**From Date:**

**M/s………………………………..**

**(Name and Address of the WEG)**

**To**

**Chief Engineer**

**Non-Conventional Energy Sources**

**Tamil Nadu Generation & Distribution**

**Corporation Limited,**

**144, Anna Salai,**

**Chennai - 600 002.**

**Dear Sir,**

**Subject: Comments / suggestions on the Miscellaneous Petition No.24 of 2016 filed by the TANGEDCO for changing the banking period for Captive Wind Energy Generators- Furnished – Reg.**

**Ref: Honorable TNERC’s Daily order dated 29-12-2016 on MP 24 of 2016**

The proposal put forth by TANGEDCO in their M.P. No. 24 of 2016 is not maintainable either in law or on facts and in any event approving such a proposal would be to the serious detriment of wind energy generators. It is also contrary to the provisions of the Electricity Act 2003, Power Procurement from New and Renewable Sources of Energy Regulations 2008, Tamil Nadu Electricity Regulatory Commission Intra-State Open Access Regulations 2005, Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations 2005 and the comprehensive Wind Energy Tariff Orders passed by the Hon’ble Tamil Nadu Electricity Regulatory Commission.

1. **Legal Grounds**
2. The present Petition filed by TANGEDCO is clearly one relatable to a Tariff Order and is therefore not maintainable in the form of a Miscellaneous Petition.Banking in connection with Wind Energy is part of a Tariff Order and is intrinsically connected to determination of Tariff. In this connection, Regulation 8 of the Commission’s “Power Procurement from New and Renewable Sources of Energy Regulations, 2008.” is reproduced below.

*“8. Issues related to captive use and third party sale*

*While issuing the general or specific tariff order, the Commission may consider appropriate criteria/ procedure/parameters/charges for each type of new and renewable source, on the following issues, for sale of power to distribution licensee, captive use and third party sale of power by the new and renewable source generators.*

*(1) Applicable demand charges*

*(2) Applicable energy charges*

*(3) Grid availability charges*

*(4) Scheduling and system operation charges*

*(5) Transmission & wheeling charges and line losses*

***4[5 A) Banking charges]4***

*(6) Reactive power charges*

*(7) Adjustment of peak and off peak power*

*………………………………………………………………………….”*

The said Regulation clearly stipulates that the Banking Charges has to be decided as part of the tariff order. The specific banking period i.e. April to March and the banking charges are interrelated and any attempt to modify the banking period through a miscellaneous petition is a clear violation of the said Regulations. Thus, any Petition which has the effect of affecting any component of Tariff can only be in the form of a Tariff Petition and cannot be maintained in the form of a Miscellaneous Petition. It is a settled proposition of law that when a statute prescribes anything to be done in a particular manner it has to be done in that manner or not at all.

1. Furthermore, the banking charges fixed by the Commission in every comprehensive wind energy order is also a tariff for that control period specified by the Commission in that order. Section 64 of the Electricity Act, 2003 stipulates that the generating company or licensee shall make an application for determination of tariff under Section 62 in such manner as determined by the regulations. Regulation 6 of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005 sets out the procedure for making application for determination of tariff. The relevant extract is set out below:

*“6. Procedure for making application for Determination of Tariff*

1. *The licensee may filethe application for determination of tariff in Form 1 in Annexure 1 to the TNERC Conduct of Business Regulations. The tariff changes should normally be applied to take effect from the 1st day of ensuing financial year and hence the application shall be filed before 30th November of Current Year along with Aggregate Revenue Requirement (ARR).”*

It is stated that in the present case, no such application has been filed by TANGEDCO, when in fact the provisions of the Electricity Act, 2003 expressly states that an application has to be filed as Tariff Application. Therefore, the Miscellaneous Petition filed by TANGEDCO is contrary to the provisions of the Electricity Act 2003 and the Regulations made thereunder.

1. Control Period for Tariff Order of 2016 already fixed for 2 years. Therefore, a petition relating to change in Banking Year cannot be filed prior to the expiry of the Control Period without any prayer seeking for any change of Control Period or grounds for seeking such change in Control period.It is stated that the Comprehensive Tariff Order on Wind Energy dated 31.03.2016 has come into force from 01.04.2016 and the tariff as approved in this order is applicable for purchase of wind energy by the Distribution Licensee from Wind Energy Generators (WEGs) conforming to this order commissioned during the control period. Therefore, the open access charges, banking charges and other such terms and conditions specified in this order shall be applicable to all the wind energy generators, irrespective of their date of commissioning. As per the Order No. 3 of 2016, the banking period has been fixed from April to Marchand the control period has already been fixed. Therefore, the question of changing the banking period from financial year to calendar year does not arise.
2. The submission for change in banking period to calendar year has already been considered and rejected by the Hon’ble Commission in the 2016 Wind Tariff Order. Therefore, any claim in that regard is barred by res judicata.It is also relevant to point out that theHon’ble Commission has specifically considered the submission of TANGEDCO for changing the banking period in the Tariff Order on wind energy issued on 31.03.2016 and has not acceded to such claim. An appeal against the said Tariff Order is pending before the Hon’ble APTEL. Such being the case, the present petition is not maintainable and is barred by the principles of *res judicata* as the issue has already been decided against the Petitioner.
3. It is pertinent to state that no Appeal or Review has been preferred against the 2016 Wind tariff Order. Therefore, TANGEDCO cannot seek to do indirectly what it has not done directly.It is further stated that any challenge seeking a change in the banking period ought to have been preferred by way of an Appeal before the APTEL. Therefore, the present petition filed by TANGEDCO ought to be dismissed on the sole reason that such a petition is not maintainable and the Hon’ble Commission has already decided by way of Tariff Order on wind energy dated 31.03.2016 that the banking period for captive generation is from April to March i.e. financial year and not on the basis of calendar year.
4. Further, the only other manner of challenging such a determination already made under the Tariff Order is by way of a Review Petition. However, no grounds for Review have been made out in the Petition filed by the TANGEDCO. Therefore, on this ground also the application is liable to be dismissed.It is a settled proposition of law that what is not or cannot be done directly cannot be done indirectly.
5. A request for change in Banking period is not maintainable since the same would be contrary to the National Electricity & Tariff Policies as also the CERC & TNERC Regulations pertaining to RPO which premise all calculations for wind energy only on a Financial Year Basis. Therefore, without amending such Policies & Regulations the petition is not maintainable.
6. The Electricity Rules, 2005 which relate to Captive Consumption have defined Annual Basis to mean a Financial Year. Therefore, when the Central Rules require calculation on the basis of a Financial Year, Banking period cannot be changed and such a prayer is not maintainable.It is stated that Rule 3 of the Electricity Rules, 2005 deals with the requirements of a captive generating plant and under the explanation to this rule, the term annual basis has been defined. The relevant portion is extracted below.

“*Rule 3 Requirements of Captive Generating Plant –*

*Explanation – For the purpose of this rule:*

1. *“annual basis” shall be determined based on a financial year”*
2. No Grounds have been stated in the petition for filing of such a petition within 6 months of the 2016 tariff Order. There has been no fundamental change in circumstances.The only reason provided in the additional affidavit filed by the TANGEDCO is the rescission of the notification dated 10.10.2014 issued by the State Government under section 11 of Electricity Act 2003. The rescission was effected by GO (Ms) No.41, Energy (A1) Department dt.31.05.2016. TANGEDCO reports that this G.O facilitates the WEGs to take their surplus power to other states. Ironically, almost the entire wheeling of wind energy in Tamil Nadu is meant for captive use within the state. The wheeling agreements are meant for the life period of WEGs. Then where is the question of taking the power to other states. Wheeling the power for captive use is the facility granted by the Electricity Act 2003 and TANGEDCO cannot suggest something which is detrimental to the WEGs. This also defeats the very purpose of providing open access under the statute.
3. Tariff Orders are self-contained codes and the Tariff and other charges that are worked out by the State Regulatory Commission are inextricably linked. Therefore, one aspect of the tariff order cannot be sought to be tinkered with in isolation and in any event retrospective changes cannot be sought. The Return on Investment is dependent upon all the factors put together. Thus, the banking period which has a great and substantial impact upon the return from investment in a WEG cannot be sought to be interfered with in isolation as is sought to be done. Further any Tariff Order is only prospective in operation and the Petitioner is seeking for changes even in respect of already commissioned WEGs. Thus, the petition is not maintainable.
4. **Merits and Facts**
5. It is submitted that the concept of banking of energy that evolved from 1983 and its transformations over a period has been discussed in detail in the tariff order for wind energy issued in 2012. The banking period that was initially fixed as nine months in 1983 has undergone frequent changes from one to two months, then to two years and subsequently to 1 year during the period from 1983 to 2006. The method by which banking period is to be maintained has already been decided and declared from the period in which wind energy was installed in the State of Tamil Nadu. Therefore, the question of changing the practice of banking of wind energy for captive generation from April to March to Calendar year is not required. Banking on the basis of Wind Year which is coterminous with the Financial Year is a long established and adopted principle and cannot be changed since all erection of windmills is based only on that fundamental premise.
6. The underlying principle for fixing the banking period from April to March is due to the Wind Year or Wind Season in Tamil Nadu. The captive WEGs generate energy during the wind season i.e. from April to September, bank the excess energy after their consumption and use the banked energy during the lean period of October to March. In case, if the banking period is shifted to calendar year, the WEGs could use their banked energy only for the three months i.e. from October to December instead of October to March. Therefore, changing the banking period to calendar year will defeat the very purpose of providing the banking provision for WEGs in the Regulations and in the order. Around 60% of the WEGs are banking their energy for their captive use. Based on their consumption during the lean period of 6 months, the WEGs are deciding their capacity of WEG installation. Hence if the banking period is revised to calendar year, there will be excess generation and their installed capacity will get stranded. The industries using captive wind energy have invested up to 80% of the annual power requirements from wind mills, if the banking period is reduced to December, their whole investment plan will go wrong. Since WEGs have installed a specific capacity of WEGs based on the present banking period, retaining the financial year for banking is an estoppel and it cannot be changed.
7. Further, the banking charges of 12% fixed by the Commission in the latest order is meant for the banking period of financial year i.e. consumption till March of next year. Both the banking charges and the banking period are interrelated. Hence, every wind order is a comprehensive package and cannot be tinkered with now by changing the banking period.

**III. Para wise Remarks on the TANGEDCO Petition and on their additional affidavit**

**1. Para 1 to 4.**

TANGEDCO have deliberated certain facts and we have no comments on the facts.

**2. Para 5 to 7**

TANGEDCO cannot blame the growth of wind energy or captive wind energy in Tamil Nadu since such growth is dependent upon the promotional measures provided in the Act, policies framed by the Central & State Governments and Regulations and orders issued by the Commission. All the WEGs have obtained due approvals for the connectivity and the TANGEDCO has never filed any petition with the commission to restrict the growth or connectivity to WEGs. It is the responsibility of the TANGEDCO to abide by the laws and the agreements made thereon.

**3. Para 8**

TANGEDCO has misrepresented the facts that as per the National Electricity Policy (NEP), the concessional/promotional measures shall be removed to bring the NCES power on par with conventional power. In fact,in clause 5.2.20, the NEP clearly stipulates that**efforts will be made to encourage private sector participation through suitable promotional measures. Further in clause 5.2.26, the policy specifies that Grid inter-connections for captive generators shall be facilitated as per section 30 of the Act. This should be done on priority basis to enable captive generation to become available as distributed generation along the grid.**This being the case, it is not known how TANGEDCO can misinterpret the National Electricity Policy.Sections 61 and 86 of the Acthave also mandated promotion of NCES power and does not de-promote it by withdrawing the concession. That is the case with the NEP also. Though such points are discussed by the commission, finally the banking period of 12 months from April to March has been upheld in their order dated 31.03.2016 on RA No.6 of 2016. Once the order is issued, it is the duty of the TANGEDCO to adhere the order.

**4. Para 9**

Changing the banking period to January to December is not a win - win situation as reported by TANGEDCO. It is another misrepresentation by the TANGEDCO. It is a win situation only for TANGEDCO since they can absorb the enormous surplus wind energy caused by changing the banking period at least cost. However, it results in huge losses to the captive WEGs since they have to purchase energy from TANGEDCOequivalent to their lost surplus wind energy at twice the cost. In such a scenario, there cannot be a win-win situation.

**5. Para 4 of the Additional affidavit filed by the TANGEDCO**

The reason provided in the additional affidavit filed by the TANGEDCO for filing this petition is the rescission of the notification dated 10.10.2014 issued by the State Government under section 11 of Electricity Act 2003. The rescission was effected by GO (Ms) No.41, Energy (A1) Department dt.31.05.2016. TANGEDCO reports that this G.O facilitates the WEGs to take their surplus power to other states.Ironically, the entire wheeling of wind energy is meant for captive use within the state. The wheeling agreements are for the life period of WEGs. Therefore, the question of taking power to other States does not arise. Wheeling the power for captive use is the facility granted by the Electricity Act 2003 and TANGEDCO cannot suggest something which is detrimental to the WEGs instead of implementing the provisions of the Electricity Act, 2003 and the Regulations.

**6. Para 5 to 8 of the Additional affidavit filed by the TANGEDCO**

We also agree with TANGEDCO that it is not related to wind energy tariff fixed by the Commission for selling it to TANGEDCO. In fact, banking does not apply to the persons who are selling their power to TANGEDCO at the tariff fixed by the Commission. We only wish to state that Banking Provision is a part of the tariff order and any part of the tariff order cannot be amended within the control period specified in the said order. We have already elaborated that the rescission of Government notification dated 10.10.2014 cannot be a ground for revisiting the Banking period. **Section 64(2) permits amendment to tariff only in respect of any changes expresslypermitted under the terms of any fuel surcharge formula as may be specified.** Therefore, there is no legal sanctity to change the banking period. The only reason repeatedly expressed by the TANGEDCO is the loss incurred by the TANGEDCO by providing banking to the wind energy. This issue has been deliberated in detail by the Commission in the wind energy order dated 31.03.2016 and anadequate banking tariff (charges) of 12% in kind has also been fixed by the Commission. The banking charges fixed by the Commission is only to adequately compensate the losses incurred by the TANGEDCO. Hence, such statement by the TANGEDCO goes only against the due process conducted by the Commission and prudentbanking charges fixed.

It is therefore requested that the Hon’ble Commission may be pleased to dismiss the petition filed by TANGEDCO.

Thanking you,

Authorized Signatory

For M/s…………….