



**Dates of hearing** : 12-11-2019; 28-01-2020; 13-10-2020;  
01-12-2020; 29-12-2020; 05-01-2021;  
02-02-2021; 16-02-2021; 23-02-2021;  
16-03-2021; 30-03-2021; 15-04-2021;  
20-04-2021; 03-08-2021; 24-08-2021;  
21-09-2021; 05-10-2021; 09-11-2021;  
07-12-2021 and 15-12-2021

**Date of order** : 19-04-2022

The D.R.P.No.11 of 2019 came up for final hearing before the Commission on 15-12-2021 and the Commission upon perusing the petition and connected records and after hearing the submissions of both sides passes the following:-

**ORDER**

**1. Prayer in D.R.P. No. 11 of 2019:-**

The prayer of the petitioner in this D.R.P.No.11 of 2019 is to-

- (i) direct the Respondent to refund the balance amount of Rs.5,72,62,542/- for the period upto March 2018 that has been collected on the basis of erroneous application of the Amendment dated 19-06-2013 along with interest of Rs.2,28,30,563/- calculated till 17-09-2019 for the purpose of this petition but payable as calculated from original due date of payment for each generation month till actual date of payment considering interest rate as per Clause 6 (2) of the Agreement;
- (ii) direct the Respondent to make all future payments towards Energy Charges in accordance with the APPC rate applicable in line with letter and spirit of Amendment dated 19-06-2013 and
- (iii) grant ex-parte ad interim relief in terms of prayer (b) as prayed for above.

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

This petition has been filed under section 86 (1) (f) and other relevant provisions of the Electricity Act, 2003 read with Regulation 2 (1) (h) of the Tamil Nadu Electricity Regulatory Commission (Renewable Energy Purchase Obligation) Regulations, 2010 dated 07-12-2010 seeking refund of amount wrongly recovered by TANGEDCO on the basis of erroneous application of the Amendment dated 19-06-2013.

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

3.1. M/s. Ratedi Wind Power Private Limited (earlier known as IL&FS Wind Power Limited) has filed the present petition under section 86 (1) (f) and other relevant provisions of the Electricity Act, 2003 read with Regulation 2 (1) (h) of the Tamil Nadu Electricity Regulatory Commission (Renewable Energy Purchase Obligation) Regulations, 2010 dated 07.12.2010 and Regulation 16 (1) of the TNERC- Conduct of Business Regulations, 2004 seeking refund of amount recovered by Tamil Nadu Generation and Distribution Corporation Limited on the basis of erroneous application of the Amendment dated 19-06-2013 issued by the Tamil Nadu Electricity Regulatory Commission vide Notification No. TNERC/RPO/19/3.

3.2. During Financial Year (FY) 2011-12, the Petitioner approached the Respondent herein with its proposal to sell wind energy generated from its Wind Energy Generator HT Sc No. 3979, 3980, 4004, 3988, 3989, 3990, 4000, 4001, 4002, 4003, 4009, 4012, 4008, 3987, 3985 with 15 Nos of Generators of Enercon make having capacity of 12 MW (15 X 800 KW WEG) as installed at SF No. 1/1B,

1C of Ukkiranklottai Village, Tirunelveli Taluk in Tirunelveli District commissioned on 28-12-2011 under Renewable Energy Certificate Scheme.

3.3. In response, the Respondent accepted the Petitioner's proposal and agreed to buy the energy from the Petitioner from their 15 Nos of Generators of Enercon make having capacity of 12 MW (15 X 800 KW WEG) vide executing Wind Energy Purchase Agreement (15 Nos). In view of name change of the Petitioner Company, 15 amended Renewable Wind Energy Purchase Agreements dated 07.02.2014 ("Agreement(s)") were executed. The details are provided below for ease of reference:-

Sl. No.	Original EPA Date	Supplementary EPA Date	HT SC No.	Date of Commissioning	MW
1	28-12-2011	07-02-2014	3980	28-12-2011	0.8
2	28-12-2011	07-02-2014	3979	28-12-2011	0.8
3	03-02-2012	07-02-2014	4004	03-02-2012	0.8
4	13-01-2012	07-02-2014	3988	13-01-2012	0.8
5	13-01-2012	07-02-2014	3989	13-01-2012	0.8
6	13-01-2012	07-02-2014	3990	13-01-2012	0.8
7	01-02-2012	07-02-2014	4000	01-02-2012	0.8
8	01-02-2012	07-02-2014	4001	01-02-2012	0.8
9	01-02-2012	07-02-2014	4002	01-02-2012	0.8
10	02-02-2012	07-02-2014	4003	02-02-2012	0.8
11	06-02-2012	07-02-2014	4009	06-02-2012	0.8
12	10-02-2012	07-02-2014	4012	10-02-2012	0.8
13	06-02-2012	07-02-2014	4008	06-02-2012	0.8
14	13-01-2012	07-02-2014	3987	13-01-2012	0.8
15	10-01-2012	07-02-2014	3985	10-01-2012	0.8
	Total				12.0

3.4. That amongst other terms and conditions, it has been agreed under Clause 5 of the Agreement that the Energy Charges payable by the Respondent to the Petitioner would be at the pooled cost of power purchase rate of Rs.2.54/KWH as

per the Commission Memo. TNERC/M.04/E/RPO dated 28.12.2010 ("Order dated 28.12.2010").

3.5. The Order dated 28.12.2010 defines Pooled Cost of Power Purchase as, 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, purchased from traders, short-term purchases and renewable energy sources." The said definition is in line with the definition of Pooled Cost of Power Purchase under Regulation 2 (1) (h) of the Tamil Nadu Electricity Regulatory Commission (Renewable Energy Purchase Obligation) Regulations, 2010 dated 07.12.2010 ("RPO Regulations").

3.6. That vide the Order dated 28.12.2010, the Commission specified the Pooled Cost of Power Purchase by the Respondent for the FY 2009-10 as Rs.2.37 per unit. It was also specified by the Commission that the Pooled Cost of Power specified in Order dated 28.12.2010 would remain in force even beyond 31.03.2011, if no new rate is notified by 31.03.2011 by the Commission.

3.7. That the said rate of Rs.2.37 per unit remained in force till 31.03.2012 as no new rate was fixed by the Commission in the interim. Thereafter, the Commission by its Order dated 03.09.2012 specified the Pooled Cost of Power Purchase as Rs.2.54 per unit for FY 2012-13. Hence, the rate of Rs.2.54/ KWH was the average Pooled Cost of Power Purchase ("APPC") rate prevailing at the time of the FY 2012-13. Subsequently, the APPC rates were revised from year to year by the Commission and specified vide its orders as follows:-

Financial Year	APPC Rate	Effective Period
2012-13	2.54	From 01-04-2012 to 31-03-2013
2013-14	3.11	From 01-04-2013 to 31-03-2014
2014-15	3.38	From 01-04-2014 to 31-03-2015
2015-16	3.55	From 01-04-2015 to 31-03-2016
2016-17	3.96	From 01-04-2016 to 31-03-2017
2017-18	3.70	From 01-04-2017 to 31-03-2018
2018-19	3.97	From 01-04-2018 to 31-03-2019

3.8. The RPO Regulations have undergone amendments to various regulations from time to time. One such amendment was made to the RPO Regulations by this Commission vide Tamil Nadu Electricity Regulatory Commission Notification No. TNERC/RPO/19/3 dated 21.01.2013 applicable w.e.f. 19.06.2013 ("Amendment dated 19.06.2013"). Vide the said amendment, the Commission amended Regulation 2 (1) (h) of the RPO Regulations by way of adding the words, "..... subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category/ sub category of NCES generators" to the definition of 'Pooled Cost of Power Purchase'. Hence, vide the Amendment dated 19.06.2013, a capping of 75% of preferential tariff was put on the APPC rate in anticipation of the APPC rate exceeding the preferential tariff in a particular year. The Amendment dated 19.06.2013 also included an explanatory statement which stated the reasoning behind bringing about the amendment. The reasoning was 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.

3.9. That Preferential Tariff has been defined as "the tariff fixed by the Commission for sale of energy from a generating station based on renewable energy sources to a distribution licensee" under Regulation 2 (1) (j) of the RPO Regulations. The following the Amendment dated 19.06.2013, the revised definition of Pooled Cost of Power Purchase under Regulation 2 (1) (h) of the RPO Regulations has been made applicable to the Petitioner's Agreement to reduce the APPC rate to 75% of the preferential tariff vide the Respondent's memo no. CFC/FC/REV/DFC/REVAS.3/D.No.388/2017 dated 15.11.2017 ("Memo dated 15.11.2017"). Such reduction has been made in complete disregard to the fact that the APPC rate applicable to the Petitioner's has already been expressly laid down in the Agreement and was specified by the Commission on 03.09.2012 i.e. before the coming into force of Amendment dated 19.06.2013.

3.10. That the APPC rate is an average price of power purchases prevailing in the previous year which may go up or down in the following years. The same is echoed by the explanatory statement appended to the Amendment dated 19.06.2013 as it states that, "In the long run, Pooled Cost of Power Purchase may exceed the preferential tariff fixed by the Commission..... " However, the APPC rates have been revised vide Memo dated 15-11-2017, irrespective of whether the APPC rate exceeds the preferential tariff for a particular FY, as follows:-

Financial Year	APPC Rate	Preferential Tariff	Effective Period	75% of Preferential Tariff	Revised Power Purchase Rate
2012-13	2.54	3.39	upto 31-07-2012	2.54	2.54
		3.96	From 01-08-2012 to 31-03-2016	2.97	2.97
2013-14	3.11	3.96		2.97	2.97
2014-15	3.38	3.96		2.97	2.97
2015-16	3.55	3.96		2.97	2.97
2016-17	3.96	4.16		3.12	3.12
2017-18	3.70	4.16		3.12	3.12

3.11. It is clear from the above stated information that in no year since FY 2012-13 till FY 2017-18 has the APPC rate exceeded the preferential tariff. However, despite of the APPC rate being lower than the preferential tariff, the Amendment dated 19.06.2013 has been made applicable to the Petitioner based on erroneous interpretation and the Petitioner's APPC rate has been arbitrarily reduced by applying the 75% cap making it equal to 75% of the preferential tariff.

3.12. Subsequent to the Amendment dated 19.06.2013, a Writ Petition (No. 22097 of 2013) was filed before the Hon'ble High Court of Judicature at Madras by a similarly placed Wind Energy Generator ("WEG") challenging the Amendment dated 19.06.2013. The Hon'ble High Court vide its judgment dated 15.07.2016 upheld the Amendment dated 19.06.2013 to be in consonance with the powers of the Commission, provisions of the Electricity Act, 2003 and the applicable Central Electricity Regulatory Commission ("CERC") regulations. However, Simultaneously, the Hon'ble High Court rightly interpreted the Amendment dated 19.06.2013 and held that,

*"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."*

3.13. Following the Hon'ble High Court of Judicature at Madras judgment dated 15.07.2016, the Commission was approached by the similarly placed WEG seeking implementation of the Amendment dated 19.06.2013 to be postponed till such time when the pooled cost of power purchase exceeds the preferential tariff fixed by the Commission for NCES generators. The Commission, however, took a contrary view and implemented the Amendment dated 19.06.2013 vide its order dated 28.04.2017 due to which the said issue was carried in appeal before Hon'ble Appellate Tribunal for Electricity ("APTEL") vide Appeal No. 232 of 2017.

3.14. Vide Appeal No. 232 of 2017, the similarly placed WEG approached the Hon'ble APTEL challenging the Commission's Order dated 28.04.2017. It was sought from Hon'ble APTEL to decide on the issue of whether the Amendment dated 19.06.2013 can be implemented with effect from the date of the preferential tariff falling below the APPC rate and whether the APPC rate and preferential tariff need to be compared in the same year or in a heterogeneous manner as adopted by the Commission. In view of the Hon'ble High Court of Judicature at Madras judgment dated 15-07-2016, the Hon'ble APTEL observed that, "the REC scheme was itself notified by CERC / TNERC during the year 2010 and the two schemes namely REC Scheme and Non-REC Scheme (Preferential Tariff) are entirely different and distinct scheme, having no scope for comparison." The Hon'ble

APTEL that "the rate of APPCs as well as preferential tariff are dynamic in nature and are determined by the State Commission from year to year considering all factors associated in their determination as per the regulations." It was also observed that, "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." In light of the submissions made by the parties to the proceedings before Hon'ble APTEL as well as the Hon'ble High Court of Judicature at Madras' judgment dated 15.07.2016, it was held and declared by the Hon'ble APTEL that:

"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; and

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.

3.15. The Order dated 28.12.2010 and the law as settled by the Hon'ble High Court of Judicature at Madras' judgment dated 15-07-2016 and the Hon'ble APTEL's judgment dated 31-05-2019, the petitioner is entitled to receive the balance amount to the tune of Rs.5,72,62,542/- (Rupees Five Crore Seventy Two Lakhs Sixty Two Thousand Five Hundred and Forty Two only) for the period between April 2013 upto March 2018. The Petitioner's legitimate claim is on account of the erroneous interpretation and application of the Amendment dated

19.06.2013 which led to reduced APPC rate being made applicable to the Petitioner instead of the actual APPC rate as stated below:

Financial Year	APPC Rate	Preferential Tariff	75% of Preferential Tariff / APPC Rate made applicable	APPC Rate reduced by	Generation (in units)	Impact (in Rupees)
2012-13	2.54	3.39	2.54	-	2,45,21,481	-
2013-14	3.11	3.96	2.97	0.14	2,20,20,368	30,82,852
2014-15	3.38	3.96	2.97	0.41	1,92,30,159	78,84,365
2015-16	3.55	3.96	2.97	0.58	1,56,82,541	90,95,874
2016-17	3.96	4.16	3.12	0.84	2,69,27,686	2,26,19,256
2017-18	3.70	4.16	3.12	0.58	2,51,38,267	1,45,80,195
<b>Total</b>						<b>5,72,62,542</b>

3.16. For FY 2018-19, the Commission specified APPC rate as Rs.3.97 per unit while the preferential tariff for the FY was determined to be Rs.2.86. As the APPC rate breached the preferential tariff in FY 2018-19, the APPC rate was capped at 75% of the preferential tariff in accordance with Amendment dated 19.06.2013, as interpreted by Hon'ble APTEL's judgment dated 31.05.2019. Furthermore, it is pertinent to state that the APPC rate has not yet been specified by the Commission for FY 2019-20. Hence, the Petitioner herein reserves its right to claim payment of Energy Charges for FY 2019-20 based on the law as settled vide Hon'ble APTEL's judgment dated 31-05-2019 with regard to interpretation of Amendment dated 19-06-2013.

3.17. The Hon'ble APTEL's judgment dated 31.05.2019 along with Hon'ble High Court of Judicature at Madras' judgment dated 15.07.2016 has settled the interpretation and applicability of Amendment dated 19.06.2013 to all the WEGs. It is further submitted that it is a settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the

date of the judgment because concededly the court does not legislate but only gives an interpretation to an existing law. Therefore, the benefit of the law as settled by Hon'ble APTEL and Hon'ble High of Judicature at Madras shall take effect from the date of Amendment i.e. 19-06-2013 and also accrue to all those WEGs who have received reduced tariff on account of erroneous interpretation of the Amendment dated 19-06-2013.

3.18. Even after the Hon'ble APTEL and Hon'ble High Court of Judicature at Madras clarified the law on interpretation of Amendment dated 19.06.2013, the Respondent is continuing to make payment of Energy Charges by making applicable reduced APPC rate for the period till FY 2017-18 on account of erroneous interpretation of Amendment dated 19.06.2013.

3.19. The Petitioner duly made a representation to the Respondent vide its letter dated 13.06.2019 in view of the settled and declared law enunciated by the Hon'ble APTEL's judgment dated 31.05.2019 along with Hon'ble High Court of Judicature at Madras' judgment dated 15.07.2016. Vide the said representation the Petitioner herein requested the Respondent for making payment of Rs.5,72,62,542/- along with interest of Rs.2,07,50,024/- for period till 31.05.19 for delayed payment beyond 30 days at the rate of 1% per month as per Clause 6 (2) of the Agreement. Till date no response to the said representation has been received from the Respondent.

3.20. The Commission direct the Respondent to make payment of the balance amount of Rs.5,72,62,542/- along with interest of Rs.2,28,30,563/- (Rupees Two Crore Twenty Eight Lakhs Thirty Thousand Five Hundred and Sixty Three Only)

calculated till 17.09.2019 in view of the present petition but payable as calculated from original due date of payment for each generation month till actual date of payment for delayed payment beyond 30 days at the rate of 1% per month as per Clause 6 (2) of 22 of the Agreement.

#### **4. Contentions of the Respondents 1 to 3:-**

4.1. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO/ Respondent) is a vertically integrated utility responsible for power generation, transmission and distribution. The Respondent is a Distribution Licensee within the provisions of the Electricity Act, 2003 and is responsible for power distribution throughout Tamil Nadu.

4.2. During Financial Year (FY) 2011-12, the petitioner approached the Respondent herein with its proposal to sell wind energy generated from its Wind Energy Generator HT Sc No. 3979, 3980, 4004, 3988, 3989, 3990, 4000, 4001, 4002, 4003, 4009, 4012, 4008, 3987, 3985 with 15 Nos of Generators of Enercon make having Capacity of 12MW (15 x 800 kW WEG) as installed at SF No.1/1B, 1C of Ukkirankottai Village, Tirunelveli Taluk in Tirunelveli District commissioned on 28.12.2011 under Renewable Energy Certificate Scheme.

4.3. In response, the Respondent accepted the Petitioner's proposal and agreed to buy the energy from the petitioner from their 15 Nos of Generators of Enercon make having capacity of 12MW (15 x 800kW WEG) vide executing Wind Energy Purchase Agreement (15 Nos). In view of name change of the petitioner company,

15 amended Renewable Wind Energy Purchase Agreements dated 07.02.2014

("Agreement(s)") were executed. The details of the WEG services are as follows:

S. No.	Original Date	EPA	Supplementary EPA Date	HT SC No.	Date of Commissioning	MW
1	28-12-2011		07-02-2014	3980	28-12-2011	0.8
2	28-12-2011		07-02-2014	3979	28-12-2011	0.8
3	03-02-2012		07-02-2014	4004	03-02-2012	0.8
4	13-01-2012		07-02-2014	3988	13-01-2012	0.8
5	13-01-2012		07-02-2014	3989	13-01-2012	0.8
6	13-01-2012		07-02-2014	3990	13-01-2012	0.8
7	01-02-2012		07-02-2014	4000	01-02-2012	0.8
8	01-02-2012		07-02-2014	4001	01-02-2012	0.8
9	01-02-2012		07-02-2014	4002	01-02-2012	0.8
10	02-02-2012		07-02-2014	4003	02-02-2012	0.8
11	06-02-2012		07-02-2014	4009	06-02-2012	0.8
12	10-02-2012		07-02-2014	4012	10-02-2012	0.8
13	06-02-2012		07-02-2014	4008	06-02-2012	0.8
14	13-01-2012		07-02-2014	3987	13-01-2012	0.8
15	10-01-2012		07-02-2014	3985	10-01-2012	0.8
Total						12.0

4.4. Amongst other terms and Conditions, it has been agreed under clause 5 of the agreement that the Energy Charges Payable by the Respondent to the Petitioner would be at the pooled cost of power purchase rate of Rs.2.54/ kWh as per the Tamil Nadu Electricity Regulatory commission ("TNERC/Commission") Memo: TNERC/(M.).4/E/RPO dated 28.12.2010.

4.5. The order dated 28.12.2010 defines Pooled Cost of Power Purchase as, "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, purchased from traders , short-term purchases and renewable energy sources". The said definition is in line with the definition of Pooled Cost of Power Purchase under Regulation

2(1) (h) of the TamilNadu Electricity Regulatory Commission (Renewable Energy Purchase Obligation) Regulations, 2010 dated 07.12.2010 ("RPO Regulations").

4.6. Vide the Order dated 28.12.2010, the Commission specified the Pooled Cost of Power Purchase by the Respondent for the FY 2009-10 as Rs.2.37 per Unit. It was also specified by the Commission that the pooled cost of Power specified Order dated 28.12.2010 would remain in force even beyond 31.03.2011, if no new rate is notified by 31.03.2011 by the Commission.

4.7. The said rate of Rs.2.37 per unit remained in force till 31.03.2012 as no new rate was fixed by the Commission in the interim. Thereafter, the Commission by this order Dated 03.09.2012 specified the Pooled Cost of Power Purchase as Rs.2.54 per unit for FY 2012-13. Hence, the rate of Rs.2.54/kWH was the Average Pooled Cost of Power Purchase ("APPC") rate prevailing at that time of the FY 2012-13. Subsequently, the APPC rates were revised from year to year by the Commission and Specified vide its orders as follows:-

Financial Year	APPC Rate	Effective Period
2012-13	2.54	From 01-04-2012 to 31-03-2013
2013-14	3.11	From 01-04-2013 to 31-03-2014
2014-15	3.38	From 01-04-2014 to 31-03-2015
2015-16	3.55	From 01-04-2015 to 31-03-2016
2016-17	3.96	From 01-04-2016 to 31-03-2017
2017-18	3.70	From 01-04-2017 to 31-03-2018
2018-19	3.97	From 01-04-2018 to 31-03-2019

4.8. The RPO Regulations have undergone amendments to various regulations from time to time. One such amendment was made to the RPO regulations by the

Commission vide Tamil Nadu Electricity Regulatory Commission Notification No. TNERC/RPO/19/3 dated 21.01.2013 applicable w.e.f.19.06.2013 ("Amendment dated 19.06.2013"). Vide the said amendment, the Commission amended Regulation 2(1) (h) of the RPO Regulations by way of adding the words, " ... subject to the maximum of 75% of preferential tariff fixed by the Commission to that category / sub category of NCES generators" to the definition of 'Pooled Cost of Power Purchase'. Hence, vide the Amendment dated 19.06.2013, a capping of 75% of preferential tariff was put on the APPC rate in anticipation of the APPC rate exceeding the preferential tariff in a particular year. The Amendment dated 19.06.2013 also included an explanatory statement which stated the reasoning behind bringing about the amendment. The reasoning was that," In the long run, Pooled Cost of Power Purchase may exceed the preferential tariff fixed for arriving at the reasonable Pooled Cost of Power Purchase. Therefore, it is proposed to amend the said regulation."

4.9. The Preferential Tariff has been defined as "the tariff fixed by the commission for sale of energy from a generating Station based on renewable energy sources to a distribution licensee' under regulation 2(1) (j) of the RPOregulations. Following the Amendment dated 19.06.2013, the revealed definition of Pooled Cost of Power Purchase under Regulation 2(1) (h) of the RPO Regulations has been made applicable to the Petitioner's Agreement to reduce the APPC rate to 75% of the preferential tariff vide the Respondents Memo No. CFC/FC/REV/DFC/REVAS.3/D.No.388/2017 dated 15.11.2017 (Memo dated 15.11.2017). Such reduction has been made in complete disregard to the fact that the APPC rate applicable to the Petitioner's has already been expressly laid down

in the Agreement and was specified by the Commission on 03.09.2012 i.e., before coming into force of Amendment dated 19.06.2013.

4.10. The APPC rate is an average price of power purchases prevailing in the previous year which may go up or down in the following years. The same is echoed by the explanatory statement appended to the Amendment dated 19.06.2013 as it states that, "In the long run, Pooled cost of power purchase may exceed the preferential tariff fixed by the Commission ....." However, the APPC rates have been revised vide Memo dated 15.11.2017, irrespective of whether the APPC rate exceeds the preferential tariff for a particular FY, as follows:

Financial Year	APPC Rate	Preferential Tariff	Effective Period	75% of Preferential Tariff	Revised Power Purchase Rate
2012-13	2.54	3.39	upto 31-07-2012	2.54	2.54
		3.96	From 01-08-2012 to 31-03-2016	2.97	2.97
2013-14	3.11	3.96		2.97	2.97
2014-15	3.38	3.96		2.97	2.97
2015-16	3.55	3.96		2.97	2.97
2016-17	3.96	4.16		3.12	3.12
2017-18	3.70	4.16		3.12	3.12

4.11. The above stated information every year from FY 2012-13 to FY 2018-19 has the APPC rate exceeded the preferential tariff. However, despite of the APPC rate being lower than the preferential tariff, the Amendment dated 19.06.2013 has been applicable to the petitioner based on erroneous interpretation and the Petitioner's APPC rate has been arbitrarily reduced by applying the 75% cap making it equal to 75% of the preferential tariff.

4.12. The Claim of M/s Ratedi Wind Power Pvt.Ltd Mumbai is as detailed below.

Table I

Financial Year	APPC Rate	Preferential Tariff	75% of Preferential Tariff / Rate applicable	APPC Rate reduced by
2012-13	2.54	3.39	2.54	-
2013-14	3.11	3.96	2.97	0.14
2014-15	3.38	3.96	2.97	0.41
2015-16	3.55*	3.96	2.97	0.58
2016-17	3.96	4.16	3.12	0.84
2017-18	3.70	4.16	3.12	0.58

Corresponding orders of the TNERC with Pooled Cost are as follows which made M/s.Retadi Wind Power Pvt.Ltd, Mumbai to make such a move to claim refund from TANGEDCO.

Table II

TNERC Order Ref for Pooled Cost	Effective Financial Year	Pooled Cost
TNERC MO 0-4/E/RPO dt. 28-12-2010	2009-10	2.37
TNERC MO 4-1/E/RPO dt. 03-09-2012	2012-13	2.54
TNERC MO 4-2/E/RPO dt. 15-07-2013	2013-14	3.11
TNERC MO 4-3/E/RPO dt. 04-02-2015	2014-15	3.38
TNERC MO 4-4/E/RPO dt. 07-03-2016	2015-16	3.35
TNERC MO 4-5/E/RPO dt. 14-09-2017	2016-17	3.96
TNERC MO 4-6/E/RPO dt. 25-09-2017	2017-18	3.70
TNERC MO 4-7/E/RPO dt. 06-09-2018	2018-19	3.97
TNERC MO 4-8/E/RPO dt. 30-09-2019	2019-20	4.07

Note: The Pooled cost per unit shall be determined for each Financial as the case may be, subject to the maximum of 75% of the Preferential Tariff fixed by the Commission to that category / sub category of NCES Generators or the APPC tariff, whichever is less.

Respective Tariff for the NCES Generators for various periods:  
(Which is the base tariff for Pooled Cost)

Table III

Tariff Period	Preferential Tariff for NCES	Preferential Tariff for NCES Generators without AD

	Generators with AD	
Wind Mills commissioned prior to 15-05-2006, if they executed EPA as per TNERC Order No.3 dated 15-05-2006		Rs.2.75 per Unit
Wind Mill commissioned prior to 15-05-2006, if they have not executed EPA as per TNERC Order No.3 dated 15-05-2006		Rs.2.70 per Unit
Wind Mills commissioned between 15-05-2006 and 18-09-2008		Rs.2.90 per Unit
Wind Mills commissioned between 19-09-2008 and 31-07-2012		Rs.3.39 per Unit
Wind Mills commissioned between 01-08-2012 to 31-03-2016	Rs.3.53 per Unit	Rs.3.96 per Unit
Wind Mills commissioned between 01-04-2016 to 31-03-2018	Rs.3.70 per Unit	Rs.4.16 per Unit
Wind Mills commissioned from 01-04-2018	Rs.2.80 per Unit	Rs.2.86 per Unit

Pooled Cost based on the Tariff of NCES Generators

As per the Instructions of the TNERC in their various order and as practice, take the lowest tariff or with the Tariff with AD as base tariff for the calculation of Pooled Cost.

Table IV

Tariff Period	Preferential Tariff for NCES Generators with AD	Actual Pooled Cost for the period	Pooled Cost for the period claimed by M/s. Retadi Pvt. Ltd.
Prior to 15-05-2006, if they executed EPA as per TNERC Order No.3 dated 15-05-2006	Rs.2.75	N.A.	N.A.
Prior to 15-05-2006, if they have not executed EPA as per TNERC Order No. 3 dated 15-05-2006	Rs.2.70	N.A.	N.A.
Between 15-05-2006 & 18-09-2008	Rs.2.90	N.A.	N.A.
Between 19-09-2008&31-07-2012	Rs.3.39	Rs.2.54	-
Between 01-08-2012to 31-03-2016	Rs.3.53	Rs.2.64	2.97
Between 01-04-2016 to31-03-2018	Rs.3.70	Rs.2.77	3.12
From 01-04-2018	Rs.2.80	Rs.2.10	-

For the sake of clarity, the above tables I, II, III & IV mentioned above shows various tariffs as detailed below;

Table I - The Claims submitted by M/s Retadi Power Company Pvt Ltd based on the Pooled Cost as per various TNERC Orders.

Table II - Actual Pooled cost of Power as per various TNERC Orders.

Table III - Actual Tariff of NCES Generator for various periods.

Table IV - Actual Pooled cost of various periods based on the base Tariffs of the NCES Generators.

4.13. For the sake of clarity and information, it is once again stressfully mentioned that the "The Pooled cost per unit shall be determined for each Financial year as the case may be, subject to the maximum of 75% of the Preferential Tariff fixed by the Commission to that category or sub category of NCES Generators or the APPC tariff, whichever is less".

4.14. The Pooled Cost claimed by M/s Retadi Power Company Pvt.Ltd as in Table-I above has never been a tariff of TANGEDCO (TNEB) during any of the period as claimed by them (Table IV)

4.15. The Commission is the competent authority to decide the APPC rate for the REC sale of Board category WEGs and the TANGEDCO is only implemented the orders issued by the Commission time to time.

4.16. In addition to that M/s Vaayu (India) power Corporation (P) Ltd, Mumbai-400 051 (TNERC,CERC, The Chairman / TANGEDCO and 1 others) has filed a petition before the Hon'ble High Court of Madras (WP No. 31798 of 2019 and WMP No. 32035 & 32036 of 2019) with a prayer to issue the respondent

*"We also agree with the High Court [S.Bharat Kumar V.state of AP., 2000 SCC online AP 565: (2000) 6 ALD 217] that the judicial review in a matter with regard to fixation of tariff has not to be as that of an appellate authority in exercise of its jurisdiction under Article 226 of the Constitution. All that the High Court has to be satisfied with is that the commission has followed the proper procedure and unless it can be demonstrated that its decision is on the face of it arbitrary or illegal or contrary to the Act, the court will not interfere. Fixing a tariff and providing for cross- subsidy is essentially a matter of policy and normally a court would refrain from interfering with a policy decision unless the power exercised is arbitrary or ex facie bad in law"*

## **5. Contention of the 2<sup>nd</sup> Respondent:-**

5.1. The Petitioner had established 15 Nos. wind generators of Enercon make with each having a capacity of 800 KW in Tirunelveli District and commissioned the wind generators on 28.12.2011 under Renewable Energy Certificate (CREC) Scheme and signed Power Purchase Agreement (PPA) with TANGEDCO for selling the entire wind power to TANGEDCO at the APPC rate fixed by the Commission from time to time. Subsequently due to the name change, the Petitioner had revised and executed fresh PPA on 07.02.2014.

5.2. The Commission's Order dated 28-12-2010 had fixed the pooled cost of power purchase for the FY 2009-10 as Rs.2.37/- per unit which would remain in force even beyond 31.03.2011, if no new rate is notified by 31.03.2011 by the Commission. The rate of Rs.2.37/- per unit was in force till 31.03.2012 as no new

rate was fixed by the Commission. There after the Commission by its order dt:03.09.2012 had fixed the APPC rate of Rs.2.54/- per unit for FY 2012-13.

5.3. The Commission vide Notification No. TNERC/RPO/19/3, dated 21.01.2013 has made an amendment to the RPO Regulations 2010, and notified in the Tamil Nadu Government Gazette on dated 19.06.2013. The extract of the amendment is reproduced as below:

*“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 / sub category of NCES generators”.*

5.4. As per the above amendment TANGEDCO makes energy payment to all renewable generators commissioned under REC scheme at APPC rate subject to a maximum of 75% of the Preferential Tariff fixed by the Commission for every year.

5.5. The above amendment was challenged in the Hon'ble High Court of Madras by filing W.P. No.22097 of 2013 by M/s.Simran Wind Project Ltd. The Hon'ble High Court after hearing the arguments on both sides had dismissed the Writ Petition granting liberty to the Petitioner M/s.Simran Wind Project Ltd to move the TNERC or appropriate directions.

5.6. As per the directions of Hon'ble High Court of Madras, the petitioner in W.P. No.22097 of 2013, M/s.Simran Wind Project Ltd had filed an M.P.No. 22 of 2016 at the Commission. The Commission in its order dt:28.04.2017 had dismissed the

petition and withheld the amendment issued vide notification No.TNERC/RPO/19/3, dated 21.01.2013.

5.7. The petitioner M/s. Simran Wind Project Ltd aggrieved against the orders issued by TNERC preferred an appeal in the Hon'ble Appellate Tribunal for Electricity (APTEL) vide Appeal No.232 of 2017. The Hon'ble APTEL vide its order dated 31.05.2019 had allowed the petition and set aside the impugned Order dt:28.04.2017 passed by the Commission in M.P. No.22 of 2016 and passed the following orders:-

- (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.
- (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.
- (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.

5.8. Against the order issued by Hon'ble APTEL in Appeal No.232 of 2017, TANGEDCO filed an Appeal before the Hon'ble Supreme Court of India vide Civil Appeal No.9268 of 2019 on the following grounds:-

- A. Because the Appellate Tribunal failed to apply the amended definition of APPC under the TNERC Regulations to the facts of the case. It is held by this Hon'ble Court in that the statutory authorities under the 2003 Act are mandatorily required to act as per the Regulations framed under the Act.
- B. Because the Appellate Tribunal failed to appreciate that as per the amendment to the definition of APPC under the Regulation, the APPC rate of a financial year was required to be compared with the corresponding financial year's 75% Preferential Tariff to arrive at the breaching point.
- C. Because the Appellate Tribunal wrongly held that Madras High Court gave a finding --- "Therefore since the object to introduce the cap was in that context, the need to implement cap had not arrived since the APPC had not exceeded the Preferential Tariff." [ @ paragraph 5.3 of the Judgment of APTEL] There is no such finding in the High Court judgment.
- D. Because in the finding at paragraph 11.29 of the impugned order is erroneous.  
".....We are unable to accept the submissions of learned counsel for the Respondents regarding conclusions drawn for such breach by

comparing APPC under CERC-REC Regulations 2010 with preferential tariff of pre-2006 which are also against the judgment of the Hon'ble Madras, High Court. We do not find force in the submissions of Respondents that "it was with a view to safeguarding the consumers' interest and balance the procurement cost of purchase of electrical component that the amendment was introduced thereby fixing a cap ..... " This is in fact a sweeping general statement which is unsubstantiated and devoid of any merit."

As the above finding is wholly incorrect and unsustainable in law. The Appellate Tribunal erred in holding that APPC price of 2010 is compared with the preferential tariff of 2006. The documents on record as well as the written submissions of the appellant clearly show that the comparison of APPC price of FY with preferential tariff of the corresponding FY. The Appellate Tribunal failed to appreciate the facts in the right perspective. Even the table produced by the Regulatory Commission before the High Court in the Writ Petition also compares the APPC price of a FY with the corresponding preferential tariff of the same FY.

- E. Because the Appellate Tribunal failed to consider the written - submissions, where the comparison of APPC rates of 2013-14 was with 75% of Preferential Tariff of 2013-14. APTEL gave an erroneous finding based on the misreading of the facts and figures. APTEL's finding was that "it was with a view to safeguarding the consumers' interest and balance the procurement cost of purchase of electrical

component that the amendment was introduced thereby fixing a cap .....” is unsubstantiated is wholly erroneous and contrary to records.

- F. The table reproduced in Para 11.25 of the impugned order, and recording of finding that APPC rate has never breached the corresponding year preferential tariff is wholly untenable and contrary to the Regulation which was affirmed by the Division Bench of the High Court.
- G. The refusal to implement the cap on the APPC as per the amended definition of APPC in the relevant Regulation is contrary to the law laid down by this Hon'ble Court. Any interpretation which is contrary to the object of workability of the amendment as a whole is wrong. The interpretation should be a purposive interpretation to achieve the workability of the amendment.
- H. Because the Appellate Tribunal failed to render any finding on the reasoning given by the State Commission. This Hon'ble Court, in T.N. Generation & Distribution Corpn. Ltd. v, PPN Power Generating Co. (P) Ltd., (2014) 11 SCC 53 @ page 74 held that:

*"APTEL exercises jurisdiction over the State Commission by way of a first appeal. Therefore, It is the bounden duty of the Appellate Tribunal to examine as to whether all the decisions rendered by the State Commission suffer from the vice of arbitrariness, unreasonableness or perversity. This would be apart from examining as to whether the State Commission has exercised powers in accordance with the statutory provisions contained in the Electricity Act, 2003."*

In a first appeal, the Appellate Tribunal is required to examine the findings arrived at by the State Commission and give finding as to

whether the decisions rendered by the Regulatory Commission suffer from arbitrariness, unreasonableness or perversity.

- I. Because there is no discussion or finding by the Appellate Tribunal in the impugned order in respect of the reasoning given by the Regulatory Commission. The Appellate Tribunal has simply set aside the reasoned order of the Regulatory Commission without even discussing the issue and substituted its views. When the findings recorded by the Regulatory Commission are not held to be perverse, irrational and based on no evidence; the Appellate Tribunal cannot interfere with the same in First Appeal.
- J. Because the findings of the Appellate Tribunal is in direct conflict with the decision of the High Court. The effect of the impugned judgment amounts to setting aside the decision of the Division Bench of High Court while disposing of the Writ Petition.
- K. It is well settled that APTEL cannot go into the virus of the regulations/amended regulations which is sought to be implemented by the State Commission; PTC vs CERC (2010) 4 SCC 603.
- L. Because Appellate Tribunal clearly failed to adhere to the principles of binding precedent under Article 141 of the Constitution.
- M. Because the State Commission pursuant to the High Court order decided the date of breach by comparing the APPC price as per the amended definition of APPC with the preferential tariff for wind of the corresponding year. Appellate Tribunal erred by not taking the APPC

price as per the amended definition of APPC while comparing the APPC rates with the corresponding year preferential tariff.

- N. Because if the impugned order is implemented, and the APPC rate is revised for 912.35MW of REC wind power generation from 2011, the purchase cost of energy to TANGEDCO will increase, which cannot be included and recovered from the consumers retrospectively in 2019-2020. 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.
- O. If the decision of APTEL is implemented, it would have the revenue impact of Rs.547.55 Crores to TANGEDCO.

Year	APPC Rate (Rs.)	75% of Pref. Tariff (Rs.)	Excess to be paid per unit (Rs.)	MU purchased from REC Generators (MU)	Approx Additional purchase cost in Crores (Rs.)
2013-14	3.11	2.97	0.14	2330	32.62
2014-15	3.38	2.97	0.41	2330	95.53
2015-16	3.55	2.97	0.58	2330	135.14
2016-17	3.96	3.12	0.84	2330	195.72
2017-18	3.70	3.12	0.38	2330	88.54
<b>Total</b>				11650	<b>547.55</b>

- P. Further the purchased units from REC wind Generators cannot be accounted for the RPO account of the TANGEDCO and so the only benefit of lower cost energy from the REC scheme is defeated for the

Discom which results in discouraging TANGEDCO from future purchase of energy from REC generators

Q. Because the Judgment of Appellate Tribunal is erroneous on facts and unsustainable in law for the reasons stated hereinabove.

**6. Rejoinder on behalf of the Petitioner to the Common Counter Affidavit on merits filed by Respondents 1 to 3:-**

6.1. There is absolutely no merit in the Counter Affidavit filed by the Respondent Nos. 1 to 3 since the averments and contentions of the Respondent Nos. 1 to 3 are founded on misconstrued reading and understanding of the law and facts. In fact, the Respondent Nos. 1 to 3 has not addressed the issues raised in the present petition and has given circuitous response to the petition.

6.2. Clause 5 of the Wind Energy Purchase Agreements the Energy Charges payable by the Respondent to the Petitioner is at pooled cost of power purchase rate of Rs.2.54/KWH as per the Commission's memo bearing no. TNERC/M.O.4/E/RPO dated 28.12.2010 ("Order dated 28.12.2010").

6.3. That vide the Order dated 28.12.2010, the Commission specified the Pooled Cost of Power Purchase' by the Respondent for the FY 2009-10 as Rs.2.37 per unit. It was also specified by the Commission that the Pooled Cost of Power specified in Order dated 28.12.2010 would remain in force even beyond 31.03.2011, if no new rate is notified by 31.03.2011 by the Commission. The said rate of Rs.2.37 per unit remained in force till 31.03.2012 as no new rate was fixed

by the Commission in the interim. Thereafter, the Commission by its Order dated 03.09.2012 specified the Pooled Cost of Power Purchase as Rs.2.54 per unit for FY 2012-13. Hence, the rate of Rs.2.54/ KWH was the Average Pooled Cost of Power Purchase rate prevailing at that time of the FY 2012-13. Subsequently, the APPC rates were revised from year to year by the Commission for FY 2012-2013, FY 2013-14, FY 2014-15, FY 2015-16, FY 2016-17, FY 2017-18, FY 2018-19 at Rs.2.54, Rs.3.11, Rs.3.38, Rs.3.55, Rs.3.96, Rs.3.70, Rs.3.97 respectively, per unit.

6.4. Vide notification bearing no. TNERC/RPO/19/3 dated 21.01.2013 applicable w.e.f. 19.06.2013 ("Amendment dated 19.06.2013"), the Commission amended Regulation 2(1)(h) of the RPO Regulations by adding the words " ... subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category / sub-category of NCES generators" to the definition of 'Pooled Cost of Power Purchase'. Hence, vide the Amendment dated 19.06.2013, a capping of 75% of preferential tariff was put on the APPC rate in anticipation of the APPC rate exceeding the preferential tariff in a particular year.

6.5. The Amendment dated 19.06.2013 has to be read with the explanatory statement which mentioned the reason for the amendment. A joint reading of the amendment and the explanatory statement provides that APPC has to be capped at 75% of the Preferential Tariff only when such APPC exceeds the preferential tariff fixed by the Commission for renewable energy due to escalation of conventional fuel cost. A bare reading of both, the amendment and the explanatory statement, makes it clear that it did not intend for the Respondent to make energy

payment to all renewable generators commissioned under the REC scheme at APPC rate subject to a maximum of 75% of the preferential tariff fixed by the Commission for every year, in a heterogenous manner, but only when such APPC exceeds the preferential tariff fixed by the Commission.

6.6. The Hon'ble APTEL's judgment dated 31.05.2019 along with Hon'ble High Court of Judicature' at Madras' judgment dated 15.07.2016 has settled the interpretation and applicability of Amendment dated 19.06.2013 to all the WEGs. It is a settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgment because concededly the court does not legislate but only gives an interpretation to an existing law. Therefore, the benefit of the law as settled by Hon'ble APTEL and Hon'ble High Court of Judicature at Madras shall take effect from the date of Amendment i.e., 19.06.2013 and also accrue to all those WEGs who have received reduced tariff on account of erroneous interpretation of the Amendment dated 19.06.2013.

6.7. The interpretation placed by the Respondents on the Amendment dated 19.06.2013 is wrong, misconceived and hence denied. It is denied that following the Amendment dated 19.06.2013, the revealed definition of Pooled Cost of Power Purchase under Regulation 2(1)(h) of the RPO Regulations has been made applicable to the Petitioner's Agreement to reduce the APPC rate to 75% of the preferential tariff vide the Respondents no. CFC/FC/REV/DFC/REVAS.3/D.No. 388/2017 dated 15.11.2017. It is reiterated that a bare reading of both, the

amendment and the explanatory statement, makes it clear that it did not intend for the Respondent to make energy payment to all renewable generators commissioned under the REC scheme at APPC rate subject to a maximum of 75% of the preferential tariff fixed by the Commission for every year, in a heterogenous manner, but only when such APPC exceeds the preferential tariff fixed by the Commission. The Hon'ble High Court of Judicature at Madras and the Hon'ble APTEL have already settled the position of law in this regard. The High Court of Judicature at Madras vide order and judgment dated 15.07.2016 passed in Writ Petition No. 22097 of 2013 held as follows:

*"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."*

6.8. Similarly, the Hon'ble APTEL vide judgment dated 31.05.2019 held and declared as under:-

*"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; and*

*2. Being dynamic in nature (which may go up or down), the APPC rate shall be compared by the State Commission on a 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."*

6.9. The settled position of law as mentioned above, the Respondents have upon erroneous interpretation and application of the Amendment dated 19.06.2013

reduced the reduced the APPC rate, instead of the actual APPC rate. Petitioner's response with respect to the Respondent's contention that the APPC rate applicable to the Petitioner has already been expressly laid down in the Agreement and Was specified by the Commission on 03.09.2012 i.e., before coming into force of Amendment dated 19.06.2013, is that: (i) determination of tariff is a function solely under the domain of the appropriate Commission under Section 86(1)(a) of the Electricity Act, 2003 and such function is exercised by the appropriate Commission from time to time as per applicable rules and regulations; (ii) an agreement cannot run contrary to the law applicable and any amendment thereto; (iii) it is settled principle of law that an amendment is applicable from the date on which it was notified and is in rem, unless specifically so restricted; (iv) any contract would also accordingly be read in effect to include the changing law to the extent of such amendment; (v) the contract entered into between the parties in the present case only indicated the law as it stood on the date the parties entered into the agreement, any subsequent change in law by the Commission under Section 86(1)(a) read with Section 62 of the Electricity Act, 2003, will have to be necessarily read as forming part of the contract entered into between the Petitioner and the Respondent from the date of such amendment. The contention of the Respondents is squarely in the teeth of the RPO Regulations and cannot be countenanced. If the argument of the Respondents is accepted than it would have the effect of converting all APPC- based PPAs under REC framework entered into as per the RPO Regulations into fixed rate PPAs. In our respectful submission, therefore, such an argument cannot be legally permitted.

6.10. Every year from FY 2012-13 to FY 2017-18 has the APPC rate exceeded the preferential tariff. However, despite of the APPC rate being lower than the preferential tariff, the Amendment dated 19.06.2013 has been applicable to the petitioner based on erroneous interpretation ... It is self-contradictory and contrary to the data provided in the table (unnumbered table) mentioned by the Respondent. The Respondent be put to proof and explain the contention made by it.

6.11. The Pooled cost per unit shall be determined for each Financial as the case may be, subject to the maximum of 75% of the Preferential Tariff fixed by the Commission to that category / sub category of NCES Generators or the APPC tariff, whichever is less. The Respondent is adding words to the Amendment dated 19.06.2013 which is impermissible in law.

6.12. As per the instructions of the TNERC in their various order and as practice, we take the lowest tariff or with the Tariff with AD as base tariff for the calculation of Pooled Cost. The said submission of the Respondent is wrong, misconceived and hence denied. In response, pooled cost of power purchase is defined as "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/ sub category of NCES generators. Therefore, the Respondent cannot calculate Pooled cost based on the lowest tariff or with the Tariff with AD as base tariff as the same is simply

contrary to law. The Respondent is trying to devise methods that are contrary to law with the sole purpose of avoiding its liability. Such actions of the Respondents deserve to be deprecated and stopped.

6.13. The Hon'ble High Court of Judicature at Madras and the Hon'ble APTEL have in no way interfered with the fixing of tariff, which power is in the domain of the State Commission. The Hon'ble High Court of Judicature at Madras and the Hon'ble APTEL have merely interpreted the operation and treatment of the Amendment dated 19.06.2013, which is within their powers. The Hon'ble High Court of Judicature at Madras and the Hon'ble APTEL have in no way sought to fix the tariff for the Commission. Therefore, the case cited by the Respondent in this present paragraph is of no significance. Even otherwise, in the spirit of judicial discipline the Commission is bound by the contentions raised by the Respondents cannot be gone into the Commission in the instant proceedings. The limited issue in the present matter is the refund of amount wrongly recovered by the Respondents on the basis of erroneous application of the Amendment dated 19.06.2013.

## **7. Rejoinder to the Counter Affidavit filed by the 2<sup>nd</sup> Respondent:-**

7.1. The Respondents have prayed for dismissal of the present petition on the ground that a Civil Appeal is pending before the Hon'ble Supreme Court of India, bearing .civil Appeal No. 9268 of 2019 titled as "TANGEOCO v. Techno Electric and Engineering 'Co. Ltd." ("Civil 'Appeal") against the judgment dated 31.05.2019

passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No. 232 of 2017 titled as "Techno Electric & Engineering Co. Ltd. v. TANGEDCO and Anr." ("APTEL Order dated 31.05.2019").

7.2. The Civil Appeal was listed for hearing on 06.12.2019, on which date the Hon'ble Supreme Court was pleased to issue notice in the matter ("SC Order dated 06.12.2019"). The SC Order dated 06.12.2019 is extracted herein for the sake of brevity:-

*"Delay condoned.*

*Issue notice on the appeal as well as on the application for stay. "*

7.3. The Hon'ble Supreme Court vide order dated 06.12.2019 did not grant stay against the APTEL Order dated 31.05.2019, on which the Petitioner herein is relying upon. The Civil Appeal has not been listed before the Hon'ble Supreme Court after 06.12.2019.

7.4. It is a well settled principle of law that mere pendency of appeal does not operate as stay of an order or decree.

7.5. That it is also pertinent to point out that Order 41 Rule 5 of Code of Civil Procedure provides as under:-

"An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellant Court may for sufficient cause order stay of execution of such decree."

7.6. Even though the Code of Civil Procedure is not *stricto sensu* applicable to a State Commission, but it can act as a guiding light for the State Commission.

7.7. Since the provision of Code of Civil Procedure is not in any express or implied conflict with the provisions of the Electricity Act, 2003, both the acts can be read together. Thus, Order 41 Rule 5 of the Code of Civil Procedure would be squarely applicable to the present case.

7.8. That in view of no stay on the effect and operation of the APTEL Order dated 31.05.2019 by the Hon'ble Supreme Court, the said order holds ground as on date and thus the present proceedings may be proceeded on that basis.

7.9. The Respondents in the present case are trying to mislead the Commission into dismissing the present petition in light of pendency of the Civil Appeal.

7.10. The amendment notified by the Commission has to be read with the explanatory statement which mentioned the reason for the amendment. A joint reading of the amendment and the explanatory statement provides that APPC has to capped at 75% of the Preferential Tariff only when such APPC exceeds the preferential tariff fixed by the Commission for renewable energy due to escalation of conventional fuel cost. A bare reading of both, the amendment and the explanatory statement, makes it clear that it did not intend for the Respondent to make energy payment to all renewable generators commissioned under the REC scheme at APPC rate subject to a maximum of 75% of the preferential tariff fixed by the Commission for every year, in a heterogenous manner.

7.11. The Hon'ble High Court did not merely dismiss the Writ Petition challenging the amendment, but also made the following observation:

*"31. ... 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."*

7.12. The Respondent No. 1 has filed the Civil Appeal before the Hon'ble Supreme Court and warrants no response from the Petitioner before the Commission.

## **8. Written Submissions on behalf of the Petitioner:-**

8.1. The issue before the Commission pertains to seeking a refund of amount wrongly recovered by Respondent on the basis of erroneous application of the Notification bearing No. TNERC/RPO/19/3 dated 21.01.2013 applicable w.e.f. 19.06.2013 ("Amendment dated 19.06.2013").

8.2 By way of Order dated 28.12.2010, the Commission specified the Pooled Cost of Power Purchase by the Respondent for the FY 2009-10 as Rs.2.37 per unit. It was also specified by the Commission that the Pooled Cost of Power specified in Order dated 28.12.2010 would remain in force even beyond 31.03.2011, if no new rate is notified by 31.03.2011 by the Commission. The said rate of Rs.2.37 per unit remained in force till 31.03.2012 as no new rate was fixed by the Commission in the interim. Thereafter, the Commission by its Order dated 03.09.2012 specified the Pooled Cost of Power Purchase as Rs.2.54 per unit for FY 2012-13. Hence, the rate of Rs.2.54/-KWH was the Average Pooled Cost of Power Purchase ("APPC") rate prevailing at that time of the FY 2012-13. Subsequently, the APPC rates were revised from year to year by the Commission for FY 2012-2013, FY 2013-14, FY 2014-15, FY 2015-16, FY 2016-17, FY 2017-

18, FY 2018-19 at Rs.2.54, Rs.3.11, Rs.3.38, Rs.3.55, Rs.3.96, Rs.3.70, Rs.3.97 respectively, per unit.

8.3. By way of Amendment dated 19.06.2013, the Commission amended Regulation 2(1)(h) of the RPO Regulations by adding the words " ... subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category / sub-category of NCES generators" to the definition of 'Pooled Cost of Power Purchase'. Hence, vide the Amendment dated 19.06.2013, a capping of 75% of preferential tariff was put on the APPC rate in anticipation of the APPC rate exceeding the preferential tariff in a particular year.

8.4. The Hon'ble APTEL's judgment dated 31.05.2019 ("APTEL Order dated 31.05.2019") along with Hon'ble High Court of Judicature at Madras' judgment dated 15.07.2016 has settled the interpretation and applicability of Amendment dated 19.06.2013 to all the WEGs as under. The High Court of Judicature at Madras vide order and judgment dated 15.07.2016 passed in Writ Petition No. 22097 of 2013 held as follows:

*"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."*

8.5. Similarly, the Hon'ble APTEL vide judgment dated 31.05.2019 held and declared as under:-

*“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; and*

*2. Being dynamic in nature (which may go up or down), the APPC rate shall be compared by the State Commission on a 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.”*

8.6. A bare reading of the aforementioned Orders passed by the Hon'ble High Court and Hon'ble APTEL shows that the Amendment dated 19.06.2013 is not be given effect to unless the APPC of a particular year exceeds the preferential tariff for that corresponding year.

8.7. After the APTEL Order dated 31.05.2019, the law is settled as on date and the Petitioner's case is squarely covered under the same. It is submitted that despite the settled position of law as mentioned above, the Respondents have upon erroneous interpretation and application of the Amendment dated 19.06.2013 reduced the APPC rate, instead of the actual APPC rate.

8.8. The Respondents have argued that the Order be not pronounced in the present petition on the ground that a Civil Appeal is pending before the Hon'ble Supreme Court of India, bearing Civil Appeal No. 9268 of 2019 titled as "TANGEDCO v. Techno Electric and Engineering Co. Ltd. ("Civil Appeal") against the judgment dated 31.05.2019 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal no. 232 of 2017 titled as "Techno Electric & Engineering Co. Ltd. v. TANGEDCO and Anr.".

8.9. The Civil Appeal was listed for hearing on 06.12.2019 on which date the Hon'ble Supreme Court was pleased to issue notice in the matter ("Supreme Court

Order dated 06.12.2019"). The Supreme Court Order dated 06.12.2019 is extracted herein for the sake of brevity:-

*"Delay condoned.*

*Issue notice on the appeal as well as on the application for stay. "*

8.10. Thereafter, the Civil Appeal was listed on 09.07.2020, on which date the Hon'ble Supreme Court directed the Registry to process the matter for listing as per rules. The Supreme Court Order dated 09.07.2020 is extracted herein for the sake of brevity:-

*"Sole respondent has filed counter affidavit.*

*Registry to process the matter for listing before the Hon 'ble Court as per rules".*

8.11. The Hon'ble Supreme Court vide order dated 06.12.2019, nor vide order dated 09.07.2020, did not grant any stay against the APTEL Order dated 31.05.2019. The APTEL Order dated 31.05.2019 is good law as on date. It is further submitted that the Civil Appeal has not been listed before the Hon'ble Supreme Court after 09.07.2020. The passing of Order in the present petition cannot be put on hold till the time the Hon'ble Supreme Court passes an Order deciding the Civil Appeal No. 9268/2019.

8.12. It is a well settled principle of law that mere pendency of appeal does not operate as stay of an order or decree.

8.13. The Order 41 Rule 5 of Code of Civil Procedure provides as under:

*"An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellant Court may for sufficient cause order stay of execution of such decree."*

Even though the Code of Civil Procedure is not *stricto sensu* applicable to a State Commission, but it can act as a guiding light for the State Commission.

8.14. Since the provision of Code of Civil Procedure is not in any express or implied conflict with the provisions of the Electricity Act, 2003, both the acts can be read together. Thus, Order 41 Rule 5 of the Code of Civil Procedure would be squarely applicable to the present case.

8.15. That in view of no stay on the effect and operation of the APTEL Order dated 31.05.2019 by the Hon'ble Supreme Court, the said order holds ground as on date and thus the present proceedings may be proceeded on that basis.

8.16. That the Amendment dated 19.06.2013 has to be read with the explanatory statement which mentioned the reason for the said amendment. The explanatory statement is extracted hereinbelow for the sake of brevity:

"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".

8.17. A joint reading of the Amendment dated 19.06.2013 and the explanatory statement provides that APPC has to be capped at 75% of the Preferential Tariff only when such APPC exceeds the preferential tariff fixed by the Commission for renewable energy due to escalation of conventional fuel cost. A bare reading of both, the amendment and the explanatory statement, makes it clear that it did not intend for the Respondent to make energy payment to all renewable generators

commissioned under the REC scheme at APPC rate subject to a maximum of 75% of the preferential tariff fixed by the Commission for every year, in a heterogenous manner, but only when such APPC exceeds the preferential tariff fixed by the Commission.

8.18. The Hon'ble APTEL's judgment dated 31.05.2019 along with Hon'ble High Court of Judicature at Madras' judgment dated 15.07.2016 has settled the interpretation and applicability of Amendment dated 19.06.2013 to all the WEGs. It is further submitted that it is a settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgment because concededly the court does not legislate but only gives an interpretation to an existing law. Therefore, the benefit of the law as settled by Hon'ble APTEL and Hon'ble High Court of Judicature at Madras shall take effect from the date of Amendment i.e., 19.06.2013 and also accrue to all those WEGs who have received reduced tariff on account of erroneous interpretation of the Amendment dated 19.06.2013. (Cases on Interpretation of law relates back to the date of the law - Lily Thomas & Ors. v. Union of India and Ors (2000) 6 SCC 224 - para 59, Sarwan Kumar and Anr. v. Madan Lal Aggarwal (2003) 4 SCC 147 - para 20, Theerthagiri v. District Collector, Dharmapuri District and Anr (Madras High Court) 2010 (4) CTC 598 - para 13, Employees State Insurance Corp v. Birla Jute and Industries Ltd. (Calcutta High Court) (2008) SCC OnLine Cal342 - para 23-25)

8.19. The APPC did not exceed the preferential tariff for the years in question:

Financial Year	APPC Rate	Preferential Tariff
2012-13	2.54	3.39
		3.96
2013-14	3.11	3.96
2014-15	3.38	3.96
2015-16	3.55	3.96
2016-17	3.96	4.16
2017-18	3.70	4.16

Therefore, due to the erroneous interpretation and application of the Amendment dated 19.06.2013 by the Respondent, the Petitioner received reduced tariff.

8.20. The Commission in Order No. 2/2020 dated 12.11.2020 has already implemented the Order dated 31.05.2019 passed by the Hon'ble APTEL in the case of M/s.Techno Electric & Engineering Co. Ltd. The Commission directed TANGEDCO to make payments to M/s. Techno Electric & Engineering Co. Ltd. at the full APPC rate without applying any cap for the years 2013-2014 to 2017 with interest rates as provided in the Energy Purchase Agreements. The relevant portion is extracted herein for the sake of brevity:

"7. Accordingly, in view of the directions of Hon'ble APTEL in para 12 of A. No.232 of 2017, Commission passes the following order:

- (i) 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”.

8.21. The Petitioner is thus, entitled to an amount of Rs.32,24,50,520/- upto November 2021 from the Respondent, together with interest at the rate of 1% per month as per Clause 6(2) of the Renewable Wind Energy Purchase Agreements dated 07.02.2014 entered into between the Petitioner and the Respondent.

8.22. The present Written Submissions are supplemental to the Petition and the Rejoinders (Rejoinder dated June 2020 and Rejoinder dated 29.01.2021) filed by the Petitioner and may be read accordingly. The Petitioner is not reiterating the stand taken by it in the pleadings already on record of the Commission, the same may be read as forming part of the present Written Submissions.

8.23. In view of the above, the Petitioner is entitled to the payment of amount of Rs.32,24,50,520/- till the month of November 2021 with *pendente. lite* interest. Further, the Petitioner is also entitled to 18% Interest from the date of the order passed by the Commission till the date of payment of the amount due and payable to the Petitioner.

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

9.1. The prayer of the petitioner is to direct the Respondent TANGEDCO to make payment of the balance amount of Rs.5,72,62,542/- that has become due to

the petitioner after the directions issued by the Hon'ble Appellate Tribunal of Electricity in A.No.232 of 2017 dt.31.5.2019.

**9.2.** The petitioner has entered into agreements with TANGEDCO for sale of energy from their 15 nos. windmills under the REC (Renewable Energy Certificate) scheme. Under this scheme the generators would get paid at a price not exceeding the Pooled cost of Power purchase in accordance to the provisions in the Commission's Renewable energy Purchase Obligation regulations 2010. The petitioner's machines have been commissioned in 2011. The Energy Purchase Agreements have been entered with the Distribution Licensee TANGEDCO during February 2014 where TANGEDCO has agreed to pay the price of energy at the Pooled cost of power purchase of Rs.2.54 per unit relevant at the time of execution of agreement. .

**9.3.** The petitioner was to be paid at APPC rates notified by the Commission each year. In 2013, an amendment was issued to the Pooled cost of power Purchase. By the amendment, the Pooled cost of power purchase was subject to a maximum of 75% of the preferential tariff fixed by the Commission to that category / sub category of NCES generators.

**9.4.** After the issue of the amendment, TANGEDCO in 2017 has issued a memo whereby the rates of APPC were compared to the preferential tariffs determined by the Commission and applicable for each year, and paid the petitioner at 75% of the preferential tariff applicable for each year.

**9.5.** The amendment issued to the RPO regulations defining 'Pooled cost of purchase' was a matter contested by stakeholders before the Hon'ble High Court of

Madras. The issue was remanded to the Commission where Commission passed orders in M.P No.22 of 2016. This order of the Commission was further contested before Hon'ble APTEL and APTEL in the judgement in A.No.232 of 2017 directed the Commission to issue necessary instructions to the Distribution Licensee, TANGEDCO, to make payment at the full APPC rate without applying any cap, for the relevant period, together with normal interest thereon.

**9.6.** Commission has issued a consequential order in Order No.1/2020 dt.12.11.2020 directing TANGEDCO to make payments as per the directions of APTEL subject to the outcome of the appeal filed by TANGEDCO before the Hon'ble Supreme Court of India.

Extract of Order No.1/2020 dt.12.11.2020:

*“7. Accordingly, in view of the directions of Hon'ble APTEL in para 12 of A.No.232 of 2017, Commission passes the following order : (i) 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”*

**9.7.** TANGEDCO maintains that the appeal is pending before the Apex Court and has cited a revenue impact of Rs.547.55 crores which cannot be recovered from the consumers in retrospect. Petitioner relied upon Order 41 Rule 5 of Civil procedure to contend that though CPC is not strictly applicable to the Commission, since it is not in express or in implied conflict with the provisions of electricity Act

2003 the same can be made applicable and that mere pendency of appeal does not operate as stay of an order or decree. The petitioner has claimed Rs.32.24 crores upto November 2021.

**9.8.** The Civil Appeal No.9268 of 2019 filed by TANGEDCO was last heard on 9.7.2020 and has not been listed for hearing till this date.

**9.9.**In view of the above, the Commission is of the considered view that in the absence of any stay on APTEL's directions in A.No.232 of 2017, the Distribution Licensee shall have to act as per the orders of the Commission issued in Order No.1 of 2020 dated 12.11.2020. Ordered accordingly.

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

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

/True Copy /

**Secretary**  
**Tamil Nadu Electricity**  
**Regulatory Commission**