

BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION

No. 16 C-1, Miller Tank Bed Area, Vasanth Nagar, Bengaluru- 560 052

Dated : 18th September, 2018

Present:

Shri M.K. Shankaralinge Gowda .. Chairman
Shri H.D. Arun Kumar .. Member
Shri D.B. Manival Raju .. Member

OP No. 131/2017

BETWEEN:

M/s. Hindustan Zinc Limited,
Yashad Bhawan,
Udaipur-313004.

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PETITIONER

[Represented by MSA Partners, Advocates]

AND:

Hubli Electricity Supply Company Limited,
Navanagar,
Hubballi – 580 025.

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RESPONDENT

[Represented by Shahbaaz Husain, Advocate]

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ORDERS

1) This petition is filed under Section 86(1) of the Electricity Act, 2003, in effect,
praying to;

(a) Direct the Respondent to pay the delayed payment surcharge,
payable to the Petitioner in terms of the Power Purchase

Agreement (PPA) and remit an amount of Rs.1,08,26,725/-, as per the Statement attached in ANNEXURE-B, upto 30.06.2017 and also interest as per the PPA, for any future delay in payment of the monthly invoices;

- (b) Direct the Respondent to pay carrying cost, at the rate of 1.5% per annum for the delay in payment of the late payment surcharge, by the Respondent;
 - (c) Direct the Respondent to remit the amounts, due and payable on time, in terms of the PPA;
 - (d) Direct the Respondent to pay the costs of the present Petition; and,
 - (e) Pass such other further Order(s), as the Commission may deem just, on the facts of the present case.
- 2) The facts of the case, as mentioned by the Petitioner and the grounds urged, in support of its prayers, may be summed up, as follows:
- (a) The Petitioner-Company, registered under the Companies Act, 1956 is operating 34.4 MW capacity Wind Generating Units at Gadag District, in the State and supplying electricity to the Respondent, under a PPA dated 23.11.2017, at the tariff determined by the Commission.
 - (b) Article 6 of the PPA provides for the payments of invoices, raised within the specified time of 15 days and for late payment surcharge, for the delay in

payment. The Respondent since May, 2013 has delayed payments towards the invoices, raised by the Petitioner, beyond the specified period of 15 days and is liable to pay late payment surcharge, at the rate equivalent to the SBI Medium Term Lending Rate. The amount of late payment surcharge or interest payable is Rs.1,08,26,725/-, as on 30.06.2017, which has not been cleared by the Respondent, despite letters dated 11.09.2015, 01.02.2016 and 05.06.2017, addressed by the Petitioner.

- (c) The delay in payment(s) to the Petitioner, adversely affects its operations.
 - (d) The Petitioner, a Wind Power Generator, which is a Renewable Energy Project, is entitled for payment of interest on delayed payment made by the Respondent, as held by the Hon'ble Appellate Tribunal for Electricity (ATE), in Appeal No.11/2012. Further, the Respondent is liable to pay, not only the delayed payment surcharge towards delayed payment towards the invoices raised, but also liable to pay interest/carrying costs, towards the delay in payment of surcharges.
 - (e) The Respondent has not disputed its liability to pay the delayed payment surcharge to the Petitioner, but has failed to pay the same, necessitating filing of this Petition, which is not barred by the law of Limitation.
- 3) Upon issuance of Notice, the Respondent appeared through the counsel and filed the Statement of Objections, which may be stated, as follows:

- (a) The claim of the Petitioner, for interest on delayed payments prior to August, 2014 is barred by law.
- (b) The Commission, in OP No.8/2014, has held that, the period prescribed for the recovery of interest due, is three years from the date, when the interest becomes due, and accordingly, has rejected the claims made beyond such periods as barred, on the principles of delay and latches.
- (c) The principles of law, as laid down by the Commission in the above case, is clearly applicable to the Petitioner's case on hand, where it is also claiming interest on interest, from 2013, which is barred by limitation, as 01.08.2017 viz., the date of filing of the Petition, has to be treated as the date for initiation of the recovery proceedings. Therefore, the Petitioner's claim for recovery of interest, for the periods prior to 01.08.2014, cannot be entertained.
- (d) The Respondent is willing to pay interest accrued from 01.08.2014, subject to reconciliation of interest amounts due, between the Petitioner and the Respondent.
- (e) The Respondent has prayed that, the Petition be disposed of, in the light of its submissions.

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- 4) We have heard the learned counsel for both the parties and perused the material placed on record. The following issues would arise, for our consideration:
- (1) Whether the claim, or any part thereof of the Petitioner, is barred on the principles of limitation?
 - (2) Whether the claims made by the Petitioner, for interest on interest, payable for the delayed payment of amounts due under the tariff invoices, are as per the terms of the PPA?
 - (3) What order?
- 5) After considering the submissions made by the learned counsel for the parties and the pleadings on record, our findings on the above issues are, as follows:
- 6) **ISSUE No.(1):** *Whether the claim, or any part thereof of the Petitioner, is barred on the principles of limitation?*
- (a) The Respondent has contended that, the claim of the Petitioner, relating to the period, prior to 01.08.2014, are barred by limitation. On the other hand, the Petitioner has claimed that, the provisions of Limitation Act are not attracted, as parties were in dialogue, and has also relied on the judgments of the Hon'ble Supreme Court, in the cases reported in (2006) 4 SCC 658 and (2007) 4 SCC 599. That in respect of executionary contracts, which entail continuous bills, the interest due, on the earlier bills, cannot be taken as barred by limitation.

- (b) The Respondent, while submitting that the Commission has, in similar cases, held that the provisions of Limitation Act. would apply to the interest demanded belatedly, contends that the judgments, cited by the Petitioner, are not applicable to the present case. That, the interest due, as per the PPA clauses, should have been claimed, within three years from the date, when interest becomes due.
- (c) It may be stated that, the Petitioner's claim cannot be taken, as having been made on the basis of a continuous bills, which reflect not only the payment due towards the latest tariff invoice raised, but also the debits and the credits towards the earlier invoices. As per the relevant clauses of the PPA, in the present case, each monthly tariff invoice is independent and such invoice does not raise any demand, towards any payments due and interest due thereon, relating to the earlier months. The tariff invoices, raised by the Petitioner, are as contemplated under the PPA.
- (d) It is now a well-settled that, the Limitation Act is applicable for the claims made before the Commission. The Petitioner has failed to claim recovery of interest / late payment surcharge, on each tariff invoice, within three years, after they became due i.e., after fifteen days, from the date of receipt of the tariff invoice, by the Respondent. The Petitioner's letters dated 11.09.2015, 01.02.2016 and 05.06.2017, giving the details of the amounts of interest, due to the Respondent, cannot be taken as the documents, based on which, the interest that became due has been claimed by the Petitioner. Therefore, the Respondent's contention that, any claim of the Petitioner, three years prior to the date of filing the Petition

i.e., 03.08.2017, is barred by limitation, is valid. The judgments cited by the Petitioner, would not apply to the present case, as the facts and circumstances of the case would differ. Accordingly, the Petitioner can claim interest accrued, only after 03.08.2014.

(e) Thus, we answer Issue No.(1), as above.

7) **Issue No.(2):** *Whether the claims made by the Petitioner, for interest on interest, payable for the delayed payment of amounts due under the tariff invoices, are as per the terms of the PPA?*

(a) The Petitioner has claimed carrying cost on the interest due, on the delayed payments of tariff invoices, so as to be compensated for the delayed payments. On the other hand, the Respondent has contended that, there is no provision for payment of the carrying cost or interest on interest. The Respondent further contends that, the interest on amounts due, towards the tariff invoices raised, would continue to accrue, till the payment of dues and there is no case for payment of interest on interest due.

(b) In OP No.8/2014 and other cases, cited by the Respondent, we have held that, any claim for interest on interest, becoming due on the delayed payments of tariff invoices, is not sustainable. Without a specific provision in the PPA, for charging of interest on interest, the Petitioner is not entitled to do so.

(c) Therefore, we answer Issue No.(2), in the negative.

8) **ISSUE No.(3):** *What order?*

For the foregoing reasons, we pass the following:

ORDER

- (a) It is declared that, the Petitioner is entitled for payment of interest on the delayed payments of tariff invoices, for the period from 03.08.2014, onwards;
- (b) The parties shall reconcile the amounts of interest due, within 2 (two) weeks, from the date of this Order and the Respondent shall make payments towards the interest due, within 4 (four) weeks, thereafter; and,
- (c) The Petitioner is not entitled for any compensation or interest on delayed payment surcharge due.

Sd/-
(M.K. SHANKARALINGE GOWDA)
CHAIRMAN

Sd/-
(H.D. ARUN KUMAR)
MEMBER

Sd/-
(D.B. MANIVAL RAJU)
MEMBER