



ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION
4th Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

O.P.No. 32 of 2015

Dated: 07-12-2017

Present
Sri Justice G. Bhavani Prasad, Chairman
Dr. P. Raghu, Member
Sri P. Rama Mohan, Member

Between:

ITC Limited
Agri Business Division ILTD, Grand Trunk Road
P.B.No.317, Guntur 522 004 ... Petitioner

A N D

1. Transmission Corporation of Andhra Pradesh Ltd.,
Vidyut Soudha, Hyderabad 500 082
2. State Load Despatch Centre, Andhra Pradesh
Vidyut Soudha, Hyderabad 500 082 ... Respondents

The petition has come up for hearing finally on 18-11-2017 in the presence of Sri K. Gopal Choudary, learned counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondents. After carefully considering the material available on record and after hearing the arguments of the learned counsel for the petitioner and learned Standing Counsel for the respondents, the Commission passed the following:

ORDER

Petition to direct the 1st respondent to refund Rs.1,51,44,360/- collected from the petitioner as transmission charges from October, 2014 to December, 2014 and further amounts collected towards transmission charges together with interest at the bank rate notified by the Reserve Bank of India from time to time, from the date of payment to the date of refund, to direct the respondents not to collect any further transmission charges in respect of wind energy generated by the petitioner, take

action under Sections 142/146 of the Electricity Act in accordance with law for contravention of transmission charges tariff order and further appropriate orders.

2. The petitioner claimed that the wind energy generated by it at its 23 Wind Turbine Generators at Ramapuram, Anantapur District had to be transmitted under intra-state short term open access for captive consumption of the petitioner's own division/factories at Chirala and Anaparthi. The erstwhile Andhra Pradesh Electricity Regulatory Commission in its transmission tariff order dated 09-05-2014 for the financial years 2014-15 to 2018-19 ordered that there shall be no transmission charges for non-conventional energy generators using wind, solar and mini hydel. Still the respondents were insisting on payment of transmission charges for considering and accepting the petitioner's application and the transmission charges were paid under protest. When the petitioner protested by a letter dated 12-08-2015, the Chief Engineer of the respondents informed on 19-08-2015 that a review petition was filed before the Commission. The Commission dismissed R.P.No.1 of 2015 on 17-10-2015 and also I.A.No.10 of 2015 for collection pending review petition. Still the petitioner's letter dated 21-11-2015 to process the application without demanding transmission charges was not granted till transmission charges were paid. The collection of transmission charges even after dismissal of the review petition was a wilful contravention and any charges collected in excess of determination of tariff will be recovered with interest equal to bank rate. The application for January, 2016 and later months cannot be held up for that reason and hence the petition.

3. The 1st respondent filed a reply on behalf of respondents that there was ambiguity in the transmission tariff order dated 09-05-2014 when it stated that exemption of wheeling and transmission charges is in line with the Government policy. However, since the dismissal of R.P.No.1 of 2015 clarifying the position, the

respondents are complying with the said order. The respondents collected transmission charges prior to that date, as they understood the orders dated 09-05-2014. The petitioner is not entitled to any interest and excess collected will be repaid in six half-yearly instalments. Instalments and repayment without interest was ordered under similar circumstances earlier.

4. Subsequently, an affidavit has been filed by the Executive Director of the 1st respondent dated 22-07-2016 stating that the 1st respondent paid Rs.1,51,44,360/- to the petitioner towards refund of transmission charges.

5. The payment of Rs.1,51,44,360/- by the respondents to the petitioner on 21-07-2016 is not in dispute and the principal amount to be refunded towards transmission charges collected has thus been paid. Any further amounts were not claimed to have been collected towards such transmission charges and therefore the direction sought for in Para 17 (a) of the petition has become no longer necessary except to the extent of the request for grant of interest at the bank rate notified by the Reserve Bank of India from time to time from the date of payment to the date of refund.

6. Similarly, the petitioner itself filed a Memo on 19-12-2015 stating that the fax letter from the 2nd respondent dated 16-12-2015, a copy of which was enclosed to the Memo itself shows that transmission charges are not payable by the petitioner. The letter dated 16-12-2015 specifically stated that in view of the dismissal of R.P.No.1 of 2015 and I.A.No.10 of 2015 by the Commission, transmission charges were exempted for processing open access. The Memo by the petitioner was recorded on 19-12-2015 by the Commission and hence the relief sought for in Para 17 (b) of the petition for a direction to the respondents not to collect any further transmission charges had also become unnecessary.

7. Concerning the request to take action/a proceeding under Sections 142/146 of the Electricity Act, 2003 for contravention of transmission charges tariff order and the provisions of the Act, Section 142 used the word 'may' in empowering the Commission to order penalty and similarly an offence under Section 146 becomes cognizable only upon a complaint in writing by the appropriate Commission or the officer authorized by it in such a case, (apart from other alternatives for taking cognizance) under Section 151 of the Electricity Act, 2003. The filing of such a complaint under the provisions of the Code of Criminal Procedure, 1973 is also optional for the Commission in exercise of its judicial discretion and not a compulsion. As the respondents claimed to have not understood the import of the order dated 09-05-2014 in the manner in which it should have been understood and to be faithfully complying with the said order since the dismissal of R.P.No.1 of 2015, the penalty or punishment under Sections 142 or 146 need not be taken recourse to and since the dismissal of R.P.No.1 of 2015, the respondents claimed to be faithfully giving effect to the order of the Commission.

8. Therefore, the only question that is left for consideration is entitlement of the petitioner to interest at the bank rate from the date of payment to the date of refund.

9. The petitioner addressed the State Government on 11-02-2015 referring to the earlier letters dated 10-11-2014 and 06-01-2015 and 2008 Wind Power Policy waiving transmission and wheeling charges for wheeling power within the State. The letter also referred to Transco/Discoms insisting on payment of such charges by the captive power generators and requested for grant of eligibility to avail the benefits under the new Wind Power Policy to wind power projects commissioned after the expiry of the earlier Wind Power Policy by April, 2013. The petitioner again addressed the State Government on 16-09-2015 referring to the new Wind Power Policy, 2015 dated 13-02-2015 and the earlier Wind Power Policy, 2008 dated

11-04-2008 to April, 2013. The petitioner requested that the Wind Power Policy, 2015 be made effective from the date of expiry of old Wind Power Policy in 2013 or the date of bifurcation of the State on 02-06-2014 or to extend 2008 Policy till the date of operation of new Policy of 2015. The Note of the State Government dated 23-09-2015 noted the discrimination between the wind generators with reference to the dates of commissioning. The letter to the State Government in its Energy Department from the Chairman & Managing Director of APTransco dated 10-11-2015 requested the State Government not to accept the request of the petitioner in its letter dated 16-09-2015 and ultimately the State Government informed the NREDCAP that the request of the petitioner cannot be accepted.

10. While so, the petitioner addressed the respondents on 12-08-2015 complaining about the respondents still insisting upon payment of transmission charges though the Commission in the transmission tariff order dated 09-05-2014 exempted transmission charges for non-conventional energy generators and informed that they made the payment under compulsion and protest. The 1st respondent informed on 19-08-2015 that they filed a review before the Commission but it is difficult to understand how the mere filing of a review petition without any stay or suspension of the orders sought to be reviewed can by itself empower or entitle the respondents not to process the STOA application without payment of transmission charges against the order of the Commission dated 09-05-2014. The letter dated 19-08-2015 referring to a review itself shows the obvious knowledge of the respondents about their disentitlement to collect such transmission charges against which the filing of review petition is sought to be projected as an excuse or enabling factor to collect such charges notwithstanding such an order. The petitioner again informed by a letter dated 21-11-2015 about being compelled to pay such charges notwithstanding the order of the Commission and dismissal of R.P.No.1 of

2015. On 30-11-2015 also the transmission charges were paid under protest. If the order dated 09-05-2014 of the Commission was rightly understood by the respondents and was sought to be negated by filing the review, the respondents cannot claim any justification for insisting of payment of transmission charges as a pre-condition for considering STOA application after that date, notwithstanding the rejection to treat 2015 Wind Power Policy to be operative since an earlier date or to extend the Wind Power Policy, 2008 till the Policy of 2015.

11. The petitioner and the 1st respondent were parties to R.P.No.1 of 2015 dismissed on 17-10-2015 and in the order, the Commission has clearly explained that the Commission has specifically referred to in the order dated 09-05-2014 about it being required under Section 86 (1) (e) of the Electricity Act, 2003 to promote non-conventional energy and its consequent decision to exempt solar, wind and mini hydel generators from wheeling charges. The Commission explained that in tune with the said decision, notes on transmission tariff mentioned that non-conventional energy generators using wind, solar and mini hydel shall have no transmission charges in line with Government policy. The Commission concluded that in discharge of its statutory function, the Commission took a decision which is binding legal, reasonable and justifiable even if it was not referred to in the notes on transmission tariff. This order of R.P.No.1 of 2015 has obviously and admittedly become final and in the order dated 17-10-2015, there is no ambiguity. The very grounds taken by the 1st respondent in R.P.No.1 of 2015 show that what the respondent contended therein was about inconsistency between the exemption and the Government policies or the Government policies being not expressive of the scope for any such exemption contrary to the exemption being stated to be in line with the Government policy in the notes on transmission tariff. Hence, it was a case of the 1st respondent claiming the exemption to be inconsistent with the Government

Policy and not due to any ambiguity in the order dated 09-05-2014. Even if the notes on transmission tariff was incorrect or ambiguous, that does not entitle the respondents to ignore the exemption granted when the grant of exemption was never ambiguous.

12. Section 62 (6) of the Electricity Act, 2003 provides that if any licensee or a generating company recovers a price or tariff exceeding tariff determination under that Section, the excess amount shall be recoverable along with interest equivalent to the bank rate. Sri K. Gopal Choudary, learned counsel for the petitioner referred to three precedents in this regard. In *LIC of India Vs S. Sindhu (2006) 5 SCC 258*, it was held that where a statute provides for payment of interest, such interest will have to be paid in accordance with the provisions of such statute. Similarly, in *Thazhathe Purayil Sarabi Vs Union of India (2009) 7 SCC 372*, it was pointed out that interest is essentially a compensation payable on account of denial of the right to utilize the money due. Similarly, in *Union of India Vs Tata Chemicals Ltd., (2014) 6 SCC 335*, it was pointed out that refund due and payable by the assessee is debt-owed and payable by the revenue and the obligation to refund money received and retained without right implies and carries with it the right to interest.

13. The question was earlier under consideration of the Commission in O.P.No.14 of 2015 decided on 21-11-2015. In the case between Hetero Wind Power Limited and the 1st respondent herein, the question involved was also the transmission and wheeling charges collected from a wind generator and it was of course considered in view of the principle laid down by the Hon'ble Supreme Court in *National Thermal Power Corporation Limited Vs Madhya Pradesh State Electricity Board and others (2011) 15 SCC 580* that it cannot be considered certain that Section 62 (6) applies to such a case. It was also considered that mere use of the word "shall" may be open to be contextually construed as "may" not interfering with the judicial discretion of the

Commission. Such an interpretation was taken aid not to grant interest prior to any default in payment of the instalments fixed by the Commission. That was on such facts where there appeared no justification for grant of any pre-litigation or *pendente lite* interest, grant of such interest was considered to be governed by judicial discretion in such matters and the exemption itself was considered to be a significant economic concession. Still interest was awarded in case of default in payment of instalments fixed by the Commission and it was clearly stated in the order that it was a decision on the facts of that case.

14. In the present case even after dismissal of R.P.No.1 of 2015, transmission charges were collected even till 30-11-2015 and even though the respondents know the legal effect of the order dated 09-05-2014, which was specifically brought to their notice by the petitioner, they relied on the filing of R.P.No.1 of 2015. The order in O.P.No.14 of 2015 cannot be treated as a binding precedent more so, when the conclusions therein were based on the facts and circumstances of that case and the petitioner has filed the relevant information emanating from the Reserve Bank of India about the prevailing rates of interest from time to time. The calculation of interest payable at Rs.14,40,990/- was made by the petitioner according to the prevailing bank rates and the table of calculation is indicative of calculation of simple interest. The demand of the petitioner for exemption from wheeling and transmission charges since 10-11-2014 was initially denied due to the stand against retrospectivity and later denied notwithstanding the order dated 09-05-2014 being unambiguous and the payments were made by the petitioner throughout under protest. Hence, this case is clearly distinguishable on facts from O.P.No.14 of 2015 and the factual conclusions therein hence cannot operate as *res judicata* or *estoppel* in the present case. The principle in I.A.No.20 of 2008 in Appeal No.269 of 2006 decided by the Hon'ble Appellate Tribunal for Electricity granting interest on the analogy of Section

34 of the Code of Civil Procedure, 1908 though not strictly under Section 62 (6) should apply to the present transaction. Under Section 34 of the Code of Civil Procedure, 1908 interest is not confined to the maximum of 6% per annum in case of commercial transactions and the transaction of the petitioner with the respondents is undoubtedly a commercial transaction within the meaning of Explanation II to Section 34 being connected with the industry, trade or business of the party incurring the liability. Therefore, interest claimed at the bank rates prevailing from time to time on the amounts to be refunded from the dates of payment till the date of refund can be fairly, reasonably and equitably granted as claimed.

15. Therefore, the payment of Rs.1,51,44,360/- by the respondents to the petitioner towards refundable transmission charges on 21-07-2016 is recorded. It is further recorded that no further amounts were collected or refundable towards such transmission charges and no action or proceedings under Sections 142 and 146 of the Electricity Act, 2003 are necessary. The respondents shall pay Rs.14,40,990/- towards interest on the refundable transmission charges from the dates of payment to the date of refund. The petition is ordered accordingly, without costs.

This order is corrected and signed on this the **7th day of December, 2017.**

Sd/-
P. Rama Mohan
Member

Sd/-
Dr. P. Raghu
Member

Sd/-
Justice G. Bhavani Prasad
Chairman