.08.2011
4.	10.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 104/B1, B2, 103/1(P) of Amandakadavu Village, Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 10.08.2011.
5.	10.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 74/2(P) "of Illupanagaram Village, Madathukulam Taluk; Tirupur District, Tamil Nadu, commissioned on 10.08.2011.
6.	12.08.2011	For supply of power from one M/s VENSYS-77 of 1500 KW, installed at S.F. No. 246/2(P), 247/3(P) of Amandakadavu Village, Madathukulam Taluk, Tirupur

		District, Tamil Nadu, commissioned on 12.08.2011.
7.	12.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW. installed at S.F. No. 97/1(P), 95/A(P) of Kuppampalayam Village, Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 12.08.2011.
8.	18.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 90/B2(P). BIC(P) of Amandakadavu VillaBe, Madathukulam Taluk; commissioned on 18.08.2011.
9.	18.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 301/1(P) of Periyapatti Village, Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 18.08.2011.
10.	18.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 402/3(P), 403/A1A, AID, 404/A2(P) of Kondampatti Village, Madathukulam Taluk; Tirupur District, Tamil Nadu, commissioned on 18.08.2011.
11.	18.08.2011	For supply of power from one M/s VENSYS-77 of 1500 KW, installed at S.F.No.256(P); 260(P) of Moonkithozhuvu Village, Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 18.08.2011.
12.	20.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 274/A6(P), A7(P), A9(P) of Moonkithozhuvu Village, Madathukulam Taluk; Tirupur District, Tamil Nadu, commissioned on 20.08.2011.
13.	24.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 418/3A(P), 419/1D(P), 420/3C(P) of Vagaithozhuvu Village, Madathukulam Taluk; Tirupur District, Tamil Nadu, commissioned on 24.08.2011.
14.	24.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 131/ A(P), B(P) of Anikadavu Village, Madathukulam Taluk, Tirupur District, Tamil Nadu,

		commissioned on 24.08.2011.
15.	30.08.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 307/D3(P) of Amandakadavu Village, Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 30.08.2011.
16.	14.09.2011	For supply of power from one M/s.VENSYS -77 of 1500 KW, installed at S.F. No. 318/2B(P) of Vadiyapelayam Vii/age, Madathukulam Taluk, Tirupur District. Tamil Nadu, commissioned on 14.09.2011.
17.	17.09.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at S.F.No. 356/B1B(P), 356/B2B(P), 356/BIA(P), 356/B2A(P). 356/BIC(P) of Moongiltholuvu Village, Madathukulam Taluk; Tirupur District. Tamil Nadu, commissioned on 17.09.2011.
18.	20.09.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at S.F. No. 25/B1C, CI(P) of Illupanagaram Village, Madathukulam Taluk, Tirupur District Tamil Nadu, commissioned on 20.09.2011.
19.	28.09.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 384(P) of Moonkithozhuvu Village, Madathukulam Taluk; Tirupur District, Tamil Nadu, commissioned on 28.09.2011.
20.	29.09.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at S.F.No.125/3(P) of Amandakadavu Village, Madathukulam Taluk; Tirupur District, Tamil Nadu, commissioned on 29.09.2011.
21.	29.09.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at S.F. No. 253(P) of Vagaithozhuvu Village, Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 29.09.2011.
22.	29.09.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at S.F. No. 172/1A, 171/1A(P) of Veethampatti Village, Madathukulam Taluk, Tirupur

		District, Tamil Nadu, commissioned on 29.09.2011.
23.	29.09.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at S.F. No. 295/2C(P), 2D(P), 2E(P) of, Anikadavu Village, Madathukulam Taluk, Tirupur District Tamil Nadu, commissioned on 29.09.2011.
24.	30.09.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at S.F. No. 278 of Kosavampalayam Village. Madathukulam Taluk; Tirupur District, Tamil Nadu, commissioned on 30.09.2011.
25.	30.09.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F.No.204/6(P) of Vagaithozhuvu Village, Madathukula Taluk, Tirupur District, Tamil Nadu, commissioned on 30.09.2011.
26.	30.09.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at .S.F.No.217/1(P) of Amandakadavu Village, Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 30.09.2011.
27.	30.09.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at S.F.No.139/8(P), 140/B5(P) of Moonkithozhuvu Village, Madathukulam Taluk; Tirupur District, Tamil Nadu, commissioned on 30.09.2011.
28.	30.11.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at S.F. No. 107/1B(P), 108/A(P), B(P), 157/ A5(P) of Illuponagaram Village, Madathukulam Taluk; Tirupur District, Tamil Nadu, commissioned on 30.11.2011.
29.	30.11.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 113/3C(P), 114/A(A) of Vagaithozhuvu Village, Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 30.11.2011.
30.	30.11.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 363/1A(P), of Moonkithozhuvu Village Madathukulam Taluk, Tirupur District, Tamil Nadu,



		commissioned on 30.11.2011.
31.	01.12.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW. installed at S.F. No. 262/AI(P), 265/1(P) of Kondampatty Village, Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 01.12.2011.
32.	05.12.2011	For supply of power from one M/s.VENSYS-77 of 1500 KW, installed at S.F. No. 564(P), of Gudimangalam Village, Madathukulam Taluk, Tirupur District, Tamil Nadu, commissioned on 05.12.2021.
33.	31.12.2011	For supply of power from one M/s. VENSYS-77 of 1500 KW, installed at S.F. No. 195/1(P), 196/1A2(P), 206/A(P) of Kondamapatty Village, Madathukulam Taluk; Tirupur District, Tamil Nadu, commissioned on 31.12.2011

1.10. On 21.01.2013, an amendment by way of Notification No. TNERC/RPO/19/3 was carried out in the RPO Regulations, 2010. By virtue of the said Notification, APPC/Pooled cost of power purchase was amended and defined by fixing a cap at 75% of the Preferential Tariff fixed by the Commission.

*"Pooled cost of power purchase means the weighted average pooled price at which the distribution licensee has purchased the electricity including cost of self-generation in the previous year from all the long-term energy suppliers, but excluding those based on liquid fuel, purchase from traders, short-term purchases and renewable energy sources subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category/subcategory of NCES generators. Explanatory Statement in the long run, Pooled Cost of Power Purchase may exceed the preferential tariff fixed by the Commission for renewable energy due to escalation of conventional fuel cost. It is prudent that a limit has to be fixed/or arriving at the reasonable Pooled Cost of Power Purchase. Therefore, it is proposed to amend the said regulation."*

1.11. In light of the amendment to the RPO Regulations 2010, the APPC rate was fixed periodically by the Commission and issued annually based on which the power generated by RE Generators would be purchased by the Distribution Licensees. The details of the yearly APPC rate is tabulated hereunder:

Year	APPC Rate (Rs. Per Unit)	Preferential Tariff (Rs. Per Unit)
FY 2011-12	2.37	3.39
FY 2012-13	2.54	3.39
FY 2013-14	3.11	3.96
FY 2014-15	3.38	3.96
FY 2015-16	3.35	3.96
FY 2016-17	3.96	4.16
FY 2017-18	3.7	4.16
FY 2018-19	3.97	2.86
FY 2019-20	4.07	2.86
FY 2020-21	4.37	2.86

1.12. However, in practice, rates were communicated by TANGEDCO on the basis of which Bills used to be raised from FY 2012-13 and under the garb of keeping the APPC rate as low as possible, TANGEDCO started arbitrarily fixing the rates, as payable to the Wind Energy Developers, at 75% of the preferential tariff rates even for the years where the APPC rates did not breach the preferential tariff rates.

1.13. The applicability as well as the amendment to the APPC rate in the RPO Regulations was challenged before the Hon'ble Madras High Court by one of the Wind Generators, namely, Techno Electric & Engineering Company Limited ("Techno"), formerly known as Simran Wind Project Private Limited in W.P. No. 22091 of 2013 titled as Simran Wind Project Private Limited & Ors. Vs. TNERC & Ors.

1.14. On 15.07.2016, Hon'ble Madras High Court vide its Judgment held that the amendment can be implemented with effect from the date of such breach as notified by the Commission and granted liberty to the Writ Petitioners to approach the Commission for appropriate directions. The relevant extract of the judgment is reproduced hereunder.

*"Hence for all the reasons stated above, the challenge to the notification 21.01.2013 fails. In view of the fact that the order dated 15.07.2013 fixing the preferential tariff at Rs.3.11 has been passed in exercise of the rights under the act and the regulations and following the proceedings dated 21.01.2013, the challenge to the same would also fail. However, this court finds force in the submission of the counsel for the petitioner that considering the object to introduce the cap, the need to implement cap has not arrived. The Impugned notification has been enacted in public Interest to prevent the generators to unjustly enrich themselves, in the event of the preferential tariff falling below the APPC. Therefore, this court is of the view' that the notification can be implemented with effect from the date of such breach as notified by the TNERC. Therefore, granting liberty to the petitioners to move the TNERC for appropriate directions, the writ petitions are dismissed. No costs."*

1.15. Pursuant to the liberty granted by the Hon'ble Madras High Court. Techno approached the Commission by way of M.P. 22 of 2016, wherein vide order dated 28.04.2011, the Commission dismissed the Petition on the following grounds:

- (a) Direction cannot be issued to the Licensee to postpone the implementation of the Regulations when the Regulation is in force;
- (b) By taking into account the preferential Tariff for a Wind Generator prevailing prior to 2006 which was Rs.2.75, the APPC rate was said to have been breached in the year 2013-14 when the APPC rate was fixed at Rs.3.11.

1.16. Being aggrieved by the said Order of the Commission, in 2017 itself, Techno filed an Appeal being Appeal No. 232 of 2017 before the Appellate Tribunal for Electricity ('Hon'ble Tribunal')

1.17. The Hon'ble Tribunal, by way of its Judgment dated 31.05.2019 passed in Appeal No. 232 of 2017, set aside the Order dated 28.04.2017 and held as follows:

(a) There was no breach of Preferential Tariff vis-a-vis APPC as compared to the APPC notified by the Commission for each FY with the Wind Tariff of that year from FY 2012-13 to FY 2017-18.

(b) The APPC rate has to be computed on an year to year basis and that the proposed cap shall only be implemented for a particular year wherein the APPC rate breaches the rate of Preferential Tariff.

(c) Further, the Hon'ble Tribunal in the said case also directed the Respondent therein, i.e. TANGEDCO to make payment to the RE Generator at the full APPC rate without applying any cap for the relevant period along with interest and further directed the Commission to issue appropriate directions in this regard.

1.18. For ready reference, the relevant extract of the said Judgment is reproduced hereunder:

"12. Summary of our Findings:

In light of the above, we sum up our findings as under:-

12.1 The notification dated 19.06.2013 which amended the definition of the APPC shall not be given effect to in as much as till date, the APPC of a year has not exceeded the preferential tariff payable to wind generators for that corresponding year.

12.2 Being dynamic in nature (which may go up or down), the APPC rate shall be compared by the State Commission on year to year basis and the proposed cap of 75% under the amendment shall be implemented for a particular year in which APPC rate crosses over the rate of preferential tariff for that corresponding year.

12.3 The State Commission is directed to issue necessary instructions to Respondent No.1 to make payment to the Appellant at the full APPC rate without applying any cap, for the relevant period, together with normal interest thereon at the rate provided for in the BPA from the date such capped tariff was effected by Respondent: Discom until date of payment to the Appellant.”

1.19. Pertinently, although the said Judgment has been challenged by TANGEDCO before the Hon'ble Supreme Court by way of CA No. 9268 of 2019, there is no stay on the operation of the said Judgment.

1.20. On 12.11.2020, upon the matter being remanded back the Commission, vide its Order directed TANGEDCO to make payments to the Petitioner therein for the years 2013-14 to 2017-18 along with interest at the fully APPC. For ease of reference, the relevant extract of the said Order is reproduced hereunder:

*“TANGEDCO is directed to make payments to the appellants at the full APPC rate without applying any cap for the years 2013-2014 to 2017- 2018 together with normal interest thereon at the rates provided in the Energy Purchase Agreement from the date the capped tariff was effected until date of payment to the Appellants. During the hearing on 9.6.2020, TANGBDCO informed that an appeal has been filed before the Hon'ble Supreme Court of India. This order is subject to the final outcome of the appeal filed by the Respondent TANGBDCO before the Hon'ble Supreme Court of India.”*

1.21. On 19.01.2022, the aforesaid decision rendered by the Hon'ble Tribunal as well the Commission was reiterated in the Grace Infra Judgment wherein a similarly placed RE Generator had approached the Commission and considering the facts of the case, the Commission held that the previous Order dated 12.11.2020 shall apply to that case as well and accordingly directed TANGEDCO to make good the shortfall in payment at

the fun APPC. For ease of reference, the relevant extract of the Grace Infra Judgment is reproduced hereunder:

*“5.4 .....*

*iv) Hon'ble APTEL in A.No.232 0/2017 dt.31.5.2019 dealt on the limited issue regarding purported breach of Preferential tariff by APPC, compared the APPC notified by the Commission for each FY with the wind tariff of that year from FY 2012-13 to FY 2017-18 and observed that no breach took place. The Tribunal ordered that the APPC rate shall be compared by the State Commission on year to year basis and the proposed cap of 75% under the amendment shall be implemented for a particular year in which APPC rate crosses the rate of preferential tariff for that corresponding year and further directed the State Commission to issue directions to the Respondent TANGEDCO to make payments at APPC rate without applying any cap for the relevant period together with normal interest thereon at the rates provided in the EPA from the date such capped tariff was effected by the DISCOM until the date of payment.*

*v). The remand application in R.A-No.2 of 2020 in M.P No.22 of 2016 was heard on 9.6.2020 and appropriate orders in terms of the order of APTEL was issued in Order No.1/2020 on 12.11.2020. During the hearing of the remand case, TANGEDCO had informed that an appeal was filed before the Hon'ble Supreme' Court of India against the judgment in Appeal Na.232 of 2017.*

*.....*

*vi) Thus the Order No.1/2020 dt.12.11.2020 is subject to the final outcome of the appeal filed by TANGEDCO before the Apex Court.*

*5.5 Neither of the parties have brought the actual facts in detail. TANGEDCO without disputing the amount, has expressed inability to pay the interest due to its dire financial condition.*

*5.6 The order No.1 /2020 dt.12.11.2020 passed by the Commission to implement the directions 0/ APTEL in A.No.232 0/ 2017 is applicable to the Instant case. TANGEDCO is directed to make payments in compliance with the Commission's order no.1/2020 dt.12.11.2020 within one month from the date of this order.*

1.22. In light of the Order dated 19.01.2022 passed by the Commission, the Petitioner checked the accounts and discovered that the same treatment as that to the Wind Energy Generator in D.RP No.7 of 2021 as well as Appeal No. 232 of 2017 was meted

out to the Petitioner herein as well i.e. even for the years during which the APPC had not breached the Preferential Tariff, the Petitioner, instead of being charged at the full APPC, was being charged at 75% of the Preferential Tariff.

1.23. As a result of the aforesaid, an amount to the tune of Rs.26.20 Crores is the differential claim towards the APPC rate which has been applied by TANGEDCO for the period FY 2012-13 to IT 2017-18 vis-a-vis the APPC rate which is applicable as per the amendment of the RPO Regulations as well as the Orders passed by the Commission.

1.24. Accordingly, on 10.03.2022, the Petitioner issued a consolidated invoice claim of Rs.26.20 Crores as the differential amount towards the APPC rate which has been applied by TANGEDCO vis-a-vis the APPC Rate which otherwise is applicable as per the Commission. However, upon verification and prior to the filing of the instant Petition it was discovered that the actual differential amount is Rs.30 Crores instead of Rs.26.20 Crores. As there is no response from TANGEDCO and till date no payment has been made, the Petitioner has approached the Commission.

1.25. In terms of the amendment to the RPO Regulations 2010, the APPC was fixed with a cap of 75% of the Preferential Tariff. The intent of the aforesaid cap is to ensure that the APPC never exceeds the Preferential Tariff fixed by the Commission. Accordingly, the APPC rates have been fixed by the Commission. However, in practice, rates were communicated by TANGEDCO on the basis of which Bills used to be raised from FY 2012-13. Under the garb of keeping the APPC rate as low as possible, TANGEDCO started arbitrarily fixing the rates, as payable to the Wind Energy

Developers, at 75% of the preferential tariff rates even for the years where the APPC rates did not breach the preferential tariff rates as per the RPO Regulations notified by the Commission.

1.26. The applicability and the amendment of the APPC rate in the RPO Regulations, 2010 was challenged before the Hon'ble Madras High Court by Techno Electric and Engg. Company Limited. The Hon'ble High Court in its Judgment dated 15.07.2016 held that the amendment could be implemented with effect from the date of such breach as notified by the Commission and liberty was granted to the Writ Petitioners to approach the Commission for appropriate directions.

1.27. Accordingly, Techno Electric and Engg. Company Limited filed a separate Petition before the Commission and the same was subsequently dismissed on 28.04.2017. The said order of dismissal was challenged by Techno before the Commission wherein the Commission set aside the Order dated 28.04.2017 inter alia held that there was no breach of Preferential Tariff vis-a-vis APPC as compared to the APPC notified by the Commission for each FY with the Wind Tariff of that year from FY 2012-13 to FY 2017-18 and that the cap can only be imposed in cases wherein APPC breaches the Preferential Tariff. Accordingly, the directions were given to TANGEDCO to make payment to the RE Generator at the full APPC rate without applying any cap for the relevant period along with interest and further directed the Commission to issue appropriate directions in this regard.



1.28. Upon the matter being remanded back Commission vide its Order dated 12.11.2020 directed TANGEDCO to make payments to the Petitioner therein for the years 2013-14 to 2017-18 along-with interest at the fully APPC. The aforesaid decision rendered by the Hon'ble Tribunal as well the Commission was reiterated in the Grace Infra Judgment

For ease of reference, the APPC applicable and the Tariff billed by TANGEDCO is tabulated hereunder:

Sl. No.	Financial Year	APPC Rate (Rs. Per Unit)	Preferential Tariff (In Rs. per unit With AD)	Breach	Applicable Tariff
1	2011-12	2.37	3.39	No	2.37
2	2012-13	2.54	3.39	No	2.54
3	2013-14	3.11	3.53	No	3.11
4	2014-15	3.38	3.53	No	3.38
5	2015-16	3.35	3.53	No	3.35
6	2016-17	3.96	3.7	Yes	2.775
7	2017-18	3.7	3.7	No	3.7
8	2018-19	3.97	2.8	Yes	2.1
9	2019-20	4.07	2.8	Yes	2.1
10	2020-21	4.37	2.8	Yes	2.1

1.29. From a bare perusal of the aforesaid, It is evident that TANGEDCO has been applying the 75% Preferential Tariff rate, even for the years when the APPC was lesser than the Preferential Tariff. Therefore, the ' Grace Infra Judgment is squarely applicable herein.

1.30. It is a settled law that when a court of law has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future

cases where facts are substantially the same. In this regard, reliance is placed upon the Judgment of the Hon'ble Supreme Court in Shanker Raju vs. Union of India (2011) 2 see 132 wherein the Hon'ble Supreme Court held as follows:

"The doctrine of stare decisis

10. *It is a settled principle of law that a judgment, which has held the field for a long time, should not be unsettled. The doctrine of stare decisis is expressed in the maxim stare decisis et non quieta movere, which means "to stand by decisions and not to disturb what is settled". Lord Coke aptly described this in his classic English version as "those things which have been so often adjudged ought to rest in peace". The underlying logic of this doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible. This has been aptly pointed out by Chandrachud. C.J. in Waman Rao v. Union of India [(1981) 2 SCC 362] thus: (SCC p. 393, para 40)*

*"40 .... for the application of the rule of stare decisis, it is not necessary that the earlier decision or decisions of long standing should have considered and either accepted or rejected the particular argument which is advanced in the case on hand. Were it so, the previous decisions could more easily be treated as binding by applying the law of precedent and it will be unnecessary to take resort to the principle of stare decisis. It is, therefore, sufficient for invoking the rule of stare decisis that a certain decision was arrived at on a question which arose or was argued, no matter on what reason the decision rests or what is the basis of the decision. In other words, for the purpose of applying the rule of stare decisis, it is unnecessary to enquire or determine as to what was the rationale of the earlier decision which "is said to operate as stare decisis."*

11. *In Manganese Ore (India) Ltd. V. CST [(1976) 4 see 124: 1976 SCC (Tax) 447] it was opined that: (SCe p. 128, para 6)*

*"6 .... the doctrine of stare decisis is a very valuable principle of precedent which cannot be departed from unless there are extraordinary or special reasons to do so."*

12. *In Ganga Sugar Corpn. v. State a/U,P. [(1980) 1 see 223: 1980 SCC(Tax) 90J at SCC p. 227, para 6 this Court cautioned that, the "Judgments of this Court are*

*decisional between litigants but declaratory for the nation". This Court further observed: (SCC p. 233, para 28)*

*"28 .... Enlightened litigative policy in the country must accept as final the pronouncements of this Court ... unless the subject be of such fundamental importance to national life or the reasoning is so plainly erroneous in the light of later thought that it is wiser to be ultimately right rather than to be consistently wrong. Stare decisis is not a ritual of convenience but a rule with limited exceptions."*

14. *In Krishena Kumar v. Union of India [(1990) 4 SCC 207: 1991 SCC (L&S) 112: (1990) 14 ATC 846J this Court has explained the meaning and importance of sparing (sic adhering to) application of the doctrine of stare decisis: (SCC p. 233, para 33)*

*"33. Stare decisis et non quieta movere. To adhere to precedent and not to unsettle things which are settled. But it applies to litigated facts and necessarily decided questions. Apart from Article 141 of the Constitution of India, the policy of courts is to stand by precedent and not to disturb settled point. When court has once laid down a principle of law as applicable to certain state of facts, it will adhere to that principle, and apply it to all future cases where facts are substantially the same. A deliberate and solemn decision of court made after argument on question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court; or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy unless there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. It should be invariably applied and should not ordinarily be departed from where decision is of long standing and rights have been acquired under it. unless considerations of public policy demand it."*

1.31. Therefore, the Grace Infra Judgment being the binding Judicial precedent read with the Techno Order, a similar dispensation ought to be accorded to the Petitioner as it has been meted out the same treatment by TANGEDCO during the same period. The Hon'ble Supreme Court in Union of India vs. Raghubir Singh AIR 1989 SC 1933 while deliberating upon the merits of doctrine of Judicial Precedent held as follows:

*"The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions. and enables an organic development of the law, besides providing assurance to the individual as to the it consequence of transactions fonning part of daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a Court. "*

1.32. Hence, in view of the factual background as elucidated above along with the Judicial Precedents, the Commission may direct TANGEDCO to pay the differential amount to the Petitioner with interest.

1.33. It is evident that the application of 75% Preferential Tariff rate, even for the years during which the APPC was lesser than the Preferential Tariff by TANGEDCO for the period ranging from FY 2013-1:4 to FY 2017-18, the Petitioner has been deprived of its legitimate dues. In fact, by doing so, TANGEDCO has unjustly enriched itself at the cost of the Petitioner.

1.34. Due to such arbitrary and mala fide conduct of TANGEDCO, an amount to the tune of Rs.30 Crores (principal) is payable as the differential amount for the period FY 2013-14 to FY 2017-18. It is also relevant to mention herein that as per Article 6 of the EPA, in case there is a delay of payment beyond 30 days, TANGEDCO is liable for interest at the rate of 1% per month. Accordingly, as on date, the amount due and payable by TANGEDCO as the differential amount is Rs.53.72 Crores along with interest

1.35. It is trite law that no person can be allowed to enrich inequitably at the expense of another. In this regard, reliance is placed upon the Judgment of the Hon'ble Supreme

Court in Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 see 161 wherein the Hon'ble Supreme Court has held that a right of recovery under the doctrine of unjust enrichment arises when there is a retention of a benefit which is against the principles of equity and justice. For ease of reference, the relevant extract of the aforesaid Judgment is as follows:

### *"UNJUST ENRICHMENT*

*169. Unjust enrichment has been defined as: "A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense. H See Black's Law Dictionary, Eighth Edition (Bryan'A: Garner) at page 1573.*

*170. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."*

*171. 'Unjust enrichment' has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.*

*172. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. "A Defendant may be liable "even when the Defendant retaining the benefit is nota wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash, 732 A,2d 217, 23233 (Delaware. 1999). USA)*

.....

*179. Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. It is defined as the unjust*

*retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is 'enriched if he has received a benefit, and he is unjust enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.*

*180. While the term 'restitution' was considered by the Supreme Court in South-Eastern Coalfields 2003 (8) SCC 648 and other cases excerpted later, the term 'unjust enrichment' came to be considered in Sahakari Khand Udyog Mandai Ltd. V. Commissioner of Central Excise and Customs MANU/SC/0187/2005 : (ZOOS) 3 see 738. 181.*

*This Court said: Unjust enrichment' means retention of a benefit by a person that is unjust or inequitable. 'Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else."*

1.36. Furthermore, TANGEDCO being a government instrumentality falls within Article 12 of the Constitution of India. Hence, TANGEDCO while exercising its powers and discharging its functions is mandated to act indubitably, fairly and in a transparent manner, as is expected of it, for public good and public interest. Moreover, a government instrumentality is placed on a higher pedestal in a contract as the impact of every state action is on public interest. However, in the instant case, TANGEDCO, under the garb of keeping the APPC rate as low as possible, started arbitrarily fixing the rates, as payable to the Wind Energy Developers, at 75% of the preferential tariff rates even for the years where the APPC rates did not breach the preferential tariff rates. In this regard reliance is placed on the Judgment of the Hon'ble Supreme Court in the case Kumari Shrilekha Vidyarthi vs. State of UP & Ors, (199.1) 1 see 212 wherein the Hon'ble Supreme Court has held as follows:

*"22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. \_*

*24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, In which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters/or regulating the conduct of the State activity ....*

*27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be*

*unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non- arbitrary and justified on the touchstone of Article 14."*

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

2.1. The petitioner has filed the petition praying to admit present Petition and direct TANGEDCO to make payment of Rs.53.72 Crores in favour of the Petitioner as the differential amount including interest for allegedly wrongfully fixing the rate at 75% of the preferential tariff rates even for the years where the APPC rates did not breach the preferential tariff rates in terms of the Order dated 19.01.2022 passed by the Commission in D.R.P. No.07 of 2021 titled as M/s.Grace Infrastructure Pvt. Ltd Vs. TANGEDCO & Ors. ("Grace Infra Judgement") towards the energy supplied by the Petitioner to TANGEDCO during the period FY 2012-13 to FY2Q17-18.

2.2. The Commission's Amendment to RPO Regulations, 2010 was notified on 19.06.2013 amending the definitions of APPC. The relevant portion of the amendment is reproduced below:

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

2.3. The explanatory statement to the amendment sets out that:

*"In the long run, pooled cost of power purchase may exceed the preferential tariff fixed by the commission for renewable energy due to escalation of conventional*



*fuel cost." It is prudent that a limit has to be fixed for arriving at the reasonable Pooled cost of power purchase. Therefore, it is proposed to amend the said regulation. "*

2.4. In the light of the amendment to the RPO Regulations 2010, the APPC rate was fixed periodically by the Commission and issued annually based on which the power generated by RE generators would be purchased by the Distribution Licensees. The details of the yearly APPC rate are as below:

Financial Year	APPC Rate (Rs. Per Unit)	Preferential Tariff (Rs. Per Unit)
2011-12	2.37	3.39
2012-13	2.54	3.39
2013-14	3.11	3.96
2014-15	3.38	3.96
2015-16	3.35	3.96
2016-17	3.96	4.16
2017-18	3.70	4.16
2018-19	3.97	2.86
2019-20	4.07	2.86
2020-21	4.37	2.86

2.5. Writ Petition No. 22097 of 2013 was filed before the Hon'ble High Court of Madras challenging the Commission's Amendment dated 19.06.2013 by the appellant, M/s.Techno Electric & Engineering Company Limited (formerly known as Simran Wind Project Limited). The petition was disposed of by the Hon'ble High Court of Madras on 15.07.2016 with certain directions. In its judgement, the Hon'ble High Court in plain and simple terms has held that:

- "(a) The APPC has not breached the preferential tariff till the pronouncement of the judgement,*
- (b) The amendment can be implemented from the date of such breach as notified by TNERC*
- (c) Liberty granted to the Appellant (Petitioner before the High Court) to move*

*TNERC for appropriate directions. "*

2.6. Para 31 of the above Hon'ble High Court's judgement is reproduced below:

*"31. The next contention of the petitioner is that the actual need has not arrived or the 1<sup>st</sup> respondent to effect the notification as the APPC has not breached the preferential tariff. Also it was contended that the REC can be sold at higher rate is far from truth and huge stocks of REC remain unsold. Again, this court cannot venture into the reasons regarding the unviability of the REC in the market. This Court taking judicial note of the happenings in the world regarding the climate change and need for sustainable development, could only see a continuing market for environmental component or carbon credit throughout the world. Hence for all the reasons stated above, the challenge to the notification 21.01.2013 fails. In view of the fact that the order dated 15-07-2013 fixing the preferential tariff at Rs.3.11 has been passed in exercising the rights under the Act and the Regulations and following the proceedings dated 21.01.2013, the challenge to the same would also fail. However, this Court finds force in the submission of the counsel for the petitioner that considering the object to introduce the cap, the need to implement the cap has not arrived. The impugned notification has been enacted in public interest to prevent the generators to unjustly enrich themselves, in the event of the preferential tariff falling below the APPC. Therefore, this court is of the view that the notification can be implemented with effect from the date of such breach as notified by the TNERC. Therefore, granting liberty to the petitioners to move the TNERC for appropriate directions, the writ petitions are dismissed. No costs."*

2.7. Based on the above orders by Hon'ble High Court of Madras, M/s. Techno Electric & Engineering Company Limited approached the Commission in M.P.No.22 of 2016, wherein the Commission vide order dated 28.04.2017 dismissed the petition on the following grounds:-

- "(a) Direction cannot be issued the Licensee to postpone the implementation of the Regulations when the Regulation is in force;
- (b) By taking in to account the preferential tariff for a wind generator prevailing prior to 2006 which was Rs.2.75, the APPC rate was said to have been breached in the year 2013-14 when the AP PC rate was fixed at Rs.3.11."

2.8. Consequent to the above order by the Commission, the petitioner, M/s. Techno Electric & Engineering Company Limited filed an Appeal No. 232 of 2017 before Hon'ble

Appellate Tribunal for Electricity (APTEL), which passed judgement dated 31.05.2019.

The relevant extract is as below:

"In light of the above, we sum up our findings as under:

12.1 The notification dated 19.06.2013 which amended the definition of the APPC shall not be given effect to in as much as till date, the APPC of a year has not exceeded the preferential tariff payable to wind generators for that corresponding year.

12.2 Being dynamic in nature (which may go up or down), the APPC rate shall be compared by the State Commission on year to year basis and the proposed cap of 75% under the amendment shall be implemented for a particular year in which APPC rate crosses over the rate of preferential tariff for that corresponding year.

12.3 The State Commission is directed to issue necessary instructions to Respondent No. 1 to make payment to the Appellant at the full APPC rate without applying any cap, for the relevant period, together with normal interest thereon at the rate provided for in the EPA from the date such capped tariff was effected by Respondent Discom until date of payment to the Appellant,"

2.9. The above judgement has been challenged by TANGEDCO before Hon'ble Supreme Court of India by way of Civil Appeal No. 9268 of 2019.

2.10. In D.R.P.No.7 of 2021 in between M/s. Grace Infrastructure Limited versus TANGEDCO, wherein the Commission has ordered as detailed below:

*"v) The remand application in R.A.No.2 of 2020 in M.P.No.22 of 2016 was heard on 09.06.2020 and appropriate orders in terms of the order of APTEL was issued in order No.1/2020 on 12.11.2020. During the hearing of the remand case, TANGEDCO had informed that an appeal was filed before the Hon'ble Supreme Court of India against the judgement in Appeal No.232 of 2017. The directions in the Order No.1/2020 issued by the Commission is extracted below:-*

*"TANGEDCO is directed to make payments to the appellants at the full APPC rate without applying any cap for the years 2013-2014 to 2017-2018 together with normal interest thereon at the rates provided in the Energy Purchase Agreement from the date the capped tariff was effected until date of payment to the Appellants.*

*During the hearing on 09.06.2020, TANGEDCO informed that an appeal has been filed before the Hon'ble Supreme Court of India. This order is subject to the final outcome of the appeal filed by the Respondent TANGEDCO before the Hon'ble Supreme Court of India.*

vi). *Thus the Order No.1/2020 dated 12-11-2020 is subject to the final outcome of the appeal filed by TANGEDCO before the Apex Court.*

*"5.6 The Order No.1/2020 dated 12-11-2020 passed by the Commission to implement the directions of APTEL in A.No.232 of 2017 is applicable to the instant case. TANGEDCO is directed to make payments in compliance with the Commission's Order No.1 of 2020 dated 12.11.2020 within one month from the date of this order."*

2.11. The petitioner M/s. The Tata Power Company Limited is claiming an amount of Rs.53.72 Crores as the differential amount including interest in terms of the above Order dated 19.01.2022 passed by the Commission in D.R.P. No. 07 of 2021 titled as M/s. Grace Infrastructure Pvt. Ltd Vs. TANGEDCO & Ors. ("Grace Infra Judgement") towards the energy supplied by the Petitioner to TANGEDCO during the period FY 2012-13 to FY 2017-18.

2.12. The tariff rates are determined by a transparent process of consulting the stakeholders after publishing the consultative paper, inviting comments and holding a public meeting.

2.13. The Commission under section 181 of the Electricity Act, 2003 notified the amendment fixing a cap on the APPC rate available to REC wind generators by restricting it to 75% of the preferential wind tariff of the relevant year.

2.14. TANGEDCO presenting the computation, showing the receipt of tariff received by the preferential RE generators along with sale of REC (Green component) vis-a-vis tariff received by preferential RE generators highlighted that the REC Generators are getting more than the preferential tariff RE Generators even with consideration of the Green component at floor price. Further, the 75% APPC cost paid to the wind energy generator is a pass through to the consumers and hence, allowing full APPC rate to REC wind generators will be a burden to the consumers.

2.15. Even in the past TANGEDCO had filed petitions before the State Commission in M.P.No.16 of 2011 praying for restrictions on the APPC rate so that it did not cross the preferential tariff against which the State Commission ruled that such issues will be addressed at appropriate time. Extracts of the Commission's order in above petition are reproduced below:

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

2.16. The State Commission itself before the Hon'ble High Court stated that considering the consumer interest, the cap has been fixed and such a cap has been fixed only to prevent the generators under REC scheme from claiming more tariff than preferential tariff. Further, in the absence of a cap, the purchase price of the electrical

component would go up and would have to be passed on to the consumers and as such there was need to provide the said cap of 75% which has been provided by the Commission in public interest exercising its power under section 61 (d) of the Act. Even Hon'ble High Court in W.P. No. 22097 of 2013 under Para 22 of the Judgement has held as under:

"from the explanation to the amendment, it is evident that the cap has been fixed to eschew the APPC from exceeding the preferential tariff The said amendment has been brought in to force, to safeguard the consumer's interest as envisaged under section 61 (d) of the Act and also at the same time, to balance the procurement cost of purchase price of electricity component. Therefore, this court is of the view that the amendment is neither vague nor arbitrary and therefore there is no violation of Articles 14 and 19 of the Constitution."

2.17. While rejecting the contention of the Appellant that the Commission did not have powers to fix a cap, the Hon'ble High Court in M.P.No. 22097 of 20 13 under Para 24 of the judgement as under

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

2.18. In the explanatory statement to the notification issued by the State Commission on 19.06.2013, the Commission has not stated that APPC rate has exceeded the preferential tariff to any particular year and what has been indicated therein was the Commission's apprehension that APPC rate may exceed the preferential rate in future. In other words, the definition of APPC itself is "APPC rate or 75% of preferential tariff whichever is less" and not APPC rate or the 75% of preferential tariff if it crosses

preferential tariff at that particular year. This definition of the Commission order dated 15.07.2013 has been upheld by Hon'ble High Court, Chennai and so it is a legally settled issue. Further, the RPO regulations, 2010 is applicable to all the entities covered under these regulations and hence, TANGEDCO alone cannot be excluded from its purview.

2.19. The Tata Power Company Limited is a generating company and a wind energy generator. The petitioner owns and operates 49.5 MW Wind Power Projects in the State of Tamil Nadu under the Renewable Energy Certificate ("REC") scheme. From the latest financials of M/s. The Tata Power Company Limited for the FY ending 2022-23, they have reported revenue of Rs.56,547 Crores with Net Profit at Rs.3,809 Crores. In spite of their good financial position, the pending invoices of the petitioner till March 2022 are paid in full inspite of many of the generators are being paid through instalments under LPSC scheme. The petitioners have been paid for an amount of Rs.588 Crores since their commission of windmills from May 2011 towards power purchase. Further, their invoices are up to date and are paid in full as per their invoices submitted in PRAAPTI portal.

2.20. Apart from above payments, the petitioner, The Tata Power Company Limited has claimed an amount of Rs.22.14 crores towards belated payment surcharge for the period from May 2011 to Mar 2022 and the same have been settled during February 2023. Many of the generators have waived BPSC at 100%/50% considering financial position of TANGEDCO.

2.21. The monthly fund inflow of TANGEDCO through revenue from sale of power to its consumers is around Rs.3,200 Crores and tariff subsidy from Government of Tamil Nadu is around Rs.600 Crores per month. The monthly fund outflow towards the revenue expenditure is around Rs.5,200 Crores towards procuring fuel, transportation of fuel, payment to power suppliers/transmission utilities, Employees including pension cost, Repairs & Maintenance cost, administrative cost, interest cost, repayment of loan among others. In this scenario, it would be difficult for TANGEDCO to consider the petition of M/s. The TATA Power Company Limited.

2.22. If the Commission if, directs the TANGEDCO to forthwith make payment if will adversely affects the fund flow of TANGEDCO. Further similar placed generators may also seek the same which will lead to multiplication of litigations. This may lead to difficulty in releasing payment for Coal companies, Central Generating Plants, Other fuel suppliers, make suppliers and power Generators similar to the petitioner.

2.23. TANGEDCO is a corporation company which wholly owned by the Government of Tamil Nadu and catering to the need of the general public at large would be put into irreparable losses grave prejudice, undue hardship and financial losses. In fact, such losses will be passing through in the future tariff which have to be passed on the end-consumers and attracts public interest. In any case, for the sake of a company, public authorities under general public should not get suffered financially.



2.24. As already appeal in the similar issue before Hon'ble Supreme Court of India is pending in Civil Appeal No. 9268 of 2019, the Commission pass such order which it deems fit to TANGEDCO.

### **3. Rejoinder filed on behalf of the Petitioner to the Counter Affidavit:-**

3.1. The amount in dispute claimed by the petitioner is the differential amount including the interest for wrongfully fixing the rate by TANGEDCO at 75% of the preferential tariff rates even for the years where the APPC rates did not breach the preferential tariff rates.

3.2. TANGEDCO, vide its Counter Affidavit, has made bald averments, which do little to address the specifics of the matter and the claims raised by the Petitioner. The following are the contentions raised-

- (a) The Judgement dated 31.05.2019 in Appeal No. 232 of 2017 ("Techno Judgement") passed by the Hon'ble Appellate Tribunal for Electricity ("Hon'ble APTEL") has been challenged by TANGEDCO before the Hon'ble Supreme Court of India, by way of Civil Appeal No. 9268 of 2019 and the same is pending adjudication.
- (b) Considering the consumer interest, such a cap has been fixed to prevent the generators under the REC Scheme from claiming more tariff than the preferential tariff. In case of absence of a cap, the purchase of the electrical component would go up and would have to be passed on to the

consumers. There was a need to provide the said cap of 75% which has been provided by the Commission in public interest while exercising its powers under Section 61(1)(d) of the Act which is a pass through in tariff. Reliance has been placed on the submissions made during the proceedings pending before the Hon'ble High Court of Madras ("Hon'ble High Court").

- (c) The Petitioner has a good financial position and the pending invoices of the Petitioner till March 2022 have been paid in full and payments for the period subsequent to March 2022 are also paid in full and submitted on the PRAAPTI Portal.
- (d) Direction for payment for differential amount by the Commission will adversely affect the fund flow of TANGEDCO (which is already in a precarious financial position) and would lead to multiplication of litigations as many of the similarly placed generators may also seek their claims.

3.3. TANGEDCO, vide its reply has also submitted that Civil Appeal No. 9269 of 2019 has been filed before the Hon'ble Supreme Court challenging the Techno Judgement passed by the Hon'ble APTEL, which is pending adjudication.

3.4. Before delving into the merits of the aforesaid contention, it is imperative to highlight what the Hon'ble APTEL held in the Techno Judgment and what directions

were passed. In this regard, the relevant extracts of the Techno Judgement passed by the Hon'ble Tribunal in Appeal No. 232 of 2017 are as follows-

*"11. Our consideration and findings*

*..... 11.23 From the perusal of the findings of the Hon'ble High Court in above para, it is crystal clear that the liberty was granted to the Appellant by the Court to approach the State Commission for an appropriate directions as per the findings whereas the Respondent Commission as well as Respondent Discom have interpreted the judgment otherwise. The basic issues generating dispute between generator (Appellant) and the Respondents are whether the rate of APPC has crossed over the rate of Preferential Tariff, if so, its date of crossing over, undue enrichment of REC generators over preferential rate (Non-REC) generators, etc. It is not in dispute that preferential tariff for wind generators was determined by the State Commission as Rs. 2.75 per KWH in the year prior to 2006 which was applicable to the wind generators commissioned before 15.05.2006 .*

*..... 11.25 .... The very objective of the State Commission for the impugned amendment dated 19.06.2013 was to prevent a situation in the long run when APPC rate may exceed the preferential tariff We find no ambiguity in the rationale given by the State Commission in its explanatory statement to the amendment but the way it is proposed to be implemented is full of legal infirmity. It would be more evident from the fact that for ascertaining the date of APPC crossing over the preferential tariff; a comparison of 2006 preferential tariff has been made with the APPC rate of 2013-14. As opined above, the tariff rate of APPC and preferential tariff are dynamic in nature and vary from year to year as determined by the State Commission. At best, they need to be compared in the same year and not in any heterogeneous manner as done in the case of the Appellant by the Respondents. While looking at year wise rate of APPC and preferential tariff, it is noticed that since last 7 years starting from 2012-13 to till date, no such breach has occurred and thus, capping of APPC based on assumptions and apprehensions cannot be sustained in the eyes of law.*

*12. Summary of our Findings:*

*In light of the above, we sum up our findings as under-*

*12.1 The notification dated 19.06.2013 which amended the definition of the APPC shall not be given effect to inasmuch as till date, the APPC of a year has not*

*exceeded the preferential tariff payable to wind generators for that corresponding year.*

*12.2 Being dynamic in nature (which may go up or down), the APPC rate shall be compared by the State Commission on year to year basis and the proposed cap of 75% under the amendment shall be implemented for a particular year in which APPC rate crosses over the rate of preferential tariff for that corresponding year.*

*12.3 The State Commission is directed to issue necessary instructions to Respondent No.1 to make payment to the Appellant at the full APPC rate without applying any cap, for the relevant period, together with normal interest thereon at the provided for in the EPA from the date such capped tariff was affected by Respondent Discom until date of payment to the Appellant.*

*13. For the forgoing reasons, we are of the considered opinion that the issues raised in the present Appeal have merit and accordingly, the Appeal is allowed. The Impugned Order dated 28.04.2017 passed by the Tamil Nadu Electricity Regulatory Commission in Miscellaneous Petition No. 22 of 2016 is hereby set aside to the extent challenged in the Appeal and directed at Para 12.1 to 12.3 of this Judgement & Order."*

3.5. From a bare perusal of the aforesaid, it is clear that while heavy reliance has been placed by TANGEDCO on the proceedings before the Hon'ble High Court, the issue therein was qua the challenge to the 75% cap and not whether the differential amount for the times when the APPC did not breach the Preferential Tariff can be claimed or not. In this backdrop, the following was held by the Hon'ble APTEL:

(a) Though the justification given by the Commission in the explanatory memorandum by fixing a cap of APPC at 75% of the preferential tariff in order to avoid APPC breaching the preferential tariff was valid, however, the way it is to be implemented, is full of legal infirmity.

- (b) APPC, being dynamic in nature, the amendment dated 19.06.2013 shall only be given effect when the APPC of a year exceeded the preferential tariff payable to wind generators for that corresponding year.
- (c) Admittedly, in the facts of Techno (which are similar to that of the Petitioner), the APPC had never breached the preferential tariff and therefore, there was no occasion for fixation of 75% cap.
- (d) Therefore, Hon'ble APTEL directed the Commission to issue necessary instructions to TANGEDCO to make payment to the Generator at the full APPC rate without applying any cap, for the relevant period, together with normal interest thereon at the provided for in the EPA as the APPC had never breached the preferential tariff for the corresponding year.

3.6. Accordingly, on 12.11.2020, upon the matter being remanded back, the Commission, vide its Order ("Remand Order"), directed TANGEDCO to make payments to the Petitioner therein for the years 2013- 14 to 2017-18 along with interest at the full APPC. For ease of reference, the relevant extracts of the Remand Order dated 12.11.2020 passed the Commission are reproduced hereunder:

*"TANGEDCO is directed to make payments to the appellants at the full APPC rate without applying any cap for the years 2013- 2014 to 2017-2018 together with normal interest thereon at the rates provided in the Energy Purchase Agreement from the date the capped tariff was effected until date of payment to the Appellants. During the hearing on 9.6 2020, TANGEDCO informed that an appeal has been filed before the Hon'ble Supreme Court of India. This order is*

*subject to the final outcome of the appeal filed by the Respondent TANGEDCO before the Hon'ble Supreme Court of India. "*

3.7. On 29.11.2019, TANGEDCO challenged the Techno Judgment before the Hon'ble Supreme Court by way of C.A. No. 9268 of 2019 and the same is pending adjudication. However, it is pertinent to mention herein that as on date there is no stay operating on the Techno Judgment and therefore, the findings and directions passed therein by the Hon'ble APTEL are still binding.

3.8. In the meantime, based on the decision rendered by the Hon'ble APTEL in the Techno Judgement, as well as the Commission in its Remand Order, the Commission in the Grace Infra Judgment while noting that a Civil Appeal has been filed by TANGEDCO against the Techno Judgment and no stay is operating, reiterated the findings rendered in the Techno Remand Order and directed TANGEDCO to make payments for the differential amount subject to the outcome of the Civil Appeal filed before the Hon'ble Supreme Court. The relevant extracts of the Grace Infra order are reproduced hereunder:

*"5.4.*

*... v) During the hearing on 9.6.2020, TANGEDCO informed that an appeal has been filed before the Hon'ble Supreme Court of India. This order is subject to the final outcome of the appeal filed by the Respondent TANGEDCO before the Hon'ble Supreme Court of India against the Judgment in Appeal No. 232 0/2017.*

*vi) Thus the order No. 01/2020 dt. 12.11.2020 is subject to the final outcome of the appeal filed by TANGDECO before the apex court.*

*5.6 The Order No.1 /2020 dt. 12.11.2020 passed by the Commission to implement the directions of APTEL in A. No.232 of 2017 is applicable to the instant case. TANGEDCO is directed to make payments in compliance with the*

*Commission's Order No.1 /2020 dt 12.11.2020 within one month from the date of this order."*

3.9. It is a settled law when a court of law has once laid down a principle of law as applicable to certain set of facts, it will adhere to that principle, and apply to all future cases where facts are substantially the same. The said doctrine/principle of law has been extensively dealt by the Petitioner in the Petition.

3.10. Further, the Hon'ble Supreme Court in the matter of Union of India v. Raghubir Singh AIR 1989 SC 1933, while deliberating upon the merits of doctrine of Judicial Precedent, has held as follows:

*"The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to its consequence of transactions forming part of daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a Court."*

3.11. However, TANGEDCO, in an attempt to evade its liability of making the differential payment has once again chosen to take umbrage under the fact that the challenge to the Techno Judgment is pending adjudication before the Hon'ble Supreme Court. However, while relying upon the pendency, TANGEDCO has failed to disclose there is no stay on the operation of the Techno Judgement which is evident from the Orders passed by the Hon'ble Supreme Court till date.

3.12. It is a trite law that mere filing of an Appeal does not amount to automatic stay of the Order against which an Appeal has been preferred unless there is a specific order

granting stay is passed. In order to substantiate the aforesaid stand, the Petitioner places reliance on the following Judgements:

(a) Collector of Customs, Bombay v. M/s Krishna Sales (P) Ltd. AIR 1994 SC 1239,

The relevant extract whereof is reproduced herein below:

*"6. According to the said para 4, the goods will not be released even where the party succeeds in cases where the customs authorities decide to go in appeal before the Tribunal or the Supreme Court. They will consider the issuance of such certificate only after the decision of the Tribunal or the Supreme Court, as the case may be. The learned Counsel for the respondent characterizes the said direction as arbitrary and contrary to law. We see the force in his submission. If the authorities are of the opinion that the goods ought not to be released pending the appeal, the straightforward course for them is to obtain an order of stay or other appropriate direction from the Tribunal or the Supreme Court, as the case may be. Without obtaining such an order they cannot refuse to implement the order under appeal. As is well-known, mere filing of an appeal does not operate as a stay or suspension of the order appealed against. Moreover, such detention is likely to create several complications relating to the demurrage charges besides the possible deterioration of the machinery and goods. We hope and trust that the Collector of Customs, Bombay shall appropriately revise the said public notice in the light of the observations made herein. If he does not do so, there is a likelihood of the customs authorities being themselves made liable for demurrage charges in appropriate cases."*

(b) Judgment dated 24.01.2012 passed by the Hon'ble High Court of Madras in the case titled as M/s. Supra Bio- Tech vs. The Additional Commissioner (2012) SCC Online MAD 5307, wherein it has been held as follows:

*"17. The mere filing of an appeal against the order of the appellate authority, and the pendency of the said appeal, cannot be shown as sufficient grounds for not giving effect to the order of the Commission of Customs (Appeals), dated 16.09.2011. Even though the National Centre for Mass Spectrometry, Indian Institute of Chemical Technology, Hyderabad, had by its communication, dated*



*9.12.2010, had opined that the samples of the goods imported sent to it, did not show any presence of pesticides or oxytrazine, the refusal of the respondents to release the goods in question cannot be held to be valid in the eye of law".*

3.13. Therefore, in view of the submissions made hereinabove, the fact remains that there is no stay on the operation of the Techno Judgement and the same has also been relied upon by the Commission in the Grace Infra Judgement. Therefore, the Techno Judgment and the Grace Infra Judgments are binding upon the Commission and TANGEDCO. Furthermore, the claims of the WEGs have been allowed by the Commission and the claims already raised by TANGEDCO have been disallowed, and hence, the finality of the decisions cannot be said to be in jeopardy in any manner as alleged by TANGEDCO.

3.14. TANGEDCO, vide its reply has emphasized that the 75% APPC cost paid to the wind energy generators, was fixed to prevent generators under the REC Scheme such as the Petitioner from claiming more Tariff than Preferential Tariff. Therefore, directing payment at full APPC would be detriment to the interest of consumers as it is a pass through in Tariff.

3.15. Before delving further, it is reiterated that the cap of 75% on the APPC was fixed only for the times when it breaches the Preferential Tariff. However, in practice, rates were communicated by TANGEDCO on the basis of which Bills used to be raised from FY 2012-13 and under the garb of keeping the APPC rate as low as possible, TANGEDCO started arbitrarily fixing the rates, as payable to the Wind Energy

Developers, at 75% of the preferential tariff rates even for the years where the APPC rates did not breach the preferential tariff rates.

3.16. Therefore, TANGEDCO now cannot take umbrage under the argument that if the Commission directs payment of full APPC, it would be to the detriment of the consumers. If TANGEDCO had never arbitrarily fixed the cap at 75% of the preferential tariff rates even for the years where the APPC rates did not breach the preferential tariff, such a situation would not have even arisen as of today. It is trite law that a party cannot be permitted to take advantage of its own wrong.

3.17. Even otherwise, it is relevant to state herein that the statutory scheme of the Act requires a balance between two competing interests to be struck. Catering to the former so as to deprive the latter of its legitimate claims is lopsided and, therefore, violative of law.

3.18. The legislative framework regulating the sector as envisaged under the National Electricity Policy by the Respondent vide Resolution No. 23/40/2004-R&R (Vol. II) dated 12.02.2005 requires that consumer interest should be protected while ensuring the financial viability and growth of the power sector. The relevant provisions are reproduced below:

*"5.5.1 There is an urgent need for ensuring recovery of cost of service from consumers to make the power sector sustainable*

*5.8.4 Capital is scarce. Private sector will have multiple options for investments. Return on investment will, therefore, need to be provided in a manner that the sector is able to attract adequate investments at par with, if not in preference to,*

*investment opportunities in other sectors. This would obviously be based on a clear understanding and evaluation of opportunities and risks. An appropriate balance will have to be maintained between the interests of consumers and the need for investments.*

*5.8.5 All efforts will have to be made to improve the efficiency of operations in all the segments of the industry. Suitable performance norms of operations together with incentives and disincentives will need to be evolved along with appropriate arrangement for sharing the gains of efficient operations with the consumers. This will ensure protection of consumers' interests on the one hand and provide motivation for improving the efficiency of operations on the other.*

*It will be necessary that all the generating companies, transmission licensees and distribution licensees receive due payments for effective discharge of their operational obligations as also for enabling them to make fresh investments needed for the expansion programmes. Financial viability of operations and businesses would, therefore, be essential for growth and development of the sector. Concerted efforts would be required for restoring the financial health of the sector. For this purpose, tariff rationalization would need to be ensured by the SERCs. This would also include differential pricing for base, intermediate and peak power."*

3.19. On a perusal of the foregoing, the scheme of the Policy is as follows:

(a) The Generator should receive due payments for effective discharge of its operational obligations as also for enabling them to make fresh investments needed for expansion programmes.

(b) Financial viability of operations and businesses is essential for growth and development of the sector and concerted efforts is to be made for restoring the financial health of the sector.

(c) Scheme of the Act promotes efficiency, financial viability and growth of the power sector

3.20. Further, the Hon'ble Supreme Court, in the matter of Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission & Ors., Civil Appeal No. 1843 of 2021 has held that consumer interest cannot be ground to resile from the contractual obligations. The relevant extracts are reproduced hereunder:

*"176. LPS cannot be equated with carrying cost or actual cost incurred for the supply of power. The Appellant has a contractual obligation to make timely payment of the invoices raised by the Power Generating Companies, subject, of course, to scrutiny and verification of the same.*

*195. There being no dispute in the present case with regard to the principal sums due under the monthly bills, interest on delayed payment at 2% in excess of 5BI PLR cannot be said to be arbitrarily high. There is no reason for this Court to reduce the contractual rate of interest and thereby alter or modify the contract between the parties, in exercise of its powers Under Article 142 of the Constitution of India.*

*196. We need not go into the question whether or not the Appellant has funds to clear its interest liability. The Appellant cannot continue to get supply of electricity without having appropriate funds. Appellant would necessarily have to raise funds to clear its contractual obligations.*

*197. Even assuming that the burden of interest would have to be passed on to the consumers, that cannot be the ground for the Appellant to resile from its contractual commitment to the Power Generating Companies. The Appellant cannot pass on the burden for delay in making payment to the Power Generating Companies."*

3.21. TANGEDCO, vide its reply has inter alia contended as follows:

- a) Petitioner has a good financial position and the pending invoices of the Petitioner till March, 2022 have been paid in full and the invoices raised thereafter have also been paid in full and submitted on the PRAAPTI Portal.
- b) Considering the monthly fund outflow of TANGEDCO, it would be difficult to consider the present Petition. Also, allowing the same would enable similarly placed generators to seek compensation leading to multiplication of litigations.

3.22. The present Petition has only been filed, keeping in view the legal and the contractual right that Petitioner has been deprived of over the years during which the Petitioner was being deprived from getting the full APPC even when it had not breached the Preferential Tariff. Pertinently, while specious contentions have been raised by TANGEDCO, the liability to pay the differential amount in law has not been disputed by TANGEDCO. Whether TANGEDCO has made payments thereafter or prior to is immaterial and beyond the scope of the present Petition as it has only been filed for a limited purpose, i.e. seeking the differential amounts for FY 2012-13 to FY 2017-18 wherein the APPC never breached the preferential Tariff.

3.23. Further, TANGEDCO has raised vague contentions which do little to address the specifics of the present Petition. TANGEDCO cannot be allowed by the Commission to shy away from its contractual and legal obligations in regard liability of payment of the differential amount by raising the contention of the precarious financial position as well as multiplication of litigations apprehended in the near future. The Commission in its

Order dated 15.03.2022 in the matter of M/s Bhabani Pigments Pvt. Ltd. v. TANGEDCO

& Ors. has held as follows:

*"4.11. If the Commission directs the TANGEDCO to forthwith make payment of Interest of Rs.21,14,833/- for the past period from April 2018 to June 2020, it will adversely affect the fund flow of the respondents. Further similar placed generators and may also seek release of payment and it will lead to multiplication of litigations. This may lead to difficulty In releasing payment for Coal companies, Central Generating Plants, Other fuel suppliers, material suppliers and power Generators similar to the petitioner.*

*4.13. TANGEDCO is a Corporation company wholly owned by the Government of Tamil Nadu catering the need of the general public at large and would be put into irreparable losses grave prejudice, undue hardship and financial losses. In fact such losses will be transferred through in the future tariffs and subsequently be passed on to the end-consumers which affect public interest. In any case, for the sake of a company, public authorities under general public should not get suffered financially.*

*5. Findings of the Commission:-*

*5.3. The financial difficulty cannot be allowed as a valid ground to avoid payment of principal and interest dues. Further, law is settled on the point that interest is payable on delayed payment and the respondent has to pay interest as per the contractual rate or as per the orders of the Commission, as the case may be. In this connection, the provisions of Tariff Order No.1 of 2009 dated 20-03-2009 issued by the Commission would be relevant:-*

*"8.11.1. When a wind generator sells power to the distribution licensee, the generator shall raise a bill every month for the net energy sold after deducting the charges for startup power and reactive power. The distribution licensee shall make payment to the generator within 30 days of receipt of the bill. Any delayed payment beyond 30 days is liable for interest at the rate of 1 % per month."*

*5.4. The Hon'ble APTEL, has also in its order dated 17-04-2012 in Appeal No.II of 2012 has upheld the payment of interest on delayed payment to the wind energy generators and this order has also been upheld by the Hon'ble Supreme Court in*

*CFC Vs. Narasinghadas Agarwal in Review Petition (Civil) No. 1606 of 2018 in Appeal No «. 5465 of 2014 dated 16-08-2018.*

*5.5. In view of the above, the Respondent TANGEDCO is liable to pay 1 % interest per month on delayed payment beyond 30 days as per the above Tariff Order on the balance amount that remains unpaid to the petitioner."*

3.24. A similar argument was also raised by TANGEDCO in the Grace Infra Judgement which has been heard and adjudicated by the Commission. The relevant extracts of the objections as raised by TANGEDCO as evident from the perusal of the Grace Infra Judgement [P /1 (Colly.) @Pg. 44A of the Petition] are as follows:

*"Contentions of the Respondent ...*

*4.11. Due to shortage of power exist in Tamil Nadu, TANGEDCO is in a position to purchase power at higher rate from other sources which leads to facing critical financial crises, further not able to make payment within the time limit prescribed.*

*4.12 The monthly fund outflow of TANGEDCO through revenue from sale of power to its consumers is around Rs. 3200 Crores and the tariff subsidy from the Government of Tamil Nadu is around Rs. 600 Crores per month.*

*The monthly fund outflow towards the revenue expenditure is as below:*

- 1. Payment for procuring fuel- Rs. 300 Crores*
- 2. Transportation of fuel- Rs. 300 Crores*
- 3. Payment to power suppliers, both CGS and Private generators Rs. 2000 Crores.*
- 4. Payment to Central and State Transmission Utilities -Rs. 300 Crores*
- 5. Employees cost including pension- Rs. 650 Crores*
- 6. Repairs, maintenance, and administrative expenses - Rs. 100 Crores*
- 7. Interest and finance charges- Rs. 1000 Crores*
- 8. Repayment of loan by TANGEDCO- Rs. 500 Crores*

*For all the above expenditures, the total outflow is around Rs. 5150 Crores. There is an average shortfall of about Rs. 1360 Crores. Some payments are postponed and made as and when loans are received from REC/PFC/IREDA and other financial institutions.*

*4.13. In the above circumstances, releasing of huge payment to wind generators will be difficult one, however, efforts are being taken for releasing payments for one or two months. And moreover, paying or adjustment of interest due every month will affect the cash inflow of TANGEDCO and payment of surcharge before payment of the dues will not be correct one under accounting principles. On 18.12.2020, wind mill payments up to the month of 06/2020 have been released.*

*4.19. Despite several financial constraints faced by TANGEDCO, sincere efforts are being made in clearing the pending bills of the wind energy generators as per seniority basis.*

*4.21. TANGEDCO is a corporation company wholly owned by the Government of Tamil Nadu and catering the need of the general public at large would be put into irreparable losses grave prejudice, undue hardship, and financial losses. In fact such losses will be passing through in the future tariffs which have to be passed on the end-consumers and attracts public interest. In any case, for the sake of a company, public authorities under general public should not get suffered financially.”*

3.25. Therefore, TANGEDCO cannot be allowed to re-agitate issues which have already been decided and adjudicated upon by the Commission as in effect by doing so it is only attempting to reargue the matter.

3.26. Even otherwise, the issue arising out of the present proceedings has already been adjudicated by the Hon'ble Tribunal in the Techno Judgement as well as the Commission in the Grace Infra Judgement, based on which the present proceedings have been initiated by the Petitioner. Furthermore, TANGEDCO being a party to the proceedings in the Techno Judgement and the Grace Infra Judgement have already raised their contentions/ objections as reproduced above which have attained finality, and thus, would attract the doctrine of Res Judicata.



3.27. In regard to the contention of multiplicity of proceedings/ litigations is concerned, initiation of claims against TANGEDCO, by the other Wind Energy Generators in the near future is immaterial and would be every developer's own prerogative.

**4. Additional Counter Affidavit filed on behalf of the Respondent 1 to 3 :-**

4.1. The rate difference claimed by M/s.The Tata Power Company Limited is as follows:

<b>M/s. The TATA Power Company Limited</b>						
<b>Financial Year</b>	<b>APPC Rate (Rs.Per unit)</b>	<b>Preferential Tariff (Rs.Per Unit with AD)</b>	<b>75% of Preferential Tariff (Rs.)</b>	<b>Rate Fixed for M/s.TATA Power Company Limited (Rs.)</b>	<b>Breach</b>	<b>APPC rate demanded by M/s.TATA (Rs.)</b>
2012-13	2.54	3.39	2.54	2.54	No	2.54
2013-14	3.11	3.53	2.65	2.65	No	3.11
2014-15	3.38	3.53	2.65	2.65	No	3.38
2015-16	3.35	3.53	2.65	2.65	No	3.35
2016-17	3.96	3.70	2.78	2.78	Yes	2.78
2017-18	3.70	3.70	2.78	2.78	No	3.70

4.2. The energy generated by the Renewable Energy Generator under REC scheme, WEG herein, has two components, one being the electricity component and the other being the environmental attribute/green component. The electricity component can be sold to local distribution utilities at the APPC rate which in effect is a price of conventional electricity and the environmental attribute can be sold through exchanges in the form of Renewable Energy Certificates (RECs) which are purchased by utilities of

other States that are not rich in renewable energy to meet their Renewable energy Purchase Obligation (RPO) and also by other obligated entities to meet their RPO. The electricity component can also be sold through traders, to open access consumers or through power exchanges at a mutually agreed price.

4.3. The following table will demonstrate that the State Commission's notification has rightly applied the amended notification based on the undisputed APPC rate and Tariff of the relevant financial year as per the Tariff Order.

<b>Year</b>	<b>Preferential Tariff</b>	<b>75% of Preferential Tariff (QR) Energy component</b>	<b>Green component From sale of REC (Rs.1.5 to 2.50 *</b>	<b>Per unit price to Wind Generator under REC</b>
2012-13	3.39	2.54	1.5	4.04
2013-14	3.53	2.65	1.5	4.15
2014-15	3.53	2.65	1.5	4.15
2015-16	3.53	2.65	1.5	4.15
2016-17	3.70	2.78	1.5	4.29
2017-18	3.70	2.78	1.0	3.78

[\* By taking the floor price of green component]

From the above it may be ascertained that on comparison to the Generator under Preferential Tariff commissioned upto 2017-2018 the petitioner is getting more tariff.

<b>Year</b>	<b>APPC Rate (Rs.)</b>	<b>Rate the wind generator gets per kwh under REC (Rs)</b>	<b>Preferential Tariff rate (Rs) for the Generator who has commissioned the WEG during 2011</b>	<b>Excess tariff the REC generator getting over the machine commissioned under Pref. TF for the year 2011</b>
2012-13	2.54	4.04	3.39	0.65
2013-14	3.11	4.15	3.39	0.76
2014-15	3.38	4.15	3.39	0.76
2015-16	3.35	4.15	3.39	0.76

2016-17	3.96	4.29	3.39	0.90
2017-18	3.70	3.78	3.39	0.39

4.4. Even if compared with the WEG who have commissioned the machine under Preferential tariff during 2011 in which the petitioner also commissioned their machine under REC it may be ascertained that the petitioner is getting higher tariff compared to Preferential tariff.

4.5. The wind energy generator has the green component and can trade the same between Rs.1.5 (floor price) - Rs.2.50 (forbearance price) upto 2016-17 and Rs.1.0 (floor price)-Rs.2.90 (forbearance price) from 01.04.2017. Taking into account the green component and the energy component, the wind generator is getting more than the preferential tariff while availing REC.

4.6. The rate for energy component of the wind energy per kwh under REC scheme, sold to the Distribution Licensee, is capped at 75% of the preferential tariff of the year of commissioning of the wind energy generator. Each wind energy generator has a distinct preferential tariff depending upon the control period in which it was commissioned. The REC availing wind generators are a different category of wind energy generators, who avail benefit of selling power by wheeling to either captive or third party and sell the surplus to the distribution licensee. These wind energy generators get the benefit of green component of the REC in addition to the energy component of the same unit of electricity sold to the distribution licensee. The petitioner is not at loss.

4.7. On the other hand, the 75% APPC cost paid to the wind energy generator is a pass through to the consumers. In fact, the State Commission ought to have taken into consideration the green energy component for deciding the cap on the 75% APPC, because it is an income to the wind energy generator satisfying the requirement of s. 61 (d) of Act, 2003.

4.8. The Hon'ble CERC introduced the REC scheme in 2010. During that time, the preferential tariff rates, already in force were Rs.2.75, Rs.2.90 and Rs.3.39 per unit as the case may be. The Average Pooled Purchase Cost (APPC) rate was Rs.2.37 per unit. As the preferential tariff rates are fixed for the entire agreement period of 20 years, the TANGEDCO insisted the APPC rate also be fixed for the entire agreement period of 20 years. TANGEDCO filed M.P.No.16 of 2011 before the TNERC and stated that, the REC projects have to be paid with the APPC rate i.e., determined by the Commission every year. TANGEDCO argued for the following issues before the Commission:-

- (i) The APPC rate is a negotiable one.
- (ii) Fixed APPC rate of the year to be fixed one for 20 years.
- (iii) APPC rate should not cross the prevailing preferential tariff rate of Rs.2. 75 per unit.

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

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

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

4.11. In 2011-12 the APPC rate was Rs.2.37, in 2012-13 it was Rs.2.54 but when it is worked out for the year 2013-14, as there was a possibility of crossing the preferential tariff rate of Rs.2.75, as requested by the TANGEDCO, the Commission took an initiative to control the APPC rate called for the comments in 2012 itself for amending the TNERC RPO Regulations, 2010. After analyzing the comments, the Commission put a cap of 75% on the preferential tariff rate. Subsequently, the Commission vide its order dated 15.07.2013, fixed the APPC rate at Rs.3 .11 (or) 75% of the preferential tariff rate of the N CES generator to that category (or) subcategory whichever is less.

4.10. The procurement of power by a distribution licensee should have a value and a purpose and expenditure to procure that power should be reasonable. The procurement

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

4.11. The Courts have consistently held that the Regulatory Commissions under the Electricity Act, 2003 are the statutory, technical bodies, the fixation of tariff is legislative in character and the same should be left to such statutory bodies. As stated already, the Hon'ble High Court of Judicature at Madras, in WP No.22097 of 2013 has also upheld the powers of the Commission and without actually going into the merit of the case, has remanded the matter to this Commission. Therefore, if, on a thorough analysis of the entire issue in detail with reference to the statutory provisions including the National Electricity Policy, following the established procedures and prudent practice in the electricity sector in India with due regard to the pleadings of the respondents that the APPC rate has exceeded the preferential tariff during the year 2013 itself, the Commission arrives to a conclusion that the APPC charges has breached the preferential tariff, it may be open and appropriate for the Commission to pass an order that the amendment to the RPO Regulations would be effective from 15.07.2013, the

date notified in the Government Gazette. In this case, as stated already, the APPC has breached and as such there is no need for postponement and also there is no statutory provisions to postpone the regulations which have already come into force and implemented.

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

4.13. The APPC rate been left unchecked, the RE generator commissioned, say, during the control period of the Order No.3 dt.20.03.2009 would get a tariff of Rs.3.39 per unit throughout the contract period of 20 years which is a tariff determined considering all financial and operational parameters ensuring rate of return to the generator whereas the RE generator commissioned during the same control period but opted for REC scheme would. be getting paid initially at Rs.2.54 per unit and subsequently at rates of Rs.3.11, Rs.3.38 etc. for the electrical component sells

environmental attribute, which energy the distribution licensee cannot account for the purpose of RPO after incurring high expenditure.

4.14. It is in this context, the Commission felt that the APPC rate, which ought to be lesser than the preferential rate of tariff, would cross the preferential tariff over a period of time and to put an end to this anomaly, the Commission has fixed the cap of 75% of the preferential tariff for the APPC rate. It is to be noted that what is to be compared is the APPC rate prevailing in the current years and the preferential tariff in respect of the generators entering their respective contract on the same period and the preferential tariff and APPC rate of every year should not be compared.

4.15. In the Explanatory Statement to the notification issued by the Commission on 19-06-2013, the Commission has not stated that APPC rate has exceeded the preferential tariff of any particular year and what has been indicated therein was the Commission's apprehension that APPC rate may exceed the preferential rate. In other words, the definition of APPC itself is "APPC rate or 75% of Preferential tariff whichever is less" and not APPC rate or the 75% of Preferential tariff if it crosses Preferential tariff at that particular year as argued by the appellant. And further, this definition of TNERC dated 15.07.2013 was upheld by the Hon'ble High Court, Chennai and so it is legally settled issue. Incidentally, the APPC rate of Rs.3.11 per unit arrived for the year 2013-14 exceeded the preferential tariff of Rs.2.75 per unit fixed for a category of generators. The TNERC (RPO) Regulations, 2010 is applicable to all entities covered under these regulations and hence the Appellant alone cannot be excluded from its purview.



4.16. Because of the APTEL implementation order, and if the APPC rate is revised for 912.35 MW of REC wind power generation from 2011 to as on date, the purchase cost of energy to TANGEDCO may rise which cannot be included and retrieved from the consumers retrospectively. This price cannot be included in the ARR of the TANGEDCO retrospectively resulting in undue favour to the petitioner at the cost of General public.

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

5.1. Having heard the parties at length and perused the material records, we find that the principal grievances of the petitioner are as follows.

- a) That the respondent has resorted to the preferential tariff of earlier years for comparison with the APPC rate for the purpose of arriving at the cap of 75% of the preferential tariff.
- b) That the capping of APPC rates has also been done even in cases where the breach of preferential tariff had not occurred.

5.2. On the first issue, a point has been made by the petitioner that the APPC rate is compared with that of the rate fixed during earlier years i.e., at the time of commissioning of the plant for each category of generators for the purpose of fixation of cap. We find nothing amiss with the said approach for the reason that in the present scenario where the APPC has already breached the preferential tariff to the point of no return, it is the preferential tariff at a capped ceiling of 75% which has become the vital factor in the payment to be made to the REC generators in lieu of actual APPC. In other words, the

traditional concept of APPC no longer survives with the capped form of preferential tariff at 75% having taken over the field. It is pertinent to point out here that if capping of preferential tariff is not done with reference to the control period in which the plant was commissioned, it would lead to an anomalous situation where the generators who commissioned the plants with different capital cost and other overheads at different point of time would be treated equally and paid the same amount of capped preferential tariff which is nothing but a new avatar of the APPC in the present scenario. This in our view, would amount to discrimination among the generators *inter se*. Therefore it is our well considered view that for the purpose of payment of preferential tariff at 75% in lieu of APPC the consideration of the date of commissioning of a generating unit as the crucial factor is the proper yardstick and the same cannot be faulted.

5.3. On the second issue, the petitioner contends that even for the years in which APPC did not breach the preferential tariff, the cap was applied arbitrarily. We have considered the judgment of Hon'ble High Court of Madras which directed that the cap cannot be fixed until the breach of preferential tariff by the APPC occurs. Therefore it is to be made clear that unless the breach occurs, no case arises for fixation of cap. If at all it is found that APPC price has been capped in the years where breach had not occurred, in all certainty, it is to be reversed and the petitioner and respondent shall ensure the same.

5.4. We find that, in what is otherwise a case of simple arithmetic and comparison involving capping of APPC in case of breach, the present grievance could have

emanated possibly due to resort to SECI prices obtained in the competitive bidding to keep the price as low as possible. If that be so, the same has to be reversed for the reason that though the intention to keep the prices as low as possible is well-intentioned, the same cannot be permitted when there is no explicit approval for taking the SECI price as the criteria for the purpose of capping the APPC price.

5.5. In fine, the following directions are given :

- a) TANGEDCO is directed to make payments to the petitioner at the full APPC rate without applying any cap whenever the APPC rate does not breach the preferential tariff determined by the Commission for the control period in which the RE plant was commissioned.
- b) Whenever the APPC rate breaches the preferential tariff determined by the Commission, the TANGEDCO is directed to make payments to the petitioner at the 75% of the preferential tariff fixed by the Commission for the control period in which the RE plant was commissioned.
- c) For the purpose of determination of the breach of preferential tariff by APPC, the comparison of APPC shall be done only with the preferential tariff applicable to a category of generators prevailing in the control period in which the RE plant was commissioned and no comparison of APPC shall be done with the SECI price or any other market price obtained in the competitive bidding.

d) The respondent is directed to verify the claim of Rs. 53.72 crores made by the petitioner in the present petition with reference to the finding and direction made herein and make payment accordingly.

With these directions, the petition is disposed of. The parties shall bear their respective cost.

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

(Sd.....)  
Member

(Sd.....)  
Chairman

/True Copy /

**Secretary  
Tamil Nadu Electricity  
Regulatory Commission**