

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

PRESENT:

ThiruM.Chandrasekar

..... Chairman

and

ThiruK.Venkatasamy

.... Member (Legal)

D.R.P. No.3 of 2015

M/s.LancoTanjore Power Company Ltd.
(formerly known as Aban Power Company Limited)
3rd Floor, 25, G.N. Chetty Road
T.Nagar
Chennai– 600 0017.

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

Vs.

1. TANGEDCO
Rep. by its Chairman & Managing Director
No.144, Anna Salai
Chennai – 600 002.
2. The Chief Financial Controller (Revenue)
TANGEDCO
144, Anna Salai,
Chennai 600 002.

... Respondents
(Thiru.Richardson Wilson,
Additional Government Pleader)

Dates of hearing : 27-08-2019; 05-09-2019; 17-09-2019;
22-10-2019; 12-11-2019; 28-01-2020;
06-10-2020; 27-10-2020; 17-11-2020;
22-12-2020; 05-01-2021; 03-02-2021;
16-02-2021; 23-02-2021; 02-03-2021;
09-03-2021; 16-03-2021; 30-03-2021;
15-04-2021; 22-06-2021; 26-10-2021;
09-11-2021; 23-11-2021; 30-11-2021;
07-12-2021; 21-12-2021 and 04-01-2022

Date of Order : 22-03-2022

The DRP No. 3 of 2015 came up for final hearing on 04-01-2022. The Commission upon perusing the affidavit filed by the petitioner and all other connected records and after hearing both the parties passes the following:-

ORDER

1. Prayer of the Petitioner in D.R.P.No.3 of 2015:-

The prayer of the petitioner in D.R.P. No. 3 of 2015 is to pass an order directing the Respondents to forthwith make payment of a sum of Rs.50,70,03,194/- being the interest due and payable to the petitioner as on 20-12-2014 together with further interest that would accrue from such date until the date of payment in respect of the delayed payments made by TANGEDCO, for sale of power made by the petitioner under the Power Purchase Agreement dated 01.09.2003 and to award costs of the present proceedings, including the court fees and legal expenses, in favour of the Petitioner and against the Respondents.

2. Facts of the Case:-

This petition has been filed to pass an order directing the Respondents to forthwith make payment of a sum of Rs.50,70,03,194/- being the interest due and payable to the petitioner as on 20-12-2014 together with further interest that would accrue from such date until the date of payment in respect of the delayed payments made by TANGEDCO, for sale of power made by the petitioner under the Power Purchase Agreement dated 01.09.2003

3. Contentions of the Petitioner:-

3.1. The petitioner is a company mainly engaged in the business of generation and sale of electricity.

3.2. The Tamil Nadu Industrial Development Corporation Limited, (TIDCO) wholly owned by Government of Tamil Nadu, had invited proposals for setting up liquid fuel based, short gestation power projects at various locations in Tamil Nadu on Build-Own-Operate basis under International Competitive Bidding process based on the guidelines dated 30.03.1992 issued by Ministry of Power, Government of India in exercise of the powers under section 43A (2) of the Electricity Supply Act, 1948.

3.3. The Petitioner submitted its bid and was selected by the TIDCO/Government of Tamil Nadu based on the tariff quoted and other parameters of evaluation to develop, procure, finance, construct, own, operate and maintain 132 MW (Contracted Capacity of 126.13 MW) Combined Cycle power project using Naphtha as fuel and sell the entire Electricity generated to the First Respondent.

3.4. Initially the power plant was envisaged to be set up at Vallur Village, Ponneri Taluk, Tiruvallur District, Tamil Nadu and Power Purchase Agreement (PPA) for the said project was entered on 20.05.1998 with First Respondent for sale of Electricity to the Board. Subsequent to the execution of the PPA on 20.05.1998, due to increase in the price of the Naptha, the Petitioner was asked to find out the alternate fuel so as to reduce the unit cost of generation. The Petitioner identified Natural gas available from the Kuttalam Gas Fields of ONGC Ltd. in the Thanjavur District as alternative fuel to be used at the plant.

3.5. The Petitioner has executed a long term Gas Supply Contract for supply of 500000 SCMD of Natural Gas from Kuttalam gas fields of ONGC in Cauveri Basin to the Petitioner. The location of the plant was changed from Vallur village to Karuppur village in Thanjavur District which was in close proximity to Kuttalam gas fields from where natural gas was to be supplied to the plant. The Government of Tamil Nadu approved the aforesaid selection and the necessary change of technology, fuel and also the shifting of the location of the project from Vallur village to No.9, Karuppur village, Thiruvaidaimaruthur Taluk, Thanjavur District of Tamil Nadu.

3.6. Consequent to the change of fuel and technology, the Power Purchase agreement dated 20.05.1998 signed in respect of the said Naphtha based Power project was amended and the present Power Purchase Agreement (PPA) was signed on 1.9.2003 with the First Respondent for a period of 15 years for sale of electricity incorporating change of technology, change of location and fuel. The said PPA dated 01.09.2003 with its subsequent addendums continues to be in force.

3.7. The selection for setting up of the power project with the above changes entitled the Petitioner to develop, procure, finance, construct, and own operate and maintain the natural gas based power project with a Combined Cycle capacity of net exportable generation of 113.2 MW electricity at Karuppur, Thanjavur District in Tamil Nadu. The First Respondent had by its letter dated 6.9.2003 placed the PPA dated 01.9.2003 before the Commission. The Commission had by its letter dated 12.9.2003 informed the First Respondent that the PPA ought to have been brought to its knowledge for its concurrence. In response to the said letter, the Chairman,

TNEB submitted letter dated 31.12.2003 giving the background of the execution of the earlier PPA dated 20.5.1998 and the PPA dated 1.9.2003.

3.8. After obtaining all the clearances, the Petitioner established the 113.2 MW Combined Cycle Gas Based Power Project by synchronizing Gas Turbine on 18-02-2005 and Steam Turbine on 11-08-2005 with TNEB grid. Since then, the Petitioner has been supplying entire electricity generated by the Petitioner's plant to Respondents at a levelised Tariff of Rs.2.32 per Kwhr which is the cheapest Tariff in the State among all IPPs. The Petitioner has been sending periodic billing statements as contemplated under the PPA to the Respondents for payment of the tariff.

3.9. The Power Generation from the Plant is the sale business of the petitioner and TANGEDCO is the exclusive purchaser of the entire generation from the Power Plant. The payments received for the power sold is to be utilised for payments for fuel, outgoings to Banks & Financial Institutions who have funded the Debt and for operations of the Power Plant. The guaranteed, timely cash flows are an imperative for the project to sustain generation. Further, uncertainties should be resolved at the earliest possible time frames, as the quantum of disputes could be large. Any delay in payment or making of part-payments would prejudicially affect the capability to continue to produce power thereby having a cascading effect upon the project viability. Similarly delayed payments have to specifically attract interest as contractually provided as it is both a measure of dis-incentivising delayed payment by TANGEDCO and compensating the petitioner for the costs incurred due to illegal withholding of payments beyond the due date.

3.10. In order to achieve the above, the Power Purchase Agreement provides for the following:-

3.11. Article 9 of the PPA which deals with billing and payment requires during the term of the Agreement, the Petitioner to submit the billing statement not later than 5 days after the end of the billing period as per the format specified in Schedule 16 of the PPA. Due date of payment in respect of a billing statement has been defined in Article 1.1 of the PPA to mean the date after 30 days from the day of receipt of the invoice from the Petitioner in terms of Article 9.1. Article 9.2 of the PPA which deals with payment, under sub clause (f) entails payment of interest in respect of any amount remaining unpaid after the date when the payment was due. Such interest is to accrue from day to day and to be compounded with monthly interests at a rate equal to the default rate, from the date when the payment was due till the amount is actually paid. Default Rate has been defined in Article 1.1 of the PPA as the per annum rate of interest equal to the sum of prime lending rate of the State Bank of India applicable during the relevant period plus 2 percent.

3.12. In terms of the above provisions of the PPA, the Petitioner has been raising monthly bills on the Respondent for the supply of power. Since April 2011, the Second Respondent has been delaying making payment of the invoices. The Petitioner has been raising invoices for the overdue interest on the delayed payment as per the Power Purchase Agreement. Copies of the invoices raised by the Petitioner on the Respondent from June 2011 to November 2014 towards overdue interest are being filed as documents along with this Petition. In January, 2014, the petitioner received a letter from the 2nd respondent requesting it to waive

50% of the interest amounts due and payable from the respondents, thereby admitting its liability to pay interest to the petitioner.

3.13. The delay on the part of the Second Respondent in making payment of the monthly invoices for the electricity generated and supplied by the Petitioner under the above PPA is considerable. The total amount outstanding and payable by the Respondent to the Petitioner, as of the date of this Petition, towards overdue interest at the rate of Default rate of prime lending rate of SBI applicable during the relevant period and 2 percent as provided for in the PPA is about a sum of Rs.460,388,955/- being the interest due and payable to the petitioner as on 30.06.2014. A statement of the amounts due and payable by the Respondent is being filed as a document along with the Petition.

3.14. Despite the repeated requests of the Petitioner to pay the outstanding towards the overdue interest the Respondent has failed to make the payment to the Petitioner and fulfill its obligations under the PPA. The Petitioner continues to supply electricity to the Respondent for which also payments are being made belatedly. The petitioner was always assured that the issue of interest was being considered. However, rather than pay the same, vide letter dated 28.11.2013 the it has been stated that the TANGEDCO was unable to make timely payments on account of the critical financial situation and therefore the interest on such delayed payments had accumulated. The respondents had also requested the petitioner herein to waive interest levied on the belated payments as a good gesture and as one time measure to support the organization. There was thus, both a specific acknowledgement of liability and a request for a waiver/settlement. The petitioner

had replied to this letter on December 12, 2013 rejecting the said request of the respondents as the delay in payment had also caused immense financial hardship to the petitioner company and the delay had resulted in acute shortfall of cash flows for the petitioner company and it had become difficult for the petitioner company to service its bank loans. The petitioner expected payment of the overdue sums thereafter, however, the payments have not been forthcoming. The liability to make payment is absolute and reiterated by various judgments of the Commission, the Hon'ble APTEL and the Hon'ble Supreme Court. The petitioner states that the financial difficulty or otherwise of the Respondent cannot be cited as a reason for non-payment of interest when it is a contractually due amount.

3.15. It would be significant to state that a petition was filed before this Hon'ble Tribunal seeking directions to be issued to the TANEGDCO to pay interest on delayed payments against invoices raised by wind power producers by the Indian Wind Power Association ("IWPA-) and certain other wind power generators whose WEGs were commissioned prior to the 2009 Tariff Order as the TANGEDCO had taken the untenable position that interest would not be payable where there was no provision in the Tariff Order. The said issue was held in favour of the generators by the Commission and finally decided by the Hon'ble APTEL in order Chairman, TNEB &Anr. v. Indian Wind Power Association and Ors in Appeal No. 11 of 2012 dated 17.04.2012. The relevant paragraphs are extracted hereunder:

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

17. In any power project, one of the important aspects is the promptitude in payment since the delays would seriously affect the viability of the project. All these projects are substantially funded through finances obtained from various funding organizations require regular repayment of principal loan

amount with interest by the generators. Only if regular payments are made for the power generated and supplied the loans can be serviced along with the promised return of investment.

21. Hence our conclusion is as follows:

"The wind power generators are entitled for payment of interest on delayed payment made by the appellant for the purchase of the power from the generators".

3.16. Therefore, as the legal position stands today, even in cases where there was no separate provision in the contract interest has been held to be payable. The petitioner's position stands on a higher pedestal in view of the specific contractual terms. I am advised to state that the issue of interest in case of PPAs and IPPs in Tamil Nadu has also been recently adjudicated upon by the Hon'ble Supreme Court of India in TANGEDCO v. PPN Power Gen Co Pvt Ltd (Civil Appeal No. 4126 of 2013) and the relevant extract has been set out below:

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

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

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

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

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

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

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

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

principle would also apply to the Appellants"

3.17. The petitioner states that the delay in making payment of the invoices has caused extreme difficulty for the Petitioner. The Petitioner has periodic repayment commitments to its lenders and others related to the project and the delay in payment of the invoices is causing severe hardship in meeting the commitments to the lenders. The considerable delay in paying the invoices is also causing difficulty to the Petitioner to sustain its regular operations.

3.18. The Respondent, while enjoying the use of the electricity supplied by the Petitioner ought to also honour its commitments under the PPA and make regular payments. When regular payments are not being made, the Respondent has to pay the interest as agreed under the PPA. The Petitioner has endeavored to amicably resolve the issues that have arisen between the parties, however there has been no commitment on the part of the Respondent to pay the amounts towards interest.

3.19. In the circumstances mentioned above, the Petitioner is filing the present petition for directions to the Respondent to remit the entire amounts due and payable to the Petitioner towards interest for belated payment and to honour its commitments under the PPA.

3.20. Article 15.2 of the PPA provides for Arbitration as the dispute resolution mechanism. In view of section 86(1)(f) of the Electricity Act, 2003 and the decision of the Hon'ble Supreme Court in Gujarat UrjaVikas Nigam Ltd. Vs. Essar Power Ltd. reported in 2008 (4) SCC 755, this the present petition is within the exclusive jurisdiction of the Commission.

3.21. The petitioner submits that it is paying a substantial court fee at 1% of the total claim to file the instant petition for recovery of amounts due to it despite being entitled to the same as a matter of right. The petitioner has been forced by the Respondent to initiate the recovery proceedings due to its obstinate refusal to pay contractual legal dues. This is evidently for the reason that the Respondent is fully aware that the strained financial position of the petitioner due to the belated payments would make it difficult for the petitioner to bear court fees and legal expenses to initiate legal proceedings. The denial of payment being deliberate, it is just and necessary that the costs that are incurred by the petitioner towards court-fees and legal expenses be awarded in favour of the petitioner and against the respondent in the event of it succeeding in the present proceedings.

4. Contention of the Respondent:-

4.1. The Power Purchase Agreement was entered into between the Respondent and the Petitioner, pursuant to selection through the process of tariff based International Competitive Bidding.

4.2. Due to financial constraints of the Respondent / TANGEDCO during the last few years, the TANGEDCO was unable to meet its financial commitments. Due to the loss incurred by the Respondent, over a period of many years, the Respondent's credit rating had deteriorated, which led to difficulty over raising of funds by way of loans also. There was considerable delay in making payments by the Respondents in recent years and that the said non-payment of dues was not intentional. The Respondent is functioning under the purview of the State Government and thereby is discharging its duties in the larger interest of public. It

is the duty of the Respondents / TANGEDCO to generate, purchase and supply electricity to its consumers at a reasonable rate without any hindrance. Due to the aforesaid reasons TANGEDCO was not able to make timely payment from March 2011 onwards and the invoice for payment of surcharge was received.

4.3. The Respondent / TANGEDCO has huge outstanding payments to tune of Rs.4800 crores to several generators from which TANGEDCO procures power. Even the loan repayments and interest payments could not be made on the due dates due to the financial crisis faced by the TANGEDCO. However, all the payments pertaining to energy bills have been made to the petitioners, except the invoices for surcharge payments.

4.4. As per the PPA dated 01-09-2003 clause 15.2, negotiation meeting was conducted with M/s.Lanco on 12-05-2015 towards the interest on delayed payments.

4.5. The Director / Finance, TANGEDCO offered a proposal of waiver of 50% interest on delayed payments in line with the offer already accepted by other generators viz., Rajshree Sugars & Chemicals Limited and others. If 50% waiver is accepted, TANGEDCO would release the balance 50% in 3 instalments. The critical financial position of the TANGEDCO was also highlighted, but M/s. Lanco did not agree for the above proposal given by Director / Finance and however promised to send his reply in writing offer consulting with their Management.

4.6. Accordingly, M/s. Lanco sent their letter dated 19-05-2015 stating as follows:-

“the delay in payments by TANGEDCO has resulted in acute shortfall of cash flows. Also due to operation of plant at a PLF of less than 85% has resulted for the under recovery of fixed charges. Huge interest burden is also being suffered by the company due to delay in payments and based on the above circumstances, the company is not able to consider any waiver in the interest on delayed payments due to the company.”

4.7. TANGEDCO is committed to meet its payment obligations and is taking appropriate steps to revive its financial strength and thereby the question of violation or nonpayment of dues on the part of TANGEDCO does not arise.

4.8. If the petition is admitted, it would lead to huge interest commitments to the already fund starved TANGEDCO resulting in very critical financial position.

5. Additional Counter Affidavit filed by the Respondents:-

5.1. The Petitioner has filed the present petition for a claim of Rs.50,70,03,194/- including interest on interest. As per LANCO's workings, interest payable on the delayed payment is Rs.36,02,68,647/- and interest on interest is Rs.14,67,34,547/- upto 20.12.2014 and therefore it has totally claimed a sum of Rs.50,70,03,194/-.

5.2. As per PPA Clause 9.1 & 9.2, TANGEDCO has worked out the interest payable and has arrived at the amount of Rs.34,06,39,102/-.

5.3. TANGEDCO is facing severe financial crisis and TANGEDCO has promptly paid the interest to generators who have given waiver and executed the undertaking to waive interest (50%/40%) or reduction in interest rate to 6%/7.5%.

5.4. Further it is submitted that the present fund position of TANGEDCO is presented as below:

- The monthly fund inflow of TANGEDCO through revenue from sale of power to its consumers is around Rs.3400 crores and tariff subsidy from Government of Tamil Nadu is around Rs.800 crores per month.
- The monthly fund outflow towards the revenue expenditure is Rs.5950 crores.
- There is an average shortfall of about Rs.1750 Crores for each and every month. Some payments are postponed and made as when loans are received from REC/PFC/ IREDA and other financial institutions.
- Due to Covid-19 pandemic, the revenue collections to TANGEDCO has also gone down and TANGEDCO is facing great hardship towards payment to its Generators.
- Though the Gol announced financial assistance through REC/PFC, the dues with regard to power purchases are pending to be paid from 01/2021 onwards.

5.5. Apart from this, it is pertinent to mention that another group company of the Petitioner, M/s.LANCO Infra Tech Ltd owes huge sums of monies to TANGEDCO. A Letter of Intent for EPC contract was issued to M/s.LANCO Infra Tech Ltd (LITL) on 27.02.2014 for a value of Rs.3921.55 Crores. Later the contract to M/s. LITL was terminated on 09.04.2018 due to poor performance and Corporate Insolvency Resolution Process initiated on the contractor by IDBI in NCLT, Hyderabad under IBC 2016. A total claim of Rs.1882.03 crores from M/s. LITL for non-completion of work and for the consequential losses to TANGEDCO was filed on 25.09.2018 before the Resolution Professional, who was later appointed as Liquidator by

Hon'ble NCLT, Hyderabad. Only a partial claim amount of Rs.708.38 crores was admitted by the Liquidator. An application was filed in the Hon'ble NCLT, Hyderabad Bench to direct the Liquidator to admit the entire claim. Subsequently, the claim had been revised to Rs.2383.61 crore based on the actual value of new EPC contract awarded, in View of GST payable for LD (Liquid Damages), penalty to be claimed and GST payable for SD (Security Deposited) already forfeited. So, an addendum of the claim in appropriate format was sent to the liquidator on 26.04.2019. The NCLT, Hyderabad Bench, has dismissed the appeal on 19-05-2020 through video conference. Appeal has been filed before the Hon'ble NCLAT, New Delhi on 23.11.2020 (Diary NO.:23650) for the total claim of Rs.1882.03 crores and the case is transferred from New Delhi to Chennai and is pending for scrutiny in the Hon'ble NCLAT Registry. Therefore, dues to the tune of Rs.1882.03 crores are receivable from the Petitioner's group companies to the TANGEDCO as well.

5.6. A fresh application for additional claims for Rs.501.58 crores was filed before the Hon'ble NCLT, Hyderabad on 11.11.2020 as IA (IBC) No. 01/2021 in Company Petition No.CP (IB) No.III/7/HDB/2017 and is pending.

5.7. In the above circumstances, if this petition is allowed, it would lead to huge interest commitments to the already fund starved TANGEDCO resulting in very critical financial position.

5.8. The Commission has also passed final orders in the following cases for those who have accepted 6% waiver of interest and dismissed the cases:

- DRP.No.14 of 2011 In M.P.No.12 of 2012 NarsingdasAgrawal-vs-

TANGEDCO

- D.R.P.No. 12 of 2015 - Indowind Energy Ltd., -vs- TANGEDCO
- D.R.P.No. 63 of 2014 - CLP Wind Farms -vs- TANGEDCO

5.9. The Commission may consider the above facts and pass an order for 50% waiver of the interest or fix the rate of interest at 6% p.a. In such circumstances, TANGEDCO assures to make the payment.

6. Written Submission on behalf of the Respondent:-

6.1. The Power Purchase Agreement was entered into between the Respondent and the Petitioner, pursuant to selection through the process of Tariff based International Competitive bidding.

6.2. Due to financial constraints of the Respondents/TANGEDCO during the last few years, the TANGEDCO was unable to meet its financial commitments to the Petitioner, and the invoices were paid belatedly on the dates mentioned therein. Due to the loss incurred by the Respondent, over a period of many years, the Respondent's credit rating had deteriorated, which led to difficulty over raising of funds by way of loans also. Thus, it is submitted that though there was a delay in making payments by the Respondents in recent years, the said non-payment of dues was not intentional.

6.3. The Respondent is functioning under the purview of the State Government and thereby is discharging its duties in the larger interest of public. It is the duty of the Respondents/TANGEDCO to generate, purchase and supply electricity to its

consumers at a reasonable rate without any hindrance. The Respondents/TANGEDCO has huge outstanding payments to tune of Rs.7150 crores to several generators from which TANGEDCO procures power. Even the loan repayments and the interest payments could not be made on the due dates due to the financial crisis faced by TANGEDCO. Due to the aforesaid reasons TANGEDCO was unable to make timely payment from March 2011 onwards and the Petitioner had raised supplementary invoices demanding interest. However, the supplementary invoices raised by the Petitioner is riddled with illegalities and cannot be sustained in law. The two broad grounds on which the Petitioner's supplementary invoices cannot be sustained are:

- (i) The supplementary invoices dated 28.06.2011, 19.08.2011 and 07.12.2011 are barred by limitation.
- (ii) The calculation of interest by the Petitioner under the invoices between June 2011 and 1 7.12.2011 are not In accordance with clause 9.2(f) of the PPA dated 01.09.2003.

6.4. The present DRP is filed seeking payment towards 37 invoices seeking interest between 28.06.2011 and 03.12.2014. The first three invoices dated 28.06.2011, 19.08.2011 and 07.12.2011 are barred by limitation since the present petition was filed before the Commission only on 18.12.2014 beyond the period of three years from the date of invoices. It is now well said that the law of limitation applies to the proceedings before the Commission. In the case of Andhra Pradesh Power Coordination Committee and Others vs. LancoKondapalli Power Limited and Others, (2016) 3 SCC 468 at Paragraph 30, the Hon'ble Supreme Court has held that Limitation Act applies to the proceedings of the Commission and therefore, as

per Article 137 of the Limitation Act, the maximum period of 3 years is available to the Petitioner to file its claims. Following this judgment, the Commission has also reiterated that the Law of Limitation is applicable to the proceedings between parties in TNERC (D.R.P 20 of 2013 dated 25.3.2019) Therefore, from the above judgments, it is clear that the party must have filed its claims within a period of 3 years from the date of accrual of cause of action. It is equally well settled that cause of action for money claims arises on the date the invoice was raised and not paid. Therefore, for the aforesaid invoices, the period of limitation expired after three years from the date of invoice and the present petition is filed beyond the period of limitation. The aforesaid invoices therefore cannot be considered by the Commission.

6.5 The petitioner has filled a tabular statement setting out the details of interest claimed by it in the Written Submission. As per the said calculation, the interest working for the delayed payments of invoices is Rs.36,02,68,647/-. In addition to this interest, the Petitioner has also calculated interest on the interest and compounded that interest on interest and has arrived at a figure of Rs.14,67,34,547/- (up to 20.12.2014) as interest on interest. Therefore, in total the Petitioner has claimed a sum of Rs.50,70,03,194/- in the present Petition.

6.6. A bare reading of clause 9.2(f) of the PPA dated 01.09.2003, shows that the Compound Interest is payable only on the amount due under the agreement, in other words, the invoice raised by the Petitioner. For example, the first supplementary invoice demanding interest in the present petition is dated 28.06.2011. The said invoice is demanding interest for the delayed payment of an

invoice dated 18.3.2011 under which, the amount payable is Rs.21,05,25,217. The due date for the said invoice is 17.04.2011 since it was received on that day and the amount is overdue from 18.04.2011 till 15.06.2011 on which date the amount due under the invoice dated 18.03.2011 was paid by TANGEDCO. Now therefore, applying clause 9.2 (f), the Compound Interest should be calculated on a monthly basis from 18.04.2011 till 15.06.2011 at the SLR rate which works out to Rs.53,64,649/-. However, the Petitioner in the supplementary invoice dated 28.06.2011 for this period, the interest amount has been erroneously shown as Rs.54,50,584/- and no break up has been given showing the interest calculation. Similarly, for all the other invoices also, there is an error in calculation on the side of the Petitioner which has resulted in a huge difference of Rs.1,93,42,469 (Rupees One Crore, Ninety Three Lakhs, Forty Two Thousand, Four Hundred and Sixty Nine Only). As per the Written Submission, which shows the break-up of calculation in the method prescribed but clause 9.2(f), the interest component is only Rs.34,09,26,178/-(Rs.31,73,79,029/- excluding law of Limitation invoices). However, the Petitioner's calculation in the typed set, the total interest due is erroneously shown as Rs.36,02,68,647/-. Therefore, in the calculation itself there is a difference of Rs.1,93,42,469/-.

6.7. The supplementary invoices are not as per clause 9.2(f) since the Petitioner has calculated separate interest on this interest in the supplementary invoice and has arrived at a separate amount of Rs.14,67,34,547/- (upto 20.12.2014), In addition to the compounded interest of Rs.36,02,68,647 -.

6.8. The Legal contention in TANGEDCO is that this interest on interest is not permissible under clause 9.2(f). The Compounding of monthly interest is contemplated only on the principal amount due under the original invoice. For this

sum, the interest has to be compounded month to month. However, what the Petitioner has done is the petitioner has first calculated the compound interest on the principal sum and thereafter, has taken a second interest calculation on the interest and compounded that as well. Nowhere in clause 9.2(f) does it permit the application of Compound Interest separately on the interest component, which would amount to interest on interest.

6.9. Therefore as per clause 9.2(f), the interest payable on the delayed payments In the present case is only Rs.34,09,26,178/- (Rs.31,73,79,029/- excluding law of Limitation invoices) and not Rs.50, 70,03,194/-.

6.10. It is submitted that as per PPA Clause 9.1 & 9.2, TANGEDCO has worked out the interest payable and has arrived at the amount of Rs.34,09,26,178/- (Rs.31,73,79,029/- excluding law of limitation invoices). The calculation is along with this Written Submissions, which is the only interest that can be legally claimed by the Petitioner.

6.11. The PPA dated 01.09.2003 Clause 15.2, negotiation meeting was conducted with M/s.LANCO on 12.05.2015 towards the interest on delayed payments. It is submitted that the Director/Finance/TANGEDCO offered a proposal of waiver of 50% interest on delayed payments in line with the offer already accepted by other generators which is M/s. Rajshree Sugars & Chemicals Limited and others. The details of which are enumerated below:

Sl. No.	Name of the Generator	Total LPSC amount (in Rs.)	Waiver %	Amount Paid (in Rs.)
---------	-----------------------	----------------------------	----------	----------------------

1	NLC		619,21,73,624	50%	309,60,86,812
2	Dhariwal Infrastructure		15,57,28,114	50%	7,78,64,057
3	Adani Enterprises		34,69,59,258	50%	17,34,79,629
4	GMR Energy		30,09,81,540	50%	15,04,90,770
5	KSK Mahanadhi		85,33,13,598	50%	42,66,56,799
6	IL & FS		140,46,75,316	50%	70,23,37,658
7	TAQA Neyveli		149,89,15,568	50%	74,94,57,784
8	Ponni Sugars		2,40,14,371	50%	1,20,07,186
9	Bannari Tirukovilur	Amman	5,63,01,605	50%	2,81,50,803
10	Rajshree Semmedu	Sugars	10,23,76,152	50%	5,11,88,076
11	Bannari Thiruvannamalai	Amman	5,49,07,251	50%	2,74,53,626
12	EID Parry / Pettavaithalai		5,81,04,933	50%	2,90,52,467
13	OPG Power		36,55,00,000	50%	18,27,50,000
14	Coastal Energen		386,83,10,630	50%	193,41,55,315
15	Dhariwal Infrastrucutre		94,17,85,016	50%	47,08,92,508
16	Jindal (LTOA)		125,63,39,166	50%	62,81,69,583
17	Jindal (MTOA)		28,57,79,704	50%	14,28,89,852
18	BALCO I & II		168,61,12,328	50%	84,30,56,164
19	PTC		88,31,39,444	50%	44,15,69,722
20	GMR		106,22,60,966	40%	63,73,56,580
21	NETS		31,33,94,200	SBI PLR agreed at 7.5%	16,25,82,695
22	Pioneer		30,00,94,317	50%	15,00,47,158
	Total		2201,11,67,100		1111,76,95,242

6.12. The above generators had mutually agreed with TANGEDCO to waive the interest at the rate of 50%/40% or to work out interest @ 7.5% p.a. and have received their interest payment. That apart, even in following cases where the Generator had filed DRPs on the file of the Commission, the Generators had later accepted for 50% interest waiver and accepted 6% interest and withdrawn the petitions:-

- DRP.No.14 of 20 11 in M.P.No.12 of2012 - Gangadhar NarsingdasAgrawal - vs - TANGEDCO

- D.R.P.No. 12 of 2015 - Indowind Energy Ltd., -vs- TANGEDCO
- D.R.P.No. 63 of 2014 - CLP Wind Farms -vs- TANGEDCO

6.13. If 50% waiver is accepted by the petitioner, TANGEDCO would release the balance 50%. The critical financial position of the TANGEDCO was also highlighted during the above mentioned negotiations, but M/s Lanco did not agree for the above proposal given by Director/Finance. At present TANGEDCO is facing severe financial crisis and in the past TANGEDCO has promptly paid the interest to Generators who have given waiver and executed the undertaking to waive LPSC (50%/40%) or reduction in interest rate to 6%/7.5%.

6.14. The present fund position of TANGECO is presented as below:

- The monthly fund inflow of TANGEDCO through revenue from sale of power to its consumers is around Rs.3400 crores and tariff subsidy from Government of Tamil Nadu is around Rs.800 crores per month.
- The monthly fund outflow towards the revenue expenditure is Rs.5950 crores.
- There is an average shortfall of about Rs.1750 Crores for each and every month. Some payments are postponed and made as when loans are received from REC/PFC/IREDA and other financial institutions.
- Due to Covid-19 pandemic, the revenue collections to TANGEDCO has also gone down and TANGEDCO is facing great hardship towards payment to its Generators.
- Though the Gol announced financial assistance through REC/PFC, the dues with regard to power purchases are pending to be paid from 02/2021

onwards.

6.15. Another group company belonging to the petitioner, M/s. LANCO Infra Tech Ltd. owes huge sums of monies to the TANGEDCO. It is submitted that a Letter of Intent for EPC contract was issued to M/s.LANCO Infra Tech Ltd on 27.2.14 for a value of Rs.3921.55 Crores. Later, the said contract with M/s.LITL was terminated on 9.4.18 due to poor performance and Corporate Insolvency Resolution Process initiated on the contractor by IDBI in NCLT, Hyderabad under IBC 2016. A total claim of Rs.1882.03 crores from M/s.LITL for non-completion of work and for the consequential losses to TANGEDCO was filed on 25.09.2018 before the Resolution Professional who was later appointed as Liquidator by Hon'ble NCLT, Hyderabad. Only a partial claim amount of Rs.708.38 crores was admitted by the Liquidator.

6.16. An application was filed in the Hon'ble NCLT, Hyderabad Bench to direct the Liquidator to admit the entire claim. Subsequently, the claim had been revised to Rs.2383.61 crore based on the actual value of new EPC contract awarded, in view of GST payable for LD (Liquid Damages), penalty to be claimed and GST payable for SD (Security Deposited) already forfeited. So, an addendum of the claim in appropriate format was sent to the liquidator on 26.04.2019. The NCLT, Hyderabad Bench, has dismissed the appeal on 19.05.2020 through video conference and an appeal has been filed before the Hon'ble NCLAT, New Delhi on 23.11.2020 (Diary No.23650) for the total claim of Rs.1882.03 crores. The case was transferred from New Delhi to Chennai and is pending for scrutiny in the Hon'ble NCLAT Registry. Therefore, a sum of Rs.1882.03 crores is due from the petitioner's group companies to the TANGEDCO as well.

6.17. The fresh applications for additional claims for a sum of Rs.501.58 crores was filed before the Hon'ble NCLT, Hyderabad on 11.11.2020 as LA. (IBC)

No. 01/2021 in Company Petition No.CP(IB) No.111/7/HDB/2017 and is pending. In the above circumstances, if this petition is allowed, it would lead to huge interest commitments to the already fund starved TANGEDCO resulting in very critical financial position.

6.18. The Commission may consider the above facts and the dire financial position of TANGEDCO and exercise its regulatory powers and inherent powers under Regulation 48 of TNERC Conduct of Business Regulations, 2004 and pass an order for 50% waiver of the interest or fix the rate of interest at 6% p.a. In such circumstances, TANGEDCO assures to make the payment depends on the fund availability. It is well settled that even in cases where interest has been contractually agreed, Courts have the discretion to award lesser interest, considering the facts and circumstances of the case. The Hon'ble Apex Court in the judgment reported in 1998 (2) SCC 317 [N.M. Veerappa v. Canara Bank and others], considered various judgments on this issue and summarized the principle in paragraph 18 wherein the Apex Court has held albeit in the context of the CPC that Courts have the discretion to award interest.

6.19. Under these circumstances, it is prayed that the Commission may pass an order to waive 50% of interest of Rs.34,09,26,178/- (Rs.31,73,79,029/- excluding law of Limitation invoices) which amounts to Rs.17,04,63,089/- (Rs.15,86,89,514/- excluding law of limitation invoices) or in the alternate, fix the interest rate @6% which amounts to Rs.12,24,90,387/- (Rs.11,38,34,498/- excluding law of limitation Invoices).

7. Findings of the Commission:-

7.1 This petition has been filed to pass an order directing the Respondents to forthwith make payment of a sum of Rs.50,70,03,194/- being the interest due and payable to the petitioner as on 20-12-2014 together with further interest that would accrue from such date until the date of payment in respect of the delayed payments made by TANGEDCO, for sale of power made by the petitioner under the Power Purchase Agreement dated 01.09.2003 along with the costs.

7.2. The petitioner had been supplying the entire electricity generated in its plant to the Respondent at a levellised Tariff of Rs.2.32 per kWhr. The Monthly Billing Statements were raised by the petitioner on the Respondent periodically. As defined in clause 1.1 of the Power Purchase Agreement, the due date for the bill is as below –

"Due Date of Payment" in respect of a Billing Statement, means the date after 30 days from the Day of receipt of such invoice by the Board's Authority, such Billing Statement submitted by the Company to the Board pursuant to Section 9.1."

And paid at a per annum rate of interest equal to the sum of the prime lending rate of the State Bank of India applicable during the relevant period, and two per cent (2%).

7.3. From April 2011, the second Respondent has been delaying for making payment for the invoices raised by the petitioners. For such delayed payments made by the Respondent, the petitioner has raised supplementary invoices from June 2011 to November 2014 towards overdue interest. The respondent sought the petitioner to waive the interest levied on the belated payment on account of its

critical financial position, vide its letter dated 28-11-2013; but the petitioner has rejected it.

7.4. The Respondent has stated that some of its invoices are time barred claims before this court under the Limitation Act 1963 and are to be disallowed, moreover the interest claim made by the petitioner is not justifiable as per clause 9.2(f) of the Power Purchase Agreement.

7.5. From the submissions of both the parties, it is found that the dispute in this case is on payment of only interest due to the petitioner for having paid the dues beyond the due date as defined under Clause 1.1 of the Power Purchase Agreement. The petitioner has agreed that entire principle have already been paid by the petitioner fully.

7.6. In this case, on a careful consideration of pleadings and arguments of both the parties, we find that only two issues to be answered, namely,

1) Whether the supplementary invoices, dated 28-06-2011, 19-08-2011 and 07.02.2011 claimed towards interest, are barred by limitation as contended by the Respondent?

2) Whether the interest arrived at by the Petitioner is correct or the interest computed by the Respondent is in accordance with the provisions of the PPA dated 01.09.2003 entered between the parties?

1) Whether the supplementary invoices dated 28-06-2011, 19-08-2011 and 07.02.2011 are barred by limitation as contended by the Respondent?

- (a) The petitioner submits that TANGEDCO has not made payment in due date for the Power supplied from 17.04.2011 to 08.11.2014. In this connection, the petitioner submits that it has raised 43 nos. of supplementary invoices to the TANGEDCO towards interest claim as per the method specified under Clause 9.2 (f) of the Power Purchase Agreement.
- (b) The Respondent contends that, out of these invoices, 3 Nos. Supplementary invoices dated 28-06-2011, 19-08-2011 and 07-02-2011 in which the petitioner has claimed interest for the bills claimed for the period from 17.07.2011 to 29.11.2011, are barred by limitation. Since the present petition has not been filed within the period of three years from the date of Invoice, but it was filed only on 18.12.2014 before the Commission.
- (c) The Respondent also referred to the decision of Hon'ble Supreme Court of India in Andhra Pradesh Power Coordination Committee and Others VsLancokondapalli Power Limited and Others (2016) 3 SCC 468 wherein the Law of Limitation has been made squarely applicable to the quasi judicial Tribunals as well. Hence, in respect of their three invoices dated 28.06.2011, 19.08.2011 and 07.12.2011, the law of limitation is applicable. Since these were brought before the Commission after expiry of 3 years period, hence these cannot be considered by the Commission.
- (d) We have considered the question of applicability of limitation and are in agreement with the respondent that as per the present legal position, the law of limitation is applicable to the proceedings before the Commission. Having said that, the incidental question which arises for consideration is when the

invoices under reference are barred by limitation and whether there is any acknowledgment of liability by the respondent.

- (e) In this case, the Respondent has sought 50% waiver of interest on belated payment from the petitioner vide its letters dated 28.11.2013 and 27.01.2014 which, in our view, amounts to acknowledgment of liability and the period of limitation would run from 28-01-2014 the last date on which the acknowledgment was reiterated . For better appreciation of the case, let us reproduce the section 18 of the Limitation Act, 1903:-

"Section 18 in the Limitation Act, 1963

18. Effect of acknowledgment in writing.—

(1)Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

As provided under the Limitation Act above, there is an acknowledgement of liability on the part of the Respondent in the case on hand; hence the petitioner is entitled for extension of limitation and the limitation period will commence from the last date of acknowledgement i.e. 27.01.2014.

- (f) Hence, the contention of the Respondent seeking to bar these 3 invoices under the Limitation Act, 1963 is not sustainable.

2) Whether the interest arrived at by the Petitioner is correct or the interest computed by the Respondent is in accordance with the provisions of the PPA dated 01.09.2003 entered into between the parties?

(a) The petitioner's claim in this petition is for issuance of direction to make payment of a sum of Rs.50,70,03,194 towards interest due from the Respondent. The petitioner has not disputed on payment of original Invoice amount (principle) payable for the supply of power as per the Power Purchase Agreement. The petitioner has stated that though the petitioner has been raising monthly bills on the Respondent for the supply of power, since April 2011, the Respondent delayed for making of payment on such invoices. The petitioner raised supplemental invoices on the Respondent towards interest for delay in payment under compounding method as stipulated in clause 9.2(f) of the Power Purchase Agreement.

(b) The Supplemental invoices were raised by the petitioner from June 2011 to November 2014. In this connection, the petitioner has submitted the copies of 43 nos. of Supplemental invoices towards interest for delay in payment of principle amount in addition to a final invoice dated 27.11.2014 for compound interest claimed for an amount of Rs.14,09,65,959 towards overdue interest claim on interest payment. Though the petitioner furnished the month wise amount of interest claim, the calculation details for such interest claim has not been attached therewith.

(c) The Respondent also in its counter affidavit accepted the delay on its part in making payment for the invoices raised for supply of power. Having received supplemental invoices for interest based on the stipulation under clause 9.2(f) of the PPA, the Respondent had not paid such dues to the petitioner. The Respondent, having regard to its critical financial position, sought a

relief of waiver of interest from the petitioner, but it was not accepted by the petitioner. Under this circumstances, the Respondent pleads before us that the interest computed by the petitioner in this petition is not as per the provisions of the PPA and that the claim should not be admitted as it is, since it consists of arithmetic error.

(d) The Respondent has submitted a detailed calculation statement for interest payable to the petitioner. It is seen that, the respondent has calculated the Interest for delayed payment under compounding method until the date of payment as per clause 9.2 (f) of the PPA as filed by them under Annexure-1; further it has worked out the interest on such interest due, till 20-12-2014 (under Annexure-2). The Respondent has furnished detailed break up of interest calculation for every part payment and every change in interest rate separately until the final payment is made by it. We find no serious error in calculation of interest submitted by the Respondent which works out to an interest due of Rs.41,72,84,339 to be paid by the TANGEDCO to the petitioner.

(e) We also find clarity and correctness in the method of calculation furnished by the Respondent unlike the petitioner whose calculations are too general in nature and not specific. Hence we accept the interest calculated by the Respondent as below- (without deducting such amount considered as time barred claim (3 invoices) by the Respondent)

- (i) Interest calculated upto the period of principle payment – Rs.34,09,26,178
(ii) Interest calculated on the above interest upto 20.12.2014 – Rs.11,23,03,622
- Total - Rs.45,32,29,800

Though the interest is worked for the period upto 20.12.2014, the petitioner is entitled to claim the interest till the date of payment in respect of the delayed payments.

7.7. As regards the plea for waiver of interest on the ground of the critical financial position of the Respondent, in our view, the same cannot be pleaded for non-settlement of dues and the Commission cannot order any waiver of interest on its own which is due to the Petitioner as provided under the clauses of the PPA. We have held so in our earlier orders and it bears no repetition here. When there are clear provisions for payment of interest for delayed payment in the agreement, it is only for the parties to negotiate for waiver and it is not for the Commission to go beyond the agreement and order any reduction in the rate of interest.

We also find that there is no case for invocation of inherent powers when the PPA governs the settlement of dues and there is no ambiguity of whatsoever nature in the PPA. It is to be understood that these are basically commercial contracts and are to be weighed and decided on the commercial principles. The invocation of inherent powers, in our view, has no place in the scheme of commercial contracts unless there is a fit case for force majeure. Hence, we cannot agree to the proposition advanced by the respondent on the invocation of Regulation 48 of the Conduct of Business Regulations.

We have also considered the contention of Respondent in its additional counter wherein has been submitted that the petitioner's another group company

viz. M/s. LANCO Infra Tech Ltd. owes an amount of Rs.1882.03 Crores for non-completion of work and in this regard an appeal was filed on 23-10-2020 before the Hon'bleNCLAT, New Delhi and the case is now transferred to Chennai. However, the issues in this regard being different and the matter being pending before a different Forum and in the absence of any specific prayer from the Respondent, the Commission cannot pass any order of adjustment thereon. Hence, the Respondent is directed to take necessary legal action to adjust the interest payable to the petitioner from the amount due from the petitioner's group company.

7.8. With the above findings, we agree with the detailed calculation of interest furnished by the Respondent. Hence, we direct the Respondent to settle the interest due of Rs.45,32,29,800 (for the period upto 20.12.2014) along with further interest for the period upto the date of payment, to the petitioner.

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

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

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

/True Copy /

**Secretary
Tamil Nadu Electricity
Regulatory Commission**