

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.PrabhakaraRao Member
and
Thiru.K.Venkatasamy Member (Legal)

D.R.P. No.2 of 2017

M/s.SRB Consultancy Pvt. Ltd.
5th Floor IDCO Tower
Janpath
Bhubaneswar -751 022, Odisha
Represented by its authorized signatory Sri ChandanRaypattnaik

... Petitioner

(Thiru Rahul K Jain

M/s.Bohra&Associates,
Advocate for the Petitioner)

Vs

1. TANGEDCO
Rep. by its Chairman Cum Managing Director
No.144, Anna Salai
Chennai – 600 002.
2. Chief Engineer
Non-Conventional Energy Source (NCES)
TANGEDCO
No.144, Anna Salai, Chennai – 600 002.
3. The Superintending Engineer
TANGEDCO
TirupurElectricity Distribution Circle
Jothi Nagar, Tirupur, Tamil Nadu

....Respondents

(ThiruM.Gopinathan
Standing Counsel for the Respondents)

**Dates of hearing :05-09-2019; 17-09-2019; 15-10-2019
10-01-2020 and 11-02-2020**

Date of order : 27-10-2020

The D.R.P.No.2 of 2017 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.2of 2017:-

The prayer of the petitioner in this D.R.P.No.2of 2017 is to direct the respondents to at once release the Late Payment Surcharge amount to petitioner jointly a sum of Total Late Payment Surcharge due Rs.36,08,439/- @ 1% p.m. beyond 30 days as agreed rate of the PPAs and to direct the respondents to establish a regular practice to release all the future payment in prescribed time limit, also release all principal sum, which is not yet paid and also pay the Late Payment Surcharge on such payment without failure and also release entire overdue principal sum i.e. Rs.36,08,439/- from April 2012 and accrued thereafter also till date and to direct the respondent to pay the cost of this litigation.

2. Facts of the Case:-

This petition has been filed to direct the Respondents to pay the petitioner a sum of Rs.36,08,439/- 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 Tirupur Distribution Circle till June, 2017, together with further interest on the aforesaid amount from this day till realization.

3. Contentions of the Petitioner:-

3.1. The petitioner is developer of the eco friendly wind energy in the State of Tamil Nadu and generating the electricity from the wind turbine which got commissioned in the village Suriyanallur, Taluk-Dharampuram, Dist-Tirupur, Tamil Nadu which got commissioned on 06-03-2012.

3.2. The petitioner is selling the said generated electricity to the respondent at the rate agreed under the terms of the PPA, and which got commissioned on 06-03-2012 and the terms of the PPA, are binding in nature and contractual one.

3.3. The PPA is executed and signed by respondent as well as by the petitioner and the terms defined therein are having a binding force in law. The Petitioner is regularly raising the bills for said sale of electricity but since last year the entire payment cycle is adversely affected as respondent has failed to follow the disciplined payment procedure and overlooking the terms of the PPA too, which is having a binding force in law.

3.4. The instant petition is being filed before the Commission seeking the claim of Late Payment Surcharge i.e. interest on delayed payment or late payment surcharge, against invoices already raised by the petitioner for which payment has already been made by the respondent.

3.5. In addition to the payments which have been made belatedly, still 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. So in the instant petition of Late Payment Surcharge, part, for which they have received after agreed days and for which the Late Payment Surcharge is overlooked by the respondents, even on regular demand made for Late Payment Surcharge part, they always overlooked.

3.6. Even after sending regular request letters, reminders, sending petitioner's staff members and representatives personally, the respondent has overlooked the regular and time bound payment, which is a proved case of financial in-discipline, violating the agreed terms of the PPA.

3.7. The provision of interest on late payments (Late Payment Surcharge) is at 1% per month beyond 30 days payment, but always overlooked this term of the PPA.

3.8. Even when payments are made belatedly, they are being made without any interest for such delay. Such non-payment of interest is a denial of a valuable right conferred by specific Tariff Orders and the judgment of the Hon'ble APTEL, and of all other Hon'ble Commissions too, hence it's a proved case of the fragrant violation of the agreed terms of the PPA, duly executed having a binding force in law.

3.9. The delay in making such payment cannot be described as situation beyond control of the respondents or bad financial condition. The respondents are selling the electricity to its consumers and getting the payment, and contrary to this, they are not releasing the time bound agreed payment and payment of Late Payment Surcharge both.

3.10. 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 payment 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.

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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.”

3.11. 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 days time limit is provided for payment and any delay beyond that will have to be made with interest @ 1% per month.

3.12. The amount which is still due from all the three respondents who are liable to pay to the petitioner, the amount of Late Payment Surcharge which till now is a sum of Rs.36,08,439/-.

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

In the hearing held on 17-09-2019, the petitioner's counsel undertook to file Memo for acceptance of 6% of interest on the payment from TANGEDCO.

5. Hearing held on 15-10-2019:-

The petitioner filed an affidavit on 15-10-2019 accepting the payment of interest on belated payments at 6% per annum. In the affidavit, the petitioner has, *inter alia*, stated as follows:-

"The petitioner humbly submits that he is ready to accept the late payment surcharge @ 6% interest, if the respondents pay the said amount within a period of 60 days, failing which petitioner would like to go as per the terms agreed between the parties in the Power Purchase Agreement (PPA).

The petitioner humbly submits that this memo of undertaking would not be taken as precedent for the other claims which is to be recovered from the respondents by the petitioner.

The petitioner humbly submits that since the matter is not contested and is settled by way of compromise, petitioner prays that this Commission may direct the registry to refund the court fee paid by the petitioner in the present case.

Therefore, it is prayed that this Commission may record this memo and direct the respondents to release the late payment surcharge without any further delay @ 6% interest rate and pass such other and further orders as this Hon'ble Commission deems fit in the circumstances of this case and thus render justice."

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 submission was filed by TANGEDCO in this case. The petitioner has also not filed any Written Submission.

7. Findings of the Commission:-

7.1. The prayer in this petition is to direct the respondents to at once release the Late Payment Surcharge amount to petitioner jointly a sum Total Late Payment Surcharge due Rs.36,08,439/- @ 1% p.m. beyond 30 days as agreed rate of the PPAs and to direct the respondents to establish a regular practice to release all the future payment in prescribed time limit, also release all principal sum, which is not yet paid and also pay the Late Payment Surcharge on such payment without failure and also release entire overdue principal sum i.e. Rs.36,08,439/- from April 2012 and accrued thereafter also till date and further direct the respondent to pay the cost of this litigation.

7.2. The matter was heard on 05-09-2019, 17-09-2019, 15-10-2019, 10-01-2020 and 11-02-2020. On 17-09-2019, the counsel for the petitioner undertook to file a Memo for acceptance of interest @ 6%. An affidavit was filed on 15-10-2019 as follows:-

“The petitioner humbly submits that he is ready to accept the late payment surcharge @ 6% interest, if the respondents pay the said amount within a period of 60 days, failing which petitioner would

like to go as per the terms agreed between the parties in the Power Purchase Agreement (PPA).

The petitioner humbly submits that this memo of undertaking would not be taken as precedent for the other claims which is to be recovered from the respondents by the petitioner.

The petitioner humbly submits that since the matter is not contested and is settled by way of compromise, petitioner prays that this Commission may direct the registry to refund the court fee paid by the petitioner in the present case.

Therefore, it is prayed that this Commission may record this memo and direct the respondents to release the late payment surcharge without any further delay @ 6% interest rate and pass such other and further orders as this Hon'ble Commission deems fit in the circumstances of this case and thus render justice."

7.3. During the hearing on 11-02-2020, the counsel for the petitioner submitted that TANGEDCO has not made payment fully and only part payments have been made. Although the Commission has ordered both parties to file Written Submissions they have not submitted the same. We are therefore, left with no other alternative except to pass orders on the basis of available records.

7.4. Having perused, the material records produced as evidences before us and after considering the rival submissions, we find that the respondent TANGEDCO has not denied its liability to pay interest. Therefore, the liability to pay interest for the payments made belatedly is an admitted fact and the only question is as to the rate. The Energy Purchase Agreement entered by the petitioner with the respondent provides as follows:-

- "6. Billing and payment:*
- (a) The Wind Energy Generator shall raise a bill every month for the net energy sold after deducting the charges for start up power and reactive power.*

- (b) *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.*
- (c) *The Wind Energy Generator agrees that if the consumption of the wind mill is more than the generation during a particular month, such excess consumption shall not be allowed to be carried forward to next month and the billing shall be done on the same month at the per unit realization rate of HT industrial service as per tariff order in force.”*

7.5. As per the terms of the above agreement, the respondent TANGEDCO is liable to pay 1% interest per month for any delayed payment beyond 30 days and we have no manner of doubt whatsoever in this regard. The respondent TANGEDCO having failed to avail the offer made by the respondent for reduced interest at the rate of 6% per annum is liable to pay interest at 1% per month beyond 30 days of receipt of the bill as per the contracted terms for the balance amount that remains unpaid. As regards the second limb of the prayer, there cannot be a general ruling in regard to future payments and hence as when a breach of PPA is committed, a separate Dispute Resolution Petition can be filed.

7.6. It is seen from the typed set of papers filed along with the petition (vide page 26 of the typed set) that Rs.36,08,439/- (Rupees thirty six lakhs eight thousand and four hundred and thirty nine only) is the interest due on the belated payment from the year 2012 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 belated payment of invoices, the cause of action for clearing such interest on delayed payment commences from the date of receipt of payment on invoice. The present petition has been filed on 26-07-2017 and hence if the date of payment of invoice is

prior to 26-07-2014, the claim for 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.

7.7. In view of the above, the respondent is directed to rework the calculation for payment of interest at 12% per annum to the delayed payment of invoice taking into the limitation factor as set out in para 7.6 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, in writing by TANGEDCO after 26-07-2014.

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.PrabhakaraRao)
Member

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission