

BEFORE THE HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION
SHIMLA

M/s Tissa Power Transmission Private Limited,
(a consortium of Independent Power Producers)
having its corporate Office at Gyamba House,
South End, Lane-IV, Sector-1 New Shimla
Through Sh. S.N.Kapoor, Authorised Signatory.

...Petitioner

V/s

The Himachal Pradesh State Electricity Board Ltd.,
thro' its Executive Director (P),
Vidyut Bhawan, Shimla-171004.

... Respondent

Petition No. 174 of 2010
(Passed on 20-01-2011)

CORAM
YOGESH KHANNA,
CHAIRMAN

Counsels:-

for the petitioner

Shri Ajay Vaidya
Advocate

for the respondents

Sh.Ramesh Chauhan
Authorised representative

ORDER

(Last heard on 20.12.2010 and order reserved)

1. The petitioner is a consortium of independent power producers generating Hydro Power in the Tissa region of Distt. Chamba, HP. The petitioner has moved this petition seeking partial review of the order passed by the Commission on 22.8.2008 in respect of the petition No. 202 of 2007, stating:-

- (i) that the Petitioner had earlier filed a petition No. 202 of 2007 for prior approval of the Commission to construct 132 KV system comprising 33/132 KV Sub-station at Kurthala and 132 KV double circuit line from Kurthala to Bathri, as per the provisions of sub-

regulation (6) of regulation 3 of the Himachal Pradesh Electricity Regulatory Commission (Power Procurement from Renewable Sources and Co-generation by the Distribution Licensee) Regulations, 2007 (hereinafter referred as "the said regulations") which reads as under:-

"(6) The generators may, in consultation with the licensee and with the prior approval of the Commission, augment or establish, on behalf of the licensee, the transmission system, beyond interconnection point, on build and transfer basis, and the expenditure so incurred by the generators shall be repaid by the licensee alongwith interest in five equal instalments, spread over a period of 5 years commencing from one year after the date of commissioning of the project, and such expenditure shall be allowed as a pass through to the licensee";

(ii) that the interim order on the said petition was passed by the Commission on 19.10.2007 and based on the same, the petitioner and the Himachal Pradesh State Electricity Board (hereinafter referred as "the Board") entered into an Agreement on 8.7.2008 for the construction of 2x50/63 MVA, 33/132 KV Sub-station at Kurthala (Near Tissa) and 132 KV D/C line from Kurthala to Bathri Sub-station of the Board including 132 KV Terminal Bays at Bathri Sub-station in district Chamba, Himachal Pradesh;

(iii) that the final order was passed by the Commission on 22.8.2008;

(iv) that while issuing the final order on the petition No. 202/2007, the Commission, vide para 8 of the said order, has stated, that the Board is to reimburse the cost of work alongwith IDC to the consortium in five equal instalments spread over a period of five years, commencing from one year after all the works are commissioned/handed over to the board per provisions in sub-regulation (6) of regulation 3 of the said regulations;

(v) that from the order passed by passed by the Commission on 22nd of August, 2008, it seems that the words "alongwith

interest” could not be incorporated/mentioned in para 8 of the said order probably because of the inadvertent omission in the agreement and the mistake is apparent from the record;

(vi) that this fact has come to the knowledge of the petitioner only a few days ago when the bankers were approached for financing further requirement of funds and it was found that the words ‘alongwith interest’ were neither mentioned in the agreement nor in the order dated 22.08.2008”;

(vii) that if the order of 22.08.2008 is implemented as such, the petitioner shall suffer huge losses.

2. The petitioner has now, prayed:--

(i) that in para 8 of the order dated 22.08.2008, the words “alongwith IDC” occurring for the second time, the words “alongwith interest” be substituted, to bring it in line with the provisions in sub regulation (6) of regulation 3 of the said regulations;

(ii) that the Board be directed to incorporate similar amendment in clause 3.2.2 of the Agreement.

3. In response to the petition the respondent/Board submits:-

(i) that the agreement signed between the parties on 8.7.2008 was ratified by the Commission vide order dated 22.8.2008 and that since the petitioner has not sought the review of the said order within the period of 30 days, the review petition being time barred, needs to be rejected;

(ii) the petitioner’s plea that the words ‘alongwith interest’ could not be incorporated in Para 3.2.2 of the agreement and para-8 of the said order of 22.8.2008 due to inadvertent error has been denied and It has been pleaded that the petitioner was fully aware of the implications that may arise due to substitution of words “interest” with ‘IDC’. The Respondent Board further submits that since the agreement was signed between the Board and the petitioner with mutual consent on 8.7.2008 and further got ratified from the Commission, no modification/amendment in the agreed terms and conditions be made at such belated stage.

4. Sh. Ajay Vaidya, the learned Counsel appearing on behalf of the petitioner, argues:-

- (i) that it undertook the construction of the 132KV system to facilitate the execution of the evacuation system for the various projects coming up in the area in view of the provisions under sub-regulation (6) of regulation 3 of the said regulations and that the reading of the said provisions clearly reveals that the expenditure by the generators is to be repaid by the licensee alongwith interest in five equal instalments, spread over a period of 5 years commencing from one year after the date of commissioning of the project, and such expenditure shall be allowed as a pass through to the licensee;
- (ii) that whereas the benefits from the system being executed by it shall be availed of by all the projects in the area, the funds have been arranged by the petitioner only and that it shall have to suffer heavy losses in case the reimbursement is not allowed to it alongwith interest, particularly when, in accordance with clause 3.1 of the agreement, the capital cost of the works to be reimbursed to him is to be restricted to the cost based on the cost data for 2006-07 or the actual audited cost as approved by the Commission, whichever is less. The petitioner further pleads that it should not be disincentivised for the initiative that has been taken by it to provide the system in the area.
- (iii) that even the para 3.2.2 of the agreement and Commission's order dated 22.8.2008 provide for reimbursement of the expenditure as per the provisions of sub-regulation (6) of regulation 3 of the said regulations and that since the said sub regulation clearly provides for payment of interest, the reimbursement should be allowed alongwith interest.

5. With regard to the respondent Board's contention that since the petitioner has not sought the review of the impugned order, within the period of 30 days, the review petition, being time barred needs to be rejected, the petitioner has satisfactorily explained the circumstances leading to

delay in filing the present application. It would be apt to state the Hon'ble APTEL in para 5 of its recent decision dated 20.10.2010 in **Power grid Corporation of India Ltd Vs. Central The Electricity Regulatory Commission and others 2010 ELR(APTEL) 1305**, has stressed that "as held by the Hon'ble Supreme Court the number of days delay is not the criteria to consider the application. We are only concerned with the diligence on the part of the party to approach the proper forum to file an appeal/review against that order".

6. The Commission observes that the petitioner has moved the present review petition soon after the omission came to its notice. The Commission, therefore, does not find merit in rejecting the claim simply on account of the expiry of limitation period, particularly when the regulations specifically provide for reimbursement of the expenditure alongwith interest.

7. The Commission also observes that para 8 of the order dated 22.8.2008 only spells out the main features of the agreement signed between the two parties and, in fact, the Commission had vide para 9 of the said order concluded that in view of the modalities mutually finalized by the parties, there is no scope for any interference by the Commission in the matter. However, the Commission, after going through the contents of the said order, clause 3.2.2 of the agreement and the other provisions of the agreement as well as back ground in the subject matter, finds that the provisions of sub-regulation (6) of regulation 3, as aforesaid, can not be overlooked for the purpose of interpretation of the said agreement which was signed after the notification of the said regulations. As such, the Respondent Board shall be liable to reimburse the expenditure permissible in terms of the provisions of clause 3.1 of the said Agreement, including IDC as per the provisions of the Agreement, alongwith interest on the outstanding amount of the permitted expenditure. The Commission further observes that in accordance with para 3.2.2 of the agreement itself, the detailed mechanism for reimbursement of the cost of works was to be worked out mutually by the Board and the Consortium in consultation with the Commission within a period of six months from the effective date. Moreover the Monitoring Committee constituted as per clause 15 of the agreement is also required to monitor the physical and financial progress of the Works.

8. In view of the above findings/factual aspects, the provisions quoted and the judgement cited hereinbefore, the Commission hereby orders that:-

- (i) the respondent Board shall be liable to reimburse to the Petitioner the permissible expenditure in terms of clause 3.1 of the said agreement dated 8.7.2008,(including IDC, as per the provisions of the agreement), alongwith interest on the outstanding amount due from time to time, in 5 equal instalments spread over a period of 5 years commencing from one year after all the works in the scope of the agreement are commissioned/handed over to the Board. However the respondent Board may, at its option, work out a mutual agreement with the other party, for the reimbursement of the permitted expenditure in a shorter period and/or for increasing the amount of initial instalments , in order to reduce the interest liabilities;
- (ii) both the parties shall work out the detailed mechanism in terms of clause 3.2.2 of the agreement for reimbursement of the cost of 'Works' within the frame work of the said agreement without any further delay;
- (iii) the respondent Board shall ensure that the Monitoring Committee constituted as per clause 15 of the said agreement of 8.7.2008 shall review and monitor the physical and financial progress of the works being executed under the agreement more frequently and also that requisite controls are exercised more effectively and suitable remedial measures taken expeditiously, wherever required. The petitioner shall also ensure that all the relevant issues are timely discussed in the meetings of the Monitoring Committee and that the works are executed at the minimum cost.

The order dated 22-08-2008, passed in petition No.202/2007, is modified and the review petition is disposed of accordingly.

Yogesh Khanna
Chairman