

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

**APPEAL NO. 232 OF 2017 &
IA NO. 572 OF 2017**

Dated : 31st May, 2019

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

IN THE MATTER OF :

Techno Electric & Engineering Company Ltd.
(Formerly known as Simran Wind Project Limited)
2F & 3, North Block, Park Plaza
71 Park Street, Kolkata 700 016

...Appellant

Versus

1. Tamil Nadu Generation and Distribution Corporation Limited
Rep. by its Chairman & Managing Director,
NPKRR Malligal,
144, Anna Salai, Chennai-600 002

2. Tamil Nadu Electricity Regulatory Commission
TIDCO Office Building,
No. 19-A, Rukmani Lakshmi pathy Salai,
Marshalls Road, Egmore,
Chennai- 600 008

...Respondent(s)

Counsel for the Appellant : Ms. Ritu Aparna
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Mr. Utkarsh Singh
Mr. Rahul Balaji

Counsel for the Respondent(s) : Mr. S.Vallinayagam
Mr. S.Amali for R-1
Mr. Sethu Ramalingam for R-2

J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by Techno Electric & Engineering Company Ltd. (Formerly known as Simran Wind Project Limited) challenging the Order dated 28.04.2017 (“**Impugned Order**”) passed by the Tamil Nadu Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in Miscellaneous Petition No. 22 of 2016, rejecting the prayer of the appellant to pass appropriate orders in compliance with the orders of the Hon’ble High Court dated 15.7.2016 in W.P.No.22097 of 2013.
2. The Appellant, Techno Electric & Engineering Company Ltd., is an leading EPC services company in India’s power sector. The Company provides engineering, procurement and construction services to all three industry segments (generation, transmission and distribution).
3. Respondent No.1, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), is a vertically integrated utility responsible for power generation, transmission and distribution.
4. Respondent No. 2, Tamil Nadu Electricity Regulatory Commission (TNERC) Is providing renationalisation of electricity tariff, transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and for matters connected therewith or incidental thereto.
5. **FACTS OF THE PRESENT APPEAL:**
 - 5.1 The TNERC passed the impugned order consequent upon the directions of the Hon’ble Madras High Court in W.P. No. 22097 of 2013 dated 15.7.2016.

- 5.2 W.P. No. 22097 of 2013 had been filed challenging an Amendment made by the TNERC dated 19.6.2013 amending the definition of the 'Average Pooled Cost of Power Purchase (APPC) in S.2(h) of the TNERC (Renewable Energy Purchase Obligation) Regulations,2010 by addition of the words '*subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category / sub category of NCES generators*' and thereby capping the APPC payable to REC based generators.
- 5.3 The Hon'ble Madras High Court, by the judgment in W.P. No. 22097 of 2013, while upholding the powers of the TNERC to pass such an amendment, nevertheless accepted the position that the Explanatory Statement to the Amendment showed that the Amendment was introduced since '*in the long run Pooled Cost of Power Purchase may exceed the preferential Tariff fixed by the Commission due to escalation of fuel cost*' and that it was prudent that a limit has to be fixed. Therefore since the object to introduce the cap was in that context, the need to implement cap had not arrived since the APPC had not exceeded the Preferential Tariff. **The Hon'ble High Court therefore held that the notification can be implemented with effect from the date of such breach as notified by the TNERC and granted liberty to the petitioners to move the TNERC for appropriate directions.**
- 5.4 The TNERC however dismissed the M.P. filed by the Appellant in furtherance of the directions on following two principal grounds:-
- (i). That a direction cannot be issued to the Licensee to postpone the implementation of the Regulations when the Regulation is in force.
 - (ii). That by taking into account the preferential Tariff for a Wind Generator prevailing prior to 2006 which was Rs.2.75, the APPC rate was said to have been breached in the year 2013-14 when the APPC rate was fixed at Rs.3.11.

It is the case of the Appellant that the TNERC committed a grave error in deciding the issue in this manner and hence has presented the instant appeal.

6. QUESTIONS OF LAW

The Appellant has raised following questions of law for our consideration:

6.1 Whether the TNERC has complied with the directions issued by the Hon'ble Madras High Court and whether its orders are in consonance with such directions?

6.2 Whether the position adopted by the TNERC that it would take into account the preferential Tariff for Wind Energy Generators prevailing in the year 2006 as the relevant rate and then compare it with the APPC rate fixed for 2013-14 and thereafter hold that a breach has occurred in 2013-14 when the APPC rate exceeded pre-2006 Wind Preferential tariff rate, is correct?

7. The principle submissions made by Mr. Anand K.Ganesan the learned counsel for the Appellant are as follows-

7.1 The above conclusion of TNERC is factually incorrect and contrary to not only the terms of the Amendment of APPC definition but also to the stand of the TNERC before the High Court and also the express findings of the High Court.

7.2 The Hon'ble High Court has specifically recorded the submissions of parties and concluded that the breach has not occurred till the date of High Court judgment (i.e. 15.07.16) and as such the Hon'ble High Court decided that the notification can be implemented from the date of breach as notified

by the TNERC. This clearly shows that the date of breach had not yet occurred so far.

7.3 Further, the explanatory statement forming part of the TNERC Amendment stated that *“In the long run, Pooled Cost of Power Purchase may exceed the preferential tariff fixed by the Commission for renewable energy due to escalation of conventional fuel cost”*. Thus, the Explanatory Statement itself envisaged only a future occurrence of a breach, clearly negating the position of the TNERC that a breach had occurred.

7.4 In the Additional affidavit dated 18.4.2016 filed before the High Court, the TNERC stated in Para-8 as below:

“The pooled cost of power purchase for the year 2013-14 was Rs. 3.11 per unit. It was felt that in the long run, pooled cost of power purchase would exceed the preferential tariff fixed for the renewable energy due to escalation in cost of conventional fuel”.

In para-10 of the said Affidavit, TNERC further submits that “It is submitted that the ceiling of 75% of the preferential tariff was fixed by the Commission to avert a situation where the pooled cost of power would become more than the preferential tariff applicable to a Renewable Energy Generator”.

Thus, from the conjoined reading of the paras-8 & 10 of the Affidavit along with the Amendment of the Regulation, it is evident that the regulation is meant for avoiding this situation in future and had not happened till then and that was the reason why the Hon’ble High Court was persuaded to direct postponement of the coming into effect of the amendment’s applicability till such time as the breach occurred .

Further, the pooled cost of power must become more than the preferential tariff applicable to an REC Power Generator, the scheme of which was

enacted in 2010. In other words, for an RE Generator selling power under APPC the breach will happen only once the APPC exceeds the applicable preferential tariff of that category / sub-category of RE Generators in any specific year upon comparison of the APPC rate of that year with the prevailing Preferential tariff of that year..

7.5 The reason stated by TNERC while rejecting the Hon'ble High Court directive is stated as :

8.7..... As the issue started in 2011 that, the APPC rate increased from Rs.2.37 to Rs.2.54 and as there was a possibility to cross the existing prevailing preferential tariff rate of Rs.2.75, TANGEDCO requested the Commission to have a control over the APPC rate. The purpose of cap is, the APPC rate and the money value of component should be lower than the Preferential Tariff Rate. As stated by the Petitioner, if the APPC rate is not crossed the Preferential Tariff Rate, there is no necessity to the Commission to take the action in 2012 and amend the regulation in 2013. As of now the APPC rate of Rs.3.11, Rs.3.38 & Rs.3.35 has crossed and is higher than the Preferential Tariff rate of Rs.2.75, the 75% cap has come into force from 2013-14 onwards.

Peculiarly the Hon'ble TNERC has for the purposes of determining the breach, adopted and had taken into account a rate of Rs.2.75 which was a Preferential Tariff rate prevailing until 2006 for Wind Energy, which period was much before the RPO Regulations which were notified only in 2010 and could therefore never have been the basis for determination or comparison .

7.6 It is pertinent to state that TANGEDCO / TNERC at various stages in the past have also proceeded on the basis of a future breach or exceeding of the Tariff , as would be seen from the following:

- a. The Commission in its order dated 22.03.2012 in MP No. 16 of 2011 stated that '*...the Commission however recognises the views raised by TANGEDCO with regard to the fact that the average pooled cost of power purchase may after a period of time go beyond the preferential tariff fixed by the Commission. ...*'. Thus, even as late as in 2012, the Commission did not consider pre-2006 preferential tariff

of Rs. 2.75 / kWh as it only recorded that after a period such breach may occur..

- b. While proposing to amend the definition of APPC in October 2012, there is no mention in the suo moto petition of TNERC about the APPC having already breached the pre-2006 preferential tariff of Rs. 2.75.
- c. Even in the explanatory statement given in the Gazette notification of 2013, vide which the said amendment has been notified, there is no reference to the pre-2006 preferential tariff of Rs. 2.75. On the contrary, it states that ... *in the long run, Pooled Cost of Power Purchase **may exceed** the preferential tariff fixed by the Commission for renewable energy due to escalation of conventional fuel cost.*
- d. The Central Electricity Regulatory Commission (CERC) in its counter-affidavit before the Madras High Court has quoted extract from Statement of Reasons for 2nd Amendment of CERC REC Regulations dated 10.07.2013, as under:

*'... Regarding suggestion received that the PPA of electricity component should be a fixed price long term contract (without escalation) since the Commission has assumed a fixed price while determining the REC price bands in its methodology, it is clarified that **the price band is subject to periodic revision; hence fixed APPC for long term contract without escalation might impact viability of RE projects.***

....

- e. From the above, it is clear that TANGEDCO / TNERC when left with no basis to justify the capping, have tried to project a new basis, post the High Court judgment when the matter came before TNERC for issuing necessary consequential directions in accordance with the judgment of the High Court.

7.7 Thus the TNERC wrongly and in an entirely contradictory manner took the preferential tariff prevailing before 2006, when the REC scheme itself was not in force, as the basis for concluding that the breach took place in 2013-14 in which year the APPC was fixed at Rs.3.11 / kWh from Rs. 2.54 / kWh. This is an altogether incorrect conclusion and demonstrably wrong since the REC Scheme itself was introduced only in 2010. Therefore it is wholly incomprehensible that there could be an REC machine under the scheme which was Commissioned prior to 2006. If indeed that was the basis of the amendment, the amendment would not have read in the manner it was set out.

7.8 A grave injustice has thus been done despite a clear direction by the High Court. It is also wrong on the part of the TNERC to state that they are passing such an order since it cannot change the coming into force of a Regulation, when in fact that is precisely the direction by the Hon'ble High Court and the Hon'ble High Court is entitled while examining the legality of the Regulations to issue such a direction. Having not challenged the judgment and having accepted the same, the TNERC cannot seek to deny the benefit under the said judgment by an altogether convoluted approach and taking a stand that the coming into effect of a Regulation cannot be postponed by it, thereby disregarding the Hon'ble High Court's express and binding direction.

7.9 **The additional relevant aspects are set out hereunder:**

7.9.1 The order passed by the Commission is contrary to the terms of the amendment dated 19.06.2013 to the definition of APPC and is contrary to the stand taken by the TNERC before the High Court of Madras and the express findings of the High Court. In this regard, it is submitted that the High Court in its order dated 15.07.2016 has clearly stated in paragraph 31 that only the object to introduce the cap has been considered, and, the

need to implement the cap has not been arrived at by the Commission. The High Court further observed that the notification dated 19.06.2013 can be implemented only with effect from the date of such breach as notified by the TNERC.

7.9.2. TNERC has arrived at erroneous conclusion by taking the rate of preferential tariff, which as per TNERC Order No. 3 dated 15.05.2006, is applicable to '*... wind power projects commissioned, and to be commissioned based on agreements executed prior to the date of this order (i.e. from 2001 to 15.05.2006)*' was prevailing before 2006 as the basis for arriving at the conclusion that the breach occurred in 2013-14, when APPC was fixed at Rs. 3.11 / kWh from Rs. 2.54 / kWh. It is wholly irrational to make a comparison to a rate which was much prior to even the introduction of REC mechanism. The order of the TNERC seeks to nullify a binding judgment of the High Court.

7.9.3 Out of the two respondents (TANGEDCO and TNERC), only TNERC has filed their counter-affidavit. The TNERC counter-affidavit is more or less on the same lines as their order in the matter and the Written Submissions deal with the stand. TANGEDCO has not filed their counter-affidavit but has filed Written Submissions on 14.03.2019 before the APTEL. In as much as the present appeal exclusively deals with an amendment, the directions of the Hon'ble High Court and the order passed by the TNERC as a consequence thereto, the stand of the TANGEDCO and its submissions to the extent they seek to supply reasons, provide justifications and support the impugned order are irrelevant. It would however be necessary to point out that, there are several errors and many portions of the written submissions are factually and legally incorrect. Some of such submissions are:-

(i). The further attempt to compare the payments that received by an REC

Wind Generator and a Preferential tariff Generator and thereafter to claim that higher returns are being received by the Appellant apart from being irrelevant is also an untenable claim since preferential tariff determined under section 62 of the EA 2003 and REC scheme are two different mechanisms and are not comparable. This has also been recognised by the Forum of Regulators. Further, the Appellant is concerned only with the manner in which the Hon'ble Madras High Court's directions are to be implemented. The TANGEDCO has incorrectly characterized the directions of the Hon'ble High Court and sought to project an interpretation that is contrary to the plain meaning and clear directions of the judgment.

- (ii). The very eligibility and the price of REC is not guaranteed beyond a control period. CERC fixes the eligibility and also the price band based on difference of APPC and the viability income of the eligible RE source. It may be noted that with the rise in APPC, the price band is bound to decline and ultimately vanish, as is happening now. This has also been stated in the Statement of Reasons for 2nd amendment of CERC REC Regulations, as brought out above.
- (iii). The attempt of TANGEDCO to project a position that there would be large scale migration to REC regime by Preferential tariff generators if higher returns are allowed, is also untenable since the REC Scheme and the Regulations themselves provide for safeguards against such migrations.
- (iv). The TANGEDCO's attempt to project that it is protecting consumer interest is also untenable, since a generator cannot be made to suffer a loss and in any event the TANGEDCO under the scheme always pays less than what it pays to a preferential Tariff Generator.
- (v). The TANGEDCO has, probably by inadvertence, provided tables with incorrect Preferential tariff rates. The correct rates set out in TANGEDCO's

own Circular is therefore being set out in these submissions and the Circular being filed as an Annexure.

- (vi). TANGEDCO has also resorted to an entirely flawed approach by claiming that breach should be determined with respect to 75 % of the preferential tariff and not the preferential tariff which has no basis even in the terms of the Amendment Notification and completely illogical.
- (vii). The TANGEDCO too, like the TNERC has failed to recognize the dynamic nature of the returns which was TNERC's own stated position in the earlier orders, wherein the APPC and Preferential tariff rates are seen year-on-year and compared.
- (viii). The submission of the Respondents that the Hon'ble High Court had upheld the orders fixing the APPC rates and therefore the same is indirectly being questioned is a submission that is entirely untenable. It is now trite law that a judgment has to be read in its entirety and it is submitted that the Hon'ble High Court has been unequivocal in its finding and direction with respect to postponement of the coming into effect of the notification for the wind REC generators till such time as the breach actually occurs. The Respondents cannot seek to ignore this express ruling.

7.10 The notified APPC and Preferential tariff Rates and the fact of the APPC rate never having exceeded the Preferential Tariff rates for a Wind Turbine Generator (Non Accelerated Depreciation sub-category) till date.

7.11 The logical and correct application of the Hon'ble Madras High Court judgment is that, the computed APPC will be limited to 75% of the preferential tariff only for that year where it exceeds the preferential tariff prevailing that year.

7.12 A year wise comparison of the APPC rate, preferential tariff and effective APPC rate (computed APPC rate subject to a maximum of 75 % of preferential tariff as interpreted and implemented by the TANGEDCO) is given in the following table in TANGEDCO’s own Circular (**Table – 2 of TANGEDCO Memo. No. CFC/FC/REV/DFC/REV/AS.3/D No. 388/2017 dated.15.11.2017 –which is applicable to the Appellant is set out below**):

Year	APPC Rate	Preferential Tariff	75 % of Preferential Tariff	Effective APPC Rate
(1)	(2)	(3)	(4)	(5)
2012 - 13	2.54	3.96	2.97	2.54
2013 - 14	3.11	3.96	2.97	2.97
2014 - 15	3.38	3.96	2.97	2.97
2015 - 16	3.55	3.96	2.97	2.97
2016 - 17	3.96	4.16	3.12	3.12
2017 - 18	3.70	4.16	3.12	3.12

As is evident from the above table, the TANGEDCO too recognizes the dynamic nature of the payment to be made with the APPC rate and preferential Tariff rate being compared as applicable for that particular year of comparison. However TANGEDCO adopts a rate by introducing a new concept of ‘75% of preferential tariff rate’ even when there is no breach, which therefore portrays an incorrect position.

7.13 A year wise comparison of the APPC rate and preferential tariff (columns 1, 2 and 3 of the above table) shows that APPC rate has never breached the corresponding year preferential tariff:

Year	APPC Rate	Preferential Tariff	Breach (Yes/No)
2012 - 13	2.54	3.96	No
2013 - 14	3.11	3.96	No
2014 - 15	3.38	3.96	No
2015 - 16	3.55	3.96	No
2016 - 17	3.96	4.16	No
2017 - 18	3.70	4.16	No

7.14 TNERC has not followed the Hon'ble High Court's directions and it is prayed that the appeal be allowed and the impugned order of the TNERC be set aside and the following ruling issued:-

- (i) Directing that the Notification dated 19.6.2013 which amended the definition of the 'Pooled Cost of Power Purchase (APPC) in S.2(h) of the TNERC (Renewable Energy Purchase Obligation) Regulations, 2010 be not given effect to, in so far the Appellant is concerned, in as much as, till date the APPC of a year has not exceeded the Preferential Tariff payable to an REC Wind Energy Generator (sub-category of Non Accelerated Depreciation WTG) for that corresponding year .
- (ii). Direct the 2nd Respondent TNERC to compare on an annual basis, the APPC rate and the applicable tariff rate for each category/sub-category of NCES generators and thereafter notify the applicability of the cap of 75% under the Amendment, only for such year where the APPC of a particular year exceeds the Preferential Tariff payable to such category for that corresponding year. Upon such notification alone TANGEDCO would be entitled to cap the payment to 75% of the preferential tariff fixed for that category / sub category of NCES generators.
- (iii). Direct the First Respondent to make payment to the Appellant at the full APPC rate without applying any cap, for the relevant period, together with interest thereon at the rate provided for in the EPA, from the date such capped tariff was effected by TANGEDCO until date of payment to the Appellant.

8. The submissions made by Mr. S.Vallinayagam, the learned counsel for the Respondent No. 1 (TANGEDCO) are as follows:

- 8.1** The appellant has challenged the determination of date of breach of 75% of preferential tariff which would determine the APPPC rate at which the REC wind generators are entitled to sell power to the distribution licensee/the first respondent herein. The contention of the appellant is that though the High Court upheld the power of TNERC to issue notification putting a cap on the APPPC rate, but the determination of date of such breach is not in consonance with the High Court orders.
- 8.2** The appeal filed by the appellant is devoid of merits. The appellant is getting more than the preferential tariff. The preferential tariff is determined by a transparent process of consulting the stakeholders after publishing the consultative paper, inviting comments and holding a public meeting.
- 8.3** The appeal of the appellant is not maintainable for the following reasons:
- (i) The State Regulatory Commission under Section 181 of the Act, 2003 notified the amendment fixing a cap on the APPPC rate available to REC wind generator by restricting it to 75% of the preferential wind tariff of the relevant year.
 - (ii) W.P. No.22097 of 2013 was filed by the appellant challenging the above notification of TNERC which capped the APPPC rate of a financial year available to a wind generator at 75% of the preferential tariff of the concerned year.
 - (iii) The amended notification of TNERC fixing a cap of 75% on the APPPC for payment to REC wind generators was upheld by the Hon'ble High Court.
 - (iv) The High Court further held that the notification can be implemented with effect from the date of such breach of 75% APPPC, and left it to the TNERC to decide the date of such breach.

- (v) Holding the above the High Court granted liberty to the petitioner in the writ petition to move the TNERC for appropriate directions.
- (vi) TNERC in compliance with the orders of the High Court, considered the facts on record and held that 75% of Preferential Tariff of control period has already been breached by the APPPC of the relevant year and capped the same to 75% of the preferential tariff of the relevant tariff period.
- (vii) The following table will demonstrate that the State Commission's notification has rightly applied the amended notification based on the undisputed APPPC rate and Tariff of the relevant financial year as per the Tariff Order.

Year	Preferential tariff	75% of preferential tariff (OR)Energy component	Green component From sale of REC [Rs.1.5 to 2.50] *	Per unit price to Wind Generator under REC
2012-2013	3.39	2.54	1.5	4.04
2013-2014	3.53	2.65	1.5	4.15
2014-2015	3.53	2.65	1.5	4.15
2015-2016	3.53	2.65	1.5	4.15
2016-2017	4.16	3.12	1.5	4.62
2017-2018	4.16	3.12	1.0	4.12

[* By taking the floor price of green component]

From the above it may be ascertained that on comparison to the Generator under Preferential Tariff commissioned upto 2017-18 the appellant is getting more tariff.

Year	APPC rate (Rs)	Rate the wind generator gets per kwh under REC (Rs)	Preferential tariff rate (Rs) for the Generator who has commissioned the WEG during 2011	Excess tariff the REC generator getting over the machine commissioned under Pref. TF for the year 2011
2012-2013	2.54	4.04	3.39	0.65
2013-2014	3.11	4.15	3.39	0.76
2014-2015	3.38	4.15	3.39	0.76
2015-2016	3.35	4.15	3.39	0.76
2016-2017	3.96	4.62	3.39	1.23
2017-2018	3.70	4.12	3.39	0.73

- Even if compared with the WEG who have commissioned the machine under preferential tariff during 2011 in which the appellant also commissioned their machine under REC it may be ascertained that the appellant is getting higher tariff compared to preferential tariff.
- The wind energy generator has the green component and can trade the same between Rs.1.5 (floor price) – Rs.2.50 (forbearance price) upto 2016-17 and Rs.1.0(floor price) – Rs.2.90 (forbearance price) from 01.04.2017. Taking into account the green component and the energy component, the wind generator is getting more than the preferential tariff while availing REC.
- The rate for energy component of the wind energy per kwh under REC scheme, sold to the Distribution Licensee, is capped at 75% of the preferential tariff of the year of commissioning of the wind energy generator. Each wind energy generator has a distinct preferential tariff depending upon the control period in which it was commissioned. The REC availing wind generators are a different category of wind energy generators, who avail benefit of selling power by wheeling to either captive or third party and sell the surplus to the distribution licensee. These wind

energy generators get the benefit of green component of the REC in addition to the energy component of the same unit of electricity sold to the distribution licensee. The appellant is not at loss.

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

8.4 The Hon'ble CERC introduced the REC scheme in 2010. During that time, the preferential tariff rates, already in force were Rs.2.75, Rs.2.90 and Rs.3.39 per unit as the case may be. The Average Pooled Purchase Cost (APPC) rate was Rs.2.37 per unit. As the preferential tariff rates are fixed for the entire agreement period of 20 years, the TANGEDCO insisted the APPC rate also to be fixed for the entire agreement period of 20 years.

The Appellant filed M.P.No.16 of 2011 before the TNERC and stated that, the REC projects have to be paid with the APPC rate that is determined by the Commission every year. TANGEDCO argued for the following issues before the Commission:-

- (i) The APPC rate is a negotiable one.
- (ii) Fixed APPC rate of the year to be fixed one for 20 years.
- (iii) APPC rate should not cross the prevailing preferential tariff rate of Rs.2.75 per unit.

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

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

- 8.6** The very basic reason to request the TNERC to put control over APPC rate is, around 3000 MW of wind projects are under Rs.2.75 rate. When the REC generator comes in 2011 and gets over and above Rs.2.75 in 2 to 3 years in 2013-14, it is a discouragement to the 3000 MW wind generators. Moreover, if the above generators move from preferential tariff to REC scheme, they will get the higher APPC rate than their already fixed preferential tariff rate of Rs.2.75 per unit.
- 8.7** In 2011-12 the APPC rate was Rs.2.37, in 2012-13 it was Rs.2.54 but when it is worked out for the year 2013-14, as there was a possibility of crossing the preferential tariff rate of Rs.2.75, as requested by the TANGEDCO, the Commission took an initiative to control the APPC rate called for the comments in 2012 itself for amending the TNERC RPO Regulations, 2010. After analyzing the comments, the Commission put a cap of 75% on the preferential tariff rate. Subsequently, the Commission vide its order dated 15.07.2013, fixed the APPC rate at Rs.3.11 (or) 75% of

the preferential tariff rate of the NCES generator to that category (or) subcategory whichever is less.

- 8.8** Since the APPC rate of Rs.3.11 per unit crossed the prevailing preferential tariff rate of Rs.2.75, the corresponding year preferential tariff rate of Rs.3.51 per unit is taken to put the 75% cap. Since the 75% of Rs.3.51 is Rs.2.63 is less than Rs.3.11, the TANGEDCO accepted the rate and paying to the REC generators. The above orders passed by TNERC are not challenged by the wind energy generators and have become final.
- 8.9** The Appellant now compares the rates of the APPC of a year with the corresponding year preferential tariff rate and approached the Commission, citing the liberty granted by the Hon'ble High Court of Madras in its order dated 15.07.2016 in W.P.No.22097 of 2013 and stated that the Appellant is entitled for the actual APPC rate.

The Appellant admitted in the High Court that:
[Para (6) of the Judgment is extracted hereunder]

"the investment cost in cases of renewable energy is high even though comparing to other sources, its availability throughout the year is low. Therefore, the pricing is based on Feed in Tariffs mechanism, whereby the gap between the conventional energy price and renewable energy price is bridged. The Tariff Policy, 2006 and section 86 (1) of the Act enabled the appropriate Commissions to fix the minimum purchase of electricity from renewable energy sources. The preferential tariffs are determined by the SERCs."

As such on every year the TANGEDCO is mandated to achieve the RPO target fixed by the Commission only by purchasing the wind energy under preferential tariff scheme and not from the electrical component of wind generation under REC scheme from the Appellant or new or migrated

generator. Hence, TANGEDCO has a greater obligation to safeguard the interest of the public while procuring power from generators for supplying to the public.

8.10 The Commission itself in the High Court stated that [@ para 9 of the Judgment] considering the consumer interest the cap has been fixed and such a cap has been fixed only to prevent the generators under REC scheme from claiming more tariff than preferential tariff. So, in the absence of a cap, the purchase price of the electrical component would go up and would have to be passed on to the consumers. Pointing out the necessity and contending that without the cap of 75% on the preferential tariff, payment of APPC to wind generators would result in unjust enrichment to generators at the cost of general public. Therefore, in public interest, exercising its power under section 61(d), the cap was fixed.

8.11 The Hon'ble High Court vide para (22) of the Judgment held that:

"from the explanation to the amendment, it is evident that the cap has been fixed to eschew the APPC from exceeding the preferential tariff. The said amendment has been brought into force, to safeguard the consumer's interest as envisaged under section 61(d) of the Act and also at the same time, to balance the procurement cost of purchase price of electricity component. Therefore, this court is of the view that the amendment is neither vague nor arbitrary and therefore there is no violation of Articles 14 and 19 of the Constitution. This court is again of the view that when the power to fix the tariff under sections 61, 62, 86 and 181 vests with the Respondent, it is open to them to impose any restriction for the fixation of APPC."

8.12 Regulation 8 of the RPO Regulation 2010 provides the power for the Commission to review, add, amend or alter the regulations. As APPC rate order for the year 2016-17 has not been issued, it is appropriate time that, the Commission may consider to take initiative to amend the RPO regulations.

The Hon'ble High Court vide para (25 & 26) of the Judgement holds that:

"The regulations framed exercising the powers under the Electricity Act have the same force as that of a statute. It is a policy decision, of course, in public interest. By operation of law, the rights created to a party under agreement can be annulled. The powers of the CERC under section 79 are administrative and the powers under section 178 are legislative. Also, by exercising the legislative powers, the contractual terms can be overridden. The powers of the State commission under section 181 is pari-material to that of the Central Commission under section 178. Further, the judgment also clearly spells that the role of the Regulatory Commission is twin folds, namely, (1) decision making and (2) specifying terms and conditions for determination of tariff. Therefore, the Commission would have the power not only to determine the tariff but also to impose conditions".

Further the Hon'ble CERC itself stated in the High Court that, from the objects and reasons dated 10.07.2013, the tariff for electricity component should not be higher than the preferential price, the amendment was issued.

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

8.14 The Courts have consistently held that the Regulatory Commissions under the Electricity Act, 2003 are the statutory, technical bodies, the fixation of tariff is legislative in character and the same should be left to such statutory bodies. As stated already, the Hon'ble High Court of Judicature at Madras, in WP No.22097 of 2013 has also upheld the powers of the Commission and without actually going into the merit of the case, has remanded the matter to this Commission. Therefore, if, on a thorough analysis of the entire issue in detail with reference to the statutory provisions including the National Electricity Policy, following the established procedures and prudent practice in the electricity sector in India with due regard to the pleadings of the respondents that the APCC rate has exceeded the preferential tariff during the year 2013 itself, the Commission arrives to a conclusion that the APCC charges has breached the preferential tariff, it may be open and appropriate for the Commission to pass an order that the amendment to the RPO Regulations would be effective from 15.07.2013, the date notified in the Government Gazette. In this case, as stated already, the APPC has breached and as such there is no need for postponement and also there is no statutory provisions to postpone the regulations which have already come into force and implemented. However, the Appellant, on a wrong appreciation and reading of the directions of the Hon'ble High Court of Judicature at Madras, has filed the above appeal. In other words, the Commission acted as per the High Court order.

8.15 The issue that arose for determination by the Commission was whether the condition for giving effect to the amendment to clause (h) of sub regulation (1) of Regulation 2 of the TNERC (Renewable Energy Purchase Obligation) Regulations, 2010 made by Notification dated 21-01-2013 has happened or not.

By the Notification No. TNERC/RPO/19/3, dated 21-01-2013, the definition of "Pooled Cost of Power Purchase" was amended as under: -

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

The challenge to the vires of the amendment: -

Writ petitions were filed before the Hon'ble High Court of Judicature at Madras for a declaration that the notification dated 21.01.2013 and all consequential orders including order dated 15.07.2013 were arbitrary, illegal and ultra vires the powers of the Commission, Electricity Act and applicable CERC Regulations. The Hon'ble High Court while rejecting the challenge that the regulations framed by the Commission have to be in consonance with that of CERC held that section 86(1)(b) gave unfettered power to determine the price of power purchase within the State and sections 181(2)(d) and (2f) empowered the State Commissions to fix and prescribe the conditions for such fixation. While observing that the object of introducing the amendment was to safeguard the consumer's interest and to balance the procurement cost of purchase price of electricity component, the Hon'ble High Court held as under:

"22. It is also pertinent to mention here that the original definition of APPC under the TNERC Regulations itself was different from that of the regulations of the CERC. However, the same was not challenged. Now the present amendment has been introduced to put a cap at 75%. The present amendment has been brought into

force after hearing the stake holders, which again is not in dispute and therefore is in conformity with the procedure contemplated under section 64. The draft notification was published as contemplated under section 181(3) of the Act and objections were called for from the public. The same were examined by the expert body and only then the amendment has been approved and the notification published.... The said amendment has been brought into force to safeguard the consumer's interest as envisaged under S.61(d) of the Act" and also at the same time, to balance the procurement cost of purchase price of electricity component"

While rejecting the contention that the Commission did not have the power to fix a cap, the Hon'ble High Court in para 24 of the order held:

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

It was thus held in Para 30 of the order that the Commission was well within its right to deviate from its earlier notification as under:-

"As regards the contention that the actual need to give effect to the notification had not arrived, the Hon'ble High Court did not decide this issue but granted liberty to the petitioners to move the Commission for appropriate directions. The writ petitions were dismissed with this liberty. The Hon'ble High Court was of the view "that the notification can be implemented with effect from the date of such breach as notified by the TNERC."

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

8.17 The Commission by Order TNERC/MO. 4-2/E/ RPO dated 15.07.2013 after taking into account the amended definition of "Pooled cost of Power purchase" has specified the Pooled cost of Power purchase payable by TANGEDCO for the year 2013-14 as Rs.3.11 per unit subject to the maximum of 75% of the preferential tariff fixed by the Commission to that category/sub category of NCES generators i.e Rs.3.11 per unit or 75% of the preferential tariff fixed by the Commission to that category/ sub category of NCES generators whichever is less. The order dated 15.07.2013 was also the subject matter of challenge. In para 31 of the order, the Hon'ble High Court has held as under:

"Hence for all the reasons stated above, the challenge to the notification dated 21.01.2013 fails. In view of the fact that the order dated 15-07-2013 fixing the preferential tariff at Rs.3.11 has been passed in exercising the rights under the Act and the Regulations and following the proceedings dated 21-01-2013, the challenge to the same would also fail."

8.18 The Hon'ble High Court upheld the order dated 15-07-2013. Every year thereafter, similar orders are being passed by this Commission, the last being TNERC/MO4-4/E/RPO, dated 07-03-2016. The orders passed by the Commission after taking into account the amendment have been specifying the pooled cost of power purchase subject to a maximum of 75% of the preferential tariff to that category / sub category of NCES generators whichever is less. Thus, the point of breach is 75% of the preferential tariff. Viewed thus it will be seen that the breach has occurred as the price specified in the order of this Commission itself provides the condition for application of the order, namely either the Pooled Cost of Power Purchase or 75% of the preferential tariff fixed by the Commission to that category / sub category of NCES generators whichever is less.

Further the TNERC extensively explained in its finding the concept of REC and reasoned why it has imposed cap as under:

“To understand the concept of APPC and preferential rate, it is essential to conceptualize the issue. There are three categories of wind energy generators, namely- (i) wind energy generators who are supplying the entire energy generated by them to the DISCOM at the preferential tariff fixed by the Commission; (ii) wind energy generators who are wheeling the energy generated by them to their captive end for the use of the captive units/third party purchase by paying the wheeling / transmission charges to the utility; and (iii) wind energy generators supplying the energy generated by them to the DISCOM at APPC rate and trading Renewable Energy Certificates. That is, selling the green component being the Renewable Energy Certificates through the Power Exchange. Thus the RE generators have options of selling the energy generated to the distribution licensee at the preferential tariff rate fixed by the Commission, use the energy for captive use/sell to third parties or participate in the REC scheme.”

8.19 The energy generated by the Renewable Energy Generator under REC scheme, WEG herein, has two components, one being the electricity component and the other being the environmental attribute/green component. The electricity component can be sold to local distribution utilities at the APPC rate which in effect is a price of conventional electricity and the environmental attribute can be sold through exchanges in the form of Renewable Energy Certificates (RECs) which are purchased by utilities of other States that are not rich in renewable energy to meet their Renewable energy Purchase Obligation (RPO) and also by other obligated entities to meet their RPO. The electricity component can also be sold through traders, to open access consumers or through power exchanges at a mutually agreed price.

8.20 The wind energy generators availing preferential rate tariff enter into a Power Purchase Agreement (PPA) with the Distribution licensee for the sale of entire energy generated by them at preferential tariff. The PPA is for a period of 20 years. For the entire period of 20 years, the tariff i.e. preferential tariff at which the RE generator sells energy is constant.

On the contrary, the RE generator under REC scheme who supplies energy to the distribution licensee gets his tariff at the various APPC rates fixed during the contract period. The APPC price is not constant as can be seen from the prices fixed for the years 2011-12,2012-13,2013-14,2014-15,2015-16 which are Rs.2.37, Rs.2.54, Rs.3.11,Rs.3.38,Rs.3.35 respectively. This APPC price depends much on the price of fuel which is largely coal. The APPC rate of Rs.3.11 per unit determined in the Order dt.15.07.2013, consequent to the notification of the amendment to the definition of Pooled Cost of Power Purchase vide notification No. TNERC/RPO/19-3,dt. 21.01.2013 and notified in Gazette dt.21.06.2013, very well crossed the preferential tariff rate of Rs.2.75 per unit fixed for a category of the wind energy generators.

- 8.21** Had the APPC rate been left unchecked, the RE generator commissioned, say, during the control period of the Order No.3 dt.20.03.2009 would get a tariff of Rs.3.39 per unit throughout the contract period of 20 years which is a tariff determined considering all financial and operational parameters ensuring rate of return to the generator whereas the RE generator commissioned during the same control period but opted for REC scheme would be getting paid initially at Rs.2.54 per unit and subsequently at rates of Rs.3.11, Rs.3.38 etc. for the electrical component sells environmental attribute, which energy the distribution licensee cannot account for the purpose of RPO after incurring high expenditure. It is in this context, the Commission felt that the APPC rate, which ought to be lesser than the preferential rate of tariff, would cross the preferential tariff over a period of time and to put an end to this anomaly, the Commission has fixed the cap of 75% of the preferential tariff for the APPC rate. It is to be noted that what is to be compared is the APPC rate prevailing in the current years and the preferential tariff in respect of the generators entering their respective contract on the same period and the preferential tariff and APPC rate of every year should not be compared.
- 8.22** In the Explanatory Statement to the notification issued by the Commission on 19-06-2013, the Commission has not stated that APPC rate has exceeded the preferential tariff of any particular year and what has been indicated therein was the Commission's apprehension that APPC rate may exceed the preferential rate. In other words, the definition of APPC itself is "APPC rate or 75% of Preferential tariff whichever is less" and not APPC rate or the 75% of Preferential tariff if it crosses Preferential tariff at that particular year as argued by the appellant. And further, this definition of TNERC dt: 15.07.2013 was upheld by the Hon'ble High Court, Chennai and so it is legally settled issue. Incidentally, the APPC rate of Rs.3.11 per unit arrived for the year 2013-14 exceeded the preferential tariff of Rs.2.75

per unit fixed for a category of generators. The TNERC (RPO) Regulations, 2010 is applicable to all entities covered under these regulations and hence the Appellant alone cannot be excluded from its purview.

8.23 The Commission has categorically stated in para 8.7 of the order in M.P.No. 22 of 2016 that:

“The Commission nowhere stated that, the APPC rate of a year is to be compared with the Preferential Tariff Rate of the same year to ascertain whether the APPC rate crosses the Preferential Tariff Rate. As the issue started in 2011 that, the APPC rate increased from Rs.2.37 to Rs.2.54 and as there was a possibility to cross the existing prevailing preferential tariff rate of Rs.2.75/-, TANGEDCO requested the Commission to have a control over the APPC rate. The purpose of cap is, the APPC rate and the money value of component should be lower than the Preferential Tariff Rate. As stated by the Petitioner, if the APPC rate is not crossed the Preferential Tariff Rate, there is no necessity to the Commission to take the action in 2012 and amend the regulation in 2013. As of now the APPC rate of Rs.3.11, Rs.3.38 & Rs.3.35 has crossed and is higher than the Preferential Tariff rate of Rs.2.75, the 75% cap has come into force from 2013-14 onwards.”

Hence the appellant has no grounds for appeal since it is well settled fact in TNERC itself and the powers of TNERC are upheld by the Hon'ble High Court in W.P.No.22097 of 2013.

8.24 Hence it is submitted that without the cap on the preferential tariff while computing APPC, the same would result in unjust enrichment to generators and so TNERC in public interest, exercising its power under section 61(d), has fixed the cap. In the above facts and circumstances the appeal deserves to be dismissed with cost.

9. Mr. S. Ramalingam, learned counsel appearing for the State Commission, Respondent No. 2 made the following submissions:

9.1 At the outset, it is submitted that the impugned order of the Commission does not call for interference from this Tribunal in view of the fact that the present appeal has been preferred on an erroneous understanding that the High Court directed the Commission to postpone the implementation of the amendment while the fact is the direction is to examine the question of keeping the implementation under abeyance.

9.2 The present appeal has been filed against the orders of this respondent dated 28.4.2017 in M.P.No.22 of 2016, rejecting the prayer of the appellant to pass appropriate orders in compliance with the orders of the Hon'ble High Court dated 15.7.2016 in W.P.No.22097 of 2013. In this connection, it is submitted that the said M.P.No.22 of 2016 had been filed due to misconception of the orders of the Hon'ble High Court. The appellant had filed the above Miscellaneous Petition before this respondent as if the Hon'ble High Court has directed the Commission to postpone the implementation of the amendment issued to the RPO Regulations, 2010 in Notification No. TNERC/M.0.4-2/5/RPO dated 15.7.2013. In this connection, the following observations and directions in the ultimate paragraph of the judgment in W.P No.22097 of 2013 would be relevant to quote.

“31. The next contention of the petitioner is that the actual need has not arrived for the 1st respondent to effect the notification as the APPPC has not breached the preferential tariff. Also it was contended that the REC can be sold at higher rate is far from truth and huge stocks of REC remain unsold. Again, this court cannot venture into the reasons regarding the unviability of the REC in the market. This court taking judicial note of the happenings in the world regarding the climate change and the need for sustainable development, could only see a continuing market for environmental component or carbon credit

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

From the above, it is evident that the Hon'ble High Court has not held that the Average Pooled Cost of Power Purchase (APPPC) rate has not breached the preferential tariff and that the Commission shall postpone the implementation of the amendment issued to the definition of Average Pooled Cost of Power Purchase (APPPC). All that the said judgement held was that it gives a liberty to approach the Commission to make his submission on the above issues and get appropriate orders.

- 9.3** The main prayer of the appellants in the writ petition No.22097 of 2013 was to issue a writ of declaration that the impugned amendment to regulations TNERC (Renewable Energy Purchase Obligation) Regulations 2010 issued in Notification No. TNERC/RPO/19/3 dt.21.1.2013 and all consequential orders including the consequential order No. TNERC/M.04-2/E/RPO/dt.15.7.2013 as being arbitrary, illegal and ultravires the powers of the TNERC and contrary to the provisions of the Electricity Act,2003 and the regulations framed thereunder.

- 9.4** Under the REC Scheme, the tariff for the electricity consists of 2 components namely, (i) tariff for the energy component and (2) tariff for green component. The tariff for the energy component is paid at Average Pooled Cost of Power Purchase (APPPC) rate while the generator realizes tariff for the green component by selling the same to the exchanges for the REC Certificate. Therefore, conceptionally, the Average Pooled Cost of Power Purchase (APPPC) rate will be lesser than the preferential tariff which is the tariff fixed for the energy supplied to the Licensee by the NCES generators without availing REC benefit. The preferential rate of tariff should necessarily be higher than the Average Pooled Cost of Power Purchase (APPPC) rate; otherwise the generators under the REC Scheme will unduly enrich themselves by availing higher tariff for the energy component as well as by selling their green component for the purchase of REC Certificate. To avoid this anomalous situation, the Commission has amended the definition of Pooled Cost of Power Purchase in Notification No. TNERC/M.O.4-2/E/RPO/dated 15.7.2013.
- 9.5** The arguments by the Commission before the High Court were to justify the notification of the amendment to the definition of Pooled cost of power purchase. The High Court upon hearing the arguments had observed that when the power to fix the tariff under sections 61,62,86 and 181 vests with the Commission, it would be open to them to impose any restriction for fixation of APPPC.
- 9.6** The Hon'ble High Court reiterated that the TNERC would have the power not only to determine the tariff but also to impose conditions and there is no error in the decision making process. However, the Hon'ble High Court had taken a lenient view on an issue raised by the appellants at the fag end of the case, that is, the issue on breach in preferential tariff pertaining

to the appellants case which nowhere featured in the arguments though the Commission had given all facts of pooled cost fixed during earlier years as well as costs fixed after the impugned notification.

- 9.7** The powers of the Commission to define pooled cost of power purchase based upon the State conditions have been upheld by the High Court and the only issue which is required to be considered in this appeal is whether the pooled cost of power exceeded the preferential tariff. In this connection, it is submitted that the reliance placed by the appellant on the affidavit filed by the Commission before the High Court is a misplaced one. In the affidavit, what was sought to be explained was the intent and purport of the amendment and not the factum with regard to pooled cost of power purchase vis-à-vis the preferential tariff. The amendment was brought about to avert the situation wherein the pooled cost of power purchased could exceed the preferential tariff.
- 9.8** The understanding of the petitioner that the Commission failed to consider the binding ruling of the High Court is erroneous. As has already been stated, it is pertinent to note that the subject matter of the proceedings before the High Court was only challenge to the Regulations of the Commission and not the question of exceeding of the preferential tariff by the pooled cost of power purchase or vice-versa. The question of exceeding the preferential tariff by the pooled cost of power was not the main subject matter in the proceedings before the High Court and it was only an incidental observation by the High Court. That is why, the Hon'ble High Court has dismissed the writ petition on merits upholding powers of the Commission to issue such amendment.
- 9.9** The present appeal has been filed on an erroneous understanding that the Hon'ble High Court has given an irresistible findings that the preferential tariff was not exceeded by the pooled cost of power. Even while the High

Court found force in the submission of the appellant herein that considering the object to introduce the cap the need to introduce the cap did not arise, the Hon'ble High Court was categorical in its observation that the notification was issued in the public interest to prevent the generators to unjustly enrich themselves and that the notification can be implemented with effect from the date of breach as notified by the respondent Commission. In other words, the Hon'ble High Court has granted the liberty to the Commission to examine the question of breach of cap exceeding the APPPC rate over preferential tariff and to cap the APPPC rate, if it actually exceeds preferential tariff.

- 9.10** In an earlier petition filed by the Appellants before the Commission in M.P.No.16 of 2011, Commission recognized the views raised by TANGEDCO with regard to the fact that the Average Pooled Cost of Power Purchase may after a period of time go beyond the preferential tariff fixed by the Commission and in the order dated 22.3.2012 in M.P.No.16 of 2011, Commission observed as follows;

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

- 9.11** As a consequence, Commission issued the amendment vide Notification No.TNERC/RPO/19/3 dt.21.1.2013 redefining Pooled cost of power

purchase and rightly, after the issue of the amendment, the Pooled cost of power purchase of 2013-14 issued on 15.7.2013 at Rs.3.11 exceeded the preferential tariffs of Rs.2.75 and Rs.2.90 per unit. Commission, to cite a few examples of how the REC generators sell the energy with two components attached to a unit of energy generated i.e the electrical component and environmental attribute to the unit of energy generated, took up the prices fixed for few years and showed that the REC generator sells the electrical component at APPPC or 75% of the preferential tariff applicable to that category and even if RECs traded at the floor price, the REC Generator would get the floor price of Rs.1.50 per unit, and both the prices i.e price for electrical component and REC component (environmental attribute) added together exceeds the preferential tariff of that category fixed by the Commission.

9.12 The various preferential tariffs and Pooled cost of power purchases issued are as follows:

Year of commissioning of wind energy generators(WEGs)	Preferential tariff
WEGs commissioned before 2006 i.e 15.5.2006	Rs.2.75
5/2006-19/3/2009	Rs.2.90
20/3/2009 to 31.3.2009	Rs.3.24
1/4/2009 to 31/7/ 2012	Rs.3.39
8/2012 to 3/2016	with AD-Rs.3.53 without AD-Rs.3.96
4/2016 until this date	with AD-Rs.3.70 without AD-Rs.4.16

The Pooled cost of power purchase are as follows:

Year	Pooled cost of power purchase
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2009-2010	Rs.2.39
2012-2013	Rs.2.54
2013-2014	Rs.3.11
2014-2015	Rs.3.38
2015-2016	Rs.3.35
2016-2017	Rs.3.96
2017-2018	Rs.3.70

From the above Table, it is clear that in respect of the WEGs commissioned before 15.5.2006, the preferential tariff is Rs.2.75. The preferential tariff remains the same during the entire life period of 25 years. Hence, the preferential tariff during 2013-2014 would also be Rs.2.75 per unit. However, the pooled cost of power purchase during 2013-14 is Rs.3.11 per unit which is higher than the preferential tariff of Rs.2.75 per unit. Similarly in respect of the WEGs commissioned during 5/2006 – 19.3.2009 preferential tariff is Rs.2.90 per unit. For such WEGs, the preferential tariff continues to be Rs.2.90 per unit only even during 2013-2014 but the pooled cost of power purchase during 2013-2014 was Rs.3.11 per unit which exceeded the preferential tariff. Thus, the contention of the appellant that the pooled cost of power purchase has not exceeded the preferential tariff is factually wrong.

- 9.13** The concept of APPPC and its relevance to the generators under REC schemes who sell electricity component at APPC prices and encash on the environmental attribute between floor prices and forbearance prices fixed for RECs by CERC, the base price which is Rs.1.50, has been explained in paragraphs 8.10 to 8.16 of the Commissions' order in M.P No.22 of 2016.dt.28.4.2017. Had the rates of APPPC been left unchecked, most generators under preferential tariff schemes would have migrated to the REC scheme and made it difficult for the distribution licensee to meet their RPO.

9.14 The appellants had admitted to the fact of APPPC for the year 2013-14 breaching the preferential tariff of Rs.2.75 per unit but contended that breaching of tariffs related to old machines need not be considered and also stated that the REC scheme was introduced in 2010 during which appellant's plant was commissioned and during that period the APPPC rate was Rs.2.39 per unit until 2.9.2012 and then Rs.2.54 per unit from 2.9.2012 to 31.3.2013 whereas preferential tariff of the machines commissioned from 1.4.2009 to 31.7.2012 was Rs.3.39 and hence not breached the preferential tariff. It is therefore, the contention of the appellant that the amendment fixing cap on the APPC rate should not implemented so far as appellant's plant is concerned. In this connection, it may be stated that regulations are made covering all the WEGs at large and appellant's WEG alone cannot be singled out of the provision which will lead to discrimination.

9.15 The Commission after considering the arguments of the appellants and the respondents felt that the regulation has to be evenly applicable to all classes of generators and cannot be postponed for one particular class like the case of the appellant. In view of the Pooled cost of power purchase of Rs.3.11 notified in the year 2013-14 exceeding the preferential tariffs of Rs.2.75 and Rs.2.90, Commission could not postpone the implementation of regulations.

9.16 In this connection, reference is invited to para-8.18 of the impugned order which is reproduced below:

“8.18. Further, the prayer of the Petitioner is to issue appropriate directions in compliance with the judgment of the Hon'ble High Court in its judgment dated 15-07-2016 in W.P.No.22097 of 2013 and to comply the same in a time bound measure. During the hearing on a specific query from the Commission as to what

direction has to be given to the Licensee by the Commission, the learned Counsel for the Petitioner has stated that direction has to be given to the Respondent to postpone the implementation of the impugned amendment till the APPC rate fixed by the Commission for a year exceeds the preferential tariff fixed for the year. The learned Counsel for the Petitioner has not put forth anything on the questions as to whether direction could be issued by the Commission against the provisions of the 36 regulations. We are of the view that direction cannot be issued to the Licensee to postpone the implementation of the regulations when the regulation is in force much so when factually the APPC rate (Rs.3.11) exceeded in the year 2013-14 itself over the preferential tariff of Rs.2.75.”

- 9.17** It may be seen that the para-8.18 of the impugned order spells out the position that the appellant herein did not put forth anything on the directions which could be issued by the Commission to the licensee against the provisions of the Regulation. The appellant herein, having failed to specify the provision of law under which a direction could be issued by the Commission against the provisions of a Regulation, cannot maintain the appeal now.
- 9.18** While the present appeal is replete with averments regarding the affidavit filed by the Commission before the High Court and the order of the High Court which gave liberty to the Commission to examine the factum of breach of preferential tariff by the pooled cost of power, there is no averment on the point as to why the appellant herein who was the petitioner before the Commission could not put forth any suggestions on the nature of direction that could be issued by the Commission. The impugned order is perfectly in consonance with Article 14 of the Constitution of India. As may be seen from the observations in Para-8.17 of the impugned order, the TNERC RPO Regulations are applicable to all

entities covered under the Regulation and therefore the appellant alone cannot be excluded from its purview. The said observations would clearly bring out the position that the principle of equality enshrined in Article 14 have been considered by the Commission.

9.19 The appellant herein failed to state as to how the postponement of the implementation of the impugned amendment to the Regulations framed by the Commission can be done after such amendment is legally brought into force. The impugned regulation has been placed before the State Assembly as per section 182 of the Electricity Act, 2003 also. Therefore, any postponement of implementation of the Regulation should be justified in the context of the provisions of the Act or the Regulations.

9.20. In the light of the above facts, the answering respondent would submit that the Hon'ble High Court has not specifically held that the breach had occurred and it was only the liberty that was given to the appellant to approach the respondent Commission for appropriate orders. It is therefore submitted that the impugned order passed by this respondent is perfectly valid as per law. In view of the foregoing submissions, it is humbly prayed that this appeal may be dismissed as not maintainable and thus render justice.

10. We have heard at length the learned counsel for the parties and carefully considered their written submissions. After critical evaluation of the relevant materials available on records, following issue arises in the present Appeal for our consideration:

“Whether in the facts and circumstances of the case and directions passed by Hon'ble Madras High Court in its Judgment dated 15.07.2016, the Impugned Order passed by the State Commission is sustainable in the eyes of law”

11. Our Consideration and Findings

11.1 Learned counsel for the Appellant submitted that decision of the State Commission is factually incorrect and contrary to not only in terms of Amendment of APPC definition but also to its stand before the Hon'ble High Court and additionally to the express findings of the Hon'ble High Court. He further contended that the Hon'ble High Court in its judgment dated 15.07.2016 has specifically recorded the submissions of all the parties and concluded that the said breach has not occurred till the date of judgment and as such Hon'ble High Court decided that the reference notification can be implemented from the date of breach as notified by the State Commission. Thus, it is crystal clear that the date of breach had not occurred so far.

11.2 Learned counsel vehemently submitted that the explanatory statement forming a part of the TNERC amendment itself envisaged only the future occurrence of the breach, clearly negating the position of the State Commission that the breach had occurred. The explanatory statement is reproduced as under :

*“In the long run, Pooled Cost of Power Purchase **may exceed** the preferential tariff fixed by the Commission for renewable energy due to escalation of conventional fuel cost”.*

11.3 Further, in the additional affidavit dated 18.04.2016 filed before the High Court, the State Commission stated in Para-8 & 10 as below:

“The pooled cost of power purchase for the year 2013-14 was Rs. 3.11 per unit. It was felt that in the long run, pooled cost of power purchase would exceed the preferential tariff fixed for the renewable energy due to escalation in cost of conventional fuel”.

In para-10 of the said Affidavit, TNERC further submitted as under:

“It is submitted that the ceiling of 75% of the preferential tariff was fixed by the Commission to avert a situation where the pooled cost of power would become more than the preferential tariff applicable to a Renewable Energy Generator”.

- 11.4 Learned counsel was quick to point out that from the conjoined reading of the paras-8 & 10 of the affidavit along with the amendment of the Regulations, it is evident that the amendments to the regulations is meant for avoiding such situation in future and the same had not happened till then and that was the reason why the Hon’ble High Court was persuaded to direct postponement of the amendment applicability coming into force till such time as the breach occurred.
- 11.5 Advancing his arguments further, learned counsel submitted that the pooled cost of power (APPC) must become more than the preferential tariff applicable to an REC Power Generator, the scheme which was enacted in the year 2010. In other words, for an RE Generator selling power under APPC, the breach will happen only once the APPC exceeds the applicable preferential tariff of that category / sub-category of RE Generators in any specific year upon comparison of the APPC rate of that year with the prevailing Preferential tariff of that year.
- 11.6 The Appellant’s counsel contended that while referring to various previous orders of the State Commission during 2012-2013, it is relevant to note that TANGEDCO / TNERC at various stages in the past have also proceeded on the basis of a future breach. Learned counsel emphasised that the State Commission wrongly and in an entirely contradictory manner took the preferential tariff prevailing before 2006, when the REC scheme itself was not in force, as the basis for concluding that the breach took place in 2013-14. Learned counsel alleged that by such a wrong comparison, a grave injustice has been caused to the Appellant despite a clear direction by the High Court.

- 11.7** The High Court of Madras in its order dated 15.07.2016 had clearly ruled in paragraph 31 that only the object to introduce the cap have been considered, the need to implement the cap had not arrived at by the State Commission. The Hon'ble High Court further observed that the notification dated 19.06.2013 can thus be implemented only with effect from the date of such breach as notified by the TNERC.
- 11.8** Learned counsel for the Appellant contended that the attempt made by TANGEDCO to compare the payments received by an REC Wind Generator and a Preferential tariff Wind Generator and thereafter to claim that higher returns are being received by the Appellant apart from being irrelevant is also an untenable claim since preferential tariff determined under Section 62 of the Act for Non-REC Scheme and that of APPC for REC scheme are two different mechanisms and cannot be compared.
- 11.9** He further submitted that the attempt of TANGEDCO to project a position that there would be large scale migration to REC regime by preferential tariff generators clubbed with false claim to protect the consumer interest are irrational and without substance. While presenting year wise rates of APPC and preferential tariff from the year 2012-2013 onwards, learned counsel for the Appellant highlighted that there had been no any breach in the last 7 years which is evidencing erroneous claim of the TANGEDCO / TNERC.
- 11.10** Summing up his submissions, the learned counsel for the Appellant reiterated that the State Commission has not followed the Hon'ble High Court directions and passed the Impugned Order full of perversity and thus the appeal may be allowed and impugned order be set aside.
- 11.11** **Per Contra**, learned counsel for Respondent No. 1 / TANGEDCO contended that the Appellant is getting more than preferential tariff which is determined by a transparent process of consulting the stakeholders after

publishing the consultative paper, inviting comments and holding a public meeting. He further submitted that the State Regulatory Commission under Section 181 of the Act, 2003 notified the amendment fixing a cap on the APPC rate available to REC wind generators by restricting it to 75% of the preferential wind tariff of the relevant year and the amended notification was upheld by the Hon'ble High Court. As such the appeal of the Appellant is not having any merit.

11.12 Learned counsel for the Respondent No. 1 while presenting the computation, showing the receipt of tariff by REC Generators along with sell of REC (Green component) *vis-à-vis* tariff received by preferential RE Generators highlighted that the REC Generators are getting more than the preferential tariff RE Generators even with consideration of the Green component at floor price. He further submitted that the 75% APPC cost paid to the wind energy generator is a pass through to the consumers and hence, allowing full APPC rate to REC wind generators will be a burden to the consumers.

11.13 Learned counsel for the Respondent No. 1 submitted that even in the past it had filed petitions before the State Commission(MP No. 16 of 2011) praying for restrictions on the APPC rate so that it did not cross the preferential tariff against which the State Commission ruled that such issues will be addressed at appropriate time. Extracts of the Commission's order in above Petition is reproduced below:

"The Commission however recognizes the views raised by TANGEDCO with regard to the fact that the average pooled cost of power purchase may after a period of time go beyond the preferential tariff fixed by the Commission. Further, the TANGEDCO has contended that what cannot be achieved directly cannot be achieved indirectly. There is merit in the

arguments of TANGEDCO in this regard. The Commission would take appropriate action to link the average pooled cost of power purchase vis-a-vis the preferential tariff for renewable energy so that there is no undue enrichment of renewable energy generators at the cost of distribution licensee / all other consumers in the State.”

- 11.14** Learned counsel advancing the arguments further, submitted that the State Commission itself before the High Court stated that considering the consumer interest, the cap has been fixed and such a cap has been fixed only to prevent the generators under REC scheme from claiming more tariff than preferential tariff. Learned counsel was quick to submit that in the absence of a cap, the purchase price of the electrical component would go up and would have to be passed on to the consumers and as such there was need to provide the said cap of 75% which has been provided by the Commission in public interest exercising its power under section 61(d) of the Act. Learned counsel emphasized that even Hon’ble High Court under Para 22 of the Judgment has held as under:

“from the explanation to the amendment, it is evident that the cap has been fixed to eschew the APPC from exceeding the preferential tariff. The said amendment has been brought into force, to safeguard the consumer's interest as envisaged under section 61(d) of the Act and also at the same time, to balance the procurement cost of purchase price of electricity component. Therefore, this court is of the view that the amendment is neither vague nor arbitrary and therefore there is no violation of Articles 14 and 19 of the Constitution. This court is again of the view that when the power to fix the tariff under sections 61, 62, 86 and 181 vests with the Respondent, it is open to them to impose any restriction for the fixation of APPC.”

- 11.15** Learned counsel further contended that while rejecting the contention of the Appellant that the Commission did not have powers to fix a cap, the Hon’ble High Court in Para 24 of the Judgment as under:

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

- 11.16** Learned counsel further contended that in the explanatory statement to the notification issued by the State Commission on 19.06.2013, the Commission has not stated that APPC rate has exceeded the preferential tariff to any particular year and what has been indicated therein was the Commission’s apprehension that APPC rate may exceed the preferential rate in future. In other words, the definition of APPC itself is “APPC rate or 75% of preferential tariff whichever is less” and not APPC rate or the 75% of preferential tariff if it crosses preferential tariff at that particular year as argued by the Appellant. He reiterated that this definition of TNERC dated 15.07.2013 has been upheld by the Hon’ble High Court, Chennai and so it is a legally settled issue. Further, the RPO Regulations, 2010 is applicable to all the entities covered under these regulations and hence, the Appellant alone cannot be excluded from its purview. Learned counsel concluded his arguments stating that the Appellant has no ground for appeal since it is a settled fact that such matters are well within the powers of TNERC itself and the powers of TNERC are upheld by the Hon’ble High Court in W.P. No. 22097 of 2013.
- 11.17** Learned counsel appearing for the State Commission/Respondent No. 2 while justifying the Impugned Order submitted that the Hon’ble High Court has not held that the APPC rate has not breached the preferential tariff and that the Commission shall postpone the implementation of the amendment issued to the definition of APPPC. He further submitted that the said judgment has only given liberty to the Appellant to approach the Commission to make his submissions and get appropriate orders. Learned counsel was quick to point out that the Hon’ble High Court has clearly held

that the Commission would have the power not only to determine the tariff but also to impose conditions and there is no error in the decision making process.

11.18 Learned counsel for the Commission further contended that the subject matter of the proceedings before the High Court was only challenge to the Regulations of the Commission and not the question of exceeding of the preferential tariff by the APPPC or vice-versa. That is why the Hon'ble High Court has dismissed the writ petition on merits upholding powers of the Commission to issue such amendment. Learned counsel for the Respondent Commission referred to the preferential tariff and APPC rate since the year 2006 onwards only to contend that wind generators commissioned before 15.05.2006 were getting preferential tariff of Rs. 2.75 only and preferential tariff remains the same during the entire project life of 25 years. Whereas, APPC rates are fixed by the Commission every year and obviously it may cross over the preferential tariff in that year while comparing the preferential tariff determined in the year 2006.

11.19 Learned counsel further submitted that the State Commission after considering the arguments of the Appellants and the Respondents held that the Regulations have to be evenly applicable to all classes of generators and cannot be postponed for one particular class like the instant case. Learned counsel contended that the Appellant herein has failed to state as to how the postponement of the implementation of the impugned amendment to the Regulations framed by the Commission can be done when such amendment is legally brought into force. Learned counsel accordingly concluded his arguments and submitted that the Hon'ble High Court has not specifically held that the breach had not occurred and it was only the liberty that was given to the Appellant to approach the State Commission for appropriate orders. As such the

Impugned Order is perfectly valid as per law and appeal may be dismissed as not being maintainable.

11.20 We have carefully considered the submissions made by the learned counsel for the Appellant and learned counsel for the Respondent Nos. 1 & 2 and taken note of the Judgment of Hon'ble High Court, Chennai in the matter. Based on the pleadings and available material on record, we now analyze the issue(s) in subsequent paras as under:

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

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

The Explanatory Statement to the amendment sets out that

*“In the long run, Pooled Cost of Power Purchase **may exceed** the preferential tariff fixed by the Commission for renewable energy due to escalation of conventional fuel cost”. **It is prudent that a limit has to be fixed for arriving at the reasonable Pooled Cost of Power Purchase.** Therefore, it is proposed to amend the said regulation.”*

(Emphasis Supplied)

11.22 The referred Writ Petition (No. 22097 of 2013) was filed before the Hon'ble High Court, Chennai, challenging the TNERC Amendment dated 19.06.2013 by the Appellant. The petition was disposed of by the High Court on 15.07.2016 with certain directions. In its judgment, the Hon'ble High Court in plain and simple terms has held that:

- (a). The APPPC has not breached the Preferential Tariff till the pronouncement of the Judgment,
- (b). The amendment can be implemented from the date of such breach as notified by TNERC.
- (c). Liberty granted to the Appellant (Petitioner before the High Court) to move TNERC for appropriate directions.

The relevant Para 31 of the High Court judgment is reproduced as under:

“31. The next contention of the petitioner is that the actual need has not arrived for the 1st respondent to effect the notification as the APPPC has not breached the preferential tariff. Also it was contended that the REC can be sold at higher rate is far from truth and huge stocks of REC remain unsold. Again, this court cannot venture into the reasons regarding the unviability of the REC in the market. This court taking judicial note of the happenings in the world regarding the climate change and the need for sustainable development, could only see a continuing market for environmental component or carbon credit throughout the world. Hence for all the reasons stated above, the challenge to the notification 21.01.2013 fails. In view of the fact that the order dated 15.07.2013 fixing the preferential tariff at Rs 3.11 has been passed in exercising the rights under the Act and the regulations and following the proceedings dated 21.01.2013, the challenge to the same would also fail. However, this court finds force in the submission of the counsel for the petitioner that considering the object to introduce the cap, the need to implement cap has not arrived. The impugned notification has been enacted in public interest to prevent the generators to unjustly enrich themselves, in the event of the preferential tariff falling below the APPPC. Therefore, this court is of the view that the notification can be implemented with effect from the date of such breach as notified by the TNERC. Therefore, granting liberty to the petitioners to move the TNERC for appropriate directions, the writ petitions are dismissed. No costs.”

- 11.23** From the perusal of the findings of the Hon'ble High Court in above para, it is crystal clear that the liberty was granted to the Appellant by the Court to approach the State Commission for an appropriate directions as per the findings whereas the Respondent Commission as well as Respondent Discom have interpreted the judgment otherwise. The basic issues generating dispute between generator (Appellant) and the Respondents are whether the rate of APPC has crossed over the rate of Preferential Tariff, if so, its date of crossing over, undue enrichment of REC generators over preferential rate (Non-REC) generators, etc. It is not in dispute that preferential tariff for wind generators was determined by the State Commission as Rs. 2.75 per KWH in the year prior to 2006 which was applicable to the wind generators commissioned before 15.05.2006.
- 11.24** The REC scheme was itself notified by CERC / TNERC during the year 2010 and the two schemes namely REC Scheme and Non-REC Scheme (Preferential Tariff) are entirely different and distinct scheme, having no scope for comparison. While preferential tariff is levelized tariff applicable to the generator w.e.f. COD for the entire life cycle of the project whereas under REC Scheme, the tariff comprises APPC plus Green component (REC). Further, APPC is an average price of power purchases prevailing in the previous year which may go up or down. The price of REC is governed by the Power exchange market. The price band of the green component (REC) in terms of floor price and forbearance price is determined by CERC based on, inter-alia, difference of APPC and viability income of the RE sources. While looking at the present trend with the rise in APPC, it is bound to decline and ultimately may vanish after some time.
- 11.25** It is relevant to note that the rate of APPC as well as preferential tariff are dynamic in nature and are determined by the State Commission from year to year considering all factors associated in their determination as per the regulations. The very objective of the State Commission for the impugned

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

A year wise comparison of the APPC rate and preferential tariff shows that APPC rate has never breached the corresponding year preferential tariff:

Year	APPC Rate	Preferential Tariff	Breach (Yes/No)
2012 - 13	2.54	3.96	No
2013 - 14	3.11	3.96	No
2014 - 15	3.38	3.96	No
2015 - 16	3.55	3.96	No
2016 - 17	3.96	4.16	No
2017 - 18	3.70	4.16	No

- 11.26** As per REC regulations framed by CERC and adopted by various state commissions including TNERC, the RE generators, whether solar, wind or any other are entitled to adopt on their own the REC scheme or Non-REC scheme (Preferential Tariff) depending upon their commercial and financial strategy and are governed under doctrine of selection/election. While

under Non-REC scheme, RE generators get the preferential tariff computed by the State Commission considering all tariff related factors and remain valid for the entire useful life of the project, on the other hand, generators under REC schemes are provided for APPC rate which is generally lower than the preferential tariff for the electricity component and get certain RE certificates which can be sold at the power exchange at the price band determined by CERC from time to time. The profit and loss as being projected by the Respondents between two distinct schemes are entirely illogical as such comparison between two heterogeneous modes of commercial operation is incomprehensible. This is also based on the fact that during past several years, RE certificates were lying unsold in the market resulting into huge unsold REC inventory and this Tribunal had several occasions of dealing with various Appeals filed by RE generators in this regard.

11.27 In view of these facts, we are of the opinion that once RE generator adopts any scheme, REC or Non-REC, the same has to be regulated by the State Commission as per regulations and not in any other way by erroneously inserting some extra conditions therein. Additionally, it is also noticed in the affidavit filed by CERC before the Hon'ble Madras High Court wherein it has quoted extracts from the statement of reasons for 2nd Amendment in CERC-REC regulations dated 10.07.2013 as under:

*'... Regarding suggestion received that the PPA of electricity component should be a fixed price long term contract (without escalation) since the Commission has assumed a fixed price while determining the REC price bands in its methodology, it is clarified that **the price band is subject to periodic revision; hence fixed APPC for long term contract without escalation might impact viability of RE projects.***

11.28 It is a settled Principle of Law that the State Commission is empowered to make regulations and determine tariff for various modes of generation as per these regulations and the matter before this Tribunal is not on the powers of the State Commission but only on the limited issue regarding purported breach of Preferential tariff by APPC as has also been opined by the Hon'ble Madras High Court.

11.29 As deliberated and analysed in the above paras, it has been erroneously projected by Respondent Nos. 1 & 2 that so called breach has occurred merely by comparing pre-2006 preferential tariff with the APPC rate of 2013-14. We are unable to accept the submissions of learned counsel for the Respondents regarding conclusions drawn for such breach by comparing APPC under CERC-REC Regulations 2010 with preferential tariff of pre-2006 which are also against the judgment of the Hon'ble Madras, High Court. We do not find force in the submissions of Respondents that *"it was with a view to safeguarding the consumers' interest and balance the procurement cost of purchase of electrical component that the amendment was introduced thereby fixing a cap....."* This is in fact a sweeping general statement which is unsubstantiated and devoid of any merit.

12. Summary of our Findings:

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

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

12.2 Being dynamic in nature (which may go up or down), the APPC rate shall be compared by the State Commission on year to year basis and the

proposed cap of 75% under the amendment shall be implemented for a particular year in which APPC rate crosses over the rate of preferential tariff for that corresponding year.

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

ORDER

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

The pending IA, if any, shall stand disposed of.

No order as to costs.

Pronounced in the Open Court on this day of **31st May, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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