

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

PRESENT:-

Thiru.K.Venugopal **Member**

and

Thiru.S.Nagalsamy **Member**

D.R.P.No.9 of 2012

T.T.Limited
305/1-A, Thirupathi Thottam
Thevampalayam, Palangarai Village
Avinashi – 641 654.

.. Petitioner
(Thiru R.S.Pandiyaraj and 3 others
Advocate for Petitioner)

Vs

1. The Chairman
TANGEDCO (TNEB)
144, Anna Salai
Chennai – 600 002.
2. The Director of Finance
TANGEDCO (TNEB)
144, Anna Salai
Chennai – 600 002.
3. The Chief Financial Controller
TANGEDCO (TNEB)
800, Anna Salai
Chennai – 600 002.
4. The Chief Engineer, NCES
TANGEDCO (TNEB)
800, Anna Salai
Chennai – 600 002.
5. The Superintending Engineer
Udumalpet Electricity Distribution Circle
TANGEDCO (TNEB)
Udumalpet.

....Respondents
(Thiru P.H. Vinodh Pandian
Standing Counsel for the Respondents)

Dates of hearing : 17-04-2012, 29-05-2012,
27-11-2012 and 08-01-2013

Date of order : 28-03-2013

The above D.R.P.No.9 of 2012 came up for final hearing before the Commission on 08-01-2013. The Commission upon perusing the above petition and the connected records and after hearing both sides passes the following order:-

ORDER

1. Prayer of the Petitioner in D.R.P. No.9 of 2012:-

The prayer of the petitioner in D.R.P.No.9 of 2012 is to direct the respondent Board to forthwith make payment of the sums due to the petitioner, as on 10-02-2012, for energy supplied to a sum of Rs.5,03,353/- under the respective Energy Purchase Agreement together with interest, for a sum of Rs.17,65,126/- at 1.5% for every month from the respective due date of the respective bills.

2. Facts of the case:-

(a) The petitioner is owning their wind mill coming under the Udumalpet Electricity Distribution Circle with HT WEG SC No.1384 and producing electricity therefrom and supplying / selling to the respondents TNEB at the above circle.

(b) The petitioner has entered into a Energy Purchase Agreement (EPA) with the Respondents on 26-05-2008 and executed the agreement in line with Order No.3 dated 15-05-2006 issued by the Commission for the purpose of selling the energy generated through their wind mill after deducting the power imported from the grid and paying the reactive power charges for using the respondent's transmission facilities.

(c) The period stipulated for recovery of dues of HT consumers is seven days. As per clause 10.15 of Order No.3 of 2006, the TNEB is obliged to make payment within seven days to the wind energy generator

(d) The respondent Board has failed to make payments despite reminders by the petitioners and even when payments are forthcoming, it is without any interest. Such an action on the part of the respondent is in clear violation of the orders of the Commission and also the EPA entered between the parties. Hence the petitioner has filed this petition.

3. Contentions as set out in the Petition:-

(a) The TNEB is entitled to charge its consumers for delayed payment of their dues @ 1.5% per month in accordance with clause 5 (4) of the Tamil Nadu Electricity Supply Code 2004 of the Commission. Therefore, it is logical that even where there is no specific provision in the orders of the Commission on delayed settlement of bills of generators by the TNEB; liability for interest should be deemed to accrue.

(b) The settlement of bills for the petitioner by the respondents have been delayed for more than 12 months and therefore interest liability for such period at 1.5% per month would be reasonable in light of section 34 (1) of the Code of Civil Procedure 1908.

(c) The principal amount payable by the respondent Board as on 10-02-2012 sums up to Rs.5,03,353/- for which the respondent Board has not made payment till date which amounts to violation of orders of the Commission.

(d) As per Clause 10.14 of Order No.3 of 2006 and clause 6 of the EPA the respondent is bound to ensure adequate and bankable payment security arrangements in favour of the generator for an amount equivalent to an average monthly bill. The respondent Board has failed to execute any such bankable security arrangements in favour of the petitioner for power purchased by it which has caused huge financial burden on the petitioner. The petitioner is entitled for interest @ 1.5% per month on this ground alone.

(e) In similar matter in M.P.No.36 of 2010, this Commission was pleased to enable those petitioners who are not covered by Order No.1 of 2009 to raise claim of interest for delayed payments and if such claim is not honoured, the petitioners may approach the Commission with specific complaints for violation of the order. This decision is squarely applicable to the present petitioner also.

4. Contentions of the Respondent in the Counter Affidavit:-

(a) Out of the total claim made by the petitioner, in the affidavit, towards sale of power for Rs.5,03,353/- TANGEDCO has released a sum of Rs.1,97,930/- during April 2012, towards the energy purchased upto March 2011. Further claim has not been received from the petitioner for December 2010 and February 2011 bills amounting to Rs.1,30,202/-

(b) The delay in making payments by the respondent was due to financial constraint in the recent years and the said non-payment of dues is not intentional.

(c) It is the duty of the respondent to generate and supply electricity to its consumers at a subsidized rate without any hindrance.

(d) The respondent had huge outstanding payments to the tune of Rs.10,000/- crores to several generators and coal companies also. It is submitted that even the loan repayments and interest payments could not be made on the due dates due to the financial crunch of the respondent.

(e) In spite of the above circumstances, the respondent managed to make payments of three months bills to Wind Energy Generators during April 2012. It is submitted that the above payments made clearly indicates the bonafide intention of the respondent to repay the outstanding dues to the Wind Energy Generators.

(f) Order No.3 dated 15-05-2006 does not provide for payment of interest. The prayer in directing payment to the generators with interest at 1.5% for every month from the respective due date of the bills would not arise. There is no contract between the petitioner and the TANGEDCO for payment of interest and as such the relief in this respect is liable to be rejected.

(g) As the payment of interest would involve huge interest commitments and as there is no provisions to pay interest in the tariff order applicable, TANGEDCO had filed an appeal before the Hon'ble Appellate Tribunal for Electricity. However, the Appellate Tribunal for Electricity was pleased to dismiss the appeal filed by TANGEDCO recently. As the TANGEDCO is of the view that it has a case for success in the appeal, an appeal is being filed before the Hon'ble Supreme Court. Even otherwise, the period as claimed by the petitioner and the interest claimed are disputable and the petitioner is put to strict proof of the same.

(h) In view of the decision to file an appeal before the Supreme Court and as any decision in the above petition may likely to result in multiplicity of proceedings on one and the same issue, this Commission may be pleased to dismiss the above petition for the present in public interest.

5. Contentions set out in the Additional Counter:-

(a) During the hearing on 27-11-2012, the Commission directed the parties to discuss the matter and file a written submission to the Commission. TANGEDCO requested the petitioner company to depute its representative for mutual discussion on 01-12-2012. The petitioner company deputed its representative on 01-12-2012 to TANGEDCO's office for discussions.

(b) The financial constraints of TANGEDCO and the efforts taken to mobilize funds were explained to the representative. It was assured that the outstanding amount towards energy bills, if any upto March 2012 in respect of S.C.No.1384 will be cleared within three months.

(c) Regarding the claim of interest by the petitioner, the company was requested not to claim interest as the company is not entitled to interest as per the agreement between the parties.

(d) The representative from M/s.T.T.Limited informed that the company will go in accordance with law in the present case and further informed that the company is not willing to withdraw its claim towards interest.

(e) TANGEDCO will be in a position to clear the windmill dues upto March 2012 within the next three months. With all the above efforts, TANGEDCO's financial health will improve by the end of the financial year 2012-13 which will help in clearing the future bills to the wind mill generators without delay.

(f) As far as the order of this Commission in M.P. No.36 of 2010 directing TANGEDCO to pay interest on delayed settlement of bills as per the provision of Code of Civil Procedure 1908 at the rate of 1% per month is concerned, it is submitted that this would involve huge interest commitments, TANGEDCO had filed an appeal before the Hon'ble Appellate Tribunal for Electricity. The Appellate Tribunal for Electricity was pleased to dismiss the appeal filed by TANGEDCO. However, an appeal has been filed before the Hon'ble Supreme Court.

6. Finding of the Commission:-

DRP No. 9 of 2012 was filed by the petitioner M/s. T.T. Limited, Avinashi with a prayer for payment for energy supplied along with interest at the rate of 15% for every month from the respective due date. The Commission had directed the parties to carry out discussions regarding the settlement of Wind Mill dues. A copy of the minutes of the meeting between TANGEDCO and M/s. T.T. Limited was filed before the Commission. From the minutes the following are observed.

- i) TANGEDCO had assured that the outstanding towards energy bills (if any) upto March 2012 will be cleared within 3 months.
- ii) Regarding the claim of interest by the company, it was explained by Chief Financial Controller/General, TANGEDCO that there was no interest clause in the Agreement between TANGEDCO and the

petitioner and the appeal filed by TANGEDCO against order of Hon'ble TNERC in M.P. No. 36 of 2011 is pending before the Hon'ble Supreme Court. Chief Financial Controller/General requested the company not to claim interest as the company is not presently entitled to interest as per the Agreement.

- iii) Mr. Rajendran representing the petitioner informed that the company will go in accordance with law in the present case and further informed that the company is not willing to withdraw its claim towards interest.

The additional affidavit filed by the Respondent expressed the financial position of the Respondent TANGEDCO. Para 13 of the additional affidavit is extracted below:-

“As far as the Order of this Hon'ble Commission in M.P. No. 36 of 2010 directing TANGEDCO to pay interest on delayed settlement of bills as per the provision of code of Civil procedure 1908 at the rate of 1% per month, I submit that this would involve huge interest commitments, TANGEDCO had filed an appeal before the Hon'ble Appellate Tribunal for Electricity. The Appellate Tribunal for Electricity was pleased to dismiss the appeal filed by TANGEDCO. However, an appeal has been filed before the Hon'ble Supreme Court.”

The parties were last heard on 08-01-2013. The Commission has perused the written submission and also the oral submission. On careful perusal of the pleadings of both the parties, it is evident that the fact of delay in making payment is not disputed. It is also not disputed that there is no express provision for payment of interest in the EPA entered by the petitioner and the respondent. But the payment mechanism has been provided in clause 5 of the said EPA which inter-alia provides as follows:-

“ 5. Billing and Payments:-

a. xxx

b. *The payments to the wind energy generators in respect of the energies supplied shall be made by the Board within the same period as provided by the Board to recover payment from its HT industrial consumers”.*

It is also an admitted fact that the agreement dated 20-05-2008 entered between the parties is covered by Order No.3 dated 15-05-2006 of the Commission. As per clause 10.15 of the said order dated 15-05-2006, the payments to the generators in respect of energy supplied shall be made by the distribution licensee within the same period as provided by the distribution licensee to recover payments from its industrial consumers. It is to be noted that the period stipulated for recovery of dues of HT consumers is seven days. This would mean that the TNEB has to make payment to the generators within seven days.

From the above discussion, it is clear that there is a time-limit for making payment by the respondent to the petitioner (generator) for the energy supplied by the respondent. The only question to be resolved is whether the petitioner is entitled for interest for the belated payment in the absence of a specific provision for payment of interest either in the EPA or in the order No.3 dated 15-5-2006 issued by the Commission. The contention of the respondent is that due to financial crunch payment could not be made on the due dates and the said order No.3 dated 15-05-2006 does not provide for payment of interest. This argument cannot be countenanced for the reason that there will be no sanctity of clause 5(b) of the agreement imposing the time frame for payment / and delayed payment without any

entitlement of interest will lead to a situation whereby the person liable to pay would not be inclined to pay.

The Commission in an earlier occasion has ordered in M.P.No.36 of 2010 directing TANGEDCO to pay interest on delayed settlement of bills as per the provision of Code of Civil Procedure, 1908 at the rate of 1% per month, which order has been upheld by the Hon'ble APTEL also. The respondent has not assailed the above orders of the Commission on any legal basis but instead in their additional affidavit filed on 4-12-2012 has stated that an appeal has been filed in the Supreme Court. The respondent has submitted that the payment of interest would involve huge interest commitments and this argument would not be a ground for denying the interest, if the petitioner is eligible for the same.

The facts of this case as discussed above are exactly the same as in the case dealt with by Hon'ble APTEL in Appeal No.11 of 2012. The said appeal No.11 of 2012 the Hon'ble APTEL had the occasion of deciding the liability of the appellant for payment of interest on the delayed payments to the generators. In the said Appeal also, there was no clause relating to the payment of interest on delayed payment either in the EPA or in the order of the Commission in order No.1 of 2006 dated 15-5-2006 which covered the transaction of the wind power generators with the TNEB in the said case. As such the factual matrix in the said Appeal No.11 of 2012 is similar to the case on hand.

The conclusion of the Hon'ble APTEL is contained in para 21 in the said Appeal No.11 of 2012 is extracted below:-

"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."

To a specific query from the Commission as to whether any stay order exist in the appeal filed before the Hon'ble Supreme Court against the Order of the APTEL in this regard, the Respondent TANGEDCO had only confirmed that an appeal has been filed before Hon'ble Supreme Court. Since no stay has been granted, the Commission is of the view that the above order of the APTEL holding that the interest is payable will apply to this case also. The interest shall however be payable at the rate of 10% per annum instead of 18% as claimed by the Appellant as ordered by the Hon'ble APTEL in its order in Appeal No. 23 of 2010 dated 9-7-2010, from the date the payments became due.

Ordered accordingly.

7. Appeal:-

An Appeal against this Order of the Commission shall lie before the Appellate Tribunal for Electricity under section 111 of the Electricity Act 2003 within 45 days, from the date of receipt of a copy of this order by the aggrieved person.

(Sd.....)
(S.Nagalsamy)
Member

(Sd.....)
(K.Venugopal)
Member

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission