

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:

Thiru M. Chandrasekar

and

... Chairman

Thiru K. Venkatasamy

... Member (Legal)

D.R.P.No.11 of 2021

M/s. Hindustan Zinc Limited
Yashad Bhawan
Udaipur
Rajasthan – 313 004

... Petitioner
(M/s. Link Legal
Advocate for the Petitioner)

Vs

1. Tamil Nadu Generation and Distribution Corporation Limited
Through its Chairman & Managing Director
Having its office at
10th Floor, NPKRR Maaligai
144, Anna Salai
Chennai – 600 002.
2. The Chief Engineer
Non-Conventional Energy Sources
TANGEDCO
NCES, Second Floor, Eastern Wing
No. 144, Anna Salai
Chennai – 600 002.
3. The Superintending Engineer
TANGEDCO
Tirupur EDC
19-a, Jyothi Nagar, Perumal Nallur Road
Tiruppur
Tamil Nadu – 641 603.

4. The Superintending Engineer
TANGEDCO
Udumalpet EDC
Eripalayam, Tiruppur Road
Udumalpet
Tamil Nadu – 642 126.
5. The Superintending Engineer
TANGEDCO
Palladam EDC
19-A, Jyothi Nagar
Perumal Nallur Road
Tiruppur
Tamil Nadu 641 603.

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

Dates of hearing : 05-10-2021; 26-10-2021; 23-11-2021;
21-12-2021; 04-01-2022; 25-01-2022
and 08-02-2022

Date of Order : 29-03-2022

The D.R.P.No.11 of 2021 came up for final hearing on 08-02-2022. The Commission upon perusing the affidavit filed by the petitioner, counter affidavits filed by the respondents, Rejoinder affidavit filed by the respondent and all other connected records and after hearing both the parties passes the following:-

ORDER

1. Prayer of the Petitioner in D.R.P.No.11 of 2021:-

The prayer of the Petitioner in the above D.R.P.No.11 of 2021 is to-

- a. direct the Respondents to strictly comply and abide with the provisions of the fourteen PPAs entered into between the Petitioner and the Respondent(s).
- b. direct the Respondents to pay the Outstanding Late Payment Interest towards the delayed payment of energy bills from October, 2011 to June, 2020

amounting to Rs.10,03,05,054/- (including interest on part payment received from March, 2018- June, 2020) and restrict their claim upto June 2020 and

- c. direct the Respondents to pay the outstanding amount towards Unpaid Energy Bills from March, 2018-March, 2021 amounting to Rs.21,71,75,405/- and interest towards late payment till the date of actual realisation.

2. Facts of the Case:-

This petition has been filed under section 86 (1) (e) and 86 (1) (f) of the Electricity Act, 2003 read with the relevant provisions of the Power Purchase Agreements executed between the petitioner and Tamil Nadu Generation and Distribution Corporation Limited seeking strict compliance with the provisions of the Power Purchase Agreements, payments towards overdue outstanding invoices, late payment interest and other consequential reliefs.

3. Contention of the Petitioner:-

3.1. M/s. Hindustan Zinc Limited ("Petitioner") is filing the present petition seeking issuance of directions to the Tamil Nadu Generation and Distribution Corporation Limited ("TANGEDCO") for making payment towards the outstanding principal amount for the outstanding Late Payment Interest and unpaid energy bills under fourteen Power Purchase Agreements ("PPAs") executed between the Petitioner and TANGEDCO. These fourteen PPAs were executed by the Petitioner with TANGEDCO to sell wind energy generated from its generating stations located at Tirupur and Udumalpet Tamil Nadu in all having capacity of 21 MW (14 x 1.5 MW).

3.2. The Petitioner is compelled to file the present petition because TANGEDCO in consistent breach of its obligations arising out of the PPAs, has not made any payment towards late payment interest since October 2011 and has not paid the energy bills in full since March, 2018 till April, 2021 (however, for Mar 2018 to June-2020 50% payment received on 18.12.2020) for the power supplied to it by the Petitioner as required under the terms of the respective PPAs. Therefore, the Petitioner having incurred financial losses on account of the same, is constrained to approach the Commission.

3.3. The Petitioner is a public limited company incorporated under the Companies Act, 1956 having its registered office at Yashad Bhawan, Udaipur, Rajasthan-313004. The Petitioner is engaged in the business of metals and mining, and hence, is a power intensive industry. The Petitioner operates 21 MW of Wind Energy Generators ("WEG") installed at Tirupur and Udumalpet districts of Tamil Nadu. The Petitioner has entered into PPAs with the TANGEDCO for sale of wind energy.

3.4. The Respondent No.1, TANGEDCO is a company incorporated in the year 2010 under the Companies Act, 1956 and validly subsisting under Companies Act, 2013 and having its registered office at 10th Floor, NPKRR Maaligai, 144, Anna Salai, Chennai, Tamil Nadu- 600002. TANGEDCO is the distribution licensee in the State of Tamil Nadu.

3.5. The Respondent No.2, Tirupur EDC, represents the office of distribution licensee TANGEDCO, having its office in Tirupur District at 19-A, Jyothi Nagar,

Perumal Nallur Road, Tiruppur, Tamil Nadu-641603. It is responsible for distribution of electricity in its region.

3.6. The Respondent No.3, Udumalpet EDC, represents the office of distribution licensee, TANGEDCO having its office in Udumalpet district at Eripalayam, Tiruppur Road, Udumalpet, Tamil Nadu-642126. It is responsible for distribution of electricity in its region.

3.7. The Respondent No.4 Palladam EDC, represents the office of distribution licensee TANGEDCO, having its office in Tirupur District at 19-A, Jyothi Nagar, Perumal Nallur Road, Tiruppur, Tamil Nadu-641603. It is responsible for distribution of electricity in its region.

3.8. The TANGEDCO, Tirupur EDC Udumalpet EDC, Palladam EDC shall be hereinafter referred to as distribution licensee/Respondent(s).

3.9. The Commission has jurisdiction to adjudicate this dispute under Section 86 (1) (b) and 86 (1) (f) of the Electricity Act, 2003 ("Act"). Section 86(1)(e) of the Act provide that the Commission shall discharge the function of promoting cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person. Further, the Commission is empowered under Section 86 (1) (f) of the Act to adjudicate disputes between the licensees and generating companies.

3.10. The Petitioner is a generating company within the meaning of Section 2 (28) of the Act and has established and operates 21 MW of wind energy generating stations ("WEGs"), installed at Tirupur district of Tamil Nadu.

3.11. The Petitioner approached the TANGEDCO, in 2011, with a proposal to sell wind energy generated from its fourteen WEGs having capacity of 1500 kW located at Tirupur district of Tamil Nadu. The TANGEDCO accepted the said proposal and agreed to buy the wind energy. Accordingly, fourteen separate PPAs were executed with respect to the WEG HTSC No.- HTSC 2176, HTSC 2177, HTSC 2178, HTSC 2080, TZA 11, TZA 12, TZA 13, TZA14, TZA 15, TZA 16, TZA 17, TZA 18, TZA 19 and TZA 20 and accordingly, the respective WEGs were commissioned as per the terms of the PPA. The details of the PP As executed and commissioning date of the WEGs are provided below for the ease of reference:

Sl. No.	TANGEDCO EDC	HTSC No.	Commissioning date	EPA Date	MW
1	Udumalpet EDC	HTSC 2176	20-10-2011	30-09-2011	1.5
2		HTSC 2177	20-10-2011	30-09-2011	1.5
3		HTSC 2178	20-10-2011	30-09-2011	1.5
4		HTSC 2080	26-12-2011	30-09-2011	1.5
5	Tirupur EDC	TZA 11	10-02-2012	10-02-2012	1.5
6		TZA 12	10-02-2012	10-02-2012	1.5
7		TZA 13	10-02-2012	10-02-2012	1.5
8		TZA 14	10-02-2012	10-02-2012	1.5
9		TZA 15	10-02-2012	10-02-2012	1.5
10		TZA 16	10-02-2012	10-02-2012	1.5
11		TZA 17	10-02-2012	10-02-2012	1.5
12		TZA 18	10-02-2012	10-02-2012	1.5
13		TZA 19	10-02-2012	10-02-2012	1.5
14		TZA 20	10-02-2012	10-02-2012	1.5

3.12. In terms of the PPA, the Distribution Licensee/Respondent(s) agreed to purchase electricity from the Petitioner for a term of twenty (20) years from the date

of execution of the PPA. Notably, under the specific terms of the PPA, the Distribution Licensee under, *inter alia*, the obligation to make payments of the energy bills for the net energy supplied to it by the Petitioner after deducting the charges for start-up power and reactive power. These payments are required to be made by the Distribution Licensee within 30 days of receipt of the energy bill. The remedy provided for non-payment of these energy bills within the stipulated 30 days period is that the Distribution Licensee shall be liable to pay interest at the rate of 1% per month for the delayed payment.

3.13. Relevant provisions of the PPA in this regard are extracted below for the sake of easy reference:

“5. Rate of energy and other charges

- a) Energy Charges: The Distribution Licensee agrees to pay Energy charges at the rate of Rs.3.39/-.*
- b) Reactive Power Charges:*
 - i) For drawing reactive power up to 10% of the net energy generated- 25 paise per kvarh.*
 - ii) For drawing reactive power more than 10% of the energy generated- 50 paise per kvarh for the entire reactive power draw!.*

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 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.*

.....
8. Term and Conditions Agreement Period

- a) This agreement shall be valid for a minimum period of 20 years from the date of execution.*

.....”

3.14. In compliance of the abovementioned provisions of the PPA(s), the Petitioner has been continuously supplying wind energy to the Distribution Licensee and fulfilling its contractual obligations. However, the Distribution Licensee i.e. the Respondent(s) has not been acting in accordance with the contractual terms of the PPA since commissioning of the first three WEGs i.e. from October ,2011 onwards and the subsequent commissioning of the rest of its WEGs i.e. from December, 2011 and February, 2012 onwards.

3.15. Due to delay in taking the Joint Meter Reading and issuance of Credit Note by the Respondents, despite repeated requests by the Petitioner, the Petitioner had initially delayed in issuing the invoices for few months and could only issue its first invoice in April, 2012. Additionally, the payment for invoices issued under the provisions of the PPA for the fourteen WEGs was always delayed.

3.16. The Distribution Licensee is under contractual obligation under clause 6 (b) of the PPA to pay interest at the rate of 1% per month on the payment of energy bills delayed beyond 30 days from receipt of the same. However, it has been failing to make timely payments of the energy bills i.e., within the stipulated period of 30 days from the receipt of the bills, since from October, 2011 onwards and still continuing to do the same. Accordingly, the Petitioner has been regularly issuing its Interest Debit Notes/Claim Notes towards interest to the Respondent(s) since September, 2012 seeking payment of interest on account of Late Payment Interest from October, 2011.

3.17. The Distribution Licensee/Respondent has not made the payment of Late Payment Interest for the period October, 2011 to June, 2020 (including the interest on part payment received for the tariff invoices from March, 2018- June, 2020 ("outstanding Late Payment Interest"). The Interest Debit Notes/Claim Notes towards interest have been regularly issued on 14.09.2012, 22.11.2012, 20.03.2013, 09.09.2013, 27.09.2013, 21.10.2013, 17.06.2014, 20.08.2014, 13.03.2015, 25.05.2015, 15.09.2015, 01.02.2016, 20.05.2016, 06.08.2016, 30.11.2016, 25.02.2017, 05.06.2017, 18.10.2017, 14.01.2018, 19.11.2018, 04.04.2019, 25.08.2019, 07.02.2020, 05.04.2020, 04.09.2020. However, no payment has been made with respect to the same. A copy of the Interest Debit Notes issued on 14.09.2012, 22.11.2012, 20.03.2013, 09.09.2013, 27.09.2013, 21.10.2013, 17.06.2014, 20.08.2014, 13.03.2015, 25.05.2015, 15.09.2015, 01.02.2016, 20.05.2016, 06.08.2016, 30.11.2016, 25.02.2017, 05.06.2017, 18.10.2017, 14.01.2018, 19.11.2018, 04.04.2019, 25.08.2019, 07.02.2020, 05.04.2020, 04.09.2020 to the Distribution Licensee.

3.18. Further, in compliance of Clause 5 and 6 of the PPA, the Petitioner has been regularly raising the monthly energy bills at the rate of energy charges i.e., Rs.3.39/- per unit, for the energy supplied to the Respondent(s). However, the Distribution Licensee has failed to pay the principal amount due towards the energy bills since March, 2018 till April, 2021 (however, part payment (50%) for Mar-18 to Jun-20 was received on 18.12.2020) ("Unpaid Energy Bills") which amounts to Rs.21,71,75,407/-. These energy bills have been duly received and accepted by the Distribution Licensee without any demur or dispute.

3.19. Even after receiving benefits of the Petitioner's services under the respective PPAs, the Distribution Licensee from March 2018 onwards has failed and neglected to clear the principal amount due and payable under the unpaid energy bills. As per Clause 6 (b) of the PPA the energy bills are supposed to be paid by the Respondent(s) within 30 days of receipt of the same, otherwise it is obligated to pay Late Payment Interest. Therefore, the Petitioner is also entitled to the interest accrued on the outstanding Unpaid Energy Bills for the period March, 2018-April 2021 (except for part payment received from March 2018 to June 2020) in accordance with Clause 6 (b) of the PPAs.

3.20. However, despite repeated follow ups by the Petitioner seeking payment of past outstanding Late Payment Interest and payment of Unpaid Energy Bills and the interest accrued thereon, the Distribution Licensee has failed to respond or take any concrete steps to pay such dues. These dues comprise of (i) Outstanding Late Payment Interest from October, 2011 to June, 2020 amounting to Rs.10,03,05,054/- (including interest on part payment received from March, 2018-June, 2020) (ii) principal amount due towards Unpaid Energy Bills from March, 2018 till April, 2021 amounting to Rs.21,71,75,407/- along with the interest applicable on the date of payment.

3.21. The Respondent(s) has been withholding the payments due against the said Unpaid Energy Bills and towards the Late Payment Interest without any basis and in contravention of the terms of the PPAs.

3.22. The Petitioner is entitled to Late Payment Interest on both the delayed payments made and on the outstanding principal amount due for the Unpaid Energy Bills. However, the Respondents have been violating the existing law and contractual provisions by not paying the principal amount due and, therefore, Late Payment Interest thereon is also accrued.

3.23. The intention behind incorporation of interest on Late Payment is essentially to ensure the Petitioner of timely payment of bills by the Respondents. The terms of the stated Clause were agreed upon by both the parties. Thus, no party is entitled to go back on its obligation under the PPA. Late Payment Interest is compensatory in character, in terms of the effect on the petitioner on account of delay by the Distribution Licensee in making the due payments.

3.24. The intent behind a clause of 'Late Payment Interest' is essentially to compensate the non-defaulting party as per the 'time value of money' whereby, it becomes an obligation of the defaulting party to put the non-defaulting party in a position where the defaulting party would have made timely payments to the non-defaulting party for the bills raised by the non-defaulting party. The concept of 'Time Value of Money' states that money that is available at present time is worth more than the same amount in the future due to its potential earning capacity or the inflation that decreases the value of the money. The actual time value of money gets lost if the payment of LPI is delayed or not paid at all. In order to do justice to the intention of LPI, and the concept of 'Time Value of Money', in case of delay in the payments of LPI, the same should be paid along with an interest so as to put the non-defaulting party in a position had the LPI payment was received by it on time.

3.25. The Petitioner has made all the efforts for continued supply of power to the Respondent(s) even in situations of extreme hardship. Pertinently, in 2020 and thereafter, due to the outbreak of COVID-19 pandemic the Government of India declared nationwide lockdown initially for 21 days from 24.03.2020 and later extended the same. The various lockdown guidelines and movement restrictions severely impacted the normal functioning of the power plants across the country. The Project and office of the Petitioner was also impacted. However, despite the same the Petitioner made all the efforts and supplied electricity to the Respondents. Therefore, the Petitioner should not be rewarded financial losses for its diligence.

3.26. Flagrant violation of legal and contractual provisions by the Respondents have compelled the Petitioner to approach the Commission for issuance of suitable directions to the Respondents and the Petitioner pleaded the following grounds for seeking relief.

3.27. The Distribution Licensee/Respondent(s) has failed to fulfil its contractual obligations in terms of the PPA. As per Clauses 5 and 6 of the PPA, the Respondent(s) is under legal obligation to make the payment of energy bills raised towards the energy supplied to the Respondent(s) and to pay Late Payment Interest for the delayed payment of energy bills.

3.28. The Respondent(s) has failed to acknowledge that under Clause 6 of the PPA(s), the Respondents are required to make payments of the amounts due under the energy bills within 30 days from the date of receipt of Petitioner's monthly energy bills.

3.29. The Respondent(s) has failed to pay the Outstanding Late Payment Interest which is required to be paid at the rate of 1% per month, if any payment of energy bill is delayed beyond the due date i.e. beyond 30 days from the receipt of the same.

3.30. The Respondent(s) has been making delayed payments of energy bills since October, 2011 and has failed to pay Late Payment Interest, despite being sought repeatedly by the Petitioner.

3.31. The non-payment of LPS since October, 2011 amounts to 'continuing breach' of the terms of the PPA. The right to interest on delayed payment arises every month based on default of a party to make payments within due date of payment and the provisions of Limitation Act, 1963 do not apply when there is a continuing wrong.

3.32. The Respondent(s) has been completely ignorant of the fact that non-payment as well as delayed payment of energy bills negatively affects its day-to-day operations due to cash flow problems.

3.33. The Respondent(s) has failed to understand that the Petitioner suffers further losses in case of non-payment of interest on delayed payments made to the Petitioner. The Petitioner has been deprived of gains and or amounts it would have earned on the Late Payment Interest, had it received the same on time. Thus, the Petitioner would have been in a better position, had it received the Late Payment Interest on time, in comparison to the position when it will receive the interest on delayed payment sought herein.

3.34. The Distribution Licensee has failed to understand that the intention behind incorporation of clause for interest on late payment in the PPA was essentially to ensure the petitioner of timely payment of bills by the Distribution Licensee. Even the Supreme Court in its various orders has stated that interest on late payment is compensatory in character, in terms of the effect on the seller on account of delay by the purchaser in making its due payment.

3.35. The Respondent(s) has failed to understand that the clause of Late Payment Interest in an agreement is essentially to compensate the non-defaulting party as per the 'time value of money' whereby, it becomes an obligation of the defaulting party to put the non-defaulting party in a position where the defaulting party would have made timely payments to the non-defaulting party for the bills raised by the non-defaulting party.

3.36. The Respondent(s) is guilty of violation of principles of natural justice, in as much as, the Petitioner was not even heard or informed about taking away of the rights, accrued to him under a valid, legal contract, the PPA.

3.37. The action of the Respondent(s) amounts to unjust enrichment, which is impermissible under law. The Respondent (s) are under legal obligation to make the payment for the energy received by it from March, 2018 till April, 2021 and interest accrued thereon, in addition to the payment of interest for the energy, admittedly received, for the energy bills have been paid for from October, 2011- June, 2020 (including the part payments made from March, 2018 to June, 2020) under the terms of the PPA and Section 70 of the Contract Act, 1872.

3.38. This non-fulfilment of the contractual liability has constrained the Petitioner to borrow funds from banks/institutions in order to operate and run the Project to supply electricity to the Respondents and fulfil its contractual obligation under the PPA.

3.39. The Respondent(s) has failed to acknowledge that the Petitioner has been fulfilling its obligations under the PPA without fail. However, despite the same the Respondent(s) has not been paying the rightful claims of the Petitioner.

3.40. Unless the prayers made are granted in favour of the Petitioner, the Petitioner would suffer irreparable loss and harm.

4. Contention of the Respondent No. 3:-

4.1. The 10 Nos. wind mill generators being WEG HT SC No: TZA 11, TZA 12, TZA 13, TZA 14, TZA 15, TZA 16, TZA 17, TZA 18, TZA 19 AND TZA 20 dated 10.02.2012 having capacity of 15 MW (10 x 1.5MW) installed at Tirupur District commissioned on 10.02.2012.

4.2. The Commission issued Comprehensive Tariff order on wind energy (order No.1 of 2009 dated 20.03.2009) where is the relevant portion is extracted as follows:-

Billing & Payment Condition as per Agreement Condition.

- 1) *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.*
- 2) *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.*

4.3. 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.

4.4. Due to shortage of power exist in Tamil Nadu, TANGEDCO is in a position to purchase power at higher rate from other sources, which leads to facing critical financial crises, further not able to make payment within the time limit prescribed.

4.5. The monthly fund inflow of TANGEDCO through revenue from sale of power to its consumers is around Rs.3200 Crores and tariff subsidy from Government of Tamil Nadu is around Rs.600 Crores per month.

The monthly fund outflow towards the revenue expenditure is as below:-

1.	Payment for procuring fuel	-	Rs.300 Crores
2.	Transportation of fuel	-	Rs.300 Crores
3.	Payment to power suppliers, both CGS and Private generators	-	Rs.2000 Crores
4.	Payment to Central and State Transmission Utilities	-	Rs.300 Crores.
5.	Employees cost including pension	-	Rs.650 Crores
6.	Repairs, Maintenance and administrative expenses	-	Rs.100 Crores.
7.	Interest and finance charges	-	Rs.1000 Crores.
8.	Repayment of loan by TANGEDCO	-	Rs.500 Crores.

For all the above expenditures, the total outflow is around Rs.5150 Crores. There is an average shortfall of about Rs.1360 Crores. Some payments are postponed and

made as and when loans are received from REC/PFC/IREDA and other financial institutions.

4.6. In the above circumstances, releasing of huge payments to wind generators will be difficult one. However efforts are being taken for releasing payments for one or two months. And moreover, paying or adjustment of interest due every month will affect the cash inflow of TANGEDCO and payment of surcharge before payment of the dues will not be a correct one under accounting principles. During the month of March 2020, wind mill payments for the period upto March 2018 have been released.

4.7. Due to Covid-19 pandemic, the revenue collections to TANGEDCO has also gone down and with great hardship TANGEDCO is maintaining the payment of 50% to the Thermal generators under LTOA, MTOA and STOA for the months from March 2020 to June 2020. The Government of India has announced a financial assistance package to a tune of Rs.90,000 Crores through REC & PFC, and TANGEDCO has also requested assistance to tune of Rs.32000 Crores through Government of Tamil Nadu. The same is pending approval by MoP and the disbursement to TANGEDCO is expected during the month of September 2020. On receipt of the financial assistance the pending energy bills and bills on late payment will be cleared.

4.8. Due to Covid-19 pandemic, as the Cash inflow of TANGEDCO has considerably reduced, there is some delay in making the payments. However action is being taken to clear the dues at the earliest.

4.9. In the meantime interest on delayed payment is the additional burden to be faced by the TNEB. The Commission confirmed the interest payment vide its order dated 17.04.2011 passed in MP No.36 of 2010 held that the TNEB is liable to pay interest at the rate of 1% per month to the Generator on the delayed payment.

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

4.11. The Commission directs TANGEDCO to forthwith make payment of Interest of Rs.2,35,49,092/- to the payment for the past period from February 2012 to March 2018, it will adversely affects the fund flow of the respondents. Further similar placed generators may also seek the relief and it will lead to multiplication of litigations. This may lead to difficulty in releasing payment for Coal companies, Central Generating Plants, Other fuel suppliers, make suppliers and power Generators similar to the petitioner.

4.12. The Commission has decided the same set of facts as found in this DRP in the Daily Order passed on 17-12-2019 in DRP No.27/2014 and 17/9/2019 in DRP No.7/2014 by ordering 6 % Interest on the payment from this 3rd respondent/TANGEDCO. This findings may be considered and applicable to this petition also.

4.13. TANGEDCO is a corporation company wholly owned by the Government of Tamil Nadu and catering 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 tariffs which have to be passed on the end-consumers and attracts public interest. In any case, for the sake of a company, public authorities under general public should not get suffered financially.

5. Contention of the Respondent No.5:-

5.1 The 4 Nos. wind mill generators being WEG No: 2176,2177,2178 commissioned on 20.10.2011 and WEG.No.2180 Commissioned on 26.12.2011 having capacity of 6 MW (4X1.5MW) installed at Tirupur District.

5.2. The Commission issued Comprehensive Tariff order on wind energy (order No.1 of 2009 dated 20.03.2009) where is the relevant portion is extracted as follows:-

Billing & Payment Condition as per Agreement Condition.

- (1) *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.*
- (2) *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. 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.

5.4. Due to shortage of power exist in Tamil Nadu, TANGEDCO is in a position to purchase power at Higher rate from other sources, which leads to facing critical financial crises, further not able to make payment within the time limit prescribed.

5.5. The monthly fund inflow of TANGEDCO through revenue from sale of power to its consumers is around Rs.3200 Crores and tariff subsidy from Government of Tamil Nadu is around Rs.600 Crores per month.

The monthly fund outflow towards the revenue expenditure is as below:-

1.	Payment for procuring fuel	-	Rs.300 Crores
2.	Transportation of fuel	-	Rs.300 Crores
3.	Payment to power suppliers, both CGS and Private generators	-	Rs.2000 Crores
4.	Payment to Central and State Transmission Utilities	-	Rs.300 Crores.
5.	Employees cost including pension	-	Rs.650 Crores
6.	Repairs, Maintenance and administrative expenses	-	Rs.100 Crores.
7.	Interest and finance charges	-	Rs.1000 Crores.
8.	Repayment of loan by TANGEDCO	-	Rs.500 Crores.

For all the above expenditures, the total outflow is around Rs.5150 Crores. There is an average shortfall of about Rs.1360 Crores. Some payments are postponed and made as and when loans are received from REC/PFC/IREDA and other financial institutions.

5.6. Releasing of huge payments to wind generators will be difficult one. However efforts are being taken for releasing payments for one or two months. And moreover, paying or adjustment of Interest due every month will affect the cash inflow of TANGEDCO and payment of surcharge before payment of the dues will not be a

correct one under accounting principles. During the month of March 2020, wind mill payments for the period upto March 2018 have been released.

5.7. Due to Covid-19 pandemic, the revenue collections to TANGEDCO has also one down and with great hardship TANGEDCO is maintaining the payment of 50% to the Thermal generators under LTOA, MTOA and STOA for the months from Mar.2020 to June 2020. The Government of India has announced a financial assistance package to a tune of Rs.90,000 Crores through REC & PFC, and TANGEDCO has also requested assistance to tune of Rs.32000 Crores through Government of Tamil Nadu. The generation period up to June 2020, 50% payment made on 18.12.2020 another 50% payment made on 30.09.2021. On receipt of the financial assistance the pending energy bills and bills on late payment will be cleared.

5.8. Due to Covid-19 pandemic, as the Cash inflow of TANGEDCO has considerably reduced, there is some delay in making the payments. However action is being taken to clear the dues at the earliest.

5.9. In the meantime interest on delayed payment is the additional burden to be faced by the TNEB. The Commission confirmed the interest payment vide its order dated 17.04.2011 passed in MP No.36 of 2010 held that the TNEB is liable to pay interest at the rate of 1% per month to the Generator on the delayed payment.

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

5.11. The Commission directs TANGEDCO to forthwith make payment of Interest for the past period from December 2011 to March 2018, it will adversely affects the fund flow of the respondents. Further similar placed generators may also seek the relief and it will lead to multiplication of litigations. This may lead to difficulty in releasing payment for Coal companies, Central Generating Plants, Other fuel suppliers, make suppliers and power Generators similar to the petitioner.

5.12. The Commission has decided the same set of facts as found in this DRP in the Daily Order passed on 17-12-2019 in DRP No.27/2014 and 17/9/2019 in DRP No.7/2014 by ordering 6% per annum Interest on the payment from TANGEDCO. These findings may be considered and applicable to this petition also.

5.13. TANGEDCO is a corporation company wholly owned by the Government of Tamil Nadu and catering 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 tariffs which have to be passed on the end-consumers and attracts public interest. In any case, for the sake of a company, public authorities under general public should not get suffered financially.

6. Rejoinder in response to the reply filed by Respondent Nos.3,4 and 5:-

6.1. The Petitioner herein has approached the Commission seeking issuance of directions to the Tamil Nadu Generation and Distribution Corporation Limited

("TANGEDCO") for making payment towards the outstanding principal amount for the outstanding Late Payment Interest and unpaid energy bills under fourteen Power Purchase Agreements ("PPAs") executed between the Petitioner and TANGEDCO. These fourteen PPAs were executed by the Petitioner with TANGEDCO to sell wind energy generated from its generating stations located at Tirupur and Udumalpet Tamil Nadu in all having capacity of 21 MW (14 x 1.5 MW).

6.2. The submissions/averments made by the Respondent No.1 in its Reply are denied for being unsustainable, unjustifiable and devoid of merits, since the same are founded on a misconstrued reading and understanding of the extant provisions of the applicable law, PPAs and the judicial pronouncements. The respondent has made all efforts (albeit incorrectly) to shirk away from its contractual responsibilities under the PPAs and the bounden duty under the governing legal framework to accept and pay for the wind power generated and supplied by the Petitioner to the Respondents.

6.3. Despite being aware and admitting the financial liabilities towards the Petitioner, the Commission is being burdened with adjudication of issues arising on account of non-payment of dues for the energy supplied by the Petitioner. By virtue of its Reply, Respondent has inter alia submitted that:

- i. Due to shortage of power in Tamil Nadu, it is forced to purchase power at higher rate from other sources, which leads to critical financial crisis and hence, it is not able to make the payment within the time limit prescribed.
- ii. There is an average shortfall of about Rs.1360 crores after considering the revenue and expenditures. So, payments are postponed and made as and

when loans are received from REC/PFC/IREDA and other financial institutions.

- iii. Due to covid-19 pandemic, the revenue collections to TANGEDCO has gone down and with great hardship TANGEDCO is maintaining the payment of 50% to the thermal generators under LTOA, MTOA and STOA for the months from March 2020 to June 2020.
- iv. Payment of interest will affect the cash flow of TANGEDCO. Further, it will encourage similarly placed generators leading to multiplicity of litigations, which in effect will lead to difficulty in releasing payments to the coal companies, central generating power plants, other fuel suppliers, make suppliers and power suppliers.

6.4. By virtue of its Reply has inter alia raised the above mentioned issues while not disputing the invoices and payments to be made therein.

6.5. The non-payment or deductions of the amount due towards the electricity supplied by the Petitioner under the PPAs is outrightly illegal and against the existing law, PPA and the applicable policy. This conduct of the Answering Respondent is in complete contravention of the provisions of the PPAs and against the national objective to promote renewable energy industry.

6.6. Under the specific terms of the PPA, the Distribution Licensee is under, *inter alia*, the obligation to make payments of the energy bills for the net energy supplied to it by the Petitioner after deducting the charges for start-up power and reactive power. These payments are required to be made by the Distribution Licensee within 30 days of receipt of the energy bill. However, in total disregard of the said

provisions, and despite repeated requests and communications issued by the Petitioner, the Respondents, arbitrarily and illegally, continue to withhold payments for the invoices.

6.7. The Respondents agreed to honour the terms of the PPA at the time of signing, therefore, it is only the Petitioner's legitimate expectation to be paid for the power supplied by it. However, the non-payments by the Respondents are severely impacting the growth of renewable energy development in the country.

6.8. It is the contention of the Respondent that due to shortage of power which exists in the state of Tamil Nadu, TANGEDCO has to purchase power at higher rate from other sources, which leads to critical financial crisis. The buying power at any rate is a decision of the Answering Respondent itself. It is a settled law that a party cannot wriggle out of its contractual obligations merely because it has become onerous to perform.

6.9. Due to COVID- 19 pandemic, the revenue collections to TANGEDCO have gone down and therefore, it is unable to make timely payments to the Petitioner. The Respondent has not made any payments to the Petitioner for the energy invoices raised since June 2020, however, it is recovering the tariff for the energy procured from the Petitioner from the ultimate consumer. Pertinently, the cost of procurement of power from the Petitioner has been accounted for in the tariff being charged by the Respondent from its consumers. Despite recovering these amounts, payments to the Petitioner are being withheld. The action not only amounts to unjust enrichment of the Respondent but is also contrary to its legal obligation to remit such monies to

the petitioner. This is not only a fraud on the consumers bearing the burden of this cost, but is also illegal, unfair and arbitrary since despite this the Petitioner has not received its due payment from the Respondent.

6.10. The Respondent has further contended that its total cash outflow/expenditure is more than its revenues and there is an average shortfall of about Rs.1360 crores. The renewable power industry is a developing industry and needs to be supported by the government and the distribution companies. The least that can be done by a distribution company is payment of the energy already purchased by it from such power developers.

6.11. The Respondents have till date never disputed any invoice raised by the Petitioner. As such, the invoices have become conclusive and the Respondent is bound to make payments for the said invoices. In the present case, TANGEDCO is misusing its dominant position in withholding payments legally admitted and due to the Petitioner without any basis whatsoever.

6.12. As per Clause 6 (b) of the PPA, the Distribution Licensee is obligated to make payment to the generator within 30 days of receipt of the bill and any delays in payment beyond 30 days, it is bound to pay interest at the rate of 1% per month. Therefore, the PPA itself makes it clear and unambiguous that any delay in making payments to the energy invoices will attract a penalty in the form of interest. Despite the same, the Answering Respondent has not paid a single penny towards interest for the delayed payments since October 2011 till June 2020.

6.13. The Respondent has completely ignored the intent behind a clause of "Late Payment Interest" ("LPI") which is essentially to compensate a non-defaulting party as per the 'time value of money' whereby, it becomes an obligation of the defaulting party to put the non-defaulting party in a position where the defaulting party would have made timely payments to the non-defaulting party for the bills raised by the non-defaulting party. The concept of "Time Value of Money" states that money that is available at present time is worth more than the same amount in the future, due to its potential earning capacity or the inflation that decreases the value of the money. The actual time value of money gets lost if the payment of LPI is delayed or not paid at all. In order to do justice to the intention of LPI, and the concept of "Time Value of Money", in case of delay in the payments of LPI; the same should be paid along with an interest so as to put the non-defaulting party in a position had the LPI payment been received by it on time.

6.14. Even in the Tariff Order No.1 of 2009 dated 20-03-2009 issued by the Commission, there is a specific inclusion of interest payment. The inclusion of the concept of Time Value of Money has been acknowledged even by this Commission even before the PPAs concerned herein were executed. 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".

6.15. The Hon'ble APTEL in its judgment in Chairman, TNEB & ilnr. vs. Indian Wind Power Association and Ors. in Appeal No.11 of 2012 dated 17-04-2012 held that

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. Relevant extract of the judgment is reproduced below:-

“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 require 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 long with the promised return of investment.

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”.

6.16. The Respondent has also referred to a daily order passed by the Commission in DRP No. 4/2014. The said order is not applicable in the present case as, therein an offer was made to the power generator to accept a lower rate of interest which was accepted by it as a matter of settlement. Firstly, no such offer has been made to the petitioner. Secondly, commercial call of one party cannot be imposed on to the other. The Respondent is bound by the terms of the agreement which is entered into out of its own volition and cannot be allowed to violate the same.

6.17. The Respondent contends that payment of interest to the Petitioner will severely impact its cash flow and will also encourage the similarly placed generators to approach the Commission for same relief, which in turn will lead to multiplicity of litigation. It is a settled law that a party cannot wriggle out of its contractual and legal obligations merely because it has become onerous to perform. The Petitioner is

already incurring huge financial burden due to the non-payment of the dues by the Respondent, non-payment of interest by the Respondent will only worsen the financial condition of the Petitioner. Therefore, the directions should be passed for payment of both the principal dues and the interest.

6.18. The Respondent is making statements based out of its own imagination. It states that paying or adjustment of interest due every month will affect cash inflow of TANGEDCO and payment of surcharge before payment of dues will not be a correct accounting principle. It has failed to understand that the petitioner is seeking directions against the Respondent to fulfil its contractual obligations and pay both the principal dues and the outstanding interest. Further, the paragraph states that financial assistance by the Government of India was pending approval by Ministry of Power and disbursement to it was expected in September 2020. The Respondent has neither annexed any document in relation to the same nor provided any recent update i.e. 2021 update, in relation thereto. Therefore, these are mere statements which have no consequential value whatsoever.

6.19. The Respondent is trying to shirk away from its own contractual responsibilities by taxing the garb of public authority.

7. Findings of the Commission:-

7.1. This petition has been filed with a prayer to-

- (a) direct the Respondents to strictly comply and abide with the provisions of the fourteen PPAs entered into between the Petitioner and the Respondent(s).
- (b) direct the Respondents to pay the Outstanding Late Payment Interest towards the delayed payment of energy bills from October, 2011 to June, 2020

amounting to Rs.10,03,05,054/- (including interest on part payment received from March, 2018- June, 2020) and restrict their claim upto June 2020 and

(c) direct the Respondents to pay the outstanding amount towards Unpaid Energy Bills from March, 2018-March, 2021 amounting to Rs.21,71,75,405/- and interest towards late payment till the date of actual realisation.

The factual matrix leading to the filing of the present petition may be briefly stated as follows:-

7.2. The fourteen PPAs were executed by the Petitioner with TANGEDCO to sell wind energy generated from its generating stations located at Tirupur and Udumalpet Tamil Nadu in all having capacity of 21 MW (14 x 1.5 MW).

7.3. The late payment interest since October 2011 and the energy bills since March, 2018 till April, 2021 except for March 2018 to June-2020 50% payment received on 18.12.2020) have not been paid in full for the power supplied to it by the Petitioner as required under the terms of the respective PPAs. These facts have not been disputed by the respondent. Hence, what remains to be decided whether interest is payable on alleged payment and if so, to what extent. In this connection, we have gone through the PPA entered between the parties.

7.4. All the 14 PPAs executed by the respondent with the petitioner contain identical provision with regard to billing and payment. The relevant provision i.e. Clause 6 is extracted below:-

“Billing and Payment:-

(1) *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.*

(2) *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.*

X X X

X X X “

7.5. In this connection, the provisions of Tariff Order No.1 of 2009 dated 20-03-2009 issued by the Commission would be relevant:-

“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.”

7.6. The Hon'ble APTEL, has also in its order dated 17-04-2012 in Appeal No.11 of 2012 has upheld the payment of interest on delayed payment to the wind energy generators and this order has also been upheld by the Hon'ble Supreme Court in CFC Vs. Narasinghadas Agarwal in Review Petition (Civil) No. 1606 of 2018 in Appeal No. 5465 of 2014 dated 16-08-2018.

7.7. From the above, it is clear that the respondent is liable to pay interest at 1% per month (i.e. 12% per annum) for the delayed payment of invoices beyond 30 days of its submission by the petitioner to the respondent. Further, the respondent in their counter have not disputed its liability to pay the outstanding dues to the petitioner. The respondent has only pleaded financial constraints faced by it as the reason for

not making the payment in time. The Respondent has further contended that its total cash outflow / expenditure is more than its revenues and there is an average shortfall of about Rs.1360 Crores.

7.8. We have dealt with the plea in our earlier orders and categorically held that financial constraints cannot be accepted as reason for non-settlement of dues. Therefore, the financial constraints faced by the respondent would not absolve it of its liability to make lawful payments to be made to the petitioner for the energy supplied by the petitioner as per the PPAs entered by them.

7.9. It is also contended by the respondent that due to COVID-19 pandemic, the revenue collections to TANGEDCO have gone down and therefore, it is unable to make timely payments to the Petitioner. We cannot accept those pleas also as the parties are governed by the clauses in the PPA which provide for payment of interest for delay in settlement.

7.10. However, the payment cannot be order without examination of limitation factor. It is a settled law that a court has to examine the question of limitation even in the absence of pleading by the parties to the case. Though TANGEDCO has not raised the plea of limitation, in view of the settled legal position, the Commission would like to examine the same before passing final orders.

7.11. In this connection, the petitioner has taken a stand in Ground "E" at para 4.16 of the petition that non-payment of LPS since October 2011 amounts to "continuing breach" of the terms of the PPA and hence, the provisions of Limitation Act, 1963 do

not apply. We are unable to agree to such proposition put forth by the petitioner for the reason that continuing breach may well be applicable for enforcement of a contract but the same cannot be applied to a statutory provision such as the limitation. Even in the case of continuing breach, it may give rise to action within the provisions of the PPA for remedy or compensation. It cannot be sought for through an entirely unknown proposition such as the one put forth here by the petitioner by stating the question of limitation become inapplicable in view of the continuous breach. Hence, we outrightly reject the concept of continuing breach as being a ground to revive the limitation.

7.12. Hence, the only question that requires answer is whether there are invoices which are barred by limitation. It is glaringly evident that invoices pertaining to the year 2011 and thereafter are sought to be enforced for payment at this distant point of time. There is nothing on record to say that such invoices have got a new lease of life by way of explicit acknowledgment of liability on the part of the respondent thereby extending the period of limitation beyond 3 years. It is now a settled position of law that the limitation is applicable to the proceedings before the Tribunals / Commissions as well. Hence, the issue can be settled only after considering the limitation factor.

7.13. In such circumstances, we are to hold that the period of limitation shall be computed with reference to the date of filing i.e. 08-09-2021 and the date of payment received in case of each invoice which shall be deemed to be a case of acknowledgement of liability in each case. This means all interest claims in respect of the invoices for which the payment was made by the respondent before

07-09-2018 are barred by limitation and the petitioner is entitled to claim only interest only in respect of those invoices against which payment / settlement was made after 07-09-2018.

7.14. As regards unpaid energy bills, valuing Rs.21,71,75,407/- the respondent shall exclude those bills dated prior to 07-08-2018 (as 30 days time limit is given for settlement of bills which means the due date would have fallen on 07-09-2018) which is the cut-off date for limitation in the instant case. Based on this, the settlement of unpaid energy bills shall be made by the respondent within 30 days from the date of this order verifying the claim of the petitioner.

Accordingly, the petition is disposed of.

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

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission