

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)

D.R.P. No.4 of 2015

M/s.Ghanshyamdas Kanhaiyalal Totala HUF
No.5/408, Marathe Mills Corner
Date Mala, Ichalkaranji – 416 115
Dist : Kolhapur
Maharashtra – 416 115.

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

Vs

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

....Respondents
(Thiru M.Gopinathan
Standing Counsel for the Respondents)

**Dates of hearing : 05-09-2019; 17-09-2019; 22-10-2019;
10-12-2019 and 11-02-2020**

Date of order : 27-10-2020

The D.R.P.No.4 of 2015 came up for final hearing before the Commission on 11-02-2020 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 in D.R.P. No.4 of 2015:-

The prayer of the petitioner in this D.R.P.No.4of 2015 is to pass an order, directing the respondents to forthwith make payment of a sum of Rs.2,46,253/- being the interest due and payable to the petitioner against delayed payments made by TANGEDCO for power supplied and to direct the respondents to bear the costs of the instant petition including court fees and legal expenses and make payment of the said sum to the petitioner.

2. Facts of the Case:-

This petition has been filed to direct the Respondents to forthwith make payment of a sum of Rs.2,46,253/- being the interest due and payable to the petitioner against delayed payments made by TANGEDCO for power supplied and direct the Respondents to bear the cost of the instant petition including court fees and legal expenses.

3. Contentions of the Petitioner:-

3.1. This petition is being filed seeking to claim interest on delayed payment against invoices raised by the petitioner for which payment has already been made by TANGEDCO.

3.2. In addition to the payments which have been made belatedly, there are substantial sums of money due under invoices raised which are as yet outstanding. The payment of the invoice amounts together with the interest thereon is also due and payable.

3.3. The petitioner is currently preferring the claim only in respect of interest portion of invoices already made as the cause of action for making a claim on interest for payments against unpaid invoices would arise only when payments in that regard are received and when such payments are made without interest.

3.4. The petitioner is a yarn merchant and commission agent which is inter alia, involved in the business of developing and operating Wind Energy Generation projects by utilizing clean technology. The petitioner is having one Wind Power Generators to the tune of 225 KW in the State of Tamil Nadu.

3.5. The petitioner has established Wind Power Generation projects in Tirunelveli in the State of Tamil Nadu with a total capacity of 225 KW i.e. 0.22 MW. The power generated by these units is being sold to the 1st respondent under the terms of agreements executed by the petitioner with the TANGEDCO.

3.6. The location of its Windmills, date of commissioning, capacity and HT SC Nos. are set out herein below:-

No.	Location of Windmill & Jurisdictional TANGEDCO Circle	Capacity of Windmill	HT SC. No.
1	Tirunelveli District, Tirunelveli Electricity Distribution Circle, TANGEDCO	22 MW	3597

3.7. The power generated by these units is being sold to TANGEDCO under the respective agreements. The petitioner has been raising invoices from time to time in accordance with the Contracts and Tariff Orders. However, for the past few years, the payments that have been received from TANGEDCO are being consistently delayed. Even when payments are made belatedly, they are being made without any interest for such delay.

3.8. In Tariff Order No.1 of 2009 issued by the Commission, there is a specific inclusion of interest payment. Para 8.11.1 of the Tariff Order deals with billing and payment and is extracted hereunder:-

“8.11.1. When a wind generator sells power to the distribution licensee, the generator shall raise a bill every month for the net energy sold after deducting the charges for startup power and reactive power. The distribution licensee shall make payment to the generator within 30 days of receipt of the bill. Any delayed payment beyond 30 days is liable for interest at the rate of 1% per month.”

3.9. The Hon'ble APTEL in its judgment in Chairman, TNEB & Anr. V. Indian Wind Power Association and Ors. in Appeal No.11 of 2012 dated 17-04-2012 held as follows:-

“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 requiring 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.*

x x x

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.”

3.10. Therefore, all Wind Generators are entitled to interest on delayed payment @ 1% per month for every month's delay from the due date. Only a 30 day time limit is provided for payment and any delay beyond that will have to be made with interest @ 1% per month.

3.11. In the light of the specific provision contained in Tariff Order No. 1 of 2009 on interest on delayed payments, which is applicable to all WEGs commissioned after 19.09.2008 such as those of the petitioner, and because of the ruling of the Hon'ble APTEL in Appeal 11 of 2012, the petitioner is entitled to interest on delayed payments including those payments which have already been remitted.

3.12. The petitioner has raised invoices for power supplied from its WEGs on a monthly basis as per the terms of the EPA and the petitioner has received payments against invoices for the period upto 31st March 2014. However, these payments have been delayed by as much as one year or more. Despite the substantial delay, TANGEDCO has not made any payment of interest on

delayed payments contrary to the order of the Hon'ble APTEL and the provisions of the Tariff Order No.1 of 2009 and the terms of the agreement.

3.13. TANGEDCO is due and liable to pay to the petitioner a sum of Rs.2,46,253/- towards interest on delayed payments alone.

3.14. The substantial delays in making payments by the respondent have caused severe difficulties for the petitioner in meeting the financial obligations towards banks and financial institutions. The interest on delayed payments being much lower than the payments, the petitioner has to make to its banks / financial institutions under the term loans, the delay in payments by TANGEDCO has also hampered the petitioner's capacity to carry on its business.

3.15. The petitioner had sent letters of demand on 20-12-2011 and 07-03-2012 seeking payment of interest on delayed payments and there has been no response or positive action from the respondents. The respondents have been making ad-hoc payments from time to time which are substantially delayed and even while making such admittedly belated payment, they have failed to pay interest on such delayed payments.

3.16. The petitioner is paying a substantial court fee of Rs.20,000/- to file the instant petition for recovery of interest on delayed payments despite being entitled to the same as per the terms of the EPA, order of APTEL in Appeal No.11 of 2012 and Tariff Order No.1 of 2009 issued by this Commission. The action of

TANGEDCO in not paying the petitioner interest on delayed payments, which the petitioner is legally entitled to, is contrary to the terms of the contract / EPA and binding judgments and the petitioner submits that it ought to be awarded the costs of the petition including court fees and legal expenses incurred.

4. Contentions of the Respondents:-

In the counter affidavit filed on 22-10-2019, the respondents have submitted as follows:-

4.1. The petitioner has raised invoices for power supplied from its WEG on a monthly basis as per the terms of the Power Purchase Agreement and the petitioner received payments against invoices for the period upto 02-08-2011. However, these payments have been delayed by as much as one year or more. Despite the substantial delay, TANGEDCO has not included interest on delayed payments.

4.2. A Comprehensive Tariff order on wind energy (Order No.1 of 2009 dated 20.03.2009) provides as follows:-

"8.11 Billing and Payment

8.11.1. When a wind generator sells power to the distribution license, the generator shall raise a bill every month for the net energy sold power and reactive power. The Distribution license shall make payment to the generator within 30 days of receipt of the bill. Any delayed payment beyond 30 days is liable for interest at the rate of 1 % per month".

From the above, it could be observed when wind energy generator sells power to the distribution license, the generator shall raise a bill for the net energy sold. The distribution licensee shall make payment to the generator within 30 days of receipt of the bill in accordance with Tariff Order No.1 of 2009 dated 20.03.2009. Any delayed payment beyond 30 days is liable for interest at the rate of 1 % per month.

A Comprehensive Tariff order on Wind energy (Order No.3 of 2016 dated 31.03.2016) provides as follows.

"9.3 Billing and Payment

9.3.1. When a wind generator sells power to the distribution licensee, the generator shall raise the bill every month for the net energy sold after deducting the charges for power drawn from distribution license reactive power charges etc. The distribution licensee shall make payment to the generator within 60 days of receipt of the bill. Any delayed payment beyond 60 days is liable for interest at the rate of 1 % per month. TANGEDCO has suggested for levy of interest at 0.75% per month. Some of the shareholders have sought for interest 1.5% to 2% for delayed payment beyond 60 days and some of them have requested for payment within 30 days. Having considered receivables of two months. Commission decides to retain the duration for payment by the Distribution licensee as 60 days as proposed and adopted in previous order and decides to adopt rate of interest of 1 % per month for any delayed payment by the Distribution licensee beyond 60 days".

From the above, it could be observed that when wind energy generator sells power to the distribution licensee, the generator shall raise the bill for the net energy sold. The distribution licensee shall make payment to the generator within 60 days of receipt of the bill in accordance with Tariff Order No.3 of 2016 dated 31-03-2016. Any delayed payment beyond 60 days is liable for interest at the rate of 1% per month.

4.3. In order to overcome from the financial crises of TANGEDCO, the generator who had been affected by delayed payments were personally requested to attend negotiation meeting in the Chamber of the Director / Finance / TANGEDCO / Chennai-2. By considering the financial position of TANGEDCO and its request to waive the interest fully, most of the generators have accepted to receive 50% of the payment of interest in instalments.

4.4. Despite severe financial constraints faced by the TANGEDCO, since efforts are being made in clearing the pending bills of the wind energy generators as per seniority basis.

4.5. If direction to TANGEDCO to forthwith make payment of a sum of Rs.2,46,253/- for the past period from 2011 to 2014 is given, it will adversely affect the fund flow of the respondents.

4.6. The TANGEDCO is a corporation company wholly owned by the Government of Tamil Nadu and catering to the need of the general public at large

would be put into irreparable losses grave prejudice, undue hardship and financial losses. In fact such losses will be passing through in the future tariff which have to be passed on to the end-consumers and attracts public interest. In any case, for the sake of a company, public authorities under general public should not suffer financially.

5. Findings of the Commission:-

5.1. The prayer in this petition is to pass an order directing the respondents to forthwith make payment of a sum of Rs.2,46,253/- being the interest due and payable to the petitioner against delayed payments made by TANGEDCO for power supplied and to direct the respondents to bear the costs of the instant petition including court fees and legal expenses and make payment of the said sum to the petitioner.

5.2. It is seen from the documents filed by the petitioner that the period of invoice for which delayed payments have been made by the respondents relates to July 2011 to February 2014. During the above period the Tariff Order No. 1 of 2009 issued by the Commission was in force. The said Tariff Order contains the following provision, namely:-

8.11.1. When a wind generator sells power to the distribution licensee, the generator shall raise a bill every month for the net energy sold after deducting the charges for startup power and reactive power. The distribution licensee shall make payment to the generator within 30 days of receipt of the bill. Any delayed payment beyond 30 days is liable for interest at the rate of 1% per month."

5.3. From the above, it is clear that any payment made beyond 30 days after receipt of the bill attracts 1% interest per month. Further judgment dated 17-04-2012 of APTEL in Appeal No.11 of 2012 is also makes it clear that interest is payable on the payment delayed to a generator and the said judgment same is relied upon by the petitioner, in his petition. The respondent in its counter affidavit has also admitted the above provision. The only defence of the respondents is that directing the TANGEDCO to forthwith make payment of a sum of Rs.2,46,253/- for the past period from 2011-2014 will adversely affect the fund flow of the respondents. This submission cannot be accepted since financial constraints of the respondents cannot be a ground to delay its liability under the contractual terms. In view of the above, the Commission holds that the petitioner is entitled for an interest of 1% per annum for any belated payment made by the respondent after 30 days from the date of receipt of the bill.

5.4. It is seen from the typed set of papers filed along with the petition (vide page 1-3 of the typed set) that Rs.2,46,253/- (Rupees two lakhs forty six thousand two hundred and fifty three only) is the interest due on the belated payment of invoices received for the year 2011 onwards. The limitation period for the money claim is 3 years from the date on which cause of action arose. In the case of interest on the delayed payments, the cause of action for claiming interest for the delayed payment commences from the date of receipt of payment on invoice. The present petition has been filed on 10-12-2014 and hence if the date of payment of invoice is prior to 10-12-2011, the claim of interest on such delayed payment is barred by limitation. Law is well settled on the point that it for the concerned Court or Forum

to examine the preliminary question of limitation even in the absence of pleadings to that effect and hence limitation factor is required to be considered.

5.5. In view of the above, the respondent is directed to rework the calculation for interest at 12% per annum to the delayed payment of invoice taking into account the limitation factor as set out in para 5.4 above, after deducting the payments, if any, already made, within a period of 3 months from the date of this order. This is also subject to acknowledgement of liability, if any made, in writing by TANGEDCO after 10-12-2011. In the circumstance, there will be no order as to costs.

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

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

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission