

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru M.Chandrasekar

..... Chairman

and

Thiru K.Venkatasamy

.... Member (Legal)

D.R.P.No.16 of 2021

M/s. Wind Construction Limited
(Formerly Purushothama Perumal Renewable
Energy Pvt. Ltd.)
Rep. by its authorized signatory – Ms. D.P. Menaka
Naman Midtown, A Wing, 21st Floor
2101, Senapati Bapat Marg
Elphinstone Road
Mumbai – 400 013.

... Petitioner
(Thiru Rahul Balaji
Advocate for the Petitioner)

Vs

1. Tamil Nadu Generation and Distribution Corporation Limited
Represented by its Chairman & Managing Director
10th Floor,
144, Anna Salai
Chennai – 600 002.
2. The Director – Finance
TANGEDCO
10th Floor,
No. 144, Anna Salai
Chennai – 600 002.
3. The Director – Generation
TANGEDCO
144, Anna Salai
Chennai – 600 002.

4. Superintending Engineer
Solar Energy, NCES, TANGEDCO
144, Anna Salai
Chennai – 600 002.

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

Dates of hearing : 26-10-2021; 16-11-2021; 30-11-2021;
07-12-2021; 21-12-2021; 28-12-2021;
19-01-2022; 08-02-2022 and 22-02-2022

Date of Order : 12-04-2022

The D.R.P.No.16 of 2021 came up for final hearing on 22-02-2021. The Commission upon perusing the affidavit filed by the petitioner, counter affidavits filed by the respondents, Rejoinder affidavit filed by the petitioner and all other connected records and after hearing both the parties passes the following:-

ORDER

1. Prayer of the Petitioner in D.R.P.No.16 of 2021:-

The prayer of the Petitioner in the above D.R.P.No.16 of 2021 is to

- (i) direct the respondents to make payment towards invoices due as of 31-07-2021 of a value of Rs.40,85,02,740/- (i.e. July 2020 to July 2021) and accrued interest thereon of Rs.1,18,49,644/- (i.e. July 2020 to July 2021) to petitioner immediately and further direct the payment of invoices from time to time within the time prescribed under clause 10 of the Energy Purchase Agreement;
- (ii) direct the Respondents to forthwith make payment of a sum of Rs.5,40,10,563/- (being the interest accrued till 31-07-2021) towards interest against delayed payments have been effected;

- (iii) direct the respondents to comply with Clause 10 (c) of the EPA between the parties and forthwith provide a Standby Letter of Credit;
- (iv) direct the Respondents to process and effect the name change application submitted by petitioner and effectuate the name change in the EPA (Energy Purchase agreement) in furtherance of the Regulations and
- (v) award costs of the instant petition including court fees and legal expenses and make payment of the said sum to the petitioner in compliance with the provisions of Regulation 33 of the TNERC- Conduct of Business Regulations, 2004.

2. Facts of the Case:-

The present petition has been filed to direct the Respondents to pay the sums due and payable against invoices of Rs.40,85,02,740/- (i.e. July 2020 to July 2021) and accrued interest thereon of Rs.1,18,49,644/- (i.e. July 2020 to July 2021) and also interest on delayed payment towards invoices already paid amounting to Rs.5,40,10,563/- (i.e. April 2018 to July 2021), together with opening of Letter of Credit under the Energy Purchase Agreements entered into with Respondent, TANGEDCO, for the sale of power generated by the Petitioner's Wind Energy Generator and immediately effect the name change.

3. Contention of the Petitioner:-

3.1. The Petitioner, Wind Construction Limited, was formerly Purushothama Perumal Renewable Energy Pvt. Ltd. Pursuant to a scheme of Amalgamation under Sections 230-232 of the Companies Act, 2013, approved by the Hon'ble National Company Law Tribunal on 23.04.2020(NCLT Order dated 23.04.2020, there has

been a name change. An application for name change has also been filed by the Petitioner with TANGEDCO and the same is being processed. The Petitioner had written to CE-NCES- TANGEDCO- Chennai office seeking Name Change in above referred Energy Purchase Agreement (EPA), vide its letter on 14-01-2021 and as per advise from CE-NCES office, the Petitioner had submitted application to the SE-NCES - TANGEDCO, Tirunelveli vide forwarding letter dated 31-05-2021 along with Indemnity bond and the order copy of the NCLT Order copy. The SE-NCES- TANGEDCO, Tirunelveli has reviewed the application and forwarded it to CE-NCES- TANGEDCO- Chennai office on 09.06.2021 for further action. Thereafter the Petitioner representative had personally met CE-NCES in this regard and as per his instructions, Petitioner has submitted once again, the Indemnity Bond at the office of CE-NCES- TANGEDCO- Chennai vide forwarding letter dated 29.07.2021.

3.2. Further Petitioner has sent reminder letters to CE-NCES- TANGEDCO- Chennai office on 06.8.2021 & 09.08.2021. However till date, Petitioner has not received approval from TANGEDCO for name change in EPA. The petitioner was awaiting the name change to be reflected in the Respondent's records before filing the present claim. However, despite substantial time having lapsed, the name change process is yet to be completed. The approval of the scheme and the consequential name change is binding on all Parties and the petitioner is not in a position to wait further to file the present petition. The Commission may in any event issue appropriate directions to effect the name change in the records of the Respondent.

3.3. The present petition is being filed seeking for payments due to the petitioner

under the Energy Purchase Agreements it has entered into with the Respondent TANGEDCO. The belated payment to the petitioner is all the more objectionable the payment security which was required to be provided is not being done despite several requests and the Respondent are thus being emboldened to deny and delay the payments. By inordinately delaying such payments the Respondents have pushed the petitioner to financial distress by not only withholding payments under EPAs for years together but also not paying interest for the belated payments despite an express clause to the effect in the EPA. Further, the present petition is being filed seeking order directing the respondents to comply with Clause 10(c) of the EPA between the parties and forthwith provide a standby letter of credit.

3.4. The standard methodology now being employed by the Respondent is to delay payment of Invoices to renewable Energy generators for years together and then force them to give rebates against Invoices as a pre-condition to release payments and also seek for express undertakings seeking waiver of interest claims or agreeing for 50% rebate on interest. Such actions are contrary to the express regulatory scheme and contrary to the binding judgment of the Hon'ble Supreme Court where TANGEDCO was a party and the Hon'ble Supreme Court has held that obtaining rebates against payments were contrary to express terms of the EPA and are impermissible. It has therefore become necessary to approach this Hon'ble Tribunal to seek payments that have become due on an urgent basis and to seek enforcement of such payments.

3.5. With the phenomenal industrial growth witnessed in the country post-liberalisation, the last decade of last century as well as the first decade of present

century faced acute crisis of electricity generation and supply. The situation in the state of Tamil Nadu saw a steady deterioration of the once comfortable power situation, leading to increasingly frequent interruptions in supply, regular power cuts, peak load restrictions etc. seriously, substantially and adversely affecting the running and functioning of industries in the State. The Central Government too realized the acute shortage of power faced throughout the country in general obstructing the pace of progress and development as well as causing immense and unparalleled hardships and problems to all sector of industries and society, promulgated the Electricity Act, 2003 (for short “the Act”) and preferred to repeal the erstwhile enactment governing and holding the filed.

3.6. An important development with the coming into force of the Act was that generation of electricity became delicensed and the concept of “Open Access” was introduced, whereby any generator could have the right to the transmission and distribution network of the utilities to wheel power to the destination of consumption. The Act was promulgated with the specific object to take measures conducive to development of Electricity industry promoting competition therein, protecting interest of consumers and supply of electricity to all areas.

3.7. There has been an impetus, both in India and abroad to promote generation of electricity from non-conventional/renewable energy sources and to increase the share of electricity from renewable sources and to gradually bring down reliance on conventional sources of energy for production of electricity. This impetus was reflected in the consensus reached between the nations of the world and was

accepted as a binding standard to be achieved by the members countries and enshrined in the Protocol to the United Nations Framework Convention on Climate Change, adopted in Kyoto, Japan on 11th December, 1997 (Kyoto Protocol'). The Protocol was aimed at addressing the need to promote the use of renewable sources of energy as a measure to reduce the emission of green house gases. India acceded to the Protocol on 22nd August, 2002. Specific reference in this regard may be had to Article 2 Clause 1 of the Kyoto Protocol which reads as follows:

- "1. *Each Party included in Annex I, in achieving its quantified emission limitation and reduction commitments under Article 3, in order to promote sustainable development, shall:*
- (a) *Implement and/or further elaborate policies and measures in accordance with its national circumstances, such as:*
 -
 - (iv) *Research on, and promotion, development and increase use of, new and renewable forms of energy (Emphasis Supplied), of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies;"*

3.8. The Electricity Act, 2003, was enacted with a view to consolidate the different aspects of electricity generation and supply which were earlier governed by distinct legislations; and to streamline the entire process of generation and supply of electricity and pertinently, to encourage private sector participation in generation, transmission and distribution with a view to alleviating power production situation in the country. Incidentally, the Electricity Act, 2003 also takes into account the obligation on the State to encourage utilization of renewable sources for generation of power and has cast an obligation upon the Regulatory Commissions under the Act to encourage and initiate measures for production of electricity from conventional sources. Section 3 of the Act casts an obligation on the Central Government to prepare a National Electricity Policy in consultation with the State Governments for development of power system based on utilization of resources including renewable

sources of energy and to prepare National Electricity Plan every five years for the implementation of the policies and milestones envisaged in the Electricity Policy.

Para 5.2.20 of the National Electricity Policy reads as follows:

“Feasible potential of non-conventional energy resources, mainly small hydro, wind and bio-mass would also need to be exploited fully to create additional power generation capacity. With a view to increase the overall share of non-conventional energy sources in the electricity mix, efforts will be made to encourage private sector participation through suitable promotional measures”.

3.9. It would also be pertinent to refer to the National Electricity Policy (NEP). The relevant extracts are as under:

“5.12 COGENERATION AND NON-CONVENTIONAL ENERGY SOURCES

5.12.1 Non-conventional sources of energy being the most environment friendly there is an urgent need to promote generation of electricity based on such sources of energy. For this purpose, efforts need to be made to reduce the capital cost of projects based on non-conventional and renewable sources of energy. Cost of energy can also be reduced by promoting competition within such projects. At the same time, adequate promotional measures would also have to be taken for development of technologies and a sustained growth of these sources.

5.12.2 The Electricity Act 2003 provides that cogeneration and generation of electricity from nonconventional sources would be promoted by the SERCs by providing suitable measures for connectivity with grid and sale of electricity to any person and also by specifying, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a Distribution Licensee. Such percentage for purchase of power from non-conventional sources should be made applicable for the tariffs to be determined by the SERCs at the earliest.

Progressively the share of electricity from nonconventional sources would need to be increased as prescribed by State Electricity Regulatory Commissions. Such purchase by distribution companies shall be through competitive bidding process. Considering the fact that it will take some time before non-conventional technologies compete, in terms of cost, with conventional sources, the Commission may determine an appropriate differential if} prices to promote these technologies.

5.12.3. Industries in which both process heat and electricity are needed are well suited for cogeneration of electricity. A significant potential for cogeneration exists in the country, particularly in the sugar industry SERCs

may promote arrangements between the co-generator and the concerned Distribution Licensee for purchase of surplus power from such plants. Cogeneration system also needs to be encouraged in the overall interest of energy efficiency and also grid stability”.

Clause 5.12.1 of the NEP emphasis that there is urgent need to promote generation based on non-conventional sources of energy as such sources are environment friendly. Besides making efforts to reduce the cost of energy for such sources, adequate promotional measures have to be taken for development of technologies and sustained growth of these sources.

Clause 5.12.2 reproduces the provision of Section 86(1)(e) of the Electricity Act and states that percentage of purchase of power from non-conventional sources as stipulated in the above provision should be made applicable in the tariff to be determined by the State Electricity Regulatory Commissions at the earliest. It further states that the share of non-conventional sources of energy needs to be increased progressively as prescribed by the State Commission.

Clause 5.12.2 of the NEP further states that power has to be procured by the Distribution Licensees through competitive bidding. However, it may take some time before the energy from non-conventional sources can compete with energy from conventional sources. Therefore, the State Commission in order to promote generation from non-conventional sources of energy may determine appropriate differential in prices of nonconventional sources of energy.

Thus, the National Electricity Policy stipulates specifying of a percentage of total consumption in the area of the Distribution Licensee by the State Commission only from non-conventional or renewable sources of energy.

3.10. Clause 6.4 of the Tariff Policy as it originally stood states as follows:-

"6.4 Non-conventional sources of energy generation including Co-generation:

(1) Pursuant to provisions of section 86(1)(e) of the Act, the Appropriate Commission shall fix a minimum percentage for purchase of energy from such sources taking into account availability of such resources in the region and its impact on retail tariffs. Such percentage for purchase of energy should be made applicable for the tariffs to be determined by the SERCs latest by April 1, 2006. It will take some time before nonconventional technologies can compete with conventional sources in terms of cost of electricity. Therefore, procurement by distribution companies shall be done at preferential tariffs determined by the Appropriate Commission.

(2) Such procurement by Distribution Licensees for future requirements shall be done, as far as possible, through competitive bidding process under Section 63 of the Act within suppliers offering energy from same type of nonconventional sources.

In the long-term, these technologies would need to compete with other sources in terms of full costs. (3) The Central Commission should lay down guidelines within three months for pricing non-firm power, especially from non-conventional sources, to be followed in cases where such procurement is not through competitive bidding."

Clause 6.4 stipulates the follows:

(l) The State Commission under Section 86(1)(e) has to fix a minimum percentage for purchase of energy from non-conventional sources of energy. As it will take some time before non-conventional technologies can compete with conventional sources in terms of cost of generation, the appropriate Commission shall determine the preferential tariffs for procurement of power by distribution licensees from such sources.

The Tariff Policy has since been amended by Government of India by Resolution dated 20.1.2011 and the revised Clause 6.4 is as under:

"6.4 Non-conventional and renewable sources of energy generation including co-generation. (1) Pursuant to provisions of section 86(1) (e) of the Act, the Appropriate Commission shall fix a minimum percentage of the total consumption of electricity in the area of a Distribution Licensee for purchase of energy from such sources, taking into account availability of such resources in the region and its impact on retail tariffs. Such percentage for purchase of energy should be made applicable for the tariffs to be determined by the SERCs latest by April 1, 2006. (i) Within the percentage so made applicable, to start with, the SERCs shall also reserve a minimum percentage for purchase of solar energy from the date of notification in the Official Gazette which will go up to 0.25% by the end of 2012-13 and further up to 3% by 2022. (ii) It is desirable that purchase of energy from nonconventional sources of energy takes place more or less in the same proportion in different States. To achieve this objective in the current scenario of large availability of such resources only in certain parts of the country, an appropriate mechanism such as Renewable Energy Certificate (REC) would need to be evolved. Through such a mechanism, the renewable energy based generation companies can sell the electricity to local Distribution Licensee at the rates for conventional power and can recover the balance cost by selling certificates to other distribution companies and obligated entities enabling the latter to meet their renewable power purchase obligations. In view of the comparatively higher cost of electricity from solar energy currently, the REC mechanism should also have a solar specific REC. (iii) It will take some time before non-conventional technologies can compete with conventional sources in terms of

cost of electricity. Therefore, procurement by distribution companies shall be done at preferential tariffs determined by the Appropriate Commission”.

3.11. The Government of India has approved certain amendments to the National Tariff Policy on 20 January 2016 ("NTP, 2016"). The National Tariff Policy is formulated and notified in continuation of the National Electricity Policy (NEP) which in turn is notified under Section 3 of the Electricity Act, 2003. NTP, 2016 is primarily focused on renewable energy, energy security and ensuring affordable tariffs. The following amendments have been introduced in relation to RPO's. Significantly, it is provided therein that RPO shall be applicable to cogeneration from sources other than renewable sources. It would be relevant to extract the powers of the SERC under the Act in this regard.

86. Functions of State Commission: -

(1) The State Commission shall discharge the following functions, namely: -

.....

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licenses”.

3.12. Furthermore, The National Action Plan for Climate Change (NAPCC) announced by the Hon. Prime Minister of India on June 30, 2008 envisages several important measures with a view to increasing the share of renewable energy in total electricity consumption in the country. NAPCC set the target of 5% renewable energy purchase for FY 2009-10 against the level of around 3.5% existing in the FY 2008-09. Further, NAPCC envisages that such target will increase by 1% for next 10 years. This would mean NAPCC envisages renewable energy to constitute approx.. 15% of the energy mix of India by the year 2019-2020. The National Electricity Policy

also re-iterates that by virtue of the purchase obligation vis-a-vis renewable sources of energy as envisaged in Section 86 (1) (e) of the Electricity Act, the share of electricity from non-conventional sources needs to be increased progressively as prescribed by the SERCs. In the meantime, acknowledging the existence of constraints in terms of availability of Renewable Energy sources evenly across different parts of the country, the Central Electricity Regulatory Commission has formulated the Central Electricity Regulatory Commission (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 ("CERC (REC) Regulations") for the development of a market in power from Non-Conventional Energy Sources by issuance of transferable and saleable credit certificates issued under and in terms of the Regulations.

3.13 .Thus, with Wind Energy having matured over the past 3 decades in India and the gradual movement from Feed in Tariffs and introduction of Renewable Energy Certification. It was felt necessary by the policy makers to further set policy parameters for the procurement of wind energy.

3.14. Competitive bidding as a mechanism for allocating renewable energy capacity is increasingly being implemented with varying degrees of success. As a procurement mechanism, reverse auctions are specifically considered to be effective in increasing cost efficiency and discovering the least price for generating electricity from a particular technology, due to their competitive nature. In India, competitive means of procuring electricity generated from Renewable Energy has been mandated in the Electricity Act of 2003 for appropriate state commissions. The main

objective for doing so is to reduce the overall cost of procurement of power for the distribution licensees and ultimately the consumer.

3.15. Procurement of electricity through competitive means is also recommended in various policies such as the National Electricity Policy, National Tariff Policy, and the National Action Plan on Climate Change. In terms of the implementation of the above mentioned guidelines and mandates, the reverse bidding mechanism has been used to successfully lower the price of electricity generation from solar technologies under the Jawaharlal Nehru National Solar Mission (JNNSM). While there are issues still prevalent in the actual completion of projects, it has proved to be effective for lowering price. The reverse bidding scheme resulted in reductions of 39% and 50% in Batch 1 and Batch 2 of JNNSM respectively, from the starting tariffs benchmarked by CERC

3.16. India had a record year and was the fourth largest market globally both in terms of cumulative capacity and annual additions last year. 3,612 MW of new wind power was added to reach a total of 28,700 MW at the end of December 2016. This total had risen to 31,177 MW at the end of March 2017. The total renewable energy capacity installed in the country crossed the 50 GW mark at the end of 2016. Among renewables, wind power accounted for over 57 percent of the installed capacity. India's wind power installations accounted for a 6.6 percent share of the global market in 2016. Wind power capacity accounted for over 9.1 percent of total domestic installed capacity. In February 2015, India committed to installing 60 GW of

wind and 100 GW of solar by 2022. Further, India made a commitment at COP21 to raise the share of non-fossil-fuel power capacity in the country's power mix to 40% by 2030.

3.17. The State Electricity Regulatory Commissions determine the tariff for wind projects. However, the Central Electricity Regulatory Commission comes up every year with a tariff guideline for the entire country based on wind power density in five zones. To address grid integration challenges, the government had initiated the Green Corridor programme. The objective was to improve linkage between India's regional grids with its national grid. This will facilitate interstate transmission. The government's Green Energy Corridor initiative to facilitate the transfer of power from the high renewable energy installation states to other parts of the country, consists of 765 kV and 400 kV high voltage transmission lines and an associated 765/400kV substation and associated equipment; and four HVDC terminals (two at 800 kV and two at 320 kV) as part of the increased inter-regional connectivity between India's western and southern regional power grids. 2016 saw a number of new policies for promoting wind power including the draft wind-solar hybrid policy, Guidelines for Development of Onshore Wind Projects, Guidelines for Prototype Wind turbines, and the Proposal for Evaluation of Small Wind Energy and Hybrid Project. The Government of India had set an ambitious target of target of achieving 175 GW power capacity from renewable energy resources by 2022 and out of this 60 GW to come from wind power.

3.18. In the wind sector, India has progressed significantly in the past decade, with the installed capacity having nearly doubled between 2008 and 2014 (Central

Electricity Authority (CEA). The growth thus far had largely been attributed to two central policy instruments which have supplemented the Feed in Tariffs (FiTs) set by the states: Accelerated Depreciation (AD), a tax saving benefit, and Generation Based Incentive (GBI), which results in increased revenues for wind projects. However, fixed tariffs can have certain disadvantages. First, state-level tariffs are determined on a cost-plus basis which may result in inefficient cost of generation, due to asymmetric information on market and technology conditions. This can result in difficulty in realistically benchmarking input assumptions such as Capacity Utilization Factor (CUF), thus resulting in a higher price to be paid by the consumer and inefficient utilisation of the finite resource. Second, improvements in technology, such as benefits accruing from installing taller turbines with larger rotor diameters, are not captured in the actual performance or indexing parameters that are used to calculate the costs. Finally, it can also lead to a situation of creating windfall profits for developers when tariffs are set too high, or limit the entry of players in the market when set too low.

3.19. Given the above mentioned concerns and proven success of the reverse bidding mechanism Tamil Nadu which is the largest Wind generating State attempted to discover the least price for wind generation through reverse bidding.

3.20. The Tamil Nadu State at the relevant time had a total installed wind generation capacity of 7850 MW as on 31.03.2017. Further the Commission vide TNERC Notification (dated 07.03.2016) had fixed RPO target of 14% for 2017-18 and TANGEDCO needs to purchase 500 MW to meet out this RPO as a first phase.

3.21. In order to facilitate the developers to establish Wind Power Projects of capacity 25 MW and above and also to have a competitive rate, TANGEDCO has proposed to procure wind power from these Projects through a Long Term Power Purchase Agreement up to a capacity of 500 MW considering a fixed tariff of RS.3.46 as an upper limit. The developers were to be selected through reverse bidding process.

3.22. RFS document with Original RFP (Specn. No. CE/NCES/OT No.2/2017-18) issued by TANGEDCO along with bids were invited through Electronic mode (e-bidding) from Wind Power Generators (WPG) by the Chief Engineer, NCES, TANGEDCO, Chennai-2 for procurement of 500 MW with the Scope of Services:

- (a) To establish, maintain and operate Wind Power Projects for a minimum of 25 MW with at least 5MW project at one site for a single bidder or company or group of companies in Tamil Nadu and
- (b) to supply the generated Wind power to TANGEDCO under long term Energy Purchase Agreement (EPA) at the rate to be finalized through reverse bidding, considering the fixed tariff of RS.3.46 per unit as upper limit, without any escalation during the contracted period.

3.23. On successful completion of the process, Tamil Nadu became the first State in the country to try reverse auction for wind projects when compared to the prevailing system of feed-in tariff that uses long-term agreements and pricing tied to cost of power production. Also, wind tariff in Tamil Nadu was already the lowest in the country at Rs.4.16 per unit. It fell further with the benchmark tariff fixed at Rs.3.46 per unit for the tender and the tender rate being finalized for Rs.3.42 per unit.

3.24. M/s. Regen Powertech Pvt Ltd. was selected as a successful bidder for a total capacity of 200 MW for setting up wind power plant at Ottapidaram Taluk in Tuticorin District. This was pursuant to the necessary regulatory approvals, including the orders of the Commission in M.P.No.10 of 2017 dated 2.6.2017 and 10.7.2017. Thereafter approval was provided vide Lr.No.CE/NCES/SE/ Solar/ EE/ WPP/AEE2/F.M/s Regen Powertech/D.17/18 dated 5.1.2018 to split the 200 MW capacity among SPVs and the present petitioner was the developer of 50 MW capacity from and out of the total of 200 MW.

3.25. The important terms of the EPA for the purposes of the present petition are extracted below:-

5. Tariff and Other Charges:

(a) Energy Charges:

The Wind Power Tariff of Rs.3.42 per unit finalized through reverse bidding shall be applicable to WPG for the entire Agreement period of 25 years i.e. 25 years from the date of Commercial Operation Date of the Wind Power Generator.

(b) Reactive Power Charges:

The reactive power charges shall be as specified in the order on Open Access and as amended from time to time by the Commission.

(c) Start up Power Charges:

The drawal of energy by the WPG from the distribution licensee shall be adjusted against the exported energy for every billing period. In case, drawal of power is in excess over the exported power in a billing

month, such excess drawal shall be billed at appropriate tariff as per Commission's Tariff Order In force.

(d) Harmonics Compensation charges:

If the WEGs inject the Harmonics beyond the stipulated limit, then they should pay compensation @ 15% of applicable generation tariff rate on every month till such time the generator reduces the harmonics within the stipulated limit.

10. Billing and Payment:

- (a) The WPG shall raise a monthly bill along with the supporting documents every month to the distribution licensee for the net energy sold/exported after deducting the charges payable to the distribution licensee such as for startup/standby power, Grid availability charges, Harmonics compensation charges and reactive power charges or any other lawful charges recoverable by the licensee,

The Distribution Licensee shall make payment to the WPG for the Wind energy purchased/exported at the metering point within 60 days from the date following the date of receipt of the bill in complete shape.

- (c) Stand-by(backup) Letter of Credit shall be opened by Distribution Licensee for an estimated value of one month bill, which will be valid for a period up to one year. The Letter of Credit so opened shall be renewed year after year for the value based on average value of previous 12 months bills. The LC will be revoked in the event of invocation due to non-payment of energy charges within the stipulated time frame. All the charges relating to establishment, amendment and

operation of Letter of Credit shall be to the account of the beneficiary that is, WPG.

12. Applicability of the Electricity Laws:

Both parties shall be bound by the provisions contained in the Electricity Act, 2003, (CA 36 of 2003) and the Regulations, Rules, codes, notifications, orders, etc., made there under, as amended from time to time.

3.26. Thus it would become evident that the very basis of the entire EPA and the reason why competitive rates were offered were the payment security and the representation of prompt payment.

3.27. The Date of Commissioning for petitioners said 50 MW Wind farm is 29.03.2018.

3.28. The Hon'ble Appellate Tribunal for Electricity has upheld the rationale behind incorporating interest/ surcharge clauses in power purchase agreements in the case of Chairman, TNEB & Another V. Indian Wind Power Association and Others in Appeal No.11 of 2012 dated 17.04.2012. The relevant paragraphs are extracted hereunder:

"13. It is settled law, when a certain time limit has been prescribed within which payments have to be made, it would mean that any payments made after the said time period would be subject to payment of interest as indicated above.

17. In any power project, one of the important aspects is the promptitude in payment since the delays would seriously affect the viability of the project. All these projects are substantially funded through finances obtained from various funding organizations require regular repayment of principal loan amount with interest by the generators. Only if regular payments are made for the power generated and supplied the loans can be serviced long with the promised return of investment."

3.29. In the case of TANGEDCO v PPN Power Generation Co Ltd Civil Appeal No. 4126 of 2013, the Hon'ble Supreme Court of India has enunciated the rationale behind incorporating interest clauses in agreements in the following manner:

"We are also not able to accept the submission of Mr. Nariman that invoices could not be paid in full as they were only estimated invoices. It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. This cannot even be disputed by the appellant in the face of its claim for rebate at the rate of 2.5% for having made part payment of the invoice amount within 5 days. We also do not find any merit in the submission that any prejudice has been caused to the appellant by the delayed submission of annual invoice by the respondents. Pursuant to the directions issued by the State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September each year. Therefore, the benefit of interest has been given on such annual invoices. With regard to the issue raised about the interest on late payment, APTEL has considered the entire matter and come to the conclusion that interest is payable on compound rate basis in terms of Article 10.6 of the PPA. In coming to the aforesaid conclusion, APTEL has relied on a judgment of this Court in Central Bank of India vs. Ravindra & Ors. In this judgment it has been held as follows:

"The essence of interest in the opinion of Lord Wright, in Riches v. Westminster Bank Ltd. All ER at p. 472 is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation; the money due to the creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have

been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute. A Division Bench of the High Court of Punjab 2002 (1) SCC 367 speaking through Tek Chand, J. in *CIT v. Dr Sham Lal Narula* thus articulated the concept of interest the words 'interest' and 'compensation' are sometimes used interchangeably and on other occasions they have distinct connotation. 'Interest' in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, "interest" is understood to mean the amount which one has contracted to pay for use of borrowed money. In whatever category "interest" in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."

56. Similar observations have been made by this Court in *Indian Council of Enviro-Legal Action vs. Union of India & Ors.* wherein it has been held as follows:

"178. To do complete justice, prevent wrongs, remove incentive for wrong doing or delay, and to implement in practical terms the concepts of time value of money, restitution and unjust enrichment noted above-or to simply levelise-a convenient approach is calculating interest. But here interest has to be calculated on compound basis-and not simple-for the latter leaves much uncalled for benefits in the hands of the wrongdoer.

179. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors i.e. use of the money and the inflationary trends, as the market forces and predictions work out.

180. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law reform which the Law Commission must take note and more so, because the serious effect it has on the administration of justice. However, the power of the Court to order compound interest by way of restitution is not fettered in any way. We request the Law Commission to consider and recommend necessary amendments in relevant laws.

57. The late payment clause only captures the principle that a person denied the benefit of money, that ought to have been paid on due dates should get compensated on the same basis as his bank would charge him for funds lent together with a deterrent of 0.5% in order to prevent delays. It is submitted by Mr. Salve and Mr. Bhushan that bankers of the respondents have applied quarterly compounding or monthly compounding for cash credits during different periods on the basis of RBI norms. Article 10.6 of the PPA has followed the norms of the bank. This cannot be said to be unfair as the same

principle would also apply to the Appellants"

3.30. It was also held in the judgment of Ravindra that interest would be capitalized and at such time loses its character as interest and thus interest is payable also on such sum. Thus, in the present case, when the invoice payments were made belatedly, at the time of effecting payment, the interest not having been paid, the said sum became due and payable. Such sum having crystallized would stand capitalized as an ascertained debt due and further interest would be payable thereon. Interest is capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date. If interest on such sum that stood capitalized is not paid, it would amount to unjust enrichment by the party retaining it.

3.31. Furthermore, the Hon'ble Appellate Tribunal for Electricity in cases such as - (1) Jaipur Vidyut Nigam Limited vs. Rajasthan Electricity Regulatory Commission [(2019) SCC Online APTEL 98] and (2) Maharashtra State Electricity Distribution Co Ltd. vs. Maharashtra Electricity Regulatory Commission &Anr. [(2018) SCC Online APTEL 38] has settled the law regarding mandatory payment of Late Payment Surcharge in the event of delay in payment of admitted outstanding dues by the Distribution Licensee to a Generating Company.

3.32. In view of the above, the Petitioner submits that in cases such as the Petitioner's, where there is a specific provision in the EPA enjoining upon the Respondent TANGEDCO to pay within the stipulated time and also provide for payment security mechanism which would be available to be encashed if payment

was not effected on or before the 60th day from Invoice, TANGEDCO ought to be held liable to make good the claim for the same with accrued interest, otherwise it would render the whole purpose of incorporating such strictures hollow and meaningless.

3.33. Further, it is now apparent that the Respondent TANGEDCO deliberately delays payments to RE Generators who are always paid after conventional generators since the RE Generators are smaller players and cannot easily file recovery proceedings due to the costs involved. Further, as would be seen from their past conduct, the TANGEDCO after withholding payments, on the verge of the Commission would belatedly offer 6% interest and delay payments of even such interest payment. It is thus necessary that such conduct detrimental to the interest of the generators and which is in the teeth of the regulator's directives be curbed and put an end to. Thus, the petitioner is seeking for award of costs of the litigation including court-fees since the petitioner is forced to approach the Commission due to the deliberate disobedience to pay admitted dues. The status of the petitioner is all the more pitiable since it is an REC generator and is already being compensated by the Respondent for the electricity purchased at a very low rate. Therefore, to not be paid even this low rate on time is wholly arbitrary and unexpected of a State controlled body such as the Respondent.

3.34. It has raised invoices for power supplied on a monthly basis as per the terms of the EPA. However, the Respondent has honoured the said PPAs very belatedly and has failed to pay the interest on delayed payments payable thereon.

3.35. The default on part of the respondents to make payment for electricity supplied as per the terms of the agreement has made it difficult for the Petitioner to meet its commitments.

3.36. Further, the Commission vide order dated 25.03.2019, in the case of Century Flours Mills v TANGEDCO D.R.P.No.21 of 2013 has stated that the TANGEDCO is liable to make payment of interest on delayed payments at 12% per annum in the following manner:

"From the above, it is clear that the petitioner is entitled for an interest of 1% per month i. e. 12% per annum for any delayed payment beyond 30 days. As such claim of the petitioner for interest at 12% as mentioned in Annexure "A" to the petition is correct. In view of the above, the petition is allowed. The respondents are directed to make the payments claimed by the petitioner after duly verifying the calculation within three months from the date of this order."

3.37. The interest due on Invoices paid and the sums due towards unpaid Invoices with accrued interest is being set forth in the Annexure to the petition. The Invoices due as of 31.07.2021 Rs.40,85,02,740 /- (i.e., July 2020 to July 2021) and accrued interest thereon of Rs.1,18,49,644 /- (i.e. July 2020 to July 2021) and also interest on delayed payment towards Invoices already paid amounting to Rs.5,40,10,563/- (i.e. April 2018 to July 2021), (being the interest accrued till 31-05-2021) towards interest against delayed payments made by TANGEDCO for power supplied under invoices where payments have been effected. The total dues claimed under the present petition is RS.47,43,62,946/- (Forty Seven Crores Forty Three Lakhs Sixty Two Thousand Nine Hundred Forty Six Only).

3.38. The substantial delays in making payments by the respondent have caused severe difficulties for the petitioner in meeting the financial obligations towards banks

and financial institutions. The interest on delayed payments is much lower than the payments the petitioner has to make to its banks/financial institutions under the term loans. The delay in payments by TANGEDCO has also hampered the petitioner's capacity to carry on its business.

3.39. It was initially attracted to the state of Tamil Nadu because of its geographical location which greatly favours wind energy generation and also by the policies of the state of Tamil Nadu and the respondents which was supportive of wind energy generation including the single window clearance system for establishing wind energy generation units. However, the petitioner submits that failure of TANGEDCO to make payments promptly as per terms of the energy purchase agreements has adversely affected the petitioner's financial position and strained its finances. The current attitude of TANGEDCO not only affects the petitioner but would also have long term negative impact on the viability of the state of Tamil Nadu as most favoured destination for investment in Renewable Energy, particularly Wind Energy Projects.

3.40. It had sent letters (i.e., Annexure-5,6,10,11&12) of demand to the Respondent electricity distribution circles seeking payment of interest on delayed payments. The said letters are also filed along with the instant petition. The petitioner submits that there has been no response or positive action from the respondents. The Respondents have been making ad-hoc payments from time to time which are substantially delayed. The payment status from the time of the commissioning of the plant is being set forth below:-

(consolidated table with Invoice No., Invoice date, Invoice value, date of payment, value of payment, days delay from due date, accrued interest at 12% per annum)

3.41. The petitioner has also written several letters to the Respondents asking for establishment of the LC as mandated under the EPA, including letters dated 05.10.2020 and 24.11.2020. However, there has been no response in that regard.

3.42. TANGEDCO sought for and was provided with an undertaking letter to release pending payments under cover of letter dated 24.12.2020. However even then payments have not been released.

3.43. While so, the Central Government has announced a slew of measures to benefit the Respondents and enable them to clear the long pending dues which steps have been accelerated post the Covid-19 crises. The Union Ministry of Power has written to all States/UTs extending Rs.90,000 crore financial package to assist the stressed DISCOMs. A communication in this regard had initially been sent on 14.05.2020. It was announced that the package for power sector will significantly reduce the burden of Power Distribution Companies (DISCOMS) for maintaining distribution of electricity as supplied by Gencos/Transcos during these difficult times. The Ministry for Power and New and Renewable Energy announced that the Government of India had on 13.5.2020 decided to make an infusion of liquidity of Rs.90,000 crores through Power Finance Corporation Limited (PFC Ltd.) and Rural Electrification Corporation Limited (REC Ltd.) as a part of the Atmanirbhar Bharat Abhiyan. The specific scheme was called the 'Special Long Term Transition Loan to

Discoms for COVID-19', with the financial assistance being meant to help the DISCOMS clear their dues to power producers, both belonging to the Central Public Sector Undertakings (PSUs) and the private sector and transmission companies. To be paid in two tranches, the loan is stated to have a tenure of up to 10 years, including moratorium period of not exceeding 3 years. The conditions have been stipulated at each stage, and to be implemented through the Power Finance Corporation (PFC) and the Rural Electrification Corporation (REC Ltd). The DISCOMS such as the Respondent TANGEDCO are to submit an "unconditional and irrevocable" guarantee from the respective State governments with due approval from the State Finance Departments before the first disbursement.

3.44. Pursuant to the initiatives, the TANGEDCO sent to the Centre, a revised application for Rs.32,682.65 crore against its original request for Rs.18,000 crore. This was in response to the Centre's decision to extend the scheme's reference date from March 31 to June 30.

3.45. As per publicly available information, the funding was sanctioned and the two Central agencies - REC Limited (formerly Rural Electrification Corporation Limited) and the Power Finance Corporation (PFC) have been provided the approvals to provide funding to TANGEDCO. The former will give Rs.17,830.3 crore including Rs.2,715.15 crore, which pertains to a portion of the PFC's component of the overall sanctioned loan amount. The remaining Rs.12,400 crore will come from the PFC. Additionally, through an official communication dated 20.8.2020 of Ministry of Power, Govt. of India, has noted that belated payments by Distribution licensee for all

payments under the Liquidity Infusion Scheme of PFC and REC, launched as a part of Atmanirbhar Bharat should bear interest at 1%p.m.

3.46. While so, in a peculiar turn of events, while the petitioner was expecting release of funds, it was shocked to receive information that the TANGEDCO has started releasing funds to the generators but only to persons identified by it. However, as has already been set out, the petitioner is already in deep financial crises due to the delay in payments and it has had to service its loans since its electricity is already being sold at the lowest rate discovered through reverse bids. However, if interest is not paid, there would be no sums to bridge the gap. The continued arbitrary action of favouring certain generators is further complicating the issue since the petitioner's lenders are aware that generators are being released funds and they are being further pressured to follow up for the release of payments.

3.47. The PFC and REC Ltd. are required to release the funds directly to the generators and also monitor the utilization of funds. The complete details of pending payments including Late Payment Surcharge / interest on delayed payment as per EPA has been uploaded on the Ministry of Power website PRAAPTI. However, it appears that all information is not being provided by the TANGEDCO who are seeking to obtain the funding claiming dues that have accumulated with interest thereon but only paying the principal sums and thereby pocketing the difference for their own purposes. This is a gross abuse of the terms of the sanction.

3.48. The petitioner is constrained to file the instant petition and is also legally entitled to, is contrary to the binding judgments of the APTEL and the Commission

and the petitioner submits that it ought to be awarded the costs of the petition including court fees and legal expenses incurred pursuant to the provisions of Regulation 33 of the TNERC- Conduct of Business Regulations, 2004.

3.49. The petitioner is paying a Court fee of Rs.47,43,629/- (Rupees Forty Seven Lakhs Forty Three Thousand Six Hundred and Twenty Nine only) being 1% of the 'amount in dispute' as required to be paid under the Commission's Regulations.

3.50 The instant petition has been filed within the period of limitation. All claims relate to sums due which are well within the 3 year period from arising of the cause of action. The EPA between the parties specifically contemplates amicable resolution and unfortunately, though the Respondent has never disputed the claims, it has not amicably resolved the issue, resulting in the petitioner having to file the present petition.

4. Contentions of 1st, 3rd and 4th Respondents:-

4.1. In the year 2017, TANGEDCO has proposed to procure wind power from developers establishing Wind Power Projects through a Long Term Power Purchase Agreement and also floated tender for procurement of 500 MW of wind power procurement under Reverse Bidding Process (E-Tender) to have a competitive rate as follows:

- (a) To establish, maintain and operate Wind Power Projects for a minimum of 25 MW with at least 5 MW project at one site for a single bidder or company or group of companies in Tamil Nadu and
- (b) To supply the generated Wind Power to TANGEDCO under long term

Energy Purchase Agreement (EPA) at the rate to be finalized through reverse bidding, considering the fixed tariff of Rs.3.46 per unit as upper limit, without any escalation during the contracted period

4.2. M/s.Regan Power Tech Pvt Ltd had participated in the E-Tender and becoming a successful bidder for total capacity of 200 MW for setting up wind power plant at Ottapidaram Taluk in Tuticorin District and also issued "Letter of Intent" (LOI) vide LOI. Lr.No:CE/NCES/SE/Solar/ EE/IWPP/AEE.2/F. M/s..Regan Power Tech Pvt Ltd/D.2067/17, dated 21.09.2017.

4.3. M/s. Regan Power Tech Pvt Ltd had Signed Power Purchase Agreement (PPA) with TANGEDCO on 19.10.2017 for supplying 200MW of Wind Power to TANGEDCO at the rate of Rs.3.42/unit for 25 years from the date of Commercial Operation Date (COD). As per the terms and conditions of PPA, M/s. Regan Power Tech Pvt Ltd has to commission the entire project within 15 months from the date of signing of PPA terms which is before 19.01.2019 without attracting Liquidated Damages (LD) clause.

4.4. M/s.Regan Power Tech Pvt Ltd in their letter dated 12.12.2017, requested to split up the allocated capacity of 200 MW into four blocks each of 50 MW capacity to be set up under different Special Purpose Vehicle (SPVs) in the following names;

(1) Purushothama Perumat Renewabe Energy Pvt Ltd,

(2) Soundararaja Perumal Renewable Energy Pvt Ltd,

(3) Sri Moorthi Perumal Renewable Energy Pvt Ltd,

(4) Vaikundananda Perumal Renewable Energy Pvt Ltd.

4.5. Based on the company's request, approval has been accorded to M/s. Regan Power Tech Pvt Ltd to form 4 Nos. SPV for splitting of 200 MW of Wind Project into

4x50 MW for each SPV in above names vide Lr.No. CE/NCES/SE/Solar/EE/WPP/AEE2/F.M/s. Regen Powertech /D.17/18, dated 05.01.2018.

4.6. Among the four companies M/s.Purushothama Perumal Renewable Energy Pvt Ltd as a Special Purpose vehicle (SPV) has executed PPA for 50 MW capacity. Out of the total load of 50 MW, only 49.5MW (33x1.5MW) has been commissioned on various dates starting from 29.03.2018, and the COD certificate issued by TANGEDCO, dated 08.11.2018.

4.7. Invoices for the wind energy sale received from M/s. Purushothama Perumal Renewable Energy Pvt Ltd from April 2019 to June 2020 were already paid, as detailed below:

S. No.	Period	Amount	Deduction	Net Amount	LOA/Date
1	April 2019	8652270	3300	8475991	299073/15-07-19
2	May 2019	23309538	25800	22818063	299074/15-07-19
3	June 2019	50053058	147300	49905758	299075/31-12-19
4	July 2019	57567851	235800	57332051	299076/31-12-19
5	August 2019	53129655	181800	52947855	299077/31-12-19
6	September 2019	31356021	88801	31267220	299078/31-12-19
7	October 2019	4254312	1800	4252512	299079/31-12-19
8	November 2019	9404090	300	9403790	299080/31-12-19
9	December 2019	14829974	7803	14822171	299081/31-12-19
10	January 2020	13705833	3302	13702531	299082/31-12-19
11	February 2020	16408513	10800	16397713	17775/11-11-20
12	March 2020	93054810	3300	9302181	17778/12-11-20
13	April 2020	7352227	1800	7350427	17777/12-11-20
14	May 2020	18416939	40800	18376139	17893/12-11-20
15	June 2020	45628453	18600	45609853	17894/12-11-20

4.8. Meanwhile a Petition was filed by M/s. Purushothama Perumal Renewable energy Private Limited "In the National Company Law Tribunal Special Bench, Mumbai "(NCLT) and NCLT has approved the amalgamation of M/s. Purushothama Perumal Renewable Energy Private Limited, and Wind Construction Ltd vide THE NATIONAL COMPANY LAW TRIBUNAL, SPECIAL BENCH, MUMBAI, Order dated 23-04-2020, as stated by the Petitioner and emerged as new entity under the name and style of M/s. Wind Construction Limited.

4.9. In the meantime M/s. Wind Construction Limited has reapplied for Name Change from M/s. Purushothama Perumal Renewable Energy Pvt Ltd to M/s. Wind Construction Limited based on the Order from NCLT. The documents submitted by M/s. Wind Construction for name change on 12-08-2021. The holding company of M/s. Purushothama Perumal Renewable Energy Pvt. Ltd. and M/s. Regen Power Tech are already under NCLT/Chennai. Hence, name change has not been approved so far. Based on the legal opinion, "Name Change" will be effected subject to satisfying the norms prescribed for effecting name change.

4.10. As the invoices were received from July 2020 to March 2021 in the name of M/s. Purushothama Perumal Renewable Energy Pvt. Ltd only and the invoices are not paid in view of the above lack of legal clarity with respect to the controlling stake of the agreement holding company M/s. Purushothama Perumal Renewable Energy Pvt Ltd. Further, as per the NCLT, Special Bench, Mumbai's Order dated 23.04.2020, the petitioner has taken possession of M/s. Purushothama Perumal Renewable Energy Pvt Ltd with effect from 23.04.2020. However the monthly generation bill have been claimed upto March 2021 in the name of M/s.

Purushothama Perumal Renewable Energy Pvt. Ltd only and not in the name of M/s. Wind Construction Ltd. After March 2021, the generation bills have not been claimed. Due to the reason stated above the payment has not been made.

4.11. The petitioners very well known the financial status and the difficulties faced by TANGEDCO. It is well known that TANGEDCO has been continuously working for improving the power status in the State and the years of power planning has been paying off. The delay in payment to the Petitioner is only temporary and the payment will be released soon.

4.12. A National Company Law Tribunal(NCLT) proceedings against M/s.Regen Power Tech Pvt Ltd is under process in Chennai and the liquidator has taken over the assets of M/s.Regen Power Tech Pvt Ltd which is the parent company having controlling stake in their SPV M/s. Purushothama Perumal Renewable Energy Pvt Ltd. Hence the name transfer or name change approval cannot be process further.

4.13. In view of the submission made, it is prayed that payment of interest may be dispensed taking into consideration the financial constrains faced by the TANGEDCO and prayed for dismissing the petition is entirety.

5. Rejoinder filed by the Petitioner:-

5.1. The Petitioner, Wind Construction Limited, was formerly M/s.Purushothama Perumal Renewable Energy Pvt. Ltd. Pursuant to a scheme of Amalgamation under Sections 230-232 of the Companies Act, 2013, approved by the Hon'ble National Company Law Tribunal on 23.04.2020, there has been a name change. An

application for name change has also been filed by the Petitioner with TANGEDCO. The Petitioner had written to CE/NCES, TANGEDCO, Chennai seeking Name Change in above referred Energy Purchase Agreement (EPA), vide its letter on 14-01-2021 and as per advice from CE-NCES office, the Petitioner had submitted application to the SE/NCES, TANGEDCO, Tirunelveli vide forwarding letter dated 31-05-2021 along with Indemnity bond and the order copy of the NCLT Order copy. The SE/NCES, TANGEDCO, Tirunelveli reviewed the application and forwarded it to CE/NCES, TANGEDCO, Chennai on 09.06.2021 for further action. Thereafter, the Petitioner's representative had personally met CE/NCES in this regard and as per his instructions, the Petitioner has once again submitted, the Indemnity Bond at the office of CE/NCES, TANGEDCO, Chennai vide forwarding letter dated 29.07.2021. Further, the Petitioner has sent reminder letters to CE/NCES, TANGEDCO, Chennai on 06.8.2021 & 09.08.2021. However, the Petitioner had not received approval from TANGEDCO for name change in EPA and its payments were kept pending under this pretext and the petitioner filed the present petition.

5.2. While so, during the pendency of the present petition, the Petitioner has merged with Fortune Integrated Assets Finance Limited (FIAFL) as per the Amalgamation Scheme approved by Order dated 14.12.2021 issued by the Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai. Accordingly, the petitioner has submitted the requisite forms to the Registrar of Companies to give effect to the said Scheme of Amalgamation. In view of the above, the Petitioner is filing an application to amend the memorandum of parties and amend the prayer to give effect to name change. Further, the petitioner has also separately made an application for giving effect to this name change to the Respondents.

5.3. It is evident from the Counter affidavit filed that the Respondents are raising completely untenable and bogus issues to delay the process of name change and also to keep the payment pending. It is evident that the Respondent is claiming as if the original shareholder and holding company of the petitioner company is before the NCLT and therefore the name change is kept on hold and also since the scheme approved by the NCLT and the name change are at different points in time, papers are not being processed because the Respondent is awaiting legal clarifications. Thereafter the Respondent is also admitting to its bad financial position as an excuse. It is thus clear that all of these claims are mere dilatory tactics to delay payment. Further, it is extremely objectionable that several generators generating thermal power are being promptly paid whereas NCES generators like the petitioner are left hanging without payments for inordinately long time for reasons best known to the Respondents. The Respondent cannot be concerned with the shareholders or any change in that regard as it is a settled position that the company is a distinct corporate legal entity unconnected with its shareholders. The company has raised a claim and that claim has to be paid. Further, with regard to name change the relevant statutory filings are already filed and there are now innumerable orders by the Commission to effect name changes which are accompanied by the necessary Registrar of Companies records. There is no scope for the Respondent to make any enquiries in that regard as the certificate itself is clear.

5.4. The Respondents shown net payable for the month of April, 2019 and May, 2019 less than to the extent of Rs.1,72,979/- and Rs.4,65,675/- respectively totaling to Rs.6,38,654/- from our invoices value. Hence, the same is to be added back in our outstanding claim dues.

5.5. The petitioner only submitted the documents for name change on 12.08.2021. As already stated in the petition, the petitioner sent a request letter as early as on 14-01-2021 and thereafter, multiple reminder letters. The details of the letters have already been delved into hereinabove and the same is not repeated herein for the sake for brevity. With regard to the contention that the invoices were not paid due to lack of clarity and invoices not claimed after 31st March 2021 is denied in toto. The NCLT order dated 23.04.2020 is very clear in this respect. With regard to Respondents' statement regarding non submission of bills after March 2021, the Petitioner has submitted invoices for the months from April 2021 to December 2021. Since the Respondents till date has not approved the name change, petitioner has submitted Invoices in the name of M/s. Purushothama Perumal Renewable Energy Pvt Ltd. In any case, when bills have been duly raised by the petitioner, the Respondents cannot give flimsy excuses for non-payment of such bills.

5.6. Furthermore, the interest on delayed payments claimed by the petitioner is for the period April 2018 to July 2021, much prior to the relevant period for TANGEDCO to claim lack of legal clarity. The inordinate delay in effecting the name change is wholly illegal, especially in view of the NCLT Order dated 23.04.2020 that approves the name change pursuant to the amalgamation. With regard to the Respondents statement that "The holding company of M/s. Purushothama Perumal Renewable Energy Pvt. Ltd. and M/s. Regen Power Tech are already under NCLT Chennai".

5.7. The shares held by M/s. Regen Powertech Pvt Ltd. were transferred to Wind Construction Ltd on 30.03.2019 much before M/s. Regen Powertech Pvt Ltd went to

NCLT on 09.12.2019. From that date onwards M/s.Regen Powertech Pvt Ltd has no stake . in M/s.Purushothama Perumal Renewable Energy Pvt Ltd. Share transfer certificate dated 30.03.2019 is enclosed herewith. Hence, TANGEDCO's contention that holding companies are under NCLT proceedings is factually incorrect and have no relevance to the present proceedings.

5.8. The shares held by M/s.Regen Powertech Pvt Ltd were transferred to Wind Construction Ltd on 30.03.2019, whereas M/s. Regen Powertech Pvt Ltd went to NCLT on 09.12.2019. In view of the above the Respondent contention that name transfer is not approved so far because National Company Law Tribunal (NCLT) proceeding against M/s. Regen Powertech Pvt Ltd., which is parent company of M/s. Purushothama Perumal Renewable Energy Pvt Ltd is invalid and untenable.

5.9. The financial constraints of TANGEDCO cannot be considered to dispense with the payment of interest which is specifically provided for in the EPA. The contention that TANGEDCO is facing financial constraints does not hold good and is untenable in as much as the same cannot absolve them of making payments in accordance with the EPA. Furthermore, as already explained, the Central government has announced several measures to the benefit of TANGEDCO and as such, TANGEDCO ought not to, be allowed to use financial constraints as an excuse. The NCLT proceedings against M/s Regen Power Tech Pvt. Ltd. have no relation/consequence to the present proceedings especially in view of fact that TANGEDCO has admitted its liability towards payments to the petitioner. Furthermore, the shareholders of M/s. Regen Power Tech Pvt. Ltd. are also unconnected to the shareholders of the petitioner herein.

5.10. The respondents have consciously not responded on the issue of opening of Letter of Credit in favour of the petitioner and prayed that this Commission may pass directions for opening of the requisite Letter of Credit in a time bound manner.

6. Application on behalf of the Petitioner for Amendment of Memorandum of Parties:-

6.1. The present petition was filed by the Applicant/Petitioner, *inter alia*, for payments against invoices raised and interest thereon, together with opening of Letter of Credit under the EPAs entered into with TANGEDCO for the sale of power generated by the Petitioner's WEG and for effecting the name change from "Purushothama Perumal Renewable Energy Pvt. Ltd." to "Wind Construction Limited".

6.2. Subsequent to filing of the present petition before the Commission and pending adjudication, a further corporate restructuring has taken place the Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai, has approved the Scheme of Amalgamation of Wind Construction Limited with Fortune Integrated Assets Finance Limited (FIAFL), vide its Order dated 14.12.2021.

6.3. Accordingly, the Applicant/Petitioner has submitted the requisite forms to the Registrar of Companies to give effect to the said Scheme of Amalgamation and name change has been submitted. In terms of the Scheme of Amalgamation and upon the scheme coming into force from the Appointed Date (as defined therein), the Undertaking of Wind Construction Limited (as defined therein) shall stand transferred

to and/or vested in or be deemed to have been and stand transferred to or vested in Fortune Integrated Assets Finance Limited. Further, as per the covenants of the Scheme, the transfer and vesting of the Undertaking of the Wind Construction Limited shall not affect any transactions or proceedings already concluded by Wind Construction Limited on or before the Appointed Date or concluded after the Appointed Date till the Effective Date.

6.4. The present application is filed to substitute the name of the new entity, i.e., "Fortune Integrated Assets Finance Limited" in place of "Wind Construction Limited" as the Petitioner in the present petition and to bring on record the amended Memorandum of Parties in this regard.

6.5. The Applicant further prayed to amend the prayer in the main petition only in respect of prayer (e) which is extracted hereunder:

"e. Direct the Respondents to process and effect the name change application submitted by petitioner and effectuate the name change in the EPA (Energy Purchase agreement) in furtherance of the Regulations "

6.6 In view of the Order dated 14.12.2021 approving the Scheme of Amalgamation whereby Fortune Integrated Assets Finance Limited will be the new entity, the prayer (e) to direct the Respondents to effect the name change from "Purushothama Perumal Renewable Energy Pvt. Ltd." to "Wind Construction Limited" requires an amendment. Instead, the Applicant requests this Commission to allow amendment of prayers by adding the following prayer:

"e. Direct the Respondents to effectuate the name change to "Fortune Integrated Assets Finance Limited" in the EPA (Energy Purchase Agreement)' in accordance with the Regulations."

6.7. The Applicant/Petitioner issued a letter dated 24.12.2021 to TANGEDCO intimating TANGEDCO of the Order dated 14.12.2021 approving the Scheme of Amalgamation.

6.8. The present application is bonafide and made in the interests of justice. No prejudice would be caused to the Respondents if the present application is allowed.

Therefore the Commission may

- (a) Allow the present application, thereby taking on record the amended Memorandum of Parties;
- (b) Substitute "Fortune Integrated Assets Finance Limited" in place of "Wind Construction Limited" as the Petitioner in the Commission's records wherever necessary;
- (c) Amend and substitute the prayer (e) in the petition from "Direct the Respondents to process and effect the name change application submitted by petitioner and effectuate the name change in the EPA (Energy Purchase agreement) in furtherance of the Regulations." to "Direct the Respondents to effectuate the name change to "Fortune Integrated Assets Finance Limited" in the EPA (Energy Purchase Agreement) between the parties in accordance with the Regulations.";

7. Written Submission on behalf of the Petitioner:-

7.1. During the pendency of the present petition, the petitioner has merged with Fortune Integrated Assets Finance Limited (FIAFL) as per the Amalgamation Scheme approved by order dated 14.12.2021 issued by the Regional Director, Western Region, Ministry of Corporate Affairs, Mumbai. Accordingly, the Petitioner has submitted the requisite forms to the Registrar of Companies to give effect to the

said Scheme of Amalgamation. In view of the above, the Petitioner has filed an application to amend the memorandum of parties and amend the prayer to give effect to name change. Further, the petitioner has also separately made an application, for giving effect to this name change to the Respondents, by amending the prayer in the main petition by adding the following prayer:

"e. Direct the Respondents to effectuate the name change to "Fortune Integrated Assets Finance Limited" in the EPA (Energy Purchase Agreement) in accordance with the Regulations. "

7.2. TANGEDCO are inordinately delaying to effect the name change and using their default as an excuse to not make payments to the Petitioner blatantly stating that they do not know under which name the payments have to be made to. TANGEDCO cannot give such flimsy excuses to not carry out its obligations under the EPA and under the Regulations framed by the Commission.

7.3. The Respondents are raising completely untenable bogus issues to delay the process of name change so as to also keep the payment in abeyance. It is evident that the Respondent is claiming as if the original shareholder and holding company, of the petitioner company is before the NCLT, thereby keeping the name change on hold even though the scheme has already been approved by the NCLT. Further the name changes are at different points in time, thus in whole the papers are not being processed as the Respondent is awaiting legal clarifications. Withal the Respondent is admitting to its bad financial position as an excuse, which are mere dilatory tactics to delay payment of invoices to renewable energy generators for years together and then force them to give rebates or waivers.

7.4. It is extremely objectionable that several generator. generating thermal power are being promptly paid whereas NCES generators like the petitioner are left hanging without payments for inordinately long time for reasons best known to the Respondents. The Respondent cannot be concerned with the shareholders or any change in that regard as it is a settled position that the company is a distinct corporate legal entity unconnected with its shareholders. The company has raised a claim and it is inclined to be paid promptly. Further, with regard to name change the relevant statutory filings are already filed and there are now innumerable orders by the Commission to effect name changes which are accompanied by the necessary Registrar of Companies records. There is no scope for the Respondent to make any enquiries in that regard as the certificate itself is clear.

7.5. Prior to the order of the Hon'ble NCT dated 14.12.2021, the Petitioner's name change was approved by the Order of the Hon'ble NCLT dated 23.04.2020 that is very clear in this respect.

7.6. The Petitioner has duly submitted invoices for the months from April 2021 to December 2021, however, since the Respondents till date has not approved the name change, petitioner has submitted Invoices in the name of M/s. Purushothama Perumal Renewable Energy Pvt Ltd. In any case, when bills have been duly raised by the petitioner, the Respondents cannot give flimsy excuses for non-payment of such bills. Furthermore, the interest on delayed payments claimed by the petitioner is for the period April 2018 to July. 2021, much prior to the relevant period for TANGEDCO to claim lack of legal clarity.

7.7. The inordinate delay in effecting the name change is wholly illegal, especially in view of the NCLT Order dated 23.04.2020 that approves the name change pursuant to the amalgamation. With regard to the Respondents statement that "The holding company of M/s. Purushothama Perumal Renewable Energy Pvt. Ltd. and M/s. Regen Power Tech are already under NCLT Chennai", the shares held by M/s. Regen Powertech Pvt Ltd. were transferred to Wind Construction Ltd on 30.03.2019 much before M/s.Regen Powertech Pvt Ltd went to NCLT on 09.12.2019. From that date onwards M/s. Regen Powertech Pvt Ltd has no stake in M/s.Purushothama Perumal Renewable Energy Pvt Ltd. Hence, TANGEDCO's contention that holding companies are under NCLT proceedings is factually incorrect and have no relevance to the present proceedings. In view of the above the Respondent's contention that name transfer was not approved so far because National Company Law Tribunal, (NCLT) proceeding against M/s.Regen Powertech Pvt Ltd., which is parent company of M/s.Purushothama Perumal Renewable Energy Pvt Ltd is invalid and untenable.

7.8. The Petitioner is entitled to the sums due and payable against Invoices together with accrued interest thereon for the period July 2020 to July 2021, in addition to delayed payment towards Invoices already paid for the period April 2018 to July 2021 together with opening of letter of credit.

7.9. The relevant terms of the EPA is extracted hereunder for ready reference:

"5. Tariff and Other Charges:

a) Energy Charges:

The wind Power Tariff of Rs.3.42 per unit finalized through reverse bidding shall be applicable to the WPG for the entire agreement period

of 25 years i.e.25 years from the date of . Commercial Operation of the Wind Power Generator.

b) *Reactive Power Charges:*

The reactive power charges shall be as specified in the order on Open Access and as amended from time to time by the Commission.

c) *Start up Power Charges:*

The drawal of energy by the WPG from the distribution licensee shall be adjusted against the exported energy for every billing period. In case, drawal of power is in excess over the exported power in a billing month, such excess drawal shall be billed at appropriate tariff as per Commission's Tariff Order in force.

d) *Harmonics Compensation Charges:*

If the WEGs inject the Harmonics beyond the stipulated limit, then they should pay compensation @ 15% of applicable generation tariff rate on every month till such time the generator reduces the harmonics within the stipulated limit.

10. *Billing and Payment:*

(a) *The WPG shall raise a monthly bill along with the supporting documents every month to the distribution licensee for the net energy sold/exported after deducting the charges payable to the distribution licensee such as startup/standby power, Grid availability charges, Harmonics compensation charges and reactive power charges or any other lawful charges recoverable by the licensee.*

The Distribution Licensee shall make payment to the WPG for the Wind energy purchased/exported at the metering point within 60 days from the date following the date of receipt of the bill in complete shape.

(c) *Stand-by (backup) Letter of Credit shall be opened by Distribution Licensee for an estimated value of one month bill, which will valid for a period up to one year. The Letter of Credit so opened shall be renewed year after year for the value based on average value of previous 12 months bills. The LC will be revolved in the event of invocation due to non-payment of energy charges within the stipulated time frame. All the charges relating to establishment, amendment and operation of Letter of Credit shall be to the account of the beneficiary that is, WPG."*

7.10. Thus, it is evident that the very basis of the entire EPA and the reason why competitive rates were offered were the payment security and the representation of prompt payment. The Hon'ble Appellate Tribunal for Electricity has upheld the rationale behind incorporating interest/ surcharge clauses in power purchase agreements in the case of Chairman, TNEB & Another V. Indian Wind Power Association and Others in Appeal No.11 of 2012 dated 17.04.2012. The relevant paragraphs are extracted hereunder:-

"13. It is settled law, when a certain time limit has been prescribed within which payments have to be made, it would mean that any payments made after the said time period would be subject to payment of interest as indicated above.

17. In any power project, one of the important aspects is the promptitude in payment since the delays would seriously affect the viability of the project. All these projects are substantially funded through finances obtained from various funding organizations require regular repayment of principal loan amount with interest by the generators. Only if regular payments are made for the power generated and supplied the loans can be serviced long with the promised return of investment. "

7.11. In the case of TANGEDCO v PPN Power Generation Co Ltd Civil Appeal No. 4126 of 2013, the Hon'ble Supreme Court of India has set at enunciated the rationale behind incorporating interest clauses in agreements in the following manner:

"We are also not able to accept the submission of Mr. Nariman that invoices could not be paid in full as they were only estimated invoices. It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. This cannot even be disputed by the appellant in the face of its claim for rebate at the rate of 2.5% for having made part payment of the invoice amount within 5 days. We also do not find any merit in the submission that any prejudice has been caused to the appellant by the delayed submission of annual invoice by the respondents. Pursuant to the directions issued by the State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September each year. Therefore, the benefit of interest has been given on such annual invoices. With regard to the issue raised about the interest on late payment, APTEL has considered the entire matter and come to the conclusion that interest is payable on compound rate basis in terms of Article 10.6 of the PPA. In coming to the aforesaid conclusion, APTEL has relied on a judgment of this

Court in *Central Bank of India vs. Ravindra & Ors.* In this judgment it has been held as follows:

".....The essence of interest in the opinion of Lord Wright, in *Riches v. Westminster Bank Ltd.* All ER at p. 472 is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation; the money due to the creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute. A Division Bench of the High Court of Punjab 2002 (1) SCC 367 speaking through Tek Chand, J. in *CIT v. Dr. Sham Lal Narula* thus articulated the concept of interest the words 'interest' and 'compensation' are sometimes used interchangeably and on other occasions they have distinct connotation. 'Interest' in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, 'interest' is understood to mean the amount which one has contracted to pay for use of borrowed money.....In whatever category 'interest' in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."

56. Similar observations have been made by this Court in *Indian Council of Enviro-Legal Action vs. Union of India & Ors.* wherein it has been held as follows:

"178. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of time value of money, restitution and unjust enrichment noted above-or to simply levelise-a convenient approach is calculating interest. But here interest has to be calculated on compound basis-and not simple-for the latter leaves much uncalled for benefits in the hands of the wrongdoer.

179. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors i.e. use of the money and the inflationary trends, as the market forces and predictions work out.

180. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law reform which the Law Commission must take note and

more so, because the serious effect it has on the administration of justice. However, the power of the Court to order compound interest by way of restitution is not fettered in any way. We request the Law Commission to consider and recommend necessary amendments in relevant laws.

57. The late payment clause only captures the principle that a person denied the benefit of money, that ought to have been paid on due dates should get compensated on the same basis as his bank would charge him for funds lent together with a deterrent of 0.5% in order to prevent delays. It is submitted by Mr. Salve and Mr. Bhushan that bankers of the respondents have applied quarterly compounding or monthly compounding for cash credits during different periods on the basis of RBI norms. Article 10.6 of the PPA has followed the norms of the bank. This cannot be said to be unfair as the same principle would also apply to the Appellants”.

7.12. It was also held in the judgment of Ravindra that interest would be capitalized and at such time loses its character as interest and thus interest is payable also on such sum. Thus, in the present case, when the Invoice payments were made belatedly, at the time of effecting payment the interest not having been paid, the said sum became due and payable. Such sum having crystallized would stand capitalized as an ascertained debt due and further interest would be payable thereon. Interest is capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date. If interest on such sum that stood capitalized is not paid, it would amount to unjust enrichment by the party retaining it.

7.13. Furthermore, the Hon'ble Appellate Tribunal for Electricity in cases such as -
(1) Jaipur Vidyut Nigam Limited vs. Rajasthan Electricity Regulatory Commission [(2019) SCC Online APTEL 98] and (2) Maharashtra State Electricity Distribution Co Ltd. vs. Maharashtra' Electricity Regulatory Commission & Anr. [(2018) SCC Online APTEL 38] has settled the law

regarding mandatory payment of Late Payment Surcharge in the event of delay in payment of admitted outstanding dues by the Distribution Licensee to a Generating Company.

7.14. In view of the above, in cases such as the Petitioner's, where there is a specific provision in the EPA enjoining upon the Respondent TANGEDCO to pay within the stipulated time and also provide for payment security mechanism which would be available to be encashed if payment was not effected on or before the 60th day from Invoice, TANGEDCO ought to be held liable to make good the claim for the same with accrued interest, otherwise it would render the whole purpose of incorporating such strictures hollow and meaningless.

7.15. Further, the Respondent TANGEDCO deliberately delays payments to RE Generators who are always paid after conventional generators since the RE Generators are similar players and cannot easily file recovery proceedings due to the costs involved. Further, as would be seen from their past conduct, the TANGEDCO after withholding payments, on the verge of the Commission would belatedly offer 6% interest and delay payments of even such interest payment. It is thus necessary that such conduct detrimental to the interest of the generators and which is in the teeth of the regulator's directives be curbed and put an end to. Thus, the petitioner is seeking for award of costs of the litigation including court-fees since the petitioner is forced to approach the Commission due to the deliberate disobedience to pay admitted dues. The status of the petitioner is all the more pitiable since it is an REC generator and is already being compensated by the Respondent for the electricity purchased at a very low rate. Therefore, not to be paid even this low rate on time is wholly arbitrary and unexpected of a State controlled body such as the Respondent.

7.16. The Commission vide order dated 25.03.2019, in the case of Century Flours Mills v TANGEDCO D.R.P. No. 21 of 2013 has stated that the TANGEDCO is liable to make payment of interest on delayed payments at 12% per annum in the following manner:-

"From the above, it is clear that the petitioner is entitled for an interest of 1% per month i.e. 12% per annum for any delayed payment beyond 30 days. As such claim of the petitioner of interest at 12% as mentioned in Annexure "A" to the petition is correct. In view of the above, the petition is allowed. The respondents are directed to make the payments claimed by the petitioner after duly verifying the calculation within three months from the date of this order."

7.17. Furthermore, as is public knowledge, the Central Government has announced a slew of measures to benefit the Respondents and enable them to clear the long pending dues which steps have been accelerated post the Covid-19 crises. Pursuant to the said initiatives, the TANGEDCO sent to the Centre, a revised application for Rs.32,682.65 crore against its original request for Rs.18,000 crore. This was in response to the Centre's decision to extend the scheme's reference date from March 31 to June 30.

7.18. As per publicly available information, the funding was sanctioned and the two Central agencies – REC Limited (formerly Rural Electrification Corporation Limited) and the Power Finance Corporation (PFC) have been provided the approvals to provide funding to TANGEDCO. The former will give Rs.17,830.3 crore including Rs.2,715.15 crore, which pertains to a portion of the PFC's component of the overall sanctioned loan amount. The remaining Rs.12,400 crore will come from the PFC. Additionally, through an official communication dated 20.8.2020 of Ministry of Power, Govt. of India, has noted that belated payments by Distribution licensee for all

payments under the Liquidity Infusion Scheme of PFC and REC, launched as a part of Atmanirbhar Bharat should bear interest at 1% p.m.

7.19. Therefore, the TANGEDCO cannot claim that its financial constraints be considered to dispense with the payment of interest which is specifically provided for in the EPA. This contention does not hold good and is untenable in as much as the same cannot absolve them of making payments in accordance with the EPA. Furthermore, as already explained, the Central government has announced several measures to the benefit of TANGEDCO and as such, TANGEDCO ought not to be allowed to use financial constraints as an excuse.

8. Findings of the Commission:-

8.1 This petition has been filed to-

- (i) direct the respondents to make payment towards invoices due as of 31-07-2021 of a value of Rs.40,85,02,740/- (i.e. July 2020 to July 2021) and accrued interest thereon of Rs.1,18,49,644/- (i.e. July 2020 to July 2021) to petitioner immediately and further direct the payment of invoices from time to time within the time prescribed under clause 10 of the Energy Purchase Agreement;
- (ii) direct the Respondents to forthwith make payment of a sum of Rs.5,40,10,563/- (being the interest accrued till 31-07-2021) towards interest against delayed payments have been effected;
- (iii) direct the respondents to comply with Clause 10 (c) of the EPA between the parties and forthwith provide a Standby Letter of Credit;

- (iv) direct the Respondents to process and effect the name change application submitted by petitioner and effectuate the name change in the EPA (Energy Purchase agreement) in furtherance of the Regulations and
- (v) award costs of the instant petition including court fees and legal expenses and make payment of the said sum to the petitioner in compliance with the provisions of Regulation 33 of the TNERC- Conduct of Business Regulations, 2004.

8.2. The matter came up on 16-11-2021, 30-11-2021, 07-12-2021, 21-12-2021 and 28-12-2021. On all these occasions, time was sought for counter but counter was not filed.

8.3. When the matter came up for hearing on 30-11-2021, it was adjourned to 07-12-2021 for filing counter. Again when the matter came up on 07-12-2021, it was adjourned to 21-12-2021 for counter. Again when the matter came up on 21-12-2021, it was adjourned to 28-12-2021. When the matter again came up on 19-11-2022, the counsel for petitioner sought time for filing Rejoinder and to further file an application for name change. The matter was adjourned to 08-02-2022 for Rejoinder and arguments. On 08-02-2022, after filing of Rejoinder and Application for name change, the matter was adjourned to 22-02-2022 for argument. On 22-02-2022, the orders were reserved after hearing arguments.

8.4. It is seen that there are two issues in this regard, namely, (a) whether the petitioner is entitled for payment of interest and (b) as to whom the payment of dues can be ordered if the petitioner succeeds in the instant case. On the question (a), the law is settled on the point that interest is payable on delayed payment and the respondent has to pay interest as per the contractual rate or as per the orders of the

Commission, as the case may be. In this connection, the provisions of Tariff Order No.1 of 2009 dated 20-03-2009 issued by the Commission would be relevant:-

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

8.5. The Hon'ble APTEL, has also in its order dated 17-04-2012 in Appeal No.11 of 2012 has upheld the payment of interest on delayed payment to the wind energy generators and this order has also been upheld by the Hon'ble Supreme Court in CFC Vs. Narasinghadas Agarwal in Review Petition (Civil) No. 1606 of 2018 in Appeal No. 5465 of 2014 dated 16-08-2018.

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

8.7. However, the respondent has sought waiver of interest citing its financial condition and except for stating that there is a financial difficulty, no other reasons have been given to dispute the claim raised by the petitioner.

8.8. We have dealt with the plea in our earlier orders and categorically held that financial constraints cannot be accepted as reason for non-settlement of dues. Therefore, the financial constraints faced by the respondent would not absolve it of its liability to make lawful payments to be made to the petitioner for the energy supplied by the petitioner as per the PPAs entered by them.

8.9. It is to be also placed on record here that the Commission cannot, on its own, order reduction in payment of interest when the Tariff Orders provide for payment of interest @ 1% per month. It is for the parties to negotiate a settlement for reduction in interest, which of course, has not been done in this case. The Commission can pass orders only with reference to the statutory provisions and the agreement executed by the parties. It is seen from the material records that no attempt seems to have been made for waiver of interest to the extent of 50% as has been done in similar cases and even a counter has been filed belatedly in the instant case. The Commission is left with no alternative but to order interest @ 12% per annum as per the extant Tariff Order in force.

8.10. However, there is yet another issue namely (b) as stated supra which requires careful consideration as to whom the dues should be ordered to be paid if the petitioner succeeds as the company has gone through / going through the process of name change more than once and the respondent taking a stand that the delay in settlement is only due to the same.

8.11. Though the Commission agrees in principle that interest is payable to the petitioner, at the same time, the contention that the payment could not be made due to lack of legal clarity with respect to controlling stake of M/s.Purushothama Permal Renewable Energy Pvt. Ltd. has got force and hence cannot be rejected outrightly as contended by the petitioner.

8.12. It is to be noted that M/s.Regan Power Tech P. Ltd., which was the original entity, is under liquidation. If one goes by the legal position, all the dues payable to M/s.Regan Power Tech P. Ltd. shall be made in the name of the Liquidator. Be that as it may, let us briefly examine the sequence of events. Based on the request of M/s. Regan Power Tech P.Ltd., the allocated capacity of 200 MW to it, was split into

four blocks of 50 MW each to four of its subsidiaries as Special Purpose Vehicle and one among them is M/s. Purushothama Perumal Renewable Energy P. Ltd. which has been allocated 50 MW and raising the invoices on the respondent.

8.13. It is further seen that M/s. Purushothama Perumal Renewable Energy and M/s. Wind Construction Limited have been amalgamated and NCLT has passed an order in this regard and resultantly, the petitioner herein i.e. M/s. Wind Construction Limited has emerged as a new entity. Consequently, the name change has been sought for in favour of M/s. Wind Construction Limited based on the order of NCLT and the name change is yet to be approved as both M/s. Purushothama Perumal Renewable Energy P. Ltd. and M/s. Regen Power Tech are under NCLT, if we are to go by the submission of the respondent. As stated by the petitioner itself, the amalgamation of M/s. Purushothama Perumal Renewable Energy Pvt. Ltd. and M/s. Wind Construction Limited has been approved. But there is nothing on record to prove that name change has been effected by the Registrar of Companies. Yet again, the petitioner has filed another petition seeking approval for name change in favour of Fortune Integrated Assets Finance Ltd. based on the amalgamation scheme approved by the Regional Director Western Region, Ministry of Corporate Affairs, Mumbai and submitted forms to Registrar of Companies to give effect to the amalgamation but here too there is nothing concrete on record to prove that the Registrar of Companies has given its nod for name change. What has been averred in this petition is that amalgamation has been approved and requisite forms have been given to Registrar of Companies for effecting name change and nowhere it has been solemnly affirmed that Registrar of Companies has cleared the name change to M/s. Wind Construction leave alone the subsequent name change to M/s. Fortune Integrated Assets Finance Ltd.

8.14. Having considered the entire gamut of the issue, we have to necessarily observe that though the question of payment of dues with regard to interest payment is an indisputable one, still the entitlement to the same has not passed the test of indisputability in view of the fact that as of today the petitioner has not obtained the name change approval from the Registrar of Companies which is the competent authority under the Companies Act, 2013. We hasten to add that name change cannot be seen as a mere empty formality, as only when the competent authority formalises the amalgamation by giving stamp of approval by acceding to the name change, the *de jure* name change can be said to have taken place though the petitioner may have a *de facto* case.

8.15. In this connection, sub-section (3) of section 13 of the Companies Act, 2013 is reproduced below:-

“13. Alteration of memorandum.—

.....

(3) When any change in the name of a company is made under sub-section (2), the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name and the change in the name shall be complete and effective only on the issue of such a certificate”.

It may be seen from the above that as per sub-section (3) of section 13 of the Companies Act, that any change in the name of a company becomes effective only upon the issue of fresh certificate of incorporation by the Registrar of Companies. It is a settled position of law when a statute prescribes something to be done in a particular manner, it should be done in that manner alone. Hence, it is within the exclusive jurisdiction of the ROC to pass final orders.

8.16. Resultantly, the prayer seeking name change in the PPA is not sustainable for the reason that the Commission cannot order such name change in the PPA when the competent authority for such declaration of name change in respect of companies is the Registrar of Companies and the name change in the PPA can only be an off-shoot or corresponding effect of the name change by the ROC and it cannot be seen as an independent exercise. This is so because any order allowing the name change in the PPA would amount to usurping the powers of ROC. It may also give rise to claims based on the orders of the Commission before other forums which cannot be agreed to. Hence, it is for the petitioner to establish its case for name change before the ROC and produce a copy of the name change to the respondents so as to seek claim for the interest dues. If the respondent still refuse to release the payment, the petitioner may approach the Commission again. Any order, if passed, solely based on the averments of the petitioner, on the factum of amalgamation alone would result in irreparable and irreversible consequences, if the Registrar of Companies rejected the case for name change at a later stage. We cannot hazard a guess that all is well with the name change and pass orders solely based on the approval for amalgamation especially when the Commission is unaware as to why the process of effecting name change is taking this long and why the ROC is keeping the matter pending.

8.17. Being the competent authority, the ROC is the appropriate authority to grant relief. We cannot step into its domain and examine the request for name change in the PPA without ROC first acceding to the same. Though the petitioner has established its case for claim on interest, the petitioner has to satisfy the requirements of name change by way of production of records relating to categorical declaration of name change by ROC such as new certificate of incorporation and

further incorporation of the same in the Memorandum of Association and Articles of Association of the company.

8.18. In view of the above findings, we hold that though the petitioner is entitled to the claim as prayed for, no relief sought for either in terms of release of dues or in terms of effecting name change can be granted at this stage until, such time the Registrar of Companies issues a name change certificate in favour of the petitioner.

This D.R.P. is finally disposed of with the above direction.

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission