

TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 13th day of February 2025

PRESENT:

Thiru K.Venkatesan ... **Member**
Thiru B. Mohan ... **Member (Legal)**

D.R.P. No.7 of 2024

1. M/s. SEP Energy Private Limited,
G-409, Capstone, Sheth Mangaldas Marg.
Opp Chirag Motors, Ellisbridge,
Ahmedabad – 380006.

2. M/s.Lemon Tree Hotels Ltd.
72, Sardar Patel Road,
Guindy,
Chennai – 600 025.

3. M/s.Shimona Hotels Pvt. Ltd.
No.31/3, 32/13 & 14, Opp. MIOT Hospital,
Mount Poonamallee High Road,
Manapakkam,
Chennai – 600 125.

...Petitioner
MSA Partners
Advocate for the Petitioner

Vs

1. Tamil Nadu Generation and Distribution
Corporation Ltd. (TANGEDCO)
Through its Managing Director,
NPKRR Maligai, 6th Floor, Eastern Wing,
144, Anna Salai
Chennai-600 002.

2. The Chief Engineer – NCES
Tamil Nadu Generation and Distribution
Corporation Ltd. (TANGEDCO)
2nd Floor, No. 144, Anna Salai
Chennai-600 002.

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

4. The Chief Financial Controller / Revenue
Tamil Nadu Generation and Distribution
Corporation Ltd (TANGEDCO)
2nd Floor, 144, Anna Salai,
Chennai-600 002

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

This Dispute Resolution Petition stands preferred by the Petitioner M/s. SEP Energy Private Ltd., with a prayer to-

- (a) Direct TANGEDCO to adjust the outstanding amount of Rs.26,98,179/- due to SEP Energy against the consumption charges / open access charges payable by petitioners No.2 & 3, respectively, along with interest at the rate of 18% per annum. Amounting Rs.37,72,841/-

- (b) Award costs of the present proceedings in favour of the petitioners and

(c) Pass such other further orders as this Commission may deem fit and proper in the circumstances of the case.

This Dispute Resolution Petition coming up for final hearing on 22.10.2024 in the presence of M/s MSA Partners, Advocate for the Petitioner and Thiru.N.Kumanan and Thiru.A.P.Venkatachalapathy, Standing Counsel for the Respondent upon hearing the arguments on both sides and on perusal of relevant material records and the matter having stood over for consideration till this date this Commission passes the following

ORDER

1. Contention of the Petitioner:-

1.1. SEP Energy uses the transmission and distribution network of TANGEDCO for supplying electricity to M/s. Lemon Tree Hotels Ltd. and M/s. Shimona Hotels Pvt. Ltd., Petitioners No.2 & 3 herein, captive consumers of SEP Energy in the State of Tamil Nadu.

1.2. SEP Energy is a wind power generating company under Section 2(28) of the Electricity Act, 2003 with the following wind generating units in the state of Tamil Nadu:

- a) HT SC No: 1640 with One No. Generator of Shriram EPC having capacity of 250KW installed at SF Nos. 40/1D & 2 of Kasikuvaithan Village, Alangulam Taluk in Tirunelveli District, commissioned on 22.03.2006.
- b) HT SC No: 2088 with One No. Generator of Shriram EPC having capacity of 250KW installed at SF Nos. 222/2 (Part) of North Kavalakurichi Village, V.K. Taluk in Tirunelveli District, commissioned on 30.09.2006.
- c) HT SC No: 2391 with One No. Generator of Shriram EPC having capacity of 250KW installed at SF Nos. 630/6 (Part) of Uthumalai Village, V.K, Pudur Taluk in Tirunelveli District, commissioned on 28.08.2007.
- d) HT SC No: 3088 with One No. Generator of SEPC having capacity of 250KW installed at SF Nos. 493/1B2 of Mayamankurichi Village, Angulam Taluk in Tirunelveli District, commissioned on 24.03.2010.
- e) HT SC No: 3089 with One No. Generator of SEPC having capacity of 250KW installed at SF Nos. 321/ (P) of Mayamankurichi Village, V.K. Taluk in Tirunelveli District, commissioned on 24.03,2010.
- f) HT SC No: 2378 with One No. Generator of SEPC having capacity of 250KW installed at SF Nos. 921/4 (Part) of Mayamankurichi Village, V.K. Taluk in Tirunelveli District, commissioned on 06.07.2007.

1.3. The Petitioner entered into Energy Wheeling Agreements with Respondent No. 1, Tamil Nadu Generation and Distribution Corporation Limited (hereinafter referred to as "TANGEDCO") for the wheeling of electricity to its captive consumers from the Project. SEP Energy was using the transmission and distribution network of TANGEDCO for supplying electricity to M/s. Lemon Tree Hotels Ltd. bearing HT Service No.: 763 (HT Tariff III/III) of Chennai (South) EDC and M/s. Shimona Hotels Pvt. Ltd. bearing HT Service No.: 926 of Chennai (North) EDC. A copy of the Energy Wheeling Agreements are annexed hereto and marked as Annexure A.

1.4. The Energy Wheeling Agreements also provided for the banking of the surplus units. SEP Energy shall bank the energy generated from the Project and the banking period shall be for a period of one year from April to March. The unutilized portion of banked energy, if any, shall be purchased by TANGEDCO at the rate of 75% of the normal purchase rate of Rs.2.75 per unit. The banking shall be done slot wise to enable unit-to-unit adjustment.

1.5. Pursuant to the Energy Wheeling Agreements, SEP Energy raised an invoice dated 11.05.2017 for the surplus banking units from its Project during the FY 2016-17 to the tune of Rs.2,34,617/-. Subsequently, on 04.04.2018, SEP Energy raised an invoice to the tune of Rs.1,36,875/-, for the surplus banking units from its Project during the FY 2017 -18.

1.6. However, contrary to the Energy Wheeling Agreements, since TANGEDCO as a matter of policy was not making payment of invoices raised by wind energy generators for surplus banking units, various wind generators had approached the Hon'ble High Court of Madras in W.P. No. 6776 of 2020 batch. The Hon'ble High Court of Madras in its decision dated 28.10.2021, in a petition filed by wind energy generators directed TANGEDCO to adjust the entire outstanding amount towards the current consumption charges / open access charges payable by the respective generators.

1.7. The Hon'ble High Court had also categorically directed that TANGEDCO shall not take any coercive steps to disconnect the electricity connection of the generators until the outstanding amounts due and payable is completely adjusted towards the current consumption charges / open access charges payable. Relevant portion of the decision in W.P. No.6776 of 2020 batch is extracted hereunder for the ready reference:

“9. It is also seen from the records that in many cases, by virtue of the interim orders passed by this Court, the TANGEDCO had taken into account the un-utilised banking units and the amount payable towards the same was also adjusted from the current consumption charges. One such sample letter is found at Page No. 52 of the

consolidated typed set of papers filed by the petitioner, issued by the Superintending Engineer, Tatabad, Coimbatore to the concerned petitioner.

10. It is clear from the above that in many of the cases, TANGEDCO has acted upon the interim orders passed by this Court and had adjusted the amounts due and payable to the petitioners from the current consumption charges.

11. In view of the above, all these Writ Petitions are Disposed of with the following directions :-

(a) In all those cases where the TANGEDCO has acted upon the interim orders passed by this Court and the entire outstanding amounts due and payable has been adjusted, those writ petitions will be rendered infructuous since the grievance of those petitioners stands redressed;

(b) In those cases where the TANGEDCO is in the process of adjusting the outstanding amount due, such adjustment shall be continued till the entire outstanding amount is adjusted towards the current consumption charges / open access charges payable by the respective petitioners and

(c) The TANGEDCO shall not take any coercive steps to disconnect the electricity connection to the petitioners until the outstanding amounts due and

payable is completely adjusted towards the current consumption charges/ open access charges payable by the petitioners.

12. Post these cases under the caption "for filing final report" on 23.12.2021 with regard to the subsequent developments that takes place in the meeting to be held on 20.12.2021 and also with regard to the submission of the policy paper as directed by this Court through order dated 03.09.2021. No costs. Consequently, connected miscellaneous petitions are closed."

1.8. In W.P.No.16297 of 2022 filed by one M/s Prospun Textile India (P) Ltd., the Hon'ble High Court Madras in its decision dated 30.06.2022, followed the decision in W.P. No. 6776 of 2020 batch and directed the TANGECO to adjust the amount due with the current consumption charges / open access charges payable. Relevant portion of the decision is extracted hereunder:

"3. Similarly placed consumers as that of the petitioner had filed a batch of writ petitions and by order dated 28.10.2021 in WP.No.6776/2018 batch, this Court directed the respondents to adjust the outstanding amount payable to the petitioners towards the current consumption charges/ open access charges payable by the respective petitioners in those writ petitions in the future. The petitioner seeks for similar direction from this Court.

4. The learned Standing Counsel appearing for the respondents has also not raised any serious objection, if similar direction is issued by this Court. Accordingly, this Writ Petition is disposed of by directing the respondents to adjust the outstanding amount due and payable to the petitioner under the Energy Wheeling Agreement towards the current consumption charges/open access charges payable by the petitioner in the future. As directed in the batch of writ petitions, the respondents shall also not take any coercive steps to disconnect the electricity connection of the petitioner until the outstanding amount due and payable is completely adjusted towards the current consumption charges/ open access charges payable by the petitioner.

5. With the aforesaid direction, the Writ Petition is disposed of No costs. Consequently, connected miscellaneous petition is closed."

1.9. In compliance with the decision in W.P.No.16297 of 2022 dated 30.06.2022, the Chief Financial Controller/Revenue, TANGEDCO issued a letter bearing reference Lr. No. CFC / REV / FC / REV / DFC / AO / AS.3 /D.501 /22 dated 07.10.2022 to the Superintending Engineer to take necessary action to adjust the invoices already raised and pending 75% purchase tariff rate of unutilized banking units in respect of that particular generator and captive user.

1.10. Subsequently, the invoice in respect of the banked units for the FY 2020-21 was raised along with the invoice for the banked units for the FY 2021-22 on 17.08.2022 to the tune of Rs. 23,26,688/-, in accordance with the roll over banking rules.

1.11. The invoices raised by SEP Energy were not paid by TANGEDCO. Hence, SEP Energy vide email communication dated 16.11.2022 sought for payment of invoices in respect of the surplus banked units for FYs. 2016-17, 2017-18, 2020-21 & 2021-22. However, TANGEDCO did not release any payments in this regard.

1.12. SEP Energy also sent a letter dated 30.05.2023 to TANGEDCO seeking payment towards invoices raised in respect of the surplus banking units. However; TANGEDCO has neither responded nor disbursed payment in respect of the invoices.

1.13. TANGEDCO has not been duly complying with the order of the Hon'ble High Court in W.P. No. 6776 of 2020 batch and is adjusting payments for unutilized banking units against current consumption charges only in respect of wind energy generators who were parties to the writ petitions before the Hon'ble High Court of Madras.

1.14. TANGEDCO has been arbitrarily following this practice on a case-to-case basis and has not provided any clarification for not disbursing payment in respect of the invoices raised by SEP Energy. TANGEDCO has been discriminating against similarly placed wind energy generators with whom it has entered into identical Energy Wheeling Agreements with similar clauses in respect of the surplus banking units.

1.15. TANGEDCO as a distribution licensee and a public utility, is required to follow the same principles for all the generators, and cannot pick and choose the principles to be applied on a case to case basis. There is no rationale whatsoever for TANGEDCO to deny the payment of the amounts to the Petitioner.

1.16. In the circumstances, the Petitioner has been constrained to approach the Commission seeking directions against TANGEDCO for adjustment of the unutilized banking against the current consumption of the consumer, and for consequential relief.

1.17. The present petition is within the jurisdiction of the Commission.

1.18. The present petition is not barred by limitation.

2. Counter Affidavit filed on behalf of the Respondents:-

2.1. The petitioner owns Wind Mill bearing WEG No 1640,2088,2391,3088,3089 & 2378 in Tirunelveli Electricity Distribution Circle. The petitioner had executed Energy Wheeling Agreement for the above WEG with respondent TANGEDCO on various dates. From their Windmill energy generated, wheel the energy to their HT SC No.763 & 926 located at Chennai EDC South and Chennai North respectively for own adjustment as per the Commission orders in force. The Commission issued Comprehensive Tariff order on wind energy (Order.No.1 of 2009 dated 20.03.2009), wherein the relevant portion is extracted as follows:

"8.2 Banking

8.2.1.xxxxx

8.2.2. The banking charges shall be realized every month for the quantum of units generated during the billing month less the consumption of the captive users/ third party sale. Slot-wise banking is permitted to enable unit to unit adjustment for the respective slots towards rebate/ extra charges. No carryover is allowed beyond the banking period. Unutilized energy at the end of the financial year may be encashed at the rate of 75% of the relevant purchase tariff. The Commission proposes to retain the same features with some modifications based on the suggestions made by the stakeholders. As and when the distribution licensee enforces restriction control measures for restricting the consumption of wind energy generators, the Commission finds justification in the plea that the unutilized energy at end of the financial year may be encashed at full value of the relevant tariff for sale to the licensee....."

"8.11 Billing and payment

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

start-up 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."

2.2. From the above, it could be observed that when the wind energy generator sells power to the distribution licensee, the generator shall raise a bill at the end of the financial year for the net energy sold.

2.3. The distribution licensee shall make payment to the generator within 30 days of receipt of the bill in accordance with Tariff Order dated 20.03.2009. Any delayed payment beyond 30 days is liable for interest at the rate of 1% per month. The distribution licensee shall make payment to the generator within 60 days of receipt of the bill in accordance with Tariff order No.3 of 2016 dated 31.03.2016. Any delayed payment beyond 60 days is liable for interest at the rate of 1 % per month.

2.4. Based on the above tariff order, the petitioner had executed an energy wheeling agreement in one of the wind generator HT SC No.1640, 2088, 2391, 3088, 3089 & 2378 with TANGEDCO on 22.03.2006, 30.09.2006, 28.08.2007, 24.03.2010, 24.03.2010 & 07.06.2007. As per clause 5 of the energy wheeling agreement "b..... the unutilized portion of banked energy if any shall be purchased by the licensee at the rate of 75% of the normal purchase rate".

2.5. The wind energy generator shall be permitted to adjust the energy generated from the windmill against the industrial consumption. If there is any surplus after adjustment the same shall be banked for future period adjustment. This practice shall be continued till the end of the financial year i.e.31st March. Even after such adjustment, energy if any, available as unutilized, at the end of the financial year, the same may be encashed at the rate of 75% of the relevant purchase tariff. As and when the distribution licensee enforces Restriction and Control measures, the unutilized energy at end of the financial year may be encashed at full value of the relevant purchase tariff.

2.6. The petitioner is having High Tension service connection bearing with HT SC NO.763 & 926 of Chennai EDC South & Chennai North and executed an Agreement as per the provisions contained in Tamil Nadu Electricity Distribution Code for energy supplied by the Respondent, the relevant clause is reproduced below:

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4. to comply with requirements of Act and Terms and Conditions of distribution Code and supply Code

"The consumer hereby undertakes to comply with all the requirements of the applicable Acts, Regulations etc., and Grid code, Distribution code and Supply Code and of any amendments, modifications or reenactment thereof or of any other enactment to be passed in relation to supply made under this agreement from time

to time and the rules, regulations or orders etc made there under from time to time, provisions of the Tariffs, Scale of Miscellaneous and other charges and the terms and conditions of supply prescribed from time to time, and the consumer hereby agrees not to dispute their applicability this agreement.

Xxx

6. *Obligation of consumer to pay all charges levied by Licensee*

" From the date this agreement comes into force the consumer shall be bound by and shall pay be Licensee, maximum demand charges, energy charges, surcharges, meter rents and other charges, if any, in accordance with the tariffs applicable and the terms and conditions of supply notified from time to time for the appropriate class of consumers to which such consumer belongs."

2.7. In accordance with the above Act and Terms and Conditions of Distribution Code and Supply Code, the petitioner is under an obligation to pay all charges levied by the respondent in terms of Current Consumption charges. The supply to the petitioner's industry has been effected as per the agreed terms of Distribution Code, Supply and Grid Code of the commission. The Section 43, 45 (3) (a) and 56 of the Electricity Act, 2003 described as follows:

"Section 43. (Duty to supply on request):-

(1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply:

Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the

electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission:

Provided further that in case of a village or hamlet or area wherein no provision for supply electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.

Explanation:- for the purpose of the sub-section, "application" means the application complete in all respects in the appropriate form, as required by the distribution licensee, along with documents showing payment of necessary charges and other compliances.

2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section(1):

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.

3) If distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.

"45. Power to recover charges:

(1). Subject to the provisions of this section, the prices to the charges by a distribution licensee for the supply of electricity by him in pursuance of section. 43 shall be in accordance with such tariffs fixed from time to time and conditions of his license.

(2). The charges for electricity supplied by a distribution licensee shall be-

(a). fixed in accordance with the methods and the principles as may be specified by the concerned State Commission;

(b) Published in such manner so as to give adequate publicity for such charges and prices.

(3). The charges for electricity supplied by a distribution licensee may include-

(a). a fixed charge in addition to the charge for the actual electricity supplied;

(b) a rent or other charges in respect of any electric meter or electrical plant provided by the distribution licensee.

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As per regulation 14(4) of chapter 2 of the Tamil Nadu Electricity Supply Code, the bills rendered to High tension consumers/ petitioner shall be paid as stipulated therein and are subject to BPSC for delayed payment as stipulated in the code, failing which, Section 56 of the Electricity Act 2003 states as follows:-

"Section 56: (Disconnection of supply in default payment):

(1)Where any person neglects to pay any charges for electricity or any sum other than a charge for electricity due from him to a licensee or the generating company in respect of supply, transmission or distribution or wheeling of electricity to him, the licensee or the generating company may, after giving not less than fifteen clear days notice in writing, to such person and without prejudice to his rights to recover such charge or other sum by suit, cut off the supply of electricity and for that purpose cut or disconnect any electric supply line or other works being the property of such licensee or the generating company through which electricity may have been supplied, transmitted, distributed or wheeled and may discontinue the supply until such charge or other sum, together with any expenses incurred by him in cutting off reconnecting the supply, are paid"

2.8. As per the Electricity Rules 2005 notified by the Ministry of Power, Government of India (June 2005), no power plant shall qualify as a captive generating plant under section 9 read with clause (8) of the Act unless-

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

(ii) not less than fifty one percent of the aggregate electricity generated in such plant determined on an annual basis is consumer for the captive use.

If the above norms mentioned in Para 4.2 have not been fulfilled in any of the year, the supply of energy will be treated as third party sale and hence the cross subsidy surcharges will be collected from the consumer in addition to the Open access charges. The petitioner is well aware of the above facts since the petitioner is a Generator and Consumer of TANGEDCO.

2.9. As per the Electricity Rules 2005, unless the 51 % norms is satisfied, the supply of energy will be treated as third party sale (Unadjusted units treated as Lapsed) and cross subsidy surcharge will be collected from the consumer in addition to the Open access charges. Further the norms as required by the Electricity Act, will be verified annually. Various WEG promoters and associations have also filed writ petitions in W.A.(MD) NO.930 and 931 of 2017 and CMP (MD) Nos.5958 and 5959

of 2019 in W.A.(MD) Nos.930 and 931 of 2017. As directed by the Hon'ble high Court in the said CMP (MD) Nos. 5958 and 5959 of 2019 in W.A.(MD) Nos.930 and 931 of 2017 to grant a personal hearing to the stakeholders, the Commission issued a Public notice on 01.12.2019 notifying the date of hearing on 23.12.2019. Pursuant to the above, the Commission issued the Procedure for verification of status of CGP vide R.A.No.7 of 2019 on 28.01.2020. TANGEDCO has issued notices to all Captive Generators, as prescribed in clause of RA No.7 of 2019 for each of the financial year from 2014-15 to 2018-19 separately in order to verify the fulfilment of condition in regard to the captive status.

2.10. As per regulation 14(5) of the Tamil Nadu Electricity Supply Code framed in accordance with the provisions contained in the Electricity Act 2003, if the amount of any bill remains unpaid beyond the period specified, the Licensee may also without prejudice to any of its rights under the agreement entered into, may disconnect the service connection without further notice. Hence the consumer is lawfully liable to pay the current consumption bills on the due dates as specified in the Supply Code, the terms of which have been agreed to by the petitioner. The Respondent is lawfully authorized to proceed against non-payment as per the provisions of Electricity Act 2003 & Tamil Nadu Electricity Supply Code.

2.11. It is seen from the above that, under section 43 of the Electricity Act, 2003, TANGEDCO is duty bound to supply electricity to a consumer on request if such consumer pays the charges as may be fixed by the Tamil Nadu Electricity Regulatory Commission. Sec.56 of the Act enables TANGEDCO to disconnect the supply of electricity in the event of non-payment of dues by the consumer after giving 15 days notice. Therefore, Current Consumption charges are covered under statutory dues. On the other hand, payment for sale of Wind Energy are covered under contractual dues and as per the wind energy tariff order, the wind energy generator is eligible to get 1 % interest for delayed payment of unutilized banked energy.

2.12. The adjustment of contractual dues against statutory dues cannot be permitted/ admitted. Further, it is submitted that despite severe financial constraints faced by TANGEDCO, sincere efforts are made to clear the pending bills of the wind energy generators as per seniority basis and the respondent is also paying interest for any delayed payments for the wind energy. Therefore, if such adjustment is permitted against the statutory provisions contained in the Electricity Act 2003 and TNE Supply Code it will adversely affect the fund flow of the respondent. Further, similarly other generators may also seek such adjustment against CC bills and it will lead to multiplicity of litigations. This may lead to difficulty in releasing payments for

Coal Companies, Central Generating Plants, other fuel suppliers, Material. Suppliers and Power Generators similar to the petitioner.

2.13. M/s Natesan Precision Components Private Limited, Chennai-16 has filed a petition against chairman TANGEDCO and 5 others before the Hon'ble High Court of Madras (WP No:- 16872 of 2019 and MP No:-16462 of 2019) with a prayer to direct the respondent not to collect current consumption charges, demand charges and any arrears from the petitioner until the respondents make payment of the outstanding dues payable to the petitioner along with interest thereon @ 1% per month payable from the time such payments became due or to give adjustment in the current consumption charges payable by the petitioner till to entire amount is adjusted. In this regard the Hon'ble High Court of Madras has passed the following order on 11-07-2019 citing Hon'ble Supreme Court in Union of India -vs- Karam Chand Thapar 2004(3)SCC 504 of C.P.C,

"xxxx A statutory due cannot be set off against contractual due. The prayer in the writ petition is in effect set off of a statutory due against contractual due, which is impermissible under law. Though on equity, the plea of the petitioner may sound appropriate ,since, law prohibits grant of such relief under article 226 of the constitution, this Court is constraint to dismiss the writ petition both on maintainability as well as on merits. If the negotiation with the wind mills generators does not reach an amicable settlement , the petitioner is at liberty to approach the Regulatory Commission and get relief as per clause 9 of the wind energy Purchase Agreement read with section 86 (1)f of the Electricity Act,2003".

2.14. The respondent is assigned with a statutory obligation of the generation and distribution of electricity in the State of Tamil Nadu with an underlying principles of Socio Economical Policy. If the adjustment of the contractual dues against the statutory dues as requested by the petitioner is permitted, the respondent's fund flow will adversely affected and the respondent will be deprived of carrying out the statutory obligation of supplying electricity to the general public of State.

2.15. Unutilized Banking bills related to the petitioner amounting to Rs.24,92,181 for the period 2016-2017,2017- 2018 and 2021-2022 have already been passed and the payment will be made as early.

3. Rejoinder filed on behalf of the petitioner to the counter affidavit filed by the Respondent :-

3.1. The present Petition has been filed by SEP Energy seeking adjustment of payments towards unutilized banking units against current consumption charges by TANGEDCO, in terms of the orders of the Hon'ble High Court in W. P. No. 6776 of2020 & batch dated 28.10.2021 and in W. P. No,16297 of 2022 dated 30.06.2022.

3.2. SEP Energy, a wind generating company in the State of Tamil Nadu, uses the transmission and distribution network of TANGEDCO for supplying electricity to its captive consumers (Petitioners No.2 & 3). The invoices raised by SEP Energy for surplus banking units for the period between 2016 - 2022 remain unpaid. Aggrieved

by the same SEP Energy has filed the present Petition seeking adjustment of the unpaid banking units with the current consumption charges of Petitioners No.2 & 3.

3.3. The primary contention of TANGEDCO is that electricity dues being statutory dues cannot be set off against the payment for banked units being contractual is wholly misconceived. Firstly, the electricity dues as well as the payment for the banked units are as regulated by the Commission under the Electricity Act. There is no basis for creating an artificial distinction between the two, only to deny the claim of the Petitioner. TANGEDCO has admitted to the liability and stated that an amount Rs.24,92,181 for the period 2016-2017, 2017-2018, and 2021- 2022 has already been passed and the payment will be made as early as possible. There is no justification as the dues have not been paid as yet. The delay in payment carries appropriate interest as sought for in the Petition.

3.4. The banking facility and electricity supply are of the same nature. They are both services provided by the electricity distribution licensee. The authority and mandate to provide both these services are set out in the Electricity Act, 2003; the inter-se obligations between the parties to their respective arrangement are primarily set out in the agreement executed between them; and the tariff/charges is determined by the State Commission in both these cases.

3.5. The Service Agreement under which HT power is supplied to the Petitioner is executed in the format given in the Tamil Nadu Electricity Distribution Code. Similarly, an energy wheeling and banking agreement is executed for the purposes of banking power with TANGEDCO. Like the service agreement format contained in the Distribution Code, the format for the energy wheeling and banking agreement is approved by the State Commission in separate proceedings.

3.6. The obligation of the consumer to pay for the electricity dues and the banking charges arises in terms of the service agreement and the WBA respectively. The State Commission determines the tariff payable for the regular supply of electricity and the banking charges in separate tariff proceedings.

3.7. The obligation of the licensee to supply is contained in the Electricity Act in Section 43 as under:

Section 43. (Duty to supply on request)

(1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply.

.....

3.8. Similarly, the licensee provides banking facilities to renewable energy since it is required to promote generation of electricity from renewable energy under Section 61 as under:

Section 61. (Tariff regulations)

The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff and in doing so, shall be guided by the following, namely-

.....

(11) the promotion of co-generation and generation of electricity from renewable sources of energy;

.....

3.9. Banking charges are recovered in kind and hence there is no scope of non-payment by the consumer. Non-payment of electricity dues authorize the licensee to disconnect supply. This, however, cannot be a ground to categorise electricity dues as statutory dues as TANGEDCO has sought to make.

3.10. The Petitioners are captive generators in the State of Tamil Nadu and are in compliance with the Rule 3 of the Electricity Rules. 2005 and all the applicable orders of the State Commission.

3.11. The Hon'ble Madras High Court in its decision in W.P. No.6776 of 2020 batch dated 28.10.2021, is clear in its directions TANGEDCO to adjust the entire outstanding amount towards the current consumption charges / open access charges payable by the respective generators, Hence, TANGEDCO is bound to comply with the same. Additionally, the Hon'ble Madras High Court has directed that "The TANGEDCO shall not take any coercive steps to disconnect the electricity connection to the petitioners until the outstanding amounts due and payable is

completely adjusted towards the current consumption charges/ open access charges payable by the petitioners."

3.12. The Petitioners also are facing challenges in cash flow due to non-payment of dues by TANGEDCO. Economic difficulty cannot be a ground for non-compliance of contractual obligations.

3.13. TANGEDCO has admitted to the liability for Rs. 24,92,181 for the period 2016-2017, 2017-2018, and 2021-2022. However, the actual outstanding amount is Rs. 26,98,179 along with interest at 18% per annum as claimed in the Petition for the period 2016 - 2022.

3.14. Hence, in light of the clear and unequivocal directions of the Madras High Court, TANGEDCO cannot proceed for recovery of any outstanding dues under the service connection till the unrecovered banking dues are paid.

3.15. In light of the above, the prayers of the Petitioner as set out in the Petition may be allowed.

4. Arguments advanced on either side heard. Materials on record perused. Relevant provisions of the Electricity Act 2003, Regulations of the Tamil Nadu Electricity Supply Code and the Tamil Nadu Electricity Distribution Code traversed. Legal precedents pressed into service considered.

5. Having heard both side Counsel and having gone through the materials on record, the following questions crop up for this Commission's consideration.

- 1) Whether the contention of the respondents that in view of contra distinction between "contractual dues" and "statutory dues", the prayer of the 1st petitioner for adjustment of unutilized banked energy charges payable by the respondents is not sustainable under law can be countenanced?
- 2) Whether the rate of interest claimed by the 1st petitioner is in accordance with law?
- 3) Reliefs, if any, the 1st petitioner is entitled to ?

6. Findings of the Commission:-

6.1) Issue No.1:-

Indisputed facts which are necessary and germane for resolving the issue are as hereunder:-

The 1st petitioner SEP Energy Private Limited entered into multiple Energy wheeling Agreements (for short EWA) with the 1st respondent for wheeling electricity to the petitioners 2 and 3. The EWA provided for banking of the surplus units after self-consumption by the petitioners 2 and 3 and the captive generators were

permitted to draw the banked energy as and when required. The undrawn or unutilized banked energy, if any, shall be procured by the first respondent at the rate of 75% of the normal purchase rate of Rs.2.75 per unit.

6.1.1) Pursuant to the EWA's, the 1st petitioner raised invoices dated 11.05.2017 and 04.04.2018 for a sum of Rs.2,34,617/- and 1,36,875/- respectively for the Financial years 2016-2017 and 2017 -2018 for the surplus banking units from its project. But the 1st respondent did not make any payments. Aggrieved by the conduct of the 1st respondent in not making payments for the invoices raised by the Wind Generators for the surplus banking units contrary to the terms agreed in the EWA's, several generators approached the Hon'ble High Court seeking redressal. Vide order dated 28.10.2021 passed in W.P. No. 6776 of 2020 and connected writ petitions, the Hon'ble High Court directed the 1st respondent TANGEDCO to adjust the entire outstanding amounts towards the consumption charges /open access charges payable by the respective generators.

6.1.2) Subsequently, in the writ petition 16297 of 2022 preferred by M/s Prospun Textile India (P) Limited on the very same subject matter the Hon'ble High Court reiterated the order passed in W.P.No.6776 of 2020 vide order dated 30.06.2022. In compliance of the order passed by the Hon'ble High Court in

W.P.No.16297 of 2022, the 4th Respondent, the Chief Financial Controller / Revenue issued a letter dated 07.10.2022 to the Superintending Engineer, Coimbatore South EDC to take necessary action to adjust the invoices already raised and pending at 75% purchase tariff rate for the unutilized banking units in respect of that particular generator and captive user.

6.1.3) On 17.08.2022, the petitioner raised invoice dated 17.08.2022 for a sum of Rs.23,26,688/- in respect of the banked units for the Financial Years 2020-2021 and 2021 – 2022 in accordance with the Roll over banking rules. The invoices so raised were not honoured by the 1st respondent TANGEDCO. Hence, the petitioner vide E-mail dated 16.11.2022, sought payment from the 1st respondent. Thereafter vide letter dated 30.05.2023 the petitioner reiterated the demand with the 1st respondent. The 1st respondent neither responded nor made payment.

6.2) From the averments made in the Counter – affidavit filed on behalf of the respondents and the oral arguments advanced by the Counsel appearing for the respondents it is pellucid that the 1st respondent is not disputing the claim for payment made by the petitioner made in the communications referred supra. The relief claimed by the petitioner is resisted by the respondents solely on technical ground. The categorical stand taken by the respondents in the

counter-affidavit and in the course of inquiry is that current consumption charges / open access charges are “Statutory charges” while payment for unutilized banked energy are “contractual dues” and as such under law statutory charges cannot be adjusted as against the contractual dues.

6.3) The moot point is as to whether the above defense projected by the respondent is sustainable under law and facts. Pertinent here to point out that when the same issue came up for consideration before the Hon’ble High Court, Madras in the writ petitions 6676 of 2020 and 16297 of 2022, the respondents did not raise the defense that since the current consumption charges / open access charges are statutory in nature, the same cannot be adjusted with payments due on unutilized banked energy the same being contractual dues in nature. Apposite to point out that the respondents did not challenge the orders passed in the W.P. No. 6776 of 2020 and 16297 of 2022 by preferring writ appeal. Curiously, the Chief Financial Controller / Revenue, TANGEDCO, the 4th respondent herein, as already pointed out, had sent communication dated 07.10.2022 to the Superintending Engineer, Coimbatore South EDC to ensure compliance of the order passed by the Hon’ble High Court by initiating appropriate action.

6.4) Curiously, now all the respondents, including the 4th respondent who had issued the communication dated 07.10.2022, are resisting the claim of the petitioner by

contending that statutory charges cannot be adjusted with contractual dues. The above defense projected by the respondents is too fragile for acceptance. Since the above referred defense was not taken by the respondents before the Hon'ble High Court, Madras which considered the very same issue of adjustments of payment for unutilized banked energy with that of the consumption charges / open access charges payable by a captive generator, under law the respondents are precluded from projecting such a defense in the present proceedings. As a sequitar of the above findings, the reliance placed by the respondent Counsel on Regulation 14(5) of the Tamil Nadu Electricity Supply Code and Section 56 read with Section 43 of the Electricity Act 2003 pale into insignificance.

6.5) The ratio laid down by our Apex Court in the case of Union of India Vs Karam Chand Thapar (2004) 3 Section 504 cannot be applied to the present case since the factual matrix in the case dealt by the Supreme Court is distinguishable to the facts of the present case.

6.6) Be that as it may, the contention of the respondents that dues arising on account of unutilized banked energy is in the nature of contractual dues, in the considered opinion of this Commission, is a misconceived one. The reason being the payment for the unutilized banked energy does not arise out of pure

volition of parties to EWA. The same has statutory recognition and approval. The right of adjustment of banked units and encashment of the unutilized banked units have got a statutory flavour as such legal right emanate from the Tariff orders passed by the Commission, which are indisputably statutory in nature. Even though the EPA's /EWA's provide for such adjustment, it cannot be gain said that the same is a contractual one for the simple reason that EPA's / EWA's are executed as a result of statutory scheme laid down in the tariff orders passed by the Commission in the exercise of power vested with it under the relevant provisions of the Electricity Act 2003. So also in the case of open access charges even though such charges are collected as per the terms agreed upon by the parties to EWA, the authority to collect the same is traceable to the Tariff orders, which are statutory in nature.

6.7) An over view of the legal and factual aspects as discussed above propel this Commission to come to the conclusion that viewed from any angle the contention of the respondents that in view of contra distinction between “contractual dues” and “statutory dues” the claim of the petitioner for adjustment of unutilized banked energy charges payable by the respondents as against the consumption charges / open access charges payable by the petitioner has to fail cannot be countenanced.

Accordingly this issue is decided.

7) Issue No.2:

7.1) The petitioner has claimed interest on the outstanding amount of Rs.26,98,179/- at the rate of 18% per annum with regard to interest payable on delayed payments. The consistent stand taken by this Commission in the Tariff orders is that for delayed payment interest is payable at the rate of one percent per month. In the EWA's entered into between the petitioner and the respondents there is no mention in regard to payment of interest arising out of delayed payment. Hence this Commission, falling in line with its earlier Tariff orders, decides that the petitioner is entitled to the outstanding principal amount set out in the petition at the rate of 12% per annum.

7.2) In the petition the petitioner has claimed an aggregate amount of Rs.10,74,661/- towards interest in regard to the invoices dated 11.05.2017, 04.07.2018 and 17.08.2022 which relate to the Financial years 2016-2017, 2017-2018, 2020-2021 and 2021-2022 respectively calculating interest at the rate of 18% per annum. This Commission has rendered a finding that the petitioner is entitled to interest at the rate of 12% only. If the interest accrued on the above referred invoices are calculated at the rate of 12% per annum, the interest amount due and payable by the respondents is arrived at Rs.7,16,411/- (Seven lakhs

sixteen thousand and four hundred and forty one only). Hence this Commission decides that the petitioner is entitled to a sum of Rs.7,16,411/- towards interest upto the date of filing of the present petition.

Accordingly this issue is decided.

8) Issue No.3:-

In view of the findings rendered on issue No.1 and 2 this Commission decides that the 1st petitioner is entitled for adjustment of a sum of Rs.34,14,620/- (Rupees thirty four lakhs fourteen thousand six hundred and twenty only) against the consumption charges /open access charges payable by the petitioners 2 and 3. However considering the nature of dispute and scope of inquiry this Commission decides that there is no scope for mulcting costs upon the respondents. It would be nothing but fair to direct the parties to bear their respective costs.

Accordingly this issue is decided.

9) In the result this Commission doth order as hereunder

- (a) The respondents are directed to adjust the sum of rs.34,14,620/- (Rupees thirty four lakhs fourteen thousand six hundred and twenty only) due to the 1st petitioner SEP Energy Private Ltd. arising on account of unutilized banked units for the Financial years 2016-2017, 2017-2018, 2020-2021 and 2021-2022

against the consumption charges / open access charges payable by the petitioners 2 and 3.

(b) Parties shall bear their respective costs.

Petition disposed accordingly.

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

(Sd.....)
Member

/True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**