

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

**PRESENT:**

Thiru M.Chandrasekar	.... Chairman
Dr.T.Prabhakara Rao	.... Member
and	
Thiru K.Venkatasamy	.... Member (Legal)

**M.P.No.17 of 2020**

National Solar Energy Federation of India  
Rep. by Mr.Dinesh Kumar Agarwal  
702-Chiranjiv Tower  
43-Nehru Place  
New Delhi – 110 019.

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

**Versus**

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|---|--|
| 1. Tamil Nadu Generation and Distribution Corporation Ltd.<br>Represented by its Chief Engineer-NCES<br>2 <sup>nd</sup> Floor, 144, Anna Salai,<br>Chennai 600 002. |  |
| 2. Ministry of New and Renewable Energy<br>Represented by its Secretary<br>Block-14, CGO Complex<br>Lodhi Road, New Delhi-110 003, India                            | . .... Respondents<br>(Thiru M.Gopinathan<br>Standing Counsel for<br>TANGEDCO) |
| 3. Thiru.S.Gandhi, President,<br>Power Engineers' Society of Tamil Nadu<br>45, Balaguru Garden, Peelamedu<br>Coimbatore – 641 004.                                  | ... Impleading Respondent<br>(Party-in-Person)                                 |

**Dates of hearings :** 04-08-2020; 08-09-2020; 29-09-2020;  
20-10-2020; 03-11-2020 and 10-11-2020

**Date of order :** 08-12-2020

The M.P.No.17 of 2020 came up for final hearing before the Commission on 10-11-2020 and the Commission upon perusing the petition, counter affidavit and

connected records and after hearing the submissions of both sides passes the following:-

### **ORDER**

#### **1. Prayer of the Petitioner in M.P. No.17 of 2020:-**

The prayer of the petitioner in M.P. No. 17 of 2020 is to exercise its regulatory powers and accept the recommendations made by the 2<sup>nd</sup> Respondent vide Office Memorandum F.No.283/25/2020-GRID SOLAR dated 16-4-2020 and allow Rollover of banked electricity from Open Access Renewable Energy Generating Stations under Captive and Third Party Sale Category of FY 2019-20 and FY 2020-21 to FY 2021-22 of all categories of Solar Generators and set out the manner and methodology for its implementation.

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

The Petitioner has filed the present petition seeking for appropriate directions with respect to implementation of the recommendations made by the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent with regards to Rollover of banked electricity from Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale Category of FY 2019-20 and FY 2020-21 to FY 2021-22.

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

3.1. The Petitioner is National Solar Energy Federation of India (hereinafter referred to as "NSEF" for the sake of brevity) is a non-profit organization with the objective of solar power development. It is an umbrella organization representing solar energy companies active along

the whole photovoltaic value chain: project developers, manufacturers, engineering companies, financing institutions and other stakeholders. The NSEFI works in a complementary manner along with the Central and State Governments for achieving India's national Solar Target of 100 GW by 2022. NSEFI is founded in 2013 by solar energy industry leaders with the vision to promote solar energy.

3.2. The members of the Petitioner have made a huge investment in solar power plants in the State of Tamil Nadu and are providing Green power to State and also supporting them to fulfill the Solar Power Purchase Obligation and consequently, the Renewable Power Obligation of the DISCOM. However, due to the nationwide lockdown imposed by the Govt. of India caused by the pandemic due to the Corona virus, the Industry as a whole, including the members of the Petitioner have been severely affected. In fact, most of the Industries and commercial establishments are in a complete shutdown. Even despite the lifting of certain restrictions, the issues plaguing the sector continue.

3.3. The members of Petitioner in the above petition are owning Solar Power Plants, *inter-alia*, in the State of Tamil Nadu under captive and 3<sup>rd</sup> party sale scheme through Intra State Open Access System in Tamil Nadu. The Solar Power Plants are established under either Renewable Energy Certificate (*REC*) Scheme or Non-REC Scheme. Because of the lockdown, the Renewable Energy Generating *stations* under Captive and 3<sup>rd</sup> Party Sale model through Intra State Open Access System in Tamil Nadu

are unable to sell the generated solar power to designated consumers (captive users / third party users) completely. The excess energy fed into the grid is treated as 'lapsed' in the case of REC Scheme and as deemed injection i.e. supply of infirm power under Sale to Board Category in the case of Non-REC Scheme. The banking and roll over of balance / excess energy is not permitted as per prevailing energy accounting and billing procedure for Solar Power Plants implemented in Tamil Nadu (neither under non-REC Scheme nor REC Scheme). It is pertinent to state that Solar Power Plants due to their very nature are Must Run under the Grid Code and apart from that have to be operated continuously since they generate power through a renewable source and cannot be shut down. Further no back down instructions on grounds of any grid issues were issued by the SLDC, which monitors and regulates the entire power generation and injection in the State thus allowing for the solar power generated to be fed into the grid in a manner permitted under law and the Regulations.

3.4. There is no payment settlement mechanism for 'lapsed' energy in the case of REC Scheme. In the event of '*deemed* injection' of energy to the grid under non-REC Scheme, then the 75% of the respective solar tariff fixed by the Commission in the respective solar tariff has been paid by the 1<sup>st</sup> Respondent. As a result of which, the members of the Petitioner's project's financial viability has been severely affected. Most of the members are exposed to a very high credit risk due to the fact that they will be unable to honor their financial commitments with banks and financial institutions. As a result of which, the long-term financial viability of

the project has been severely affected and the members of *the* Petitioner are suffering huge economic loss due to this unforeseen force majeure event. At this juncture, it is pertinent to note clause 11.5.6 of the Order on generic tariff for Solar power and related issues (Order No. 5 of 2019) dated 29.03.2019 which states as follows:

*"11.5 Energy Accounting and Billing Procedure*

*11.5.1 TANGEDCO has stated that as per the Solar Energy Policy 2019, the wheeling of energy will be permitted only during the generation of electricity and will be adjusted slot/block to slot/block and on daily basis during the billing period and excess energy fed into grid shall be treated as infirm power under sale to DISCOM category only. The distribution licensee has also requested that the amount towards purchase of infirm power be given credit to the consumer for 60 days from the date of receipt of invoice.*

*11.5.6 After the billing period, the balance energy may be sold at the rate of 75% of the respective solar tariff fixed by the Commission in the respective orders to the generators".*

3.5. The 2<sup>nd</sup> Respondent, aware of the widespread difficulties that would be faced by those in the Renewable Energy Sector, has sought to alleviate the concerns of the Petitioner vide its Office Memorandum FNo.283/25/2020-GRID SOLAR dated 15.04.2020. The 2<sup>nd</sup> Respondent clarified that the pre-existing Office Memorandum No. 283/20/2020-GRID SOLAR dated 4<sup>th</sup> April, 2020, clarifying that the "Must Run" status of Renewable Energy (RE) remains unchanged during the COVID-19

Lockdown period and that the *Renewable Energy must not be* curtailed but for energy security reasons.

3.6. The Office Memorandum states as follows:

*“Due to nationwide lock-down in the wake of COV1D-19, industries and commercial establishments using electricity generated directly as well as through banking, from Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations under captive and Third-Party Sale, are running their operations at their lowest and consequently their demand of electricity has reduced to minimum since mid March'20. Due to this, the generated and banked units in previous months could not be utilized by such consumers. The lapse of such banked units or purchase thereof at APPC rate would severely affect the profitability of both the developers and consumers associated with such Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations. This situation is likely to continue for another few months (FY 20-21) till the pandemic is controlled and the industrial production and commercial footfalls return to normal”.*

3.7. The Memorandum further recommends to the various Power/Energy Departments including the 1<sup>st</sup> Respondent to consider permitting Rollover of banked electricity (from Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale) of FY 2019-20 and FY 2020-21 to FY 2021-22. However, despite the issuance of the Office Memorandum on 16-4-2020, till date no steps

have been taken by the 1<sup>st</sup> Respondent to implement the recommendations issued by the 2<sup>nd</sup> Respondent.

3.8. Immediately after the Office Memorandum dated 16-4-2020 was published, the Petitioner vide letter bearing Ref.No.NSEFI/20-21/TNERC/1 dated 20-4-2020, wrote to the 1<sup>st</sup> Respondent appraising them of the situation faced by the various Generating Stations and Consumers, and requested the 1<sup>st</sup> Respondent to do the following namely:

- (a) consider and allow banking and/or rollover of solar energy generated from Solar PV Power Plants implemented under CAPTIVE AND THIRD PARTY POWER SALE category through intra State Open System in Tamil Nadu
- (b) extent the provision for banking or rollover of generated solar energy throughout FY 2020-21.
- (c) Implement the recommendations made by the MNRE and to consider Rollover of banked electricity From Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale Category of FY 2019-20 and FY 2020-21 to FY 2021-22.

3.9. The Petitioner requested that these policy changes may be made as soon as possible. Further, the Petitioner also requested that the 1<sup>st</sup> Respondent:-

- (a) Form a Core Open Access (OA) Team within Non-Conventional Energy Sources (NCES) Department of TANGEDCO, which can

undertake activities related to revision of existing EWAs and Long Term Open Access Approval to include new captive / third party users, as appropriate, be issued on immediate and priority basis.

- (b) Support and *extend* the grid connected Solar PV Power Plants under the SALE TO BOARD category with MUST RUN STATUS to avoid generation and related revenue loss, vide MNRE'S Office Memorandums F.No.283/20/2020-GRID SOLAR dated 4th April,2020 and F.No.283/25/2020-GRID SOLAR dated 16<sup>th</sup> April 2020.

3.10. Despite issuance of the same, no reply has been forthcoming from the 1<sup>st</sup> Respondent and no action has been taken in this regard. Individual Members of the Petitioner Organisation have also written various representations to the 1<sup>st</sup> Respondent requesting Banking of Generated Energy from April 2020 and rollover of banked energy from FY 2020-21 to FY 2021-22 in line with office Memorandum F.No.283/25/2020-GRID SOLAR dated 16-4-2020 issued by the 2<sup>nd</sup> Respondent. Despite receiving several letters and representations both from the petitioner as well as the individual members of the Petitioner for requesting Banking of Generated Energy from April 2020 and rollover of banked energy from FY 20-21 to FY 21-22 in line with office Memorandum F.No.283/25/2020/GRID SOLAR dated 16-4-2020 issued by the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent has failed to either implement the recommendations made by the 2<sup>nd</sup> Respondent or to take any other action.



3.11. Due to the inaction of the 1<sup>st</sup> Respondent, the individual members of the Petitioner will be severely affected if they are unable to rollover the banked units, in so far as huge financial commitments to banks and financial institutions will be unable to be completed, since the units generated have either been lapsed or been deemed to be injected in the grid. If urgent actions, as recommended by the 2<sup>nd</sup> Respondent are not taken, the members of the Petitioner Organization are under severe economic duress and may be forced to wind up. Such a situation will grossly affect the distribution of power within the state.

3.12. Compared to non-renewable sources such as coal, gas, oil, nuclear the advantages are pretty high as Solar is absolutely non-polluting, with no break downs and requires less maintenance. The Ministry of Environment and Forest (MoEF) has also released a new categorization of industries i.e., White category for harmonization of classification of industrial sectors. The newly introduced white category of industries pertains to those industrial sectors which are practically non-polluting and lists 36 industries including Solar Power Plant through photovoltaic cell. Therefore, such resources need to be utilized optimally and efficiently.

3.13. In this state of affairs, the Solar plants would be continuously under serious hardship and the economic sustainability of Solar

energy generation in the State of Tamil Nadu would be seriously jeopardized. Statutorily, it is submitted that Renewable Energy must be actively encouraged and promoted.

3.14. Section 86(1)(e) of The Electricity Act, 2003 provides as follows:

*“86(1) The State Commission shall discharge the following functions, namely:-*

*.....*

*(e) "Promote co generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also to specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee “*

3.15. The State Electricity Regulatory Commission (CSERC) is mandated to promote the Renewable Energy (RE), issue the regulations for grid connectivity *and sale of RE Power* to the distribution utility, CPP or open access consumer. Any instruction issued by SERC shall have to be followed by respective agencies for promoting the RE Power in the State.

3.16. Further, The National Electricity Policy as extracted below provides *that the* renewable Energy potential should be exploited fully to create additional power capacity and private participation should be encouraged by providing necessary promotional measures.

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

3.17. The Central Electricity Regulatory Commission has also stipulated in clause 5.2 (u) of the CERC (Indian Electricity Grid Code), Regulations, 2010 that Solar Generators should be treated as "MUST RUN" plants. It directs System Operator (RLDC/SLDC) to make all efforts to evacuate all available solar power and treat *them* as 'MUST RUN' plants. The scheduled generation can only be curtailed under circumstances of Grid security and in consideration to safety of any equipment or personnel. The relevant clause as mentioned in CERC (Indian Electricity Grid Code), Regulations, 2010 is as below:

*"5.2 (U) Special requirements for Solar/ wind generators*

*System operator (SLDC/RLDC) shall make all efforts to evacuate available solar and wind power and treat as a must-run status. However, System operator may instruct the solar /wind generator to back down generation on consideration of grid security or safety of any equipment/ or personnel is endangered and Solar / Wind generator shall comply with the same. For this, Data Acquisition System facility shall be provided for transfer of Information to concerned SLDC and RLDC"*

3.18. TANGEDCO has benefited from utilizing the power generated by such sources during the lockdown. Such rollover has been done even in the past by the Commission. As a matter of example, when consumers were disabled from utilizing the renewable wind power during R&C *measures* that were in Force in Tamil Nadu during 2008 onwards, Commission specifically allowed for rollover of the banked energy and allowed it to be utilized over 5 months in the next year. This situation is similar where the consumption of the generated units is not capable of being done due to governmental directives.

3.19. *Renewable* Energy potential must be exploited fully and that the only way to do so would require that the banked units *are* allowed to be rolled over for the next Financial Year. Further, if not permitted to do so, the existing developer would be losing the interest to invest in the state of Tamil Nadu as well as the State will not achieve its objective to project it as Solar hub State. Moreover, the State is wasting its natural resource. In view of the utmost urgency as stated above, Commission may be pleased to direct the 1<sup>st</sup> Respondent to implement the recommendations made by the 2<sup>nd</sup> Respondent vide Office Memorandum F.No.283/25/2020-GRID SOLAR dated 16.04.2020 and to consider Rollover of banked electricity from Open Access Renewable Energy Generating Stations under *Captive and Third-Party Sale* Category of FY 2019-20 and FY 2020-21 to FY 2021-22.

#### **4. Contents of the First Respondent:-**

4.1. TANGEDCO facilitates open access approvals to the developers for the establishment of utility scale solar power plants under REC scheme as well as under non-REC scheme i.e. as per the preferential tariff order issued by the Commission with the following options as detailed below:

REC Scheme : a) Sale to Board and

b) Third Party Sale

Non-REC scheme: a) Captive use or self-consumption and

b) Third party sale

4.2. The balance energy, if any, after captive use and third party sale shall get lapsed under REC scheme, whereas under non-REC scheme, the balance energy after self-consumption and third party sale shall be paid at 75% of applicable tariff issued by the Commission in its order from time to time.

4.3. The adjustment of Solar energy generation against consumption shall be slot wise, within the billing period and can be adjusted as per clause 5.5.6 of the Commission's Order on "Procurement of solar power and related issue" issued vide order No.9 of 2020 dated 16-10-2020.

4.4. There is no banking facility in respect of solar energy and the open access solar developers shall adjust their un-utilized generated energy against the consumption, within the billing period as detailed in para 6 above. Under this ground alone, the petition is liable to be rejected.

4.5. The impact of Covid-19 for rollover of Banking for the year 2019-20 is only for 6 days which is negligible and so the prayer of the Petitioner to rollover the Banking facility for the Financial Year 2019-20 has no grounds for their claim and is to be rejected.

4.6. Further the unutilized energy is to be paid at 75% of the applicable tariff in respect of non-REC open access consumers and hence no loss as claimed by the Petitioner exist which warrants this Hon'ble forum's intervention.

4.7. The prayer for the rollover of Banking for the FY 2019-20 has no grounds since lockdown started only on 24-3-2020 barely 6 days left for the FY 2019-20 and is to be rejected. Also, as there is no banking facility in respect of solar energy, the prayer for rollover for the FY 2020-21 and 2021-22 is premature at this stage and so is to be not admitted.

4.8. The Petitioner company and its association is not only affected due to nationwide lockdown imposed by the Government of India caused by the pandemic due to Corona virus, the DISCOM's are also facing heavy revenue loss during this pandemic period. The TANGEDCO has evacuated maximum RE generation keeping our own low cost generation idle at heavy financial loss. Hence further considering the rollover of solar energy from open access renewable energy generators under captive and third party sale for the FY 2019-20, 2020-21 and 2021-22 to all categories of solar

energy generation will further hamper the financial condition of TANGEDCO.

**5. PETITION FILED BY THIRU S.GANDHI, PESOT AS IMPEADING PETITIONER:**

5.1. The petition filed by the 1<sup>st</sup> respondent, is largely relied upon the Ministry of New and Renewable Energy's Office Memorandum dated 16-4-2020. Lock down was not ordered by the second respondent here, namely TANGEDCO. The relief sought by the 1<sup>st</sup> respondent, consequent of lock down ordered by the Governments of Union and State cannot come from discom utility, a corporation in the competitive market. It is equally true that the same discom, namely, TANGEDCO is also seriously affected by loss of business by the same lock down. The prayer is not in the right forum. The relief, if at all any, has to come from the Governments and more appropriately from Ministry of New and Renewable Energy.

5.2. Notwithstanding the above, the claim of 1<sup>st</sup> respondent, for rollover of banked energy beyond 31-3-2020, and rollover of solar energy is in violation of the generic tariff orders for wind energy and tariff order for solar energy issued by Commission now in force. The renewable energy generators in M.P.24/2016 oppose the amendment sought by the respondent 2, to change the banking period that has been recorded in the tariff order No.6 dated 13-4-2018 under para 10.1.6 as follows:

*“During the hearing in M.P.No.24 of 2016 before this Commission for changing of banking period, the wind energy generators vehemently*

*opposed the claim on the ground that a petition with such a prayer cannot be entertained by the Commission in the Misc.Petition and it should be filed only as a tariff petition. Further, it was the contention of the wind energy generators that banking forms part of the wind energy tariff order and any amendment to the same can be made only by following the procedure which was followed while issuing the wind tariff order”.*

The contention of the generators was accepted and all changes were undertaken while deciding tariff for renewable energy.

5.3. Banking of energy is not allowed in the tariff order for solar energy. The rollover of solar energy to following financial years more equivalent to banking and this goes against the tariff order decided after following the procedures. The office Memorandum of MNRE is advisory in nature. It says only to consider the representation and addressed to only to three states.

5.4. The Commission has complied with all the statutory provisions including under Section 86(1)(e) and more liberal of allowing banking which finds no place in the Electricity .Act 2003. Banking is a concession at the cost of respondent 2 namely TANGEDCO, which is being transferred to common public. Elongating the non-statutory concessions by one reason or other, will be unreasonable and will not ensure the reasonable cost to consumers as provided in the Electricity Act 2003.



5.5. The 1<sup>st</sup> Respondent had not placed the quantum of banked energy as on the last week of its expiry. If it is high accumulation, then it is logical that the industries are more interested in encashment than any rollover.

5.6. The pandemic and lock down has destroyed the earning opportunities of crores of poor and marginalized and left them to suffer without any compensation. Contrary to that, solar power generators or renewable energy generators are compensated by encashment of energy. This claim is to elongate the concessions aiming more profit under the pretext lock down.

5.7. The restriction and control (R&C) promulgated during 2008 cannot be equated to lock down. R&C was short of generation over demand. The banked energy could not be drawn during R&C period. But lock down is excessive generation and demand was far below and there is good opportunity to utilize the energy. As such there is no steam in the argument comparing the R&C to lockdown. The present petition lacks real grievance.

5.8. The memorandum of MNRE dated 16-4-2020 is an advisory in nature only to three states of the country on representations from generators. It is neither an order nor at least guide line but simple disposal of representations to consider. It has no effect on statutory tariff order.

5.9. The captive status of the wind generators still to be verified as ordered by the Hon'ble High Court of Madras in WA 930 and 931. Without

ensuing their eligibility to have banking of energy, extending further concessions may further complicate the issue which has been settled after long legal battle.

**6. PRELIMINARY OBJECTIONS FILED ON BEHALF OF 1<sup>ST</sup> RESPONDENT (I.E., THE PETITIONER IN THE MAIN CASE) TO THE IMPEADING APPLICATION FILED BY PESOT**

6.1. The application seeking for implement is not maintainable and is an of this Commission and liable to be dismissed with costs.

6.2. The impleading application is bereft of details necessary to place on record the necessary interest and standing of the proposed impleading party to the present proceedings such as:

- a. The nature of the impleader, whether individual, company or association;
- b. The specific grievance of the impleader bearing nexus to the instant prayer sought for in the instant petition;
- c. Reasons as to why a decision in the instant petition will significantly impact/affect the impleader;
- d. A specific prayer seeking to be impleaded in the instant petition with leave to file a counter on the merits of the case if the application to implead is allowed by the Commission.

6.3. The implead petitions cannot be entertained when the petitioner shows no direct interest in the matter. The principles circumscribing the power of a Court to implead third parties to a pending us has been set out by the Hon'ble Madras High Court in the case of C.M. V.ICrishnamachari v. Dahanalakshmi Ammal 1966 2 MLJ

298. The said judgement stipulates that the interest that is necessary to make a person a party is legal interest including equitable interest, that is, an interest which law would recognise and uphold. Thus, the sine qua non for any person being impleaded to an already pending suit is that he or she should have a direct or tangible interest in the subject-matter. A mere convenience or benefit which might possibly result to a party applicant by adding another party to the pending suit is not the test to be applied.

6.4. The Hon'ble Supreme Court in the case of Razia Begum v Sahebzadi Anwar Begum and Ors Y958 AIR 886 has also held that if the person who seeks to be impleaded in a pending *lis* has an interest that is either indirectly or commercially affected, such a person is not a proper party requiring to be impleaded.

6.5. In the case of Mahadeva Rice & Oil Mills Vs. Chennimalai Gounder AIR 1968 Mad. 287, the Hon'ble Madras High Court has laid down a set of four tests which serve as a guide to permit third parties to be impleaded:

- i) *"If, for the adjudication of the "real controversy" between the parties on record, the presence of a third party is necessary, then he can be impleaded;*
- ii) *It is imperative to note that by such impleading of the proposed party, all controversies arising in the suit and all issues arising thereunder may be finally determined and set at rest, thereby avoiding multiplicity of suits over a subject matter which could still have been decided in the pending suit itself;*

- iii) *The proposed party has a defined, subsisting, direct and substantive interests in the litigation, which interest is either legal or equitable and which right is cognizable in law*
- iv) *Meticulous care should be taken to avoid the adding of a party if it is intended merely as a ruse to ventilate certain other grievances of one or the other of the parties on record which is neither necessary or expedient to be considered by the Court in the pending litigation and*
- v) *It should always be remembered that considerable prejudice would be caused to the opposite party when irrelevant matters are allowed to be considered by Courts by adding a new party whose interest has not nexus to the subject-matter of the suit.*

6.6. The implead application made by PESOT demonstrates no case of any legal or equitable interest in the outcome of the instant petition. In fact, the implead application challenges the very legality of banking facility which is not the subject matter of the instant petition. The time for challenging banking is already past since Tariff orders in that regard have already been passed and as such the issue is no longer open to be re-agitated. If the proposed impleading petitioner has any grievance only an appeal to APTEL would lie against the Tariff Order. The instant application lacks all of the above and is liable to be dismissed *in limine*. The averments in the instant petition are in nature of a challenge to banking facility which is outside the scope of the instant petition. A bare reading of the implead application makes it clear that the application has been filed as a ruse to ventilate the PESOT's long standing grievance against banking facility – a challenge which it has repeatedly failed in.

6.7. The prayer in the implead application is to dismiss the instant petition. Such a prayer is impermissible in an implead application, the sole purpose of which is to enable this Commission to decide whether third parties can be heard in a pending lis based on whether or not they are a proper party. This requires for third parties to demonstrate how a decision in a pending lis, will have an impact on the third party. The instant application, titled as an 'implead petition' makes no such case, further still has not even prayed to be impleaded in the instant case.

6.8. The prayer of the instant petition reads as follows:

*“Exercise its regulatory powers and accept the recommendations made by the 2<sup>nd</sup> Respondent vide Office Memorandum F. No. 283/2 512020-GRID SOLAR dated 16.04.2020 and allow Rollover of banked electricity from Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale Category of FY 2019-20 and FY 2020-21 to FY 2021-22 of all categories of Solar Generators and set out the manner and methodology for its implementation and pass such further or other orders as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case and thus render justice”*

6.9. The instant petition has been filed under section 86(1)(b) and 86(1)(e), seeking for the Commission to exercise its regulatory power and permit rollover of banked units FY 2019-20 and FY 2020-21 to FY 2021-22 in view of the recommendations made by the Ministry and New and Renewable energy. Therefore, the instant petition has been filed in view of the policy advisory and the view taken by several State Regulatory Commissions in this regard.

6.10. "Banking" is recognized by the Commission in various tariff orders issued thus far and continues to be in vogue. Banking facility has been extended to renewable energy generators in view of the specific mandate of the Electricity Act and the National Tariff Policy to promote electricity from renewable sources of energy. Any grievance against the same ought to be agitated through a tariff petition or an appeal against the existing Tariff Orders only.

6.11. However, the instant implead application raises contentions questioning the banking facility itself which has now been given legal sanctity in view of the various tariff orders passed by the Commission, including the latest wind tariff order dated 07.10.2020, in which this *Commission has decided to continue extend banking facility, for the following among other reasons:*

*"In view of the above and the findings of Hon "ble APTEL in A. No. 42 of 2018 referred to by stakeholders, and on account of the unprecedented situation that arose due to the outbreak of the Covid 19 pandemic where several restrictions were in place on the movement of public and opening of offices etc., and the gradual slowdown in economic activity, Commission decides not to disturb the current position in this order."*

6.12. The Commission in its latest Solar Tariff Order dated 16.10.2020 has retained its position with respect to payment for unutilized excess energy in the following manner:-

*"5.5.8After the billing period, the excess energy generated but not consumed, may be sold at the rate of 75% of the respective solar tariff fixed by the Commission*

*in the respective orders to the generators and where no tariff is fixed **at** 75% of latest tariff discovered in the competitive bidding."*

Therefore, any contentions questioning the legal sanctity of banking or payment for excess energy is irrelevant and outside the scope of the instant proceedings.

6.13. The instant application has been filed on the assumption that vide G.O.Ms.No. 152 dated 23.03.2020, not all industries were forced to shut down their operations. Such a statement is blatantly erroneous.

6.14. The lock down was imposed on all activities save those that were specifically exempted in the said notification, i.e. essential services. Even in respect of factories and industries, only those that were engaged in the production of essential commodities and agricultural items were allowed to function. Therefore, during the period of lock down, only those essential activities vital for existence were allowed to function.

6.15. As unlock began, industries were allowed to open only in a phased manner and with several restrictions. As a natural corollary, there was a huge fall in demand of electricity since all the industries and large power consumers were forced to shut down their operations. In the absence of any demand, the electricity generated by generators were all injected into the grid and ultimately consumed by the TANGEDCO. It is for this reason the Petitioner is praying for rollover of banked units. The petitioner has drawn a parallel between the instant situation

with the R&C time because in both situations, the generators were forced to sell all of the power generated to the TANGEDCO.

6.16. TASMA has filed a detailed counter to the implead petition setting out the lack of *locus standi* and the rejection of the attempts in the past by the impleading petitioner as also the failure to disclose the constitution of the implead petitioner, the issue as to payment of court fee and other grounds. The petitioner adopts the same and is not repeating the same and requests the Commission to take such objections also on record.

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

7.1. The prayer of the petitioner is to exercise its regulatory powers and accept the recommendations made by the 2<sup>nd</sup> Respondent vide Office Memorandum F.No.283/25/2020-GRID SOLAR dt.16.4.2020 and allow Rollover of banked electricity from Open Access Renewable Energy Generating Stations under captive and third party sale category of FY 2019-20 and FY 2020-21 to FY 2021-22 of all categories of Solar Generators and set out the manner and methodology for its implementation

7.2. The petitioner is an association with member consumers and generators owning Wind mills and solar power plants wheeling power to their captive units. The crux of the issue is due to the lockdown of offices and other establishments announced by the Central Government from 24.03.2020 that was followed by the announcement of the State Government of the closure of operations of offices,



establishments in G.O (Ms) No.152 Health and Family Welfare (P1) Department dt.23.03.2020, the power generated from their plants could not be utilized due to the non-functioning of industries in the lockdown phase. The Ministry of New and Renewable Energy issued a clarification through its office memorandum dt.01.04.2020 that 'Must Run' status of Renewable Energy (RE) remains unchanged during COVID-19 lockdown period and that RE should not be curtailed but for grid security reasons.

**7.3.** In the case of wind energy, normally, the consumers utilize the power generated from their captive power plants and bank the unutilised energy every month which is carried over till the end of March of a financial year(FY), and at the end of the financial year the unutilized banked energy is sold to the Distribution licensee at the rate fixed by the Commission in the tariff orders which is 75% of applicable tariff / 75% of Average Pooled Cost of power(APPC) for non REC and REC generators as the case maybe. In the case of solar power, the unutilised energy at the end of every billing cycle is encashed at 75% of the applicable tariff by the Solar Power Generator(SPG).

**7.4** Reliance is placed on Ministry of New and Renewable Energy(MNRE)'s Office memorandum(OM) dt. 1.4.2020 and 16.4.2020 by the petitioners. The OM dt.1.4.2020 of MNRE clarified that 'MUST RUN' status of the RE power generating plants remains unchanged during Covid 19 lockdown period and the OM dt.16.4.2020 requested the Power/Energy Departments and DISCOMs of Andhra Pradesh, Karnataka and Tamil Nadu to consider permitting roll over of banked energy of FY 2019-20 and FY 2020-21 to FY 2021-22. NRE's Office Memorandum dt. 16.4.2020 reads as follows;

*“ F. No. 283/25/2020-GRID SOLAR/  
Government of India  
Ministry of New & Renewable Energy (MNRE)  
Block No. 14, C.G.O. Complex,  
Lodi Road, New Delhi –110003  
Dated: 16<sup>th</sup>April, 2020*

**OFFICE MEMORANDUM**

*Sub: Rollover of banked electricity (from Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations under Captive and Third Party Sale) of FY 2019-20 and FY 2020-21 to FY 2021-22-reg.*

- 1. Please refer to this office's O.M. No. 283/20/2020-GRID SOLAR (ii) dated 4<sup>th</sup> April, 2020 (copy enclosed), clarifying that 'Must Run' status of Renewable Energy (RE) remains unchanged during COVID-19 lockdown period and that RE should not be curtailed but for grid security reasons.*
- 2. Due to nationwide lock-down in the wake of COVID-19, industries and commercial establishments using electricity generated directly as well as through banking, from Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale, are running their operations at their lowest and consequently their demand of electricity has reduced to minimum since mid March '20. Due to this, the generated and banked units in previous months could not be utilized by such consumers. The lapse of such banked units or purchase thereof at APPC rate would severely affect the profitability of both the developers and consumers associated with such Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations. This situation is likely to continue for another few months (FY 20-21) till the pandemic is controlled and the industrial production and commercial footfalls return to normal.*
- 3. Representations have been received in this Ministry for issuing an advisory to States of Andhra Pradesh, Karnataka and Tamil Nadu allowing rollover of banked electricity from such projects.*
- 4. Accordingly, the undersigned is directed to convey to Power/Energy Departments and DISCOMs of Andhra Pradesh, Karnataka and Tamil Nadu that they may consider permitting Rollover of banked electricity (from Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale) of FY 2019-20 and FY 2020-21 to FY 2021-22*
- 5. This issues with the approval of Secretary, MNRE*

*(Sanjay G. Karndhar)  
Scientist-D*

To

1.....

2. ...

3.Pr. Secretary, Energy Department, Government of Tamil Nadu, Secretariat, Chennai  
600 009, Tel: 044-25671496, Fax: 25672923, Email: enersec@tn.gov.in,  
enerps@tn.gov.in

*Copy to :*

....

*8. Chairman-cum-Managing Director, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), 10th Floor, NPKRR Maaligai, 144, Anna Salai, Chennai - 600 002”*

**7.5.** The Distribution Licensee, TANGEDCO, has questioned the maintainability of the petition for the simple reason that both TANGEDCO and the petitioner face similar effects of revenue loss due to the pandemic. Heeding to the claims of the petitioner would mean hampering their financial condition at the cost of general public. Having evacuated RE power, keeping their own low cost generation idle, TANGEDCO seeks dismissal of the petition. Further, it is their contention that despite their own losses, the RE generators are paid at 75% of applicable tariff for the unutilized energy at the end of the banking period or billing cycle, as the case maybe. The public at large cannot be burdened. TANGEDCO also states that the petitioner has duration until the end of FY for adjustment.

**7.6** The impleading petitioner, Thiru.S.Gandhi, President, PESOT also asks for dismissal of the petition on the ground that losses due to the pandemic is endured by all stakeholders, and any concession given to the petitioner would ultimately burden the consumers. Banking is a concession at a cost to TANGEDCO that is transferred to the common public. Many of the industries remained shut only for few days.

**7.7** The petitioner has questioned the credentials and interests of PESOT as an impleading petitioner emphasizing that PESOT has not demonstrated its stakes and therefore the petition lacks locus standi.

7.8 During the course of argument, the Counsel for the Petitioner has objected to the impleadment of Thiru S. Gandhi and vehemently argued that he has *no locus standi* in this case. In this connection, it may be pointed out that Hon'ble APTEL in its order dated 09-0-9-2016 in D.F.R. No.2566 of 2015 wherein a preliminary objection was raised by the respondent in that case that Energy Watchdog was not an aggrieved person over the orders passed by the Commission in the extension of control period for solar tariff, has held as follows:-

*“Any order which is likely to affect its members, cause legal injury to them can be challenged by Energy Watchdog as a representative body. It is not necessary to say in the appeal memo that Mr. Rama Suganthan made a grievance to Energy Watchdog. We do not feel that a busybody or a meddlesome interloper has filed this appeal. We therefore reject the submission that this appeal is a public interest litigation.”*

7.9. From the above, it is clear that any order which is likely to affect the members of an association can interfere and implead as a party to a proceeding. In this case, the impleading petitioner PESOT has submitted proof of a registered entity 'Power Engineers Society of Tamil Nadu' under the 'The Tamil Nadu Societies registration Act 1975' (Tamil Nadu Act 27 of 1975). PESOT has represented the case on behalf of consumers at stake who may have to bear the extra burden of roll over of banked energy to the next Financial year which in PESOT's opinion would deem to occur due to the financial stress of TANGEDCO. Though PESOT is an association of the Electricity Engineers, still their members are ultimate consumers and any order passed in this case in favour of the petitioner will have a pecuniary impact on them also. Hence, we hold the impleadment of PESOT does not suffer from any

legal infirmity. However, we confine ourselves to the implementation of the guidelines issued by the MNRE and therefore we refrain from examining the issues raised by the impleading petitioner in depth.

7.10 Let us first look at the relevant provisions of banking and energy accounting in the case of wind and solar power, the latest orders - Order No.6 of 2018 for wind and Order No.5 of 2019 for solar power at the time of filing of the petition.

Relevant provisions in Order No.6 of 2018 for wind energy:

#### **“Para 10.0 Banking**

*10.1.13 .....the Commission decides not to disturb the current position in this order and decides to continue with the present banking period of 12 months from the 1st of April to 31st of March of the succeeding year for the WEG machines commissioned on or before 31.3.2018 under captive wheeling in the case of normal and REC scheme (for REC as provided in Order No.3 of 2016 and R.A No.6 of 2013) with increase in the banking charges from 12% to 14% as proposed in the consultative paper.*

*.....*

*10.1.15 The energy generated during April shall be adjusted against consumption in April and the balance if any shall be reckoned as the banked energy. The generation in May shall be first adjusted against the consumption in May. If the consumption exceeds the generation during May, the energy available in the banking shall be drawn to the required extent. If the consumption during May is less than the generation during May, the balance shall be added to the banked energy. This procedure shall be repeated every month.*

*10.1.16 Unutilized energy as on 31st March every year may be encashed at the rate of 75% of the applicable wind energy tariff rate fixed by the Commission for existing normal wind energy captive users and 75% of Pooled cost of power purchase as notified in the orders of the Commission from time to time for existing captive generators under REC scheme. The banking charges shall be 14% in kind.*

*10.1.17 ..... The Commission decides to extend banking facility of one month to the new WEG machines commissioned on or after 01.04.2018 both under normal and REC category, from 01.04.2018.*

*10.1.18 Any new WEG machines commissioned from the date of applicability of this order in the normal category or REC scheme shall have facility of banking of energy for a period of one month. There shall be no banking charges. The purchase of excess generation/ unutilized banked energy shall be at 75% of respective wind energy tariff for normal wind energy captive users and 75% of Pooled cost of power purchase as notified in the orders of the Commission from time to time for captive generators under REC scheme at the end of the month.*

*10.1.19 There shall be no facility of banking of energy for third party power purchase.”*

#### **“10.6 Energy Accounting and Billing Procedure**

*10.6.1 The energy accounting shall be regulated by the Commission's Regulations/ Order on open access, Deviation Settlement Mechanism (DSM). Till such time the DSM is implemented in the State, if a renewable energy generator utilizes power for captive use or if he sells it to a third party, the distribution licensee shall raise the bill at the end of the billing period for the net energy supplied. The licensee shall record the slot wise generation and consumption during the billing period. Slot-wise adjustment shall be made for the billing period. However, peak hour generation can be adjusted to normal hour or off peak hour consumption of billing period. Normal hour generation can be adjusted to off peak hour consumption of the billing period. Excess consumption will be charged at the tariff applicable to the consumer subject to the terms and conditions of supply.*

*10.6.3 After the banking period, the balance energy may be sold at the rate of 75% of respective wind energy tariffs for normal wind energy captive users and 75% of Pooled cost of power purchase as notified in the orders of the Commission from time to time for captive generators under REC scheme, at the end of the month/as on 31st of March of every year as may be applicable."*

**11. Relevant provisions in order No.5 of 2019 for solar power:**

#### **"11.5 Energy Accounting and Billing Procedure**

*11.5.4 ..... if a solar power generator utilizes power for captive use or if he sells it to a third party, the distribution licensee shall raise the bill at the end of the billing period for the net energy supplied. The licensee shall record the slot wise generation and consumption during the billing period. Slot wise adjustment shall be for the billing period. Peak hour generation can be adjusted to normal hour or off peak hour consumption of the billing period and normal hour generation can be adjusted to off peak hour consumption of the billing period. Excess consumption will be charged at the tariff applicable to the consumer subject to the terms and conditions of supply.*

*11.5.6 After the billing period, the balance energy may be sold at the rate of 75% of the respective solar tariff fixed by the Commission in the respective orders to the generators.*

**7.11.** From the extracts provided above, it may be seen that in the case of wind power for the WEGs, both REC and non REC schemes, commissioned prior to 1.4.2018, the date of effect of order No.6 of 2018, the generators have 12 months banking and at the end of the FY the unutilized energy can be sold at 75% of applicable tariff/APPC. In the case of solar power, the unutilized energy is sold at 75% of applicable tariff at the end of each billing period.

**7.12.** For the FY 2019-20, since the lockdown was from 24.3.2020, the generated energy that remained unutilized in the bank is for a period of seven days. This period falls in the lean windy season where generation is very meagre.

**7.13.** For the FY 2020-21, it is seen from the G.Os issued by the Government of Tamil Nadu that during the first phase of lockdown many essential industries were permitted to function. From 4.5.2020, GoTN has issued instructions relaxing lockdown in terms of industrial activities in steps. The wind generators whose commissioning is prior to 1.4.2018 have banking provision for 12 months from March to next April in a FY and therefore have duration until March 2021 to utilize the banked energy. For the wind energy generators commissioned from 01.4.2018, banking is for a period of one month. Similar is the case for the solar generators commissioned, that have an inherent banking equal to the billing period which is one month. The unutilized banked energy is paid at 75% of applicable tariff/APPC at the end of the Financial year for those generators with 12 month banking facility and at the end of the month for the generators with one month's banking.

**7.14** The petitioner has compared the directions issued in the common order in M.P Nos.6,11,12 and 16 of 2008 dt.22.5.2008 where the Commission permitted utilization of banked energy of 2007-2008 to be adjusted in the consumption of April, May, and June 2008. The said order was issued during the period when there was shortage of power in TANGEDCO and due to its inability to supply power un-intermittently and for reasons discussed in the order.

**7.15.** In the case in question, both the petitioner and the respondents are affected parties. TANGEDCO has the obligation to pay their generators for the fixed cost of power contracted for supply. To compensate the claimed loss by RE generators would mean devolving the expenses on the consumers who were also affected parties during Covid 19.

**7.16** The case itself has been filed prematurely as it is only at the end of the financial year would one know the actual status of energy banked and unutilized for the wind energy generators. As to the solar generators, they are seeking an arrangement not mentioned in the tariff order for solar power.

**7.17** MNRE's memo is an advisory issued to the States of Karnataka, Andhra Pradesh and Tamil Nadu. Karnataka ERC in the order dt.25.6.2020, in the matter of carry forward of excess banked energy on account of Covid 19, has not permitted carry forward of banked energy in the case of RE generators under REC and non REC schemes.

**7.18** The petitioner has requested to treat the spread of Covid 19 as a Force majeure nature condition and permit carry forward of unutilized energy generated during the period of closure of the industries..

(a) Extract of the Force Majeure clause in the agreements for wind :

*"1. Definitions:*

*(1)...*

*.....*

*.*

*(3) "Force Majeure" events means any event which is beyond the control of the agencies involved which they could not foresee or with a reasonable amount of diligence could not have foreseen or which could not be prevented and which substantially affect the performance by either agency such as but not limited to :-*



- (a) Acts of natural phenomena, including but not limited to floods, droughts, earthquakes and epidemics;*
- (b) Acts of any Government domestic or foreign, including but not limited to war declared or undeclared, hostilities, priorities, quarantines, embargoes;*
- (c) Riot or Civil Commotion*
- (d) Grid / distribution system's failure not attributable to agencies involved"*

*"10. Force Majeure: (1) Both the parties shall ensure compliance of the terms of this agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this agreement to the extent that such failure is due to force majeure events as defined in this agreement. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event(s)."*

**(b) Extract of the Force Majeure clause in the agreements for solar :**

***12. Force Majeure:-***

*Both the parties shall ensure compliance of the terms of this agreement. However, no party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of this agreement to the extent that such failure is due to force majeure events as defined here under. Any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event(s) by giving notice to the other party in writing within 15 days from the occurrence of such Force majeure.*

*"Force Majeure" events means any event which is beyond the control of the parties involved which they could not foresee or with a reasonable amount of diligence could not have been foreseen or which could not be prevented and which substantially affect the performance by either party such as but not limited to:-*

- (i) Acts of natural phenomena, including but not limited to floods, droughts, earthquakes, lightning and epidemics;*
- (ii) Acts of any Government domestic or foreign, including but not limited to war declared or undeclared, hostilities, priorities, quarantines, embargoes;*
- (iii) Riot or Civil Commotion; and*
- (iv) Grid / Distribution System's failure not attributable to parties to this agreement.*

**7.19.** A Force Majeure clause in the contract exempts both parties from their contractual liability or obligation when prevented by such an unforeseeable event from fulfilling their obligations. What is sought here by the petitioner is a concession to allow extended period of banking. The Energy Purchase Agreement (EPA) and Energy Wheeling Agreements (EWA) are between the generator and the Distribution Licensee, where both are the affected parties due to the pandemic. Commission

taking suo motu cognizance of the pandemic has already passed an order in SMP No.2 of 2020 for payment of minimum 20% demand charges from the affected HT consumers.

**7.20** In view of the foregoing discussions and in as much as the Distribution Licensee's revenues also have been affected by the pandemic, Commission decides that there shall be no carry forward of banked energy in the case of WEGs and Solar generators under REC/ non REC scheme to the subsequent financial years/months, as the case maybe. Banking charges as notified in the tariff orders for wind energy shall be applicable.

**7.21.** The excess generation/unutilized energy may be encashed at 75% of applicable tariff at the end of the financial year/billing period as per the provisions of respective tariff orders applicable.

**7.22** The petitioner has mentioned about carryover of unutilized energy from rooftop plants that have been installed for captive consumption. If the rooftop is in parallel operation with the grid, it is expected that the industry takes all precautions not to inject energy into the grid, to be put in other words to switch off the plant when the industry is not functioning. Therefore, off grid and rooftop solars in parallel operation is of no consequence to this case. If any petitioner is under net metering, Commission's order on net metering will be applicable. During the course of argument Thiru Rahul Balaji, learned counsel for the petitioner in M.P.No. 16 of 2020 fairly submitted that the MNRE letter is only in the nature of advisory to the implementing agency and not mandatory and it is for the Commission to allow the roll over as prayed for by taking into account the pandemic situation. In this

connection, we are constrained to point out that when the whole country has been suffering economically, particularly weaker section of the society and every citizen is sharing the economic distress of the nation proportionate to their standard of living, it is not only unreasonable but unconscionable and unethical on the part of the petitioner to claim such benefits involving public exchequer as in the prayer specially when the Commission has already allowed them to pay 20% M.D. charges during the pandemic period.

In the result, the petition is dismissed.

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

(Sd.....)  
**(Dr.T.Prabhakara Rao)**  
**Member**

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

/True Copy /

Secretary  
Tamil Nadu Electricity  
Regulatory Commission