

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.70 of 2014

KBD Sugars and Distilleries Ltd.
(Formerly known as Karnataka Breweries and
Distilleries Pvt. Ltd.)
17, Sankey Road
Bangalore – 560 020.
Represented by the Director Mr.D.A. Srinivas

... Petitioner
(Thiru R.S.Pandiyaraj
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.
3. The Superintending Engineer
TANGEDCO
Udumalaipet Distribution Circle
Udumalipet.

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

Dates of hearing : 23-10-2018; 30-07-2019; 20-08-2019;
17-09-2019; 22-10-2019; 10-01-2020 and
11-02-2020

Date of order : 08-09-2020

The D.R.P.No.70 of 2014 came up for final hearing before the Commission on 11-02-2020 and the Commission upon perusing the petition and connected records and after hearing the submissions of both sides passes the following:-

ORDER

1. Prayer in D.R.P. No. 70 of 2014:-

The prayer of the petitioner in this D.R.P.No.70of 2014 is to direct the Respondents to pass an order directing the respondents to pay the petitioner a sum of Rs.6,38,79,678/- (Rupees Six crores thirty eight lakhs seventy nine thousand six hundred and seventy eight only), being the balance of amount due to the petitioner from TANGEDCO (which is due after adjusting the interest on each invoice as and when payments received) for power supplied from the wind generation units of the petitioner till 11-11-2011, together with further interest on the aforesaid amount from this day till realization and direct the respondents to pay the costs of this petition including court fees of the petitioner.

2. Facts of the Case:-

This petition has been filed to claim a sum of Rs.6,38,79,678/- being the balance of amount due to the petitioner from TANGEDCO (which is due after adjusting the interest on each invoice as and when payments received) for power supplied from the wind generation units of the petitioner in Udumalpet Distribution Circle till, 11-11-2011 together with further interest on the aforesaid amount from this day till realisation.

3. Contentions of the Petitioner:-

3.1. The petitioner has established Wind Power Generation projects in Thiruppur District in the State of Tamil Nadu with a combined capacity of 5 M.W. The power

generated by these units is being sold to the 1st respondent under the terms of Power Purchase Agreements executed between the petitioner and TANGEDCO.

3.2. The Power Purchase Agreements have a billing and payment clause which reads as follows:-

“Clause No.5 Billing and Payment

- a. The Wind Energy Generator agrees to raise bill on the Distribution Licensee for the energy generated and fed into the grid after deducting the energy imported from the grid.*
- b. The payments to Wind Energy Generator in respect of the energy supplied shall be made by the Board within the same period as provided by the Board to recover payments from its HT Industrial consumers.”*

3.3. The time period stipulated for recovery of dues from HT consumers by TANGEDCO is 7 days and therefore as per the terms of the Power Purchase Agreements, TANGEDCO is liable to make payment against invoices within a period of 7 days from the date of invoice. If not, interest is automatically chargeable by implication.

3.4. Despite the above mentioned clauses, payment against invoices raised by the petitioner for power sold to TANGEDCO was being delayed inordinately by TANGEDCO. Further, even when the payments were being made, no interest on delayed payment was included.

3.5. The interest on delayed payments against invoices raised by Wind Power Producers was finally decided by the Hon'ble APTEL in Chairman, TNEB & Anr.V. Indian Wind Power Association and Ors. in Appeal No.11 of 2012 dated 17-04-2012.

3.6. In any power project, the delays would seriously affect the viability of the project. The petitioner's projects are substantially funded through finances obtained from various Banks which require regular repayment of principal loan amount with interest. As regular payments were not made by TANGEDCO for the power generated and supplied, the loans could not be serviced and because of this the petitioner's wind project became sick and ultimately, the petitioner had to sell all its machines.

3.7. In the light of the specific provision contained in Clause No.5 of Power Purchase Agreement that the payments shall be mandatorily made within seven days, and because of the ruling of the Hon'ble APTEL in Appeal No.11 of 2012, the petitioner is entitled to interest on delayed payments.

3.8. The petitioner has raised invoices for power supplied from its WEGs on a monthly basis as per the terms of the Power Purchase Agreement and the petitioner has received payments against invoices for the period upto 11-11-2011.

3.9. 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, contrary to the Power Purchase Agreement. Therefore, the petitioner has been applying the payments received, first towards the interest and the balance towards the energy charges due.

3.10. TANGEDCO is due and liable to pay to the petitioner a sum of Rs.6,38,79,678/- which is the outstanding amount after adjusting interest on delayed payments together with interest thereon till realisation.

3.11. The petitioner had sent a detailed letter dated 17-02-2014 with final outstanding to the 1st respondent bringing to its notice the details of various outstanding payments due and payable to the petitioner and that there has been no response or positive action from the respondents. The petitioner had also sent reminder dated 19-03-2014.

4. Hearing held on 17-09-2019:-

In the hearing held on 17-09-2019, the petitioner counsel was directed to file Memo for acceptance of 6% of interest on the payment from TANGEDCO, since the petitioner was willing to offer made by the respondents with regard to the interest.

5. Memo filed by the Petitioner on 22-10-2019:-

In the hearing held on 22-10-2019, the petitioner has filed a memo accepting the proposal of TANGEDCO for settlement of dues with interest at 6% interest of

the payment is made within 60 days. In the said memo, the petitioner has stated as follows:-

“The petitioners are accepting the above proposal of payment of 6% interest within 60 days towards the delayed payment on each invoice till the date of its realisation towards the power supplied from the WEGs of the petitioners.”

The petitioner reserves its rights to claim 10% interest as per the order of the Hon'ble Supreme Court on the delayed payments if the above agreed 6% interest is not paid within 60 days from today. The petitioner also reserves its right to approach this Commission in case of any disputes between the petitioner and TANGEDCO regarding the above settlement. It is pertinent to mention here that the above proposal by TANGEDCO and acceptance by the petitioners pertains only to the period claimed in the above D.R.P. Nos.70, 71, 72, 73, 74 & 75 of 2014. For any future delay in payments, the petitioner reserves their right to claim interest as per the respective agreements and orders passed by this Commission, Hon'ble APTEL and the Hon'ble Supreme Court.

6. Hearing held on 11-02-2020:-

In the hearing held on 11-02-2020, the Counsel for the petitioner has informed that TANGEDCO has not made payment fully and only part payments have been made. Both the parties have been directed to file their Written Submissions within 2 weeks after serving a copy to the other side. Neither counter nor written submissions are filed by TANGEDCO in this case.

7. Findings of the Commission:-

7.1. The petition has been filed to direct the Respondents to pass an order directing the respondents to pay the petitioner a sum of Rs.6,38,79,678/- (Rupees Six crores thirty eight lakhs seventy nine thousand six hundred and seventy eight only), being the balance of amount due to the petitioner from TANGEDCO (which is due after adjusting the interest on each invoice as and when payments received) for power supplied from the wind generation units of the petitioner till 11-11-2011, together with further interest on the aforesaid amount from this day till realization and direct the respondents to pay the costs of this petition including court fees of the petitioner.

7.2. During the hearing on 17-09-2019, the counsel for the petitioner was directed to file a Memo for acceptance of 6% interest on the payment from TANGEDCO. During the hearing held on 22-10-2019, the counsel for the petitioner has filed a Memo as set out in para 5 of this order accepting the offer of TANGEDCO for settlement of dues with interest at 6% per annum, if the payment is made within 60 days. However, in the hearing held on 11-02-2020, the Counsel for the petitioner has informed that TANGEDCO has not made payment fully and only part payments have been made. Both the parties have been directed to file their Written Submissions within 2 weeks after serving a copy to the other side. In the above circumstances, the Commission is inclined to decide the issue based on the available records.

7.3. The respondent TANGEDCO has not denied its liability for payment of interest on the belated payment. The respondent having failed to avail the offer made by the petitioner for reduced interest at the rate of 6% per annum are liable to pay interest as per the contractual terms. In this connection, our attention is drawn to the provisions contained in the PPA. Clause 5 of the said PPA provides as follows:-

“Clause No.5 Billing and Payment

- a. The Wind Energy Generator agrees to raise bill on the Distribution Licensee for the energy generated and fed into the grid after deducting the energy imported from the grid.*
- b. The payments to Wind Energy Generator in respect of the energy supplied shall be made by the Board within the same period as provided by the Board to recover payments from its HT Industrial consumers.”*

The petitioner contends that the time limit stipulated for recovery of dues from HT consumers by TANGEDCO is 7 days and therefore as per the terms of the Power Purchase Agreement, TANGEDCO is liable to make payments against the invoices within a period of 7 days from the date of invoice and if not, interest is automatically chargeable by implication. The petitioner has also relied on the decision dated 17-04-2012 of APTEL in Appeal No.11 of 2012 and submitted in the Memo that if the settlement is not effected at 6% per annum it reserves the right to claim 10% per annum in view of the decision of the Hon'ble Supreme Court which governs the subject matter herein.

7.4. We have carefully considered the submission of the petitioner and the position of law which has emerged out of the ruling of APTEL and the Hon'ble Supreme Court. We have no manner of doubt on the question of entitlement of interest on the part of the petitioner for the delay in settlement. However, the rate at which the interest is payable by the respondent to the petitioner for the belated payment of invoice amount, remains to be settled. As stated by the petitioner, the question with regard to percentage of settlement of interest has been settled by the Hon'ble Supreme Court of India in CFC Vs. Gangadhar Narasinghadas Agarwal wherein payment of 10% interest has been stipulated. We are of the view in cases where there is no express provision in the PPA, the rate of interest prescribed by the Commission in the Tariff Orders or the interest ordered by the Supreme Court, as the case may be, will be applicable.

7.5. In this connection, it is necessary to refer to the Memo filed on 22-10-2019 by the petitioner which apart from staking the right of interest based on the clauses in the EPA and the order of APTEL has sought liberty to claim 10% interest as per the orders of the Hon'ble Supreme Court on the delayed payments if the agreed 6% interest is not paid within 60 days. Viewed in the said backdrop, we find that the counsel for the petitioner, during the hearing held on 11-02-2020 submitted that only partial payments were made and the payment was not effected in full. The Commission after recording the same directed the parties to file their Written Submission within two weeks after serving copies to the other side. However, none of the parties chose to file the Written Submission and hence the Commission is now constrained to pass orders on merits. It is seen that the petitioner has

furnished its claim amounting to Rs.6,38,79,678/- which includes principal as well as interest for the delay over and above the due date of payment. The petitioner has restricted its claim to 10% in line with the decision of the Supreme Court in their Memo dated 22-10-2019 and hence we are inclined to settle the issue at the rate prescribed in the orders of the Hon'ble Supreme Court in CFC Vs. Gangadhar Narasinghadas Agarwal in Review Petition (Civil) 1606 of 2018 in Appeal No.5465 of 2014 dated 16-08-2018. It is further made clear that the rate of 10% interest is ordered in view of the non-payment of interest 6% per annum within 60 days as agreed upon by the parties during the course of hearing and in view of the liberty sought by the petitioner itself for 10% interest in its Memo dated 22-10-2009. In the result, the Commission directs TANGEDCO to rework the claims of the petitioner set out in the petition with reference to the principal and interest dues and pay 10% per annum for the delay in settlement of invoices after 7 days of its receipt as sought for by the petitioner in its Memo dated 22-10-2019.

7.5. In view of the above, the respondent is directed to rework the calculation for payment of interest at 10% on the delayed payment beyond 7 days of its receipt and settle both the principal as well as interest after deducting the payments if any, already made within a period of three months from the date of receipt of this order.

In the circumstances, there will be no order as to the costs.

This D.R.P. is finally disposed of on 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