

**ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION**  
4<sup>th</sup> Floor, Singareni Bhavan, Red Hills, Hyderabad 500 004

O.P.No.14 of 2015  
Dated: 21-11-2015

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

**Between:**

M/s. Hetero Wind Power Ltd.  
Rep. by its DGM  
8-3-166/7, Hetero House  
Erragadda, Hyderabad - 500 018

... Petitioner

**A N D**

Transmission Corporation of Andhra Pradesh Limited  
(APTRANSCO), Rep. by its MD  
Vidyut Soudha, Somajiguda, Hyderabad - 500 082

... Respondent

The petition has come up for hearing finally on 07-11-2015 in the presence of Sri V. Prasad Rao, learned counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondent. After carefully considering the material available on record and after hearing the arguments of both the counsel, the Commission passed the following:

**ORDER**

Petition to direct the respondent not to compel or insist the petitioner to pay the transmission and wheeling charges on the electric power generated by it, to refund an amount of ₹2,32,00,000/- paid to the respondent from 01-06-2014 till 31-01-2015 along with interest in respect of 54 MW Wind Power Project of the petitioner at Tirumalayapalli, Kadapa District, Andhra Pradesh and for other appropriate orders.

2. The petitioner, M/s. Hetero Wind Power Limited was claimed to have been established by the Hetero Group to avoid the perennial problem of power cuts,

which has been adversely affecting the productivity of its manufacturing units. The installed capacity of power generated through wind energy is 54 MW approved by the Nodal Agency (NREDCAP). The erstwhile Andhra Pradesh Electricity Regulatory Commission passed the tariff order on 09-05-2014 in O.P.No.62 of 2013 for the control period of 2014 to 2019 in respect of transmission tariff on the petition filed by the respondent and directed that there shall be no transmission charges for non-conventional energy generators using wind, solar and mini-hydel. In a similar order in O.P.Nos.64, 66, 68 and 70 of 2013 filed by the respective Discoms on the same date, the Commission directed that there shall be no wheeling charges for non-conventional energy generators using wind, solar and mini-hydel sources, in line with Government policy. The orders of the Commission have become final. The wind power plant of the petitioner was commissioned on 03-07-2013 (Commercial Operation Date) and was synchronized with the grid in the year 2013-14. The transmission, wheeling and SLDC charges were paid as per the orders of the State Electricity Regulatory Commission and in view of the orders of the Commission dated 09-05-2014, the petitioner applied to the respondent on 17-05-2014 not to raise any bills for transmission charges from 17-05-2014. But, the respondent is collecting transmission and wheeling charges contrary to the orders of the Commission, even in the absence of any stay or abeyance order and the petitioner has to submit itself to avoid throttling of transmission and wheeling to its captive consumers. Hence, the petition.

3. Along with the petition, the petitioner filed among other documents, the copies of the correspondence in this regard including copies of three provisional bills and payment intimation.

4. The respondent through its Executive Director filed a counter contending that Long Term Open Access for transmission was accorded to the petitioner on 07-05-2014 and Long Term Open Access Agreement was concluded between the AP Transco, two Discoms and the petitioner on 31-05-2014, to be in force from 01-06-2014. The Agreement was amended after the bifurcation of the State on 27-01-2015 with a revised approval and the APSLDC is billing the energy and demand settlement as per Regulation 2 of 2006. Wind power policy of the Government of Andhra Pradesh under G.O.Ms.No.48 dated 11-04-2008 expired in April, 2013. Again new wind power policy, 2015 was announced by the Government of Andhra Pradesh through G.O.Ms.No.9 dated 13-02-2015. Either of the wind power policies was not in force on the date of synchronization of the petitioner on 03-07-2013 and hence not applicable to the petitioner. The respondent, therefore, filed R.P.No.1 of 2015 before the Regulatory Commission in respect of the order dated 09-05-2014 passed in O.P.No.62 of 2013 and the same is pending, including a request for interim relief. An amount of ₹3,47,03,849/- was received from the petitioner towards transmission charges from June, 2014 to April, 2015. Hence, the respondent desired the petitioner to be directed to pay the transmission charges as per its bills and to dismiss the petition with costs.

5. The petitioner filed a rejoinder claiming ignorance about the advisory by the erstwhile Andhra Pradesh Electricity Regulatory Commission to the State Government about the expiration of the wind policy and the period of 5 years restricted by G.O.Ms.No.99 dated 09-09-2008 should be computed prospectively from the date of the G.O., making the policy to be in force by the date of

synchronization on 03-07-2008. Hence, the contention of the respondent is to be rejected.

6. Arguments of Sri V. Prasad Rao, learned counsel for the petitioner and Sri P. Shiva Rao, learned Standing Counsel for the respondent are heard.

7. The point for consideration is whether the petitioner is entitled to prevent the respondent from collecting any transmission and wheeling charges and to have refund of the amount so collected towards transmission and wheeling charges since 01-06-2014 up-to-date.

8. The contentions raised by the respondent have been sufficiently answered in the order of this Commission in R.P.No.1 of 2015 & I.A.No.10 of 2015 dated 17-10-2015 filed under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation Nos.56 and 59 of APERC (Conduct of Business) Regulations, 1999 for review of the order of the erstwhile Andhra Pradesh Electricity Regulatory Commission dated 09-05-2014 determining the transmission tariffs for the period FY 2014-15 to FY 2018-19. After a detailed reference to the pleadings of the respondent herein and the objectors therein, this Commission found that the impugned order is an elaborate and reasoned order, duly following all the prescribed procedures and formalities and referring extensively to the data, background and circumstances for various conclusions of the Commission. It was noted that the Commission expressly stated in its reasoning at page 19 of the impugned order that it was exercising its jurisdiction under Section 86 (1) (e) of the Electricity Act, 2003 in this regard in taking the decision to exempt solar, wind and mini-hydel generators from wheeling charges. It was also noted that the

Commission in discharge of its statutory functions under Section 86 (1) (e) of the Electricity Act, 2003 to promote co-generation and generation of electricity definitely acted within its jurisdiction in granting exemption from wheeling charges or transmission charges. Section 61 (h) of the Electricity Act, 2003 was also referred to as strengthening the jurisdiction of the Commission in this regard and it was also held that the merits of the decision of the Commission cannot be the subject matter of a review in exercise of the power as is vested in a civil court for review. It was also concluded that mere absence of reference in the notes on transmission tariffs or wheeling tariffs to Section 86 (1) (e) of the Electricity Act does not make the decision any less binding or reasonable or justifiable. In view of the said order on the review petition at the instance of the respondent, the objections of the respondent herein based on any such review petition have to consequently meet a natural failure.

9. Even concerning the wheeling charges, the two Discoms within the territory of the present State of Andhra Pradesh filed a similar review petition in R.P.No.12 of 2015 which is pending adjudication before the Commission with the petitioners and the objectors therein raising similar contentions. Without expressing any premature opinion on the merits of that review petition, it is suffice to note for the purpose of this petition that there is no stay or suspension of the impugned order of the Commission pending that review petition, granted by the Commission or any other authority. Therefore, the pendency of that review petition by itself is neither a bar for consideration by this Commission on merits nor has any impact on the merits of the issues involved.

10. While there is no need for expression of any opinion whether the period of earlier policy in force should be computed from the date of G.O.Ms.No.99 or not in view of the decision of the Commission being not solely based on the Government policy but was primarily in exercise of its statutory duty and function under Section 86 (1) (e), it was inappropriate for the respondent to have collected the exempted charges from the petitioner since 01-06-2014 up-to-date though the exemption order was in force and was not stayed or suspended or kept in abeyance by this Commission or any other authority or court. Such executive excess in total disregard of a binding quasi judicial statutory directive from a statutory Commission has to be deprecated but in the hope that such irregularities or illegalities will not be repeated, no separate action is being initiated to remedy the same. It is suffice to confine the relief to be granted herein to refund of the amount so collected without any lawful authority or sanction.

11. It is submitted or the Commission even can take judicial notice of the fact that the respondent is not in a very comfortable financial position to refund the entire amount so collected in *lump sum*. Striking a reasonable balance between the rights and interests of the private generator and the public utility, it will serve the interests of justice if the respondent is directed to pay the amount collected towards the transmission and wheeling charges from the petitioner from 01-06-2014 up-to-date in monthly instalments of ₹25 lakhs each till the entire amount is repaid.

12. The petitioner also sought for grant of interest as per Section 62 (6) of the Electricity Act, 2003. The applicability of Section 62 (6) was the subject of consideration before the Hon'ble Supreme Court in National Thermal Power

Corporation Limited Vs. Madhya Pradesh State Electricity Board and others (2011) 15 SCC 580 wherein the Hon'ble Apex Court dealt with the back ground of Sub-Sections (1) to (5) of Section 62 and pointed out that the earlier five sub-sections laid down the manner in which the tariff is to be determined and thereafter Sub-Section (6) lays down that the licensee or a generating company shall not recover a price or charge exceeding the tariff that is determined. It was made clear that what is prohibited is recovery of price or charge exceeding the tariff determined under this section and then only the generating company will have to pay the interest on the difference. Incidentally, the Hon'ble Apex Court also dealt with the question of awarding interest on the basis of justice, equity and fair play and on the principles of restitution recognized under Section 144 of the Code of Civil Procedure, 1908 or even under the Interest Act or usage of the trade having force of law. The Hon'ble Apex Court also dealt with the industrial practice which also shows that in any of such occasions, interest has never been either determined or paid when the price fixation takes place. In view of the principles regarding the applicability of Section 62 (6) laid down by the Hon'ble Supreme Court, it cannot be considered certain that Section 62 (6) applies to the present case. The transmission and wheeling charges during the relevant period were collected from the petitioner only at the price or charge fixed by the Commission in this regard, of course ignoring in the process, the exemption granted by the Commission and hence it cannot be said that this is a case of recovery of a price or charge exceeding tariff determined under this Section within the meaning and scope of Section 62 (6). In a comparable situation arising out of the remand of a matter by the Appellate Tribunal for Electricity to the State Electricity Regulatory Commission for re-determination of tariff in the case of M/s. Poddar Alloys (Pvt.)

Ltd., Vs. Uttaranchal Electricity Regulatory Commission and another (I.A.No.20 of 2008 in Appeal No.269 of 2006) dated 01-04-2008, the Appellate Tribunal found the amount collected in excess of re-determined tariff, based on the original tariff to be not strictly attracting Section 62 (6), as the excess collection was under a tariff order which the Appellate Tribunal set aside. Therefore, the Appellate Tribunal granted interest at 6% per annum on the analogy of Section 34 of the Code of Civil Procedure, 1908 prescribing such interest for money decrees.

13. As stated in the order in R.P.No.1 of 2015 dated 17-10-2015, it was the reference in the note in the tariff order to the Government policy alone, which was claimed to be not in existence at the relevant time, that made the respondent seek a review and collect the transmission and wheeling charges in the meanwhile, as the exercise of power and jurisdiction by the Commission under Section 86 (1) (e) was not specifically referred to in the said notes on transmission and wheeling charges in the respective orders though it was specifically a part of the reasoning of the Commission in its order. Though any mistaken impressions of the respondent were dis-spelled by the dismissal of R.P.No.1 of 2015 and though the collection of transmission and wheeling charges in the absence of any stay or suspension or abeyance was found inappropriate and improper, any grant of interest at the bank rate as indicated by Section 62 (6) would impose an unduly heavy burden on the public utility which would ultimately be passed on to the common man consumer. It may not be just or equitable to make any executive excess on the part of any officer of the respondent in such a situation necessarily result in penalization of any public utility or a common consumer. Even otherwise, it is well settled that grant of interest either as damages or as compensation for an amount wrongfully



collected or withheld is a matter of judicial discretion for the Court or Tribunal or quasi judicial authority concerned and it is also well settled that mere use of the word 'shall' in a statute does not indicate necessarily any unexceptionable nature and the word is open to be contextually construed as 'may' in the light of the statutory background, scheme and intendment through a purposive construction. If the word 'shall' used in Section 62 (6) were to be thus construed to be not interfering with the judicial discretion of this Commission, on facts, there appears no justification for grant of any pre-litigation or *pendente lite* interest as but for the exemption, the petitioner would have been liable to pay the fixed transmission and wheeling charges like any other consumer and the benefit from exemption by itself is a significant economic concession to achieve the object of Section 86 (1) (e) which obligates the respondent and the DISCOMs to undertake the transmission and wheeling of the power produced by the petitioner free of cost, foregoing the expense they had to incur for extending such service through their systems and enforcing such concession without any further liability for interest will by itself be evenly balancing the interests of both the parties under such circumstances.

14. However, if the respondent defaults in payment of monthly instalments now ordered to be paid, there will be no excuse for such default and hence, if a date for payment of instalment in each month is fixed and interest at 6% per annum for any default in payment by that date as permitted by Section 34 of the Code of Civil Procedure, 1908 is permitted, the same will meet the ends of justice.

15. Therefore, the respondent shall refund the amount collected from the petitioner towards transmission and wheeling charges in respect of 54 MW Wind Power Project of the petitioner at Tirumalayapalli, Kadapa District, Andhra

Pradesh from 01-06-2014 up-to-date, in monthly instalments of ₹25 lakhs (Rupees Twenty Five Lakhs only) each till the entire amount is repaid, commencing from December, 2015 before the end of each month and in default of payment of any instalment, the defaulted amount shall be paid with interest at 6% per annum thereon from the date of default till the date of payment. The respondent shall not hereafter collect any further transmission and wheeling charges exempted by the Commission under the relevant orders dated 09-05-2014 so long as the said orders are in force. The petition is ordered accordingly. The parties shall bear their own costs.

This order is corrected and signed on this the 21<sup>st</sup> day of November, 2015.

**Sd/-**  
**P. Rama Mohan**  
Member

**Sd/-**  
**Dr. P. Raghu**  
Member

**Sd/-**  
**Justice G. Bhavani Prasad**  
Chairman