

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 2 of 2014

Dated : 17th October, 2014

**Present : Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of :

**Viyyat Power Pvt. Ltd.
Viyyat Kausthubham, Kariyavattom P.O.
Trivandrum – 695 581.**

... Appellant(s)

Versus

**1. Kerala State Electricity Regulatory Commission
C.V. Raman Pillai Road, Vellayambalam,
Thiruvananthpuram - 695004**

**2. The Secretary,
Kerala State Electricity Board
Vydyuthi Bhavanam, Pattom,
Trivandrum – 695 004**

**3. Principal Secretary, Power Department,
Government of Kerala, Secretariat
Trivandrum – 695 001**

And

**4. The Director, Energy Management Centre
Sreekrishna Nagar, Sreekariyam,
Trivandrum – 695 017**

...Respondent(s)

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Mandakini Ghosh
Ms. Swapna Seshadri

Counsel for the Respondent(s) : Mr. Ramesh Babu for R.1
Mr. M. T. George
Ms. Kavitha for R.2 & R.3

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Viyyat Power Pvt. Ltd against the order dated 10.10.2013 passed by Kerala State Electricity Regulatory Commission (“State Commission”) in Petition No. O.P. No. 19 of 2013 by which the Appellant has not been allowed to claim interest on the balance of payments received from the Respondent No.2 as a result of determination of the date from which the tariff is to be paid.

2. The Appellant is a generating company which has set up a hydro power project of 3 MW capacity in the State of Kerala. The State Commission is the Respondent No.1 Kerala State Electricity Board (“Electricity Board”) is the Respondent No.2.

3. The facts of the case are as under :

(a) The Appellant was allotted a small hydro electric project by the Govt. of Kerala on 09.07.2004 pursuant to the policy for development of renewable energy projects in the State with private participation. Irrutakanam Small Hydel Project Stage I was allotted to the Appellant by the State Government for implementation on BOOT basis as the Appellant was selected through competitive bidding route based on the lowest tariff rate quoted by the Appellant.

(b) The Appellant entered into an Implementation Agreement with the Government of Kerala on 11.12.2004. The Power Purchase Agreement (“PPA”) was executed by the Appellant

with the Electricity Board on 07.06.2007. The tariff applicable for power generated from the project was provided for in the PPA. The PPA provided that the tariff for the supply of infirm energy i.e. the energy supplied prior to the Commercial Operation Date of each generating unit shall be Rs. 0.25/kWh.

- (c) Unit 1 of the Power Project was synchronized on 18.09.2010 and Unit 2 on 19.09.2010. The Appellant vide letter dated 25.10.2010 communicated to the Electricity Board that they were ready for carrying out the Performance Tests. Accordingly, a Committee constituted by the Electricity Board conducted the tests on 04.11.2010 and recommended for COD on 04.11.2010.
- (d) Accordingly, the State Electricity Board confirmed the COD of 04.11.2010.
- (e) In the meantime, on 28.09.2010, the Appellant filed a Petition being No. 88 of 2010 for approving the rate of energy injected into the grid prior to the date of commencement of COD @ Rs.2.70 per unit, i.e. rate applicable for firm energy, instead of Rs.0.25 per unit as provided for in the PPA.
- (f) When the matter was pending before the State Commission, the Electricity Board made a written statement dated 27.10.2010 that the generating company can carry out the tests immediately and get the provisional certificate valid from the date of synchronization and thereby payment for the energy generated can be considered as per Article 8.2 of the PPA i.e. tariff of Rs.2.70 per kWh.

- (g) The above Petition was disposed of by the State Commission vide order dated 18.01.2011 with the observation that the State Commission has no objection in applying the tariff as per Article 8.2 the PPA based on the Provisional Certificate of Commercial Operation.
- (h) Subsequently, the Electricity Board vide letter dated 19.02.2013 informed the Appellant that their request for provisional COD from the date of synchronization cannot be granted. The Electricity Board however, decided to issue Provisional COD w.e.f. 25.10.2010, i.e. the date when the Appellant communicated its readiness for carrying out the Performance Tests.
- (i) On 30.05.2013, the Appellant filed a Petition being No. O.P. No. 19/2013 for resolving the dispute between the Appellant and the Electricity Board (Respondent No. 2) about date of issue of Provisional COD as well as the claim for the difference in tariff for the said period along with interest.
- (j) The State Commission vide the impugned order dated 10.10.2013 partly allowed the petition and directed the Respondent No.2 to pay to the Appellant the tariff @ Rs.2.70 per kWh for the period 18.09.2010 to 25.10.2010. The State Commission, however, did not allow any interest on payment allowed for the above period.
- (k) Aggrieved by the disallowance of the interest in the impugned order dated 10.10.2013, the Appellant has filed this appeal.

4. The Appellant has made the following submissions:
 - (a) Interest is payable consequent to the liability to pay the tariff wrongfully withheld by the Respondent No.2 for the period of almost three years. Interest is not a penalty but is payable for the time value of money and the failures on the part of the Respondent No.2 to pay the correct tariff to the Appellant within the stipulated time period.
 - (b) There is no express provision in the PPA prohibiting award of interest. On the other hand interest is payable as per the PPA for any delayed payments by the Electricity Board.
 - (c) The State Commission has failed to appreciate that the interest was payable in terms of the Agreement, and also based on the principles of restitution and equity.

5. The Electricity Board (R-2) in reply to the above issue has made the following submissions:
 - (a) The Appellant misinterpreted the order of the State Commission dated 18.01.2011 and without initiating any action for obtaining provisional certificate from the date of synchronization, the Appellant had requested to Electricity Board to declare COD from the date of synchronization.
 - (b) The Electricity Board duly considered the order of the State Commission dated 18.01.2011, the representation of the Appellant and the report of the Committee entrusted for conducting the Performance Test and took a lenient view on the subject matter and decided to issue provisional COD w.e.f.

25.10.2010 i.e. the date on which the Appellant informed its readiness to conduct the Performance Test.

- (c) The Appellant did not raise the bill from the date of synchronization for reasons best known to them and raised the bill for the first time on 17.10.2013 after the passage of the impugned order and the entire payment was made by the Electricity Board within the prescribed time.
- (d) The State Commission directed that the Appellant is deemed to have obtained provisional certificate of COD from the date of synchronization shall be eligible for tariff as per Article 8.2 of the PPA by the impugned order dated 10.10.2013. In the absence of the said order, as per the PPA, the Appellant could have raised bill only under Article 8.3 of the PPA at the rate of Rs.0.25/kWh. Thus, there was no delay on the part of the Respondent No.2 in effecting the bill raised by the Appellant.

6. On the above issues, we have heard Shri Anand K. Ganesan, Ld. Counsel for the Appellant and Shri M.T.George, Ld. Counsel for the Electricity Board, the Respondent No.2.

7. The only issue that arises for our consideration in the present case is **“whether the Appellant is entitled to claim interest on the payment on account of the tariff decided by the State Commission for the energy supplied from the date of synchronization of the first unit to the date when the intimation was sent by the Appellant for readiness to conduct the Performance Test?”**

8. Let us examine the PPA dated 07.06.2007 entered into between the Appellant and the Electricity Board.

9. Commercial Operation Date (“COD”) is defined as the date on which the generating unit marks entry into the commercial service pursuant to the Performance Tests demonstrated by the generating company before the Electricity Board. Similarly the COD in respect of the project is when the project marks commercial operation pursuant to the Performance Tests.

10. ‘Due date of payment’ is defined as the 10th day after Billing Date. “Infirm Energy” is defined as energy generated prior to the COD of each Unit.

11. The PPA provides that the Appellant shall at least 7 days prior to the date of completion give to the Board notice and shall invite Board’s representative or any other agency authorized by Government to attend the Performance Test. The Board or authorized agency of Government shall issue the certificate of COD on successful completion of the Performance Test. The procedure for Performance Test is also described in Schedule 2 of the PPA.

12. There is also a provision of grant of Provisional Certificate of commercial operation under which if due to non-availability of water, the Performance Tests cannot be carried out by the Appellant, the Board may issue a Provisional Certificate of Commercial Operation of the project to the Company after carrying out the tests that are possible to be conducted with the available water.

13. The PPA under Article 8 provides for tariff for supply of infirm energy and tariff after achieving COD. The tariff for infirm energy is Rs.0.25/kWh as per Article 8.3. The tariff after achieving COD as applicable to the Appellant's project is Rs.2.70/kWh as per Article 8.2 of the PPA.

14. It is stipulated in the PPA that the company shall submit to the Board a separate bill for infirm energy within 15 days from COD of each generating unit.

15. There is a provision in the PPA for late payment. Late payment i.e. payments after the due date of payment, shall bear interest at a rate equal to SBI prime lending rate of interest per annum for the period of delay.

16. Similarly, there is a provision for rebate @ 2.5% in case the payment is made by the Board within 5 days of the billing date.

17. We have noticed that the draft PPA was earlier approved by the State Commission on 15.12.2006.

18. Admittedly, the units were synchronized on 18.09.2010 and 19.09.2010 respectively and the Appellant vide letter dated 25.10.2010 informed its readiness to conduct the Performance Test. The Performance Test was conducted on 04.11.2010 and 05.11.2010 and the Certificate of Commercial Operation w.e.f. 04.11.2010 was issued by the Electricity Board. Admittedly, no bill was raised by the Appellant for the energy supplied from the date of synchronization of the units till the COD.

19. In the meantime, the Appellant filed a Petition before the State Commission for amendment of Article 8.3 of the PPA relating to tariff for infirm energy under which the agreed tariff was Rs.0.25/kWh and allow normal tariff of Rs.2.70/kWh from the date of synchronization considering the date of synchronization as the provisional COD.

20. The Appellant referred to the order dated 18.03.2010 in the case of another Hydro Project wherein the State Commission had held that infirm tariff had no relevance in the case of single part tariff. The Electricity Board in its written submission before the State Commission took a stand that the Appellant can carry out the test immediately and get provisional certificate from the date of synchronization and thereby payment for energy generated can be considered as per Article 8.2 of the PPA.

21. We find that the State Commission by its order dated 18.01.2011 disposed of the Petition filed by the Appellant as under:

“Thus respondent is agreeable to apply tariff as stated in article 8.2 of the PPA even before the date of declaration of commercial operation. Provisional certificate valid from the date of synchronization has to be issued by the respondent if the respondent is convinced of the capacity demonstrated after synchronization.

Commission has no role in this process. By this process, the developer can get the tariff as per clause 8.2 of the PPA. But the respondent has to see that the levelised tariff does not exceed the rate of Rs.2.4 per kWh which was the criterion used

for selection in the bidding process. This is emphasized in clause 8.5 of the PPA.

It is also noted that as per clause 8.5 of the PPA, the BOOT period expiry date remains constant even if COD is achieved earlier than the date taken for clause 8.2. This criterion should be applied if COD is delayed also. The levelised tariff should not be disturbed.

Order:

Commission has no objection in applying tariff as per clause 8.2 of the PPA based on a provisional certificate of commercial operation. Respondent KSEB has to maintain the levelised tariff at Rs.2.4 per kWh. The petition is disposed of accordingly.”

22. Thus the State Commission disposed of the Petition by order dated 18.01.2011 and gave its no objection in applying the first year tariff (Rs.2.70/kWh) based on a provisional certificate of commercial operation. However, the State Commission did not amend Article 8.3 of the PPA as prayed for by the Appellant. The State Commission also did not give any finding regarding allowing normal tariff of Rs.2.70/kWh from the date of synchronization of the Unit.

23. Subsequent to the above order the Electricity Board by its letter dated 19.02.2013 refused to grant provisional COD from the date of synchronization of the Unit and did not grant the normal (first year) tariff for the infirm power from the date of synchronization. However, the

Electricity Board approved provisional COD from 25.10.2010 i.e. date of communication of readiness for Performance Test by the Appellant.

24. Thereafter, the Appellant filed the Petition before the State Commission praying for resolving the dispute and issue directions to the Respondent No.1 to issue provisional certificate valid from the date of synchronization of the unit and to allow interest for belated payment as per Article 9.7 of the PPA. The Appellant also sought penal action against the Electricity Board under section 142 of the Electricity Act, 2003. This Petition was disposed of by the State Commission by the impugned order dated 10.10.2013.

25. Let us now examine the findings of the State Commission in the impugned order.

26. The findings of the State Commission are summarized as under :

- (i) A plain reading of the Commission's order dated 18.01.2011 makes it clear that the Commission had not given any mandatory directions to the Electricity Board, the non-compliance of which would attract the penal provisions of the Act. The observations in the order do not amount to directive to the Electricity Board on the matter.
- (ii) The State Commission has examined the matter as a whole afresh to address the grievance of the Appellant.
- (iii) The Electricity Board had approved 25.10.2010 as the date of COD even though the COD was demonstrated on 04.11.2010. The State Commission examined the actual units sent out from the plant from the date of synchronization to the date of

Performance Tests and computed the capacity of the plant. It was seen that individual generators as well as the plant as a whole had demonstrated capacity almost steadily from the date of synchronization. Hence, the Commission concluded that Provisional Certificate valid from the date of synchronization can be issued to the Appellant.

- (iv) In small plants where single part tariff is applied, capacity demonstration has little relevance on the tariff applicable to the energy generated. Keeping these facts in mind, the Commission had observed that infirm tariff had no relevance in the case of single part tariff in the order dated 18.03.2010 (in the case of Ullungal Small Hydro Project).
- (v) In the instant case, the PPA provides for infirm tariff before COD. Once the generator becomes eligible for a Provisional Certificate valid from the date of synchronization, all the energy injected from the date of synchronization has to be treated as firm energy and eligible for tariff under Article 8.2 of the PPA.
- (vi) The Commission has taken facilitating approach to a small hydro generator of 3 MW capacity, who had established the plant under tiring circumstances.
- (vii) The payment as per this order cannot be conceived as late payments under Article 9.7 of the PPA and hence the Appellant shall not be eligible for any interest.

(viii) The Appellant may prefer a claim for balance payment and the Respondent shall make the payment in view of this order within a period of one month. The Appellant will not be eligible for any interest for payment if payment is made within the stipulated time.

27. Thus, even though the PPA clearly provided for payment of infirm power at Rs.0.25/kWh, the State Commission keeping in view that the Appellant has set up a small hydro project under tiring circumstances, allowed provisional COD from the date of synchronization and payment of energy supplied from the date of synchronization at first year tariff of Rs.2.70/kWh. However, the State Commission did not allow interest as it was not conceived as late payment in terms of the PPA.

28. We find that the State Commission in passing the impugned order has relied upon its own order dated 18.03.2010 in case of another hydro project. In that case the State Commission held as under :

“Infirm tariff has no relevance in the case of single part tariff. Once the units are offered for tests the tariff period and hence the single part tariff comes in to force. If there is a shortfall in capacity, only a penalty can be applied.”

Thus in the above order, the State Commission held that the single part tariff comes into force once the units are offered for tests.

29. In the present case, the Appellant offered units for Performance Test only on 25.10.2010. However, the State Commission approved the normal tariff from the date of synchronization of the first unit i.e. 18.09.2010. This was decided by the State Commission after examining

the generation data for the period of date of synchronization to COD and finding that the Appellant had supplied power steadily from the date of synchronization. We find that the State Commission allowed deviations to the approved PPA taking a facilitating approach to a small hydro project. The impugned order was accepted by the Electricity Board and complied with.

30. We feel that the right to charge tariff @ Rs.2.70/kWh from the date of synchronization accrued to the Appellant only after the passing of the impugned order as under the approved PPA, the Appellant was entitled to get a tariff of only Rs.0.25/kWh for the infirm energy. The Appellant had not raised any bill on the Electricity board for energy supplied during the period from the date of synchronization to COD. Only after the passing of the impugned order the Appellant raised the bill for the above period which was paid by the Electricity Board promptly.

31. We find that the Appellant had sought interest as per Article 9.7 of the PPA. Article 9.7 provides that late payment i.e. payments after the due date of payment shall bear interest. The due date is 10th day after the billing date. In the present case, the State Commission had given liberty to the Electricity Board to make payment within a period of one month after the claim is preferred by the Appellant for the balance payment. Thus, the late payment would have triggered only if the payment had not been released by the Electricity Board within one month of raising of the bill.

32. In the present case the bill was raised only after the passing of the impugned order, which was paid. Thus, the Appellant will not be entitled to claim any interest for the period prior to the raising of the bill.

33. Shri Anand K. Ganesan, Ld. Counsel for the Appellant has cited the following judgments of the Hon'ble Supreme Court and this Tribunal to press the claim of interest:

- (i) South Eastern Coalfields Ltd. v. State of MP (2003) 8 SCC 648
- (ii) Sovintorg (India) Ltd. v. State Bank of India (1999) 6 SCC 406
- (iii) Mahanadi Multipurpose Industries v. State of Orissa & Anr. AIR 2002 Orissa 150
- (v) Judgment of this Tribunal dated 30.06.2014 in Appeal No. 62 of 2013 and 47 of 2013 in the matter of PTC India Ltd. Vs. Gujarat Electricity Regulatory Commission & Others.

34. In all the above cases, the payment due to the party was delayed. It was held that even if the PPA did not have a claim for payment of interest, the interest will be payable as the party was deprived of the money to which he was legitimately entitled to. These findings will not be applicable to the present case where the Appellant did not have entitlement to claim normal tariff from the date of synchronization as per the PPA but its right to claim the charges was established only after the passing of the impugned order. In the present case, the payment was made by the Respondent Electricity Board immediately after bill was raised by the Appellant in pursuance of the impugned order of the State Commission. Therefore, we do not find any merit in the claim of the Appellant for interest on delay in payment.

35. Summary of our findings:

The Appellant is not entitled to payment of interest as its right to get normal tariff from the date of synchronization to COD was accrued only after passing of the impugned order. The State Commission allowed one month's time for payment to the Electricity Board after the bill was raised by the Appellant.

Admittedly, the amount was paid after raising of the bill. Therefore, there is no merit in the claim of the Appellant for payment of interest for the period prior to the raising of the bill.

36. In view of the above, the Appeal is dismissed as devoid of any merit.
No order as to costs.

37. Pronounced in open court on 17th October, 2014.

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

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REPORTABLE/NON-REPORTABLE