

Rajasthan Electricity Regulatory Commission

Petition No. RERC-1920/2021

Petition filed under Section 86(1(f) of the Electricity Act, 2003 for adjudication of dispute.

Coram:

Dr. B. N. Sharma,	Chairman
Shri S. C. Dinkar,	Member
Shri Prithvi Raj,	Member

Petitioner : M/s Maharaja Shree Umaid Mills Ltd., Pali

Respondent : Jodhpur Vidyut Vitran Nigam Ltd.
Rajasthan Urja Vikas Nigam Ltd.

Date of hearings : 02.09.2021, 05.10.2021

Present : Sh. P. N. Bhandari, Advocate for Petitioner
Sh. Anand Ganesan , Advocate for Respondents

Order Date: **22.11.2021**

ORDER

1. Petitioner, M/s. Maharaja Shree Umaid Mills Ltd. filed this petition on 18.07.2021 under Section 86(1(f) of the Electricity Act for adjudication of dispute.
2. Notices were issued to Respondent through online portal to file reply on the petition. Respondents filed their reply on 22.09.2021. Petitioner filed the rejoinder on the reply of RUVNL on 01.10.2021.

3. The matter was listed for hearing on 05.10.2021. Sh. P. N. Bhandari, Advocate appeared for the Petitioner, Sh. Anand Ganesan, Advocate appeared for Respondents.
4. Petitioner in its petition and during hearing has submitted as under:
 - 4.1 The Petitioner is a wind energy generator. The Petitioner had executed Long Term PPA with the Respondent Jodhpur Discom on 22.8.2014 and 25.8.2014 for supply of wind energy to be generated from Petitioner's 15.35 MW Wind Power Plants situated in the District of Jaisalmer and Jodhpur.
 - 4.2 The Rajasthan Discoms Power Procurement Centre (RDPPC) was making payments from October 2014 to April 2015 as per the invoices, without any objection.
 - 4.3 From May 2015, the RDPPC refused to even accept the invoices as per the PPA tariff and compelled the Petitioner to revise the invoices at lower rates, failing which the invoices would not be accepted. Aggrieved by the same, the Petitioner filed petition No. RERC/576/2015 on 08.10.2015 before the Commission for clarification of the tariff as per the PPA.
 - 4.4 The Commission vide its Interim order dated 07.01.2016 directed the Discom/RDPPC to make the payment of the undisputed tariff, pending disposal of the petition. Accordingly, RDPPC/Discom started making payment of monthly bills w.e.f. April, 2015 at reduced tariff, that too with average delay of around 100-200 days.
 - 4.5 The Commission issued final order on 20.06.2016 and clarified that the applicable tariff shall be the tariff as stated in the PPA.
 - 4.6 Despite the issue of final order of the Commission, the RDPPC/Dicsom did not comply & continued to release only reduced tariff on the ground that

they were going to prefer Appeal before the Hon'ble APTEL against the order of the Commission.

- 4.7 The Petitioner therefore filed a petition u/s 142 on 17.08.2016 before the Commission for implementation of its order dated 20.06.2016. The Commission vide its order dated 06.09.2017 directed the Respondent to comply with the Commission's order dated 20.06.2016 pending appeal before the Hon'ble APTEL.
- 4.8 In the meanwhile, RUVNL (erstwhile RDPPC)/Discom filed an Appeal before the Hon'ble APTEL against the order dated 20.06.2016 of the Commission.
- 4.9 In pursuance of the order of the Commission u/s 142, RUVNL/Discom released a sum of Rs. 9,21,09,385/- on 09.11.2017 being the amount of differential tariff for the period from October, 2014 to September, 2017.
- 4.10 In the meanwhile, Hon'ble APTEL dismissed the appeal filed by Respondents RUVNL/Discom and upheld the order of the Commission vide its Judgement dated 12.2.2020.
- 4.11 Since the Judgement of Hon'ble APTEL, the Petitioner has contacted senior officials of the Respondents on various occasions and simultaneously sent a number of communications (requesting for release of the outstanding amount of LPS), but all in vain.
- 4.12 Late Payment Surcharge/interest has not been released even after the Judgement of Hon'ble APTEL. The due amount of LPS stood frozen on 09.11.2017, when the Respondents paid the principal amount but legitimate amount of LPS has been withheld for the last four years, without any justification. The Petitioner deserves to be compensated for this long and unjust delay with appropriate interest as per bank rates.

4.13 Article 7 of the PPAs reads thus :

"7. Billing and Payment procedures:

7.2 Payment Procedure

i) Monthly invoice showing the quantity of electricity delivered at Delivery point and price payable shall be submitted by the Power Producer to the designated officer of concerned Discom.

ii) In case the payment of bills is delayed beyond a period of 1.5 months from the date of presentation of bill, a late payment surcharge at the rate of 1.25% per month on daily basis shall be payable by the Discom."

4.14 Respondent RUVNL vide its latest letter dt. 05.07.2021 stated that LPS is not payable, since there is no order of either RERC or APTEL to pay LPS.

4.15 This issue has arisen for the first time after the judgement of the Hon'ble Tribunal & particularly after making the payment by the Respondents to the Petitioner. The liability of LPS can be counted only from the date of actual payment. Payment of LPS was never a subject of dispute either before the Commission or the Hon'ble APTEL. The issue of LPS had not arisen before the Hon'ble APTEL & hence there was no question of any direction on LPS by the Hon'ble APTEL.

4.16 PPA is a single document & has to be considered in totality. Respondents cannot pick up the tariff from the PPA & refuse to accept the LPS provisions of the PPA.

4.17 The Respondents had paid LPS as per the PPA, on the reduced tariff from October 2014 to September 2017. Similarly LPS was paid by the Respondents from time to time, after September 2017 on full tariff. Refusal to pay LPS as per PPA for the period October 2014 to September 2017 is therefore not based on any legal objections but only because of their mood & fancy.

- 4.18 The Commission had passed its order dated 20.6.2016, upholding the validity of the PPAs entered between the parties. It had directed for the payment based on these PPAs.
- 4.19 If the Respondent has made payment as per the PPA, then LPS too is payable as per the said PPA. No fresh order is required for the payment of LPS by any Authority. Once the PPA has been upheld & recognised by the Commission & Hon'ble Aptel, LPS cannot be delinked from that.
- 4.20 Petitioner has referred to following judgements in support of its contention (a) M/s. Konaseema Gas Power Limited Vs. Andhra Pradesh Electricity Regulatory Commission (Appeal No. 117 of 2011 & Appeal No. 100 of 2010 dt. 17.04.2013) (b) (2010) 1 Supreme Court Cases 512 urban improvement trust, Bikaner Vs. Mohan Lal.
- 4.21 The Commission has consistently held in a number of orders that LPS has to be paid as per the PPA such as in HIL Ltd. Vs RUVNL & JdVVNL, with more than 150 petitioners.
- 4.22 Respondents repeatedly raised the issue that LPS was not claimed by the petitioner. The argument is puerile. Something which is part and parcel of the long term PPA with the Respondents does not have to be claimed every time. No reminder is required every time for terms and conditions which have been agreed between the petitioner and the respondent, for the next 25 years.
- 4.23 It is well established that limitation would not run while the matter is sub judice. While the dispute was under adjudication before the Hon'ble Commission and the Hon'ble APTEL, there is no question of any claim getting time barred. The limitation starts only from the day when the respondent's appeal was dismissed.

- 4.24 Respondents in their reply have stated that the Petitioner had requested for payment of LPS for the first time on 18.2.2020 which is not correct. The communications dated 19.9.2017, 13.11.2017, 18.02.2020, 29.01.2016 and 10.5.2016 show that LPS had been repeatedly demanded by the petitioner.
- 4.25 It is absurd to invoke res judicata under Section 11 of the CPC. Strictly speaking, CPC is not applicable in matters covered by the Electricity Act. An issue which should have been raised in a suit but was not raised may amount to constructive res judicata in civil suits. But since the issue of interest was inadvertently raised, it has no effect on the case. LPS was neither claimed nor rejected by the Commission.
- 4.26 In view of above Petitioner has prayed to pay:
- (a) Outstanding LPS as per article 7 of the PPAs, on the differential amount from October, 2014 to September, 2017.
 - (b) Reasonable bank interest, as may be specified by the Commission, on the non-payment of LPS from 9.11.2017 to actual date of payment.
5. Respondents in their common reply and during hearing submitted that:
- 5.1 The present Petition has been filed as an after-thought and is an abuse of process of the court. The claim for LPS is in fact barred by limitation. Further, the principal order of the Commission did not grant any interest as is sought to be presently claimed. The claim is therefore barred by law.
- 5.2 The Petitioner had filed Petition No. 576/2015 on the dispute with regard to applicable tariff and payment thereof. In the said petition, the Petitioner also claimed the recovery of the amounts together with interest. This fact is also recorded in the Order dated 20.06.2016 of the Commission.

- 5.3 However, while disposing of the said petition, the Commission did not grant any relief for LPS or interest. Therefore, the Petitioner is barred from again approaching the Commission once again with the same prayer, which was earlier not granted.
- 5.4 While the issue on applicable tariff and payment thereof arose from May 2015 onwards, it is only on 18.02.2020, that the demand for LPS has been raised for the first time. Thus, the claim for LPS for the period from October 2014 to September 2017 is barred by limitation.
- 5.5 Further the Petitioner has prayed for interest to be paid on the LPS amounts. It is submitted that there cannot be any claim for interest on interest, when neither the contract, nor the law provides for the same.
- 5.6 Initially the Commission vide its interim order dated 07.01.2016 directed the answering Respondents to make the payment of the undisputed tariff till disposal of the main Petition. Accordingly, the answering Respondents had duly complied with the said order.
- 5.7 Thereafter, in the final order of the Commission dated 20.06.2016, there was no direction for payment of any late payment surcharge. This is despite the fact that there was a specific claim of the Petitioner for interest.
- 5.8 In the circumstances, the Petitioner is barred from claiming interest in the present proceedings. The said claim is barred by the principle of res-judicata.
- 5.9 In fact, while the answering Respondent decided to prefer an appeal before the Appellate Tribunal, the Petitioner in the meanwhile on 17.08.2016 filed a petition under Section 142 before the Commission for the implementation of the order dated 20.06.2015.

- 5.10 While seeking implementation of the Commissions' order dated 20.06.2016 in Petition No. 849/2016, the Petitioner had never raised the issue of LPS. This was obviously because the claim for interest was not granted by the Commission in the order dated 20.06.2016. The Petitioner obviously cannot allege non-compliance of a claim which was not allowed by the Commission. Accordingly in the order dated 06.09.2017 also, there was not any relief granted by the Commission in this regard.
- 5.11 Thereafter, in compliance of the above, the answering Respondents released a sum of Rs. 9,21,09,385/- on 09.11.2017 being the amount of differential tariff for the period from October, 2014 to September, 2017.
- 5.12 The above payment was accepted by the Petitioner without any protest or any rights being reserved on its claim for LPS. The answering Respondents have therefore already complied with the order of the Commission by paying the principal amount. There can be no further claim in this regard at this stage.
- 5.13 The principle of res-judicata/constructive res-judicata is clearly applicable in the present case. In this regard, the Respondents have referred to the following judgments of the Hon'ble Supreme (a) Daryao v. State of U.P., (1962) 1 SCR 574 (b) Shiv Chander More v. Lt. Governor, (2014) 11 SCC 744 (c) Asgar v. Mohan Varma, (2020) 16 SCC 230.
- 5.14 As has been observed by Halsbury, "the doctrine of res judicata is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation." Thus, the Petitioner shouldn't be allowed to raise new default or claim time and time again as the matter was already before the Commission and has been adjudicated upon in favour of the Petitioner and upheld by the Hon'ble Appellate Tribunal. If this is allowed there will never be an end to litigation.

- 5.15 The claim of the Petitioner for LPS on amounts due from October 2014, is barred by limitation. As stated above, the Petition on the issue applicable tariff and payment thereof was filed on 08.10.2015. Thereafter, the Petitioner for the first time raised the issue of LPS only on 18.02.2020, and the present Petition claiming LPS has only been filed on 15.07.2021.
- 5.16 It is stated that no claims at all are maintainable for any period prior to three years before filing of the present petition i.e. prior to 15.07.2018. Any claims for this period are barred by limitation in terms of the Judgment of the Hon'ble Supreme Court in AP Power Coordination Committee &Ors v M/s LancoKondapalli Power Ltd &Ors (2016) 3 SCC 468.
- 5.17 The Hon'ble Supreme Court has held that the limitation period of 3 years would apply in adjudication proceeding initiated under Section 86 (1) (f) of the Electricity Act, 2003. In the Lanco Case, the entire issue first before the APERC, then before the Appellate Tribunal and finally before the Hon'ble Supreme Court was a dispute under the PPA which was adjudicated under Section 86 (1) (f). The Appellate Tribunal also adjudicated (under its coextensive power as a first appellate court) the matter and deviated with the findings of the APERC on certain aspects. Thereafter, the matter travelled to the Hon'ble Supreme Court under Section 125 of the Act. Therefore, the Hon'ble Supreme Court, after considering the specific nature of power of adjudication under Section 86 (1) (f) laid down the following principles

"...a statutory authority like the Commission is also required to determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus Sections 174 and 175 of the Electricity Act assume relevance. Since no separate limitation has been prescribed for exercise of power under Section 86(1)(f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time-barred claims, there is no conflict between the provisions of the Electricity Act and the Limitation Act to attract the provisions of Section 174 of the Electricity Act.

....In the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view."

- 5.18 The only response of the Petitioner on the above aspect is that the issue of LPS could not have been raised until 09.11.2017, when the payment of the differential amounts was actually made by the answering Respondents. This is however wrong and misconceived.
- 5.19 The cause of action for payment of LPS would arise from the date of non-payment of applicable tariff i.e. from May 2015 as per the claim of the Petitioner. The Petitioner itself has recognized this fact in the Petition, wherein it has stated that LPS becomes automatically becomes payable, if the payment is delayed. In the circumstances, the claim is clearly barred by limitation and is liable to be rejected.
- 5.20 In any event, the Petitioner's claim is also hit by the doctrine of 'Delay or Laches'. It is based on the maxim "Vigilantibus non dormientibus aequitas subvenit" which means equity aids the vigilant and not the ones who sleep over their rights.
- 5.21 The answering Respondents released a sum of Rs. 9,21,09,385 on 09.11.2017 being the amount of differential tariff for the period from October, 2014 to September, 2017. The claim of LPS was made by the Petitioner only on 18.02.2020. No protest was made or right was reserved by the Petitioner regarding LPS during the time of receiving the payment as well. Thus, the action of the Petitioner is barred by the doctrine of delay or laches. The Respondent has referred to the Order of the Hon'ble High

Court of Delhi Cable News Network Lp, Llp (Cnn) vs Cam News Network Limited, 2008 (36) PTC 255 Del.

- 5.22 While the Petitioner has sought to give an impression that it had raised the claim for LPS immediately after the dismissal of the Appeal filed by the answering Respondents by the Appellate Tribunal, it is submitted that the said stance taken by the Petitioner is simply an afterthought.
- 5.23 Admittedly, the payment of the principal amounts was made on 09.11.2017, which was accepted without any protest or demur by the Petitioner. There is no explanation given by the Petitioner on why the claim for LPS then only been raised from the first time only on 18.02.2020 after a huge delay.
- 5.24 The pendency of the Appeal before the Appellate Tribunal can certainly not be a ground for not claiming the LPS amounts, as the pendency has no relation whatsoever with the claim of LPS. While the answering Respondents had already complied with the order of the Commission when the matter was pending before the Appellate Tribunal, it is not open for the Petitioner to then rely on the pendency of the Appeal to claim LPS.

Commission's view

6. Commission has considered the submissions, reply and oral arguments made on behalf of the Petitioner and Respondents.
7. Petitioner has submitted that Respondents made payment on reduced rates for supply of wind energy generated from Petitioner's 15.35 MW Wind Power Plants. The Commission vide orders dated 20.06.2016 and 06.09.2017 directed the Discom to make the payment as per PPA. Accordingly, payment of differential amount as per the Commission's order dated 20.06.2016 and 06.09.2017 was made. However LPS on the differential amount has not been by paid by the Respondents.

8. Petitioner therefore has prayed for payment of outstanding LPS as per article 7 of the PPAs, on the differential amount from October, 2014 to September, 2017 and to pay reasonable bank interest, as may be specified by the Commission, on the non-payment of LPS from 9.11.2017 to actual date of payment.
9. Per Contra Respondents submitted that the present Petition has been filed as an afterthought and is an abuse of process of the court. The claim for LPS is in fact barred by limitation. Further, the principal order of the Commission did not grant any interest as is sought to be presently claimed. The claim is therefore barred by law.
10. It is observed that issue is regarding the payment of LPS on differential amount which was paid by the Respondents consequent to Commission's order dated 20.06.2016 and 06.09.2017 for the period October, 2014 to September, 2017.
11. Before going into the merits of the case, we first look into the brief facts of the case as the issue is related to earlier dispute between the parties.
12. The Petitioner filed a petition bearing No. RERC/576/2015 on 08.10.2015 before the Commission for clarification of the applicable tariff for supply of wind energy generated from Petitioner's Wind Power Plants.
13. The Commission issued final order on 20.06.2016 and clarified that the applicable tariff shall be the tariff as stated in the PPA.
14. Respondents did not comply with the Commission's order on the ground that they were to prefer Appeal before the Hon'ble APTEL against the order of the Commission.
15. The Petitioner thereafter filed a petition u/s 142 before the Commission for implementation of its order dated 20.06.2016. The Commission vide its order

dated 06.09.2017 directed the Respondent to comply with the Commission's order dated 20.06.2016 pending appeal before the Hon'ble APTEL.

16. In pursuance of the order of the Commission u/s 142, RUVNL/Discom released a sum of Rs. 9,21,09,385/- on 09.11.2017 being the amount of differential tariff for the period from October, 2014 to September, 2017.
17. Hon'ble APTEL, through its Judgement dated 12.02.2020, dismissed the appeal filed by Respondents RUVNL/Discom and upheld the order of the Commission.
18. The Respondents mainly contended that LPS claimed by the Petitioner is barred by limitation and the principle of res-judicata/constructive res-judicata is applicable in the present case and therefore the prayers cannot be allowed.
19. The first contention of the Respondent that LPS claimed by the Petitioner is barred by limitation does not hold water as the applicable tariff on Petitioner's wind plants was not final but under adjudication first before the Commission and then before Hon'ble APTEL. The issue was finally decided by the Hon'ble APTEL only on 12.02.2020. Thus the limitation period will run from 12.02.2020, therefore, Petitioner's LPS claim is not time barred.
20. Further to decide the applicability of the principle of res-judicata in the present case, we looked into Commission's earlier orders dated 20.06.2016 and 06.09.2017. The Commission observes that issue of LPS was not specifically raised/argued by any of the parties nor decided by the Commission. In Commission's view the payment of LPS was not disputed anytime before, as it is as per their contractual agreement, therefore issue of LPS was not required to be decided by the Commission. As per PPA if

there is any delay in payment of bills, LPS has to be paid. Therefore, the principle of res-judicata is not applicable in the present case.

21. It is observed that the applicable tariff for the Petitioner's plant was under adjudication, the Commission decided the applicable tariff vide its order dated 20.06.2016, therefore Petitioner's claim for LPS even before the Commission's order is not justified.
22. However, it is also observed that Respondents needlessly delayed the payment of Petitioner after the Commission's order dated 20.06.2016, the payment should have been made promptly once the matter was finalized by the Commission. If the payments are delayed the LPS are consequential in terms of PPA. Discoms have signed the agreements consciously and are bound by the agreements. The Petitioner is therefore entitled to get the LPS as per PPA since the applicable tariff on Petitioner's wind plants was finalized by the Commission vide order dated 20.06.2016 till the date the differential amount was actually paid.
23. Further, the Petitioner's prayer for interest to be paid on the LPS amounts cannot be granted as there is no provision in the PPA for interest on interest, nor the law provides for the same.
24. In view of above, the Respondents are directed to pay LPS as per PPA on the difference amount paid by the Respondents for the period July, 2016 to the date the amount was actually paid. The Respondents are also directed to pay the cost of proceedings. The Respondents shall file the compliance report in this regard within one month.
25. Petition stand disposed of accordingly.

(Prithvi Raj)
Member

(S. C. Dinkar)
Member

(Dr. B.N. Sharma)
Chairman