

**BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA**

Case No. HERC/PETITION NO. – 22 of 2021

**Date of Hearing : 15.09.2021
Date of Order : 28.09.2021**

IN THE MATTER OF:

Petition for adjudication of dispute between generating company and distribution licensee under Section 86 (1) (f) of the Electricity Act, 2003

Petitioner

Haryana Power Purchase Centre, Panchkula (HPPC)

Respondent

M/s. Subash Infraengineers Pvt. Ltd.

Present on behalf of the Petitioner, through Video Conferencing

1. Smt. Sonia Madan, Advocate

Present on behalf of the Respondent, through Video Conferencing

1. Shri Tabrez Malawat, Advocate

Quorum

**Shri R.K. Pachnanda
Shri Naresh Sardana**

**Chairman
Member**

ORDER

1. The present petition has been filed by HPPC for adjudication of dispute under Section 86 (1) (f) of the Electricity Act, 2003 arising with M/s. Subash Infraengineers Pvt. Ltd. (1 MW solar power generator in Village Khatoti, Haryana, selected under bidding by HPPC in 2015).
2. The petitioner herein has sought directions against the respondent to submit requisite proof evincing whether they have availed the benefit of accelerated depreciation or not; and in the event the respondent is availing the benefit of accelerated depreciation, HPPC may be permitted to adjust the excess amount paid to the respondent along with interest equivalent to LPS specified in the PPA from the future bills raised by the respondent.
3. **Brief facts of the case are as under:**
 - i) That the HPPC issued a 'Notice Inviting Tender' (NIT) in the month of April 2014 for procurement of 50 MW \pm 10% of solar power on long term basis from grid connected solar PV power projects, through a tariff based competitive bidding process.

- ii) That HPPC received total offers of 124 MW in response to the said NIT. Final bids were opened on 23.02.2015. During negotiations, the selected bidders agreed to lower the tariff to Rs. 6.44/kWh. Capacity negotiated with different bidders was 20 MW with M/s Neel Metal Products Ltd., 2 MW with M/s Sudhakar Infratech Ltd., and 1 MW each with M/s Balarch Renewable Energy Pvt. Ltd., Ultimate Sun Systems Pvt. Ltd., and M/s Subhash Infraengineers Pvt. Ltd.
- iii) That a long-term Power Purchase Agreement (PPA) was signed between the petitioner and the respondent on June 26, 2015. Pursuant to the signing of PPA, HPPC filed petition no. HERC/PRO-6 of 2016 seeking approval of PPAs signed with four solar power developers. The Commission decided the matter vide order dated 12.09.16/04.10.16. Relevant extracts from the said order are as under:-
- “Given the position discussed above and the fact that this Commission, on many occasions, has emphasized the need for procurement of RE Power by the Discoms as well as taken serious note of shortfall in both Solar as well as Non-Solar RPO. Hence, to balance the equity on both sides the Commission orders as under:-*
- i) In order to restore HPPC and the successful bidders to their initial status, HPPC shall restore the bank guarantee, if not already done, as well as CPG amount without any other cost i.e. interest etc.*
- ii) However, in the case of the successful bidders who have already commissioned their plants or are nearing completion (more than 80% complete) under the PPA executed by HPPC, and are willing, may explore the possibilities for arriving at an equitable and reasonable solution to arrive at a tariff aligned to the prevailing market conditions subject to the ceiling of the project cost determined by CERC for the FY 2016-17 in accordance with the 6.4 (3) of the National Tariff Policy, 2016 and HERC RE Regulations in vogue as the projects are likely to be commissioned during FY 2016-17 only. **In such an event HPPC, shall submit the outcome arrived at for the consideration and order of the Commission, before 30th September, 2016.***
- iii) In case of successful bidder(s), other than those covered in point no. ii above, the PPAs are not approved. **HPPC, if required, may invite fresh bids after following the due process prescribed for the purpose and these bidders may be given preference in the next round of fresh bids to be called by the Power Utilities in the State. The developer shall be allowed to supply the quantity of power for which the PPA has already been signed and at the rate allowed to the successful bidder in that round of procurement of Solar power.**” (Emphasis Supplied)*

- iv) That the respondent filed an appeal no. 307/2016 before Hon'ble Appellate Tribunal for Electricity (APTEL) against the order of the Commission dated 12.09.2016. An interim order dated 13.12.2016 was passed in the said appeal whereby the Hon'ble APTEL, after taking into consideration the tariff determined by the Hon'ble Central Commission vide order dated 29.04.2016 for projects commissioned in FY 2016-17, allowed provisional tariff of as Rs. 5.68 per kWh (without accelerated depreciation) for the project of the respondent till the decision of appeal.
- v) That the Hon'ble APTEL, vide order dated 09.03.2018, categorically fixed the tariff as approved by the Hon'ble CERC for the Solar Projects to be commissioned in FY 2016-17. The Hon'ble Central Commission in its order made explicit division of levellised total tariff as Rs. 5.68/kWh and Net levellised tariff as Rs. 5.08/kWh after adjusting for accelerated depreciation benefit. The tariff made applicable to the project of respondent was in terms of the Hon'ble CERC order and fixed as Rs. 5.68/kWh (without accelerated depreciation) with the intent that the cost assumed by CERC for solar projects commissioned in 2016-17 is to be adopted.
- vi) That the respondent and other 3 solar power developers who had signed PPAs with the HPPC have filed appeal against the order of the Hon'ble APTEL before the Hon'ble Supreme Court of India vide Civil Appeals (No. 5962, 5869, 5843 and 7296 of 2018), which are pending adjudication. There is no stay or interim order contrary to the order dated 09.03.2018 of the Hon'ble APTEL.
- vii) That in terms of the order of the Hon'ble APTEL dated 09.03.2018, matter was remanded to this Commission for approval of PPA at the tariff of Rs. 5.68/kWh (without accelerate depreciation) determined by CERC for FY 2016-17. Consequently, the Commission vide order dated 10.01.2019 approved the PPA at the tariff of Rs. 5.68/kWh (without accelerate depreciation), i.e. tariff determined by CERC for projects commissioned in FY 2016-17.
- viii) That in furtherance of the order of this Commission dated 10.01.2019, Amended PPA was executed between HPPC and the respondent on 04.02.2019, wherein the clauses pertaining to tariff were amended and the tariff was clearly spelt out in terms of the order of the APTEL dated 09.03.2018.
- ix) That pursuant to the interim order of Hon'ble APTEL order dated 13.12.2016, respondent had commenced supply of power from the solar project on 05.01.2017. The respondent was being paid @Rs. 5.68/kWh till now for the energy purchased under PPA executed between parties.

DISPUTE THAT LED TO FILING OF PRESENT PETITION -

- x) That in support of the foregoing facts, it is the understanding of the petitioner that in terms of the Hon'ble APTEL order dated 09.03.2018 and consequential order of this Commission dated 10.01.2019, the respondent developer is entitled to tariff of Rs. 5.68/kWh of the delivered energy if the benefit of accelerated depreciation is not being availed by the respondent. Therefore, in the event the developer is availing the benefit of accelerated depreciation, the tariff had to be paid at Rs. 5.08/kWh of the delivered energy as spelled out in the order of the Hon'ble Central Commission. The understanding of the petitioner is logically derived from the reading of the order of the Hon'ble CERC dated 29.04.2016 read with orders of Hon'ble APTEL dated 13.12.2016 and 09.03.2018 and order of this Commission dated 10.01.2019.
- xi) That based on foregoing interpretation of the tariff applicable to the respondent, the petitioner vide letter dated 01.12.2020, while referring to various emails sent earlier, requested the respondent to submit the auditor certificate in respect of the claim of benefit of accelerated depreciation. Similar requests were made repeatedly by the petitioner vide letters dated 14.01.2021, 19.02.2021 and 02.04.2021. Owing to non-responsive attitude of the respondent, the petitioner returned the invoices in original with a condition that the energy bills be resubmitted along with requisite certificate from the statutory auditor.
- xii) That in response to said requests of petitioner, the respondent vide letter dated 06.04.2021 refused to submit auditor's certificate on the pretext that the tariff provided in the order of the Hon'ble APTEL dated 09.03.2018 is a single part tariff fixed at Rs. 5.68 per kWh irrespective of whether the respondent avail or do not avail benefit of accelerated depreciation. It was stated that the respondent is not bound to provide any clarification/ certificate as the financial aspect of the projects have to be managed as per the business practices and HPPC have no right to call any clarification of the same.
- xiii) That in response to the aforesaid letter of the respondent, the petitioner vide letter dated 04.05.2021 stated that the amended PPA was executed with an understanding that respondent had not claimed accelerated depreciation for the project. It was also intimated that the similarly placed generators who were allowed similar tariff vide common order of Hon'ble APTEL dated 09.03.2018 had categorically represented that they would not be claiming the benefit of accelerated depreciation. It was further mentioned that there appears to be no anomaly or error of interpretation in the averment of HPPC that as per terms of PPA, respondent is entitled to levelized tariff of Rs. 5.68 per unit if the benefit of accelerated depreciation is not availed. However, since the dispute had arisen between the parties on this issue, HPPC processed bills of the

respondent reserving its right to approach this Commission for resolution of the present dispute.

- xiv) That the respondent vide letter dated 11.05.2021 again denied to submit the desired information regarding accelerated depreciation and instead stated that they reserve right to claim Late Payment Surcharge (LPS) from due date of payment.
 - xv) The petitioner has prayed that the respondent may be directed to submit requisite proof evincing whether they have availed benefit of accelerated depreciation or not; and in the event the respondent is availing the benefit of accelerated depreciation, the HPPC may be permitted to adjust the excess amount paid to the respondent along with interest equivalent to LPS specified in the PPA from the future bills of the respondent.
4. The respondent filed its reply, under affidavit dated 26.08.2021, submitting as under:-
- i) The present petition filed by the Haryana Power Purchase Centre ("HPPC"), is an afterthought, devoid of substance and deserves outright rejection on grounds of maintainability along with exemplary cost.
 - ii) That at the outset, the present petition is not maintainable in view of the Civil Appeals No. (5962, 5869, 5843, 7296 of 2018) involving the identical issue of applicable tariff along with accelerated depreciation being *sub-judice* before the Hon'ble Supreme Court of India, therefore, deserves to be dismissed *in-limine*.
 - iii) That a sub-ordinate court ought not to interfere in the justice delivery mechanism where higher court is seized of the matter. If any interference is made, the same amounts to judicial impropriety and violation of norms.
 - iv) That the Format 4.7 of the Notice Inviting Tender (NIT), contained the contents of financial bid which provided for tariff for the period of 25 years without there being any conditions appended to it.
 - v) Further, definition of "**Quoted tariff**", in Revised NIT provided as under:-
*"Quoted Tariff" shall mean the Quoted Energy Charges, as applicable, **quoted by the Bidder as per the prescribed Format 4.7** and shall be construed to be at the Interconnection Point as mentioned in its Bid;*
The levelized tariff as determined by HERC for Renewable Energy Projects to be commissioned during FY 2014-15 under Regulation 7 of HERC Regulations, 2010 will be the ceiling limit and the bidder quoting the tariff above that will be allowed only the levelized tariff decided by HERC".
 - vi) That the interim order dated 13.12.2016 in the Appeal No. 307 of 2016 passed by Hon'ble APTEL which was later adopted by the Hon'ble APTEL while passing the final order dated 09.03.2018 neither made any reference to the accelerated depreciation nor attached any conditions to the tariff. The same is evident from followings:-

“14. Under the circumstances as discussed above, we direct that as an interim measure, the Appellants' generators shall supply electricity to the respondent No.2 at the tariff of Rs.5.68 per kWh, being the tariff determined by the Central Commission for the year 2016-2017”

vii) That while disposing of the Appeal No. 307 of 2016 vide order dated 09.03.2018, Hon'ble APTEL passed following directions, which makes it evident that the interim order dated 13.12.2016 was adopted by the Hon'ble APTEL:-

*“Considering the circumstances of the case equitably and the fact that the Solar Power Projects have been established by the Appellants and in terms of Section 86 (1) (e) of the Act, the power generation from renewable sources of energy need to be promoted, it would be appropriate to approve the PPAs between the appellants and the respondent No. 2 for procurement of solar power at the tariff of Rs. 5.68/kWh (without accelerated depreciation) **as allowed in the interim orders dated 13.12.2016 and 29.3.2017 of this Tribunal.**”*

viii) That the consequential order dated 10.01.2019 passed by this Commission also does not stipulate any conditions qua the tariff.

ix) Accordingly, the parties executed a supplementary PPA dated 04.02.2019 amending the PPA dated 26.06.2015 to the extent of incorporating the tariff determined by the Hon'ble APTEL. The relevant part of the supplementary PPA is extracted below:

<i>Recital/ Clause</i>	<i>Existing Clause</i>	<i>Amended Clause</i>
<i>2.1.39</i>	<i>“Tariff” means the rate i.e. Rs 6.44/KWh payable by HPPC for every KWh of net delivered energy at the delivery point and acceptable by Solar Power.</i>	<i>“Tariff” means the rate i.e. Rs 5.68/KWh payable by HPPC for every KWh of net delivered energy at the delivery point and acceptable by Solar Power</i>
<i>4.2</i>	<i>The DISCOM shall pay tariff of Rs 6.44/Unit (KWh) for the entire agreement period arrived through the Competitive bidding for this particular location based on the bidding guidelines issued vide NIT No 51 /CE/HPPC/LTP dated 16.04.2014</i>	<i>The DISCOM shall pay tariff of Rs 5.68/Unit (KWh) for the entire agreement period arrived as per APTEL order dated 09.03.2018 and subsequent HERC order dated 10.01.2019 for this particular location based on the bidding guidelines issued vide NIT No 51 /CE/HPPC/LTP dated 16.04.2014</i>

4.6	<i>DISCOM, at any time during a contract year will purchase electricity at the tariff of Rs 6.44/KWh for the solar power developer upto the CUF of 19%, beyond the said quantum, the electricity will be purchased at a flat rate of Rs 3.0/Unit for the entire agreement period.</i>	<i>DISCOM, at any time during a contract year will purchase electricity at the tariff of Rs 5.68/KWh for the solar power developer upto the CUF of 19%, beyond the said quantum, the electricity will be purchased at a flat rate of Rs 3.0/Unit for the entire agreement period.</i>
-----	---	---

- x) Post submission of supplementary PPA before the Commission, there was no change in billing process with respect to accelerated depreciation assuming that no depreciation factor was included in interim tariff.
- xi) Meanwhile, the respondent along with other generators, being *inter-alia* aggrieved by the reduced tariff of INR 5.68/kWh fixed by the Hon'ble APTEL as opposed to INR 6.44/kWh discovered through competitive bidding process, challenged the order dated 09.03.2018 before the Hon'ble Supreme Court vide Appeal Nos. 5962, 5869, 5843, 7296 of 2018.
- xii) That the respondent and other generators vide the aforementioned appeals filed before the Hon'ble Supreme Court sought following reliefs:-
“(a) admit and allow the instant Civil Appeal filed under section 125 of the Electricity Act, 2003 and set aside the impugned final judgment and order dated 09.03.2018 passed by the Appellate Tribunal for electricity in Appeal No. 307 of 2016 to the extent the Appellate Tribunal has reduced the tariff from Rs. 6.44/- per Kwh discovered in the bidding process to Rs. 5.68 per Kwh, without any basis;
(b) pass such other or further order(s) as this Hon'ble Court may deem just and proper in the circumstances of the case.”
- xiii) In view of the above, it is evident that the appeals preferred before the Hon'ble Supreme Court predominantly seek adjudication of applicability of tariff of Rs. 5.68/kWh fixed by the Hon'ble APTEL as opposed to Rs. 6.44/kWh discovered through competitive bidding process.
- xiv) The issue of applicability of tariff of INR 5.68/kWh (with or without accelerated depreciation) is *sub-judice* before the Hon'ble Supreme Court vide the aforementioned appeals preferred by the respondent and other similarly positioned generators. As per the last order dated 10.01.2019 passed by the Hon'ble Court, pleadings were yet to be completed in the said appeals.
- xv) That the present petition is also barred by limitation. It is an admitted position that Hon'ble APTEL had passed its interim order on 13.12.2016. Pursuant to the same,

invoices were raised by the respondent at the tariff of Rs. 5.68/ kWh. The said interim order thereafter was confirmed by the Hon'ble APTEL vide its final order. In view of the same, it is admitted position that the cause of action for the present petition arose pursuant to the interim order dated 13.12.2016. However, the issue in relation to the same has been raised by the petitioner now after a lapse of three years; therefore, the present petition is clearly barred by the limitation and, therefore, deserves to be dismissed and set aside.

xvi) From aforesaid, it is evident that:

- A. HPPC is taking a contrary position to the stipulations of the bidding documents which were formulated, drafted, agreed and circulated by itself.
- B. Hon'ble APTEL has approved the bidding documents as well while passing the order dated 09.03.2018; therefore, there is no reason for the HPPC to act contrary to the same.
- C. Interim order dated 13.12.2016 has no reference to the accelerated depreciation. In effect, there are no conditions being attached. The same was further duly adopted by the Hon'ble APTEL while passing of the order dated 09.03.2018. Even consequential order dated 10.01.2019 provided for no conditions in relation to the tariff.
- D. Civil Appeals in relation to the present issue being filed before the Hon'ble Supreme Court and the same is seized of the matter.
- E. HPPC has not even challenged the matter; therefore, it has no right to agitate the same before the Commission.
- F. It is also a matter of record that present petition is barred by the law of limitation.
- G. Therefore, the present petition is evidently, being filed as an afterthought and deserves to be dismissed with cost.

Proceedings in the Case

5. The case was heard through video conferencing on 15.09.2021, as scheduled, in view of COVID-19 pandemic. The petitioner as well as the respondent herein, mainly reiterated the contents of their written submissions, which for the sake of brevity have not been reproduced here.

Commission's order

6. The Commission has heard the arguments of the parties at length as well as perused the filings placed on record by the parties. Shri Tabrez Malawat, learned advocate appearing for the respondent, argued the case on mainly three grounds viz. jurisdiction, applicability of the Limitation Act, 1963 and pendency of the matter before Hon'ble Supreme Court.

Shri Malawat argued that since the tariff of Rs. 5.68/unit was decided by Hon'ble Appellate Tribunal for Electricity (APTEL) replacing the tariff of Rs. 6.44/unit discovered through the bidding process, hence, clarification on the applicability of tariff, can be sought from the authority passing the said order. Therefore, this Commission does not have any jurisdiction to interpret the order of the Hon'ble APTEL dated 13.12.2016 read with order dated 09.03.2018. Shri Malawat argued that the present petition is also barred by limitation. Further, Hon'ble Supreme Court is seized of the matter on the Civil Appeals (CWP) filed before it, in relation to the tariff issue. Hence, it would be appropriate to wait till the CWP is disposed of by the Apex court.

7. Per-contra, Smt. Sonia Madan, learned advocate for the petitioner, vehemently argued that the present petition is maintainable before this Commission. The orders dated 13.12.2016 & 09.03.2018 passed by Hon'ble APTEL are crystal clear and its jurisdiction is not required to be invoked to seek any further clarification. Smt. Madan further averred that the law of limitation is not applicable in the present case. The delay has occurred due to denial/inaction on the part of the generator to submit the requisite details. There is continuous default on the part of the generator leading to the right of cause of action. Smt. Madan submitted that the matter regarding applicability of tariff in case accelerated depreciation is claimed, is not under consideration of Hon'ble Supreme Court and on the other issue also, no stay on the order of Hon'ble APTEL has been granted.
8. Upon hearing the learned counsel for the parties at length and perusal of the record of the appeal, the following issues have been framed for the consideration of the Commission and findings thereto.
 - a) **Whether the present petition is maintainable before this Commission?**
 - b) **Whether the petition is time barred, under applicable provisions of the Limitation Act, 1963?**
 - c) **Whether issue raised in the petition can be decided, in view of the Civil Appeal Nos. 5962, 5869, 5843, 7296 of 2018, pending for adjudication before the Hon'ble Supreme Court?**
 - d) **Whether the generator is bound to submit necessary documents to establish that it has not claimed accelerated depreciation?**

Issue (a):

Whether the present petition is maintainable before this Commission?

The respondent has argued that the tariff of Rs. 5.68/kWh was decided by the Hon'ble Appellate Tribunal for Electricity (APTEL) replacing the tariff of Rs. 6.44/unit discovered through the bidding process. The tariff of Rs. 5.08/kWh (with accelerated depreciation) was nowhere discussed in the order of Hon'ble APTEL. In case there is any ambiguity in the said order, clarification on the same can only be sought from the authority passing

the order i.e. Hon'ble APTEL. Consequently, the present petition is not maintainable before this Commission.

The Commission has heard the arguments of both the parties on the issue supra and has carefully perused the relevant para 12.e (ix) of the order of Hon'ble APTEL dated 09.03.2018, which is as under:-

"....., it would be appropriate to approve the PPAs between the Appellants and the Respondent No. 2 for procurement of solar power at the tariff of Rs. 5.68/kWh (without accelerated depreciation) as allowed in the interim Orders dated 13.12.2016 and 29.3.2017 of this Tribunal."

Further, para 14 of the order dated 13.12.2016 of Hon'ble APTEL provides as under:-

"Appellants' generators shall supply electricity to the Respondent No.2 at the tariff of Rs.5.68 per Kwh, being the tariff determined by the Central Commission for the year 2016-2017."

A conjoint reading of both the orders dated 13.12.2016 & 09.03.2018, clarifies the position that the applicable tariff shall be Rs. 5.68/kWh (without accelerated depreciation) i.e. the tariff determined by the Hon'ble CERC for the year 2016-17.

It needs to be noted that under the regulatory regime the regulated entities are entitled for an assured return on eligible equity. The said return is not only significantly higher than the return on equity that a promoter in sectors other than regulated power sector would get. The significantly higher RoE is built in the tariff that a beneficiary i.e. distribution licensees would pay for the power procured by them for onward sale to the electricity consumers. Hence, the incidence of any increase in cost of power is on the consumers. In the ultimate analysis this would mean that a generator, having been allowed to recover its allowed OPEX and CAPEX is also given a return on the equity capital deployed by them. As a corollary, he ought not to seek any profit which would be an unjust enrichment through any other means. The Electricity Regulatory Commission's, in the present case, the Hon'ble CERC, is conscious of the possibilities of such unjust enrichments by taking advantage of the accelerated depreciation provision of the Indian Income Tax Act. Consequently, the Hon'ble CERC, in the present case, determined a higher tariff i.e. Rs.5.68 / kWh for the FY 2016-17 without the benefit of accelerated depreciation and in case the Income Tax provision of accelerated

depreciation is availed by any regulated power generating company, then the benefit is passed on to the beneficiary distribution licensee and ultimately to the end consumers of electricity in the form of lower tariff, in the present case Rs. 5.08 / kWh. The logic behind the two sets of tariffs is that the position of generator vis-à-vis return on equity remains un-affected by depreciation options and tax planning i.e. the return is restricted to that allowed by the Regulators and nothing beyond it. Consequently, the benefit of accelerated benefit in terms of lower tax incidence than considered by the Hon'ble CERC while grossing up RoE to arrive at the effective post tax RoE is not allowed to be retained and hence the tariff with accelerated depreciation claimed by any generator is lower than the tariff without accelerated benefit.

In view of the above discussions it is evident that the Central Commission has also determined tariff of Rs. 5.08/kWh, which is applicable in case accelerated depreciation is claimed by the generator. The effect to the order(s) of the Hon'ble APTEL was given by this Commission's consequential order dated 10.01.2019. The jurisdiction of Hon'ble APTEL, as averred by the respondent, may have been required to be invoked seeking clarification of its order dated 09.03.2018, in case different interpretations of the order was possible. In the present case, the order is crystal clear that the applicable tariff is Rs. 5.68/kWh (without accelerated depreciation) and Rs. 5.08/kWh (with accelerated depreciation) is payable to the generator.

In view of the above discussions, the Commission answers issue (a) framed above in the affirmative i.e. the present petition is maintainable before this Commission.

Issue (b):

Whether the petition is time barred, under applicable provisions of the Limitation Act, 1963?

The respondent herein has argued that the present petition is barred by limitation, as Hon'ble APTEL has passed its interim order on dated 13.12.2016. Pursuant to the same, invoices were raised by the respondent at the tariff of Rs. 5.68/ kWh. The said interim order thereafter was confirmed by the Hon'ble APTEL vide its final order. In view of the same, the cause of action for the present petition arose pursuant to the interim order dated 13.12.2016. However, the issue in relation to the same has been raised by the petitioner now after lapse of three years; therefore, the present petition is barred by the limitation and therefore, deserves to be dismissed and set aside.

In order to examine the issue in the right perspective, the Commission has referred to the following judgements cited by the petitioner (HPPC):-

- i) Hon'ble High Court of Rajasthan decision dated 20.02.2014 in the matter of J.K. Cement Works and Ors. vs. Rajasthan Electricity Regulatory Commission and Ors. (S.B. Civil Writ Petition No. 16789/2013 and Stay Application No. 14191/2013 and Ors.).

*"47. The Jharkhand High Court in M/s. Tata Steel Limited and Others v. Jharkhand State Electricity Board and Others - AIR 2008 Jharkhand 60, dealt with the case where JSEB was short charging HT consumers by mistake by allowing rebate, which was not admissible. The judgment arose out of identical facts. In that case, Regulatory Commission framed Jharkhand State Electricity Regulatory Commission (Tariff) Regulations, 2003, with a view to encourage the higher consumption, the JSEB introduced various incentives in the said 2004 Tariff for industrial consumers. For HT and HTSS consumers certain rebates were provided, such as, Voltage Rebate, Load Factor Rebate and Power Rebate. Subsequently the petitioners were served with demand notice in the nature of supplementary bills mentioning therein that excess rebate than what was permissible was given to petitioners therein and the balance short amount is payable by them by the month of March, 2007. The argument of recovery being barred by limitation, similar to the one raised in the present matters, was also raised before the High Court in the aforesaid case and was rejected holding that the amount of short payment became due only after realization of mistake and the assessment of the short charged amount, and on raising the bill for the same by the JSEB and not on the date the electricity was consumed. **Amount of revised bill was never demanded earlier and therefore it cannot be said to be due at earlier point of time. Contention that recovery would now be barred by limitation having been raised in view of sub-section (2) of Section 56 of the Act, with the delay of more than two years, is wholly without substance because the said Section 56(2) only provides that any sum due from the consumer under this Section shall not be recoverable after a period of two years from the date such sum became due unless the same has been shown continuously recoverable as arrears of charges. On same analogy, similar argument was rejected by the Jharkhand High Court in M/s. Tata Steel Limited, supra. In the present case, the amount that is being demanded by the respondent-Discoms from the petitioners was not shown as due against them at any point of time earlier. This sum is being demanded now when the Discoms realized their mistake." (Emphasis supplied)***

- ii) Hon'ble APTEL decision dated 14.07.2021 in the matter of Alps Industries Limited Vs. Uttarakhand Electricity Regulatory Commission & Ors.

“106. In addition to the above discussion, what we notice is that every month or every time when the Respondent UPCL levies additional surcharge, it leads to right of cause of action. Such right was continued as long as there is unauthorized levy of additional surcharge on the consumers. The said right got fructified by suo motu order dated 23.05.2017. Therefore, we are of the opinion that the question of delay and laches as opined by the Respondent Commission was not justified.....”

In the Hon'ble High Court of Rajasthan judgement cited above, the case before the Hon'ble Court was in reference to sub section (2) of Section 56 of the Electricity Act, 2003 wherein the limitation period of two years triggers if any amount payable by a consumer to the distribution company is not continuously shown as recoverable of arrears of charges in the energy bills of the electricity consumers. However, the present dispute is between a power generating company and a distribution company purchasing power for onward supply to its consumers. The dispute, as averred by the petitioner, has to be seen in the context of Section 62 (6) of the Electricity Act, 2003 reproduced below:-

“If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.”

In the present case, the applicable tariff of Rs. 5.68 / kWh (without accelerated depreciation) and Rs. 5.08 / kWh (with accelerated depreciation) was determined by the Hon'ble CERC for the FY 2016-17 under Section 62 of the Electricity Act, 2003 on the basis of the CERC Regulations in vogue. In the present case, there is clear denial/inaction on the part of the generator to submit the requisite details on whether they have claimed accelerated depreciation or not. In the hearing held in the matter on 15.09.2021, the learned Counsel for the respondent, chose not to reply to the direct query of the Commission regarding whether the generator is availing the benefits of accelerated depreciation or not. Hence, the Commission concludes that there is continuous default on the part of the generator leading to the right of cause of action. Moreover, the petitioner has made reasonable attempt, as reproduced earlier in the present order, to elicit the requisite details so that the payments made / to be made to the respondent herein is based on correct tariff.

In view of the above discussions the Commission answers the issue framed at (b) in the negative i.e. the petition is not time barred.

Issue (c):

Whether issue raised in the petition can be decided, in view of the Civil Appeal Nos. 5962, 5869, 5843, 7296 of 2018, pending for adjudication before Hon'ble Supreme Court?

The Commission observes that the generator (respondent herein) has filed an appeal before the Hon'ble Supreme Court to set aside the order dated 13.12.2016 & 09.03.2018 passed by Hon'ble APTEL and to uphold the tariff discovered through competitive bidding process. Hence, the matter before the Apex Court is specifically regarding the tariff purportedly discovered through a transparent process of bidding to be allowed to the petitioners, including the respondent herein, before the Hon'ble Supreme Court as contradistinguishable from the issue before this Commission i.e. regarding applicability of tariff in case accelerated depreciation is claimed. It is further observed that CWPs No. 5962, 5869, 5843 and 7296 dates back to the year 2018. So far, the Hon'ble Supreme Court has neither stayed the order of the Hon'ble APTEL nor passed any interim order to the contrary.

In view of the above, the Commission answers this issue in the negative i.e. the issue raised in the present petition can be adjudicated by this Commission. Needless to say, subject to the judgement of the Hon'ble Supreme Court in the CWPs supra, as and when pronounced.

Issue (d):

Whether the generator is bound to submit necessary documents to establish that it has not claimed accelerated depreciation?

The decision on issue no. (a), has established beyond an iota of doubt that as per the orders of Hon'ble APTEL dated 13.12.2016 and 09.03.2018, the applicable tariff is Rs. 5.68/kWh (without accelerated depreciation) and Rs. 5.08/kWh (with accelerated depreciation).

Accordingly, the generator is duty bound to declare, on its own, that whether it has claimed accelerated depreciation or not. However, the generator is shirking from filing such declaration even on the persistence of HPPC. The Commission has also perused the case laws cited by HPPC in this regard. Hon'ble APTEL in its order dated 20.11.2014 in the matter of Gujarat Urja Vikas Nigam Ltd. vs. EMCO Limited (Appeal No. 252 of 2013) has decided at para 62 (c) that "*Complete reading of the Tariff Order*

dated 27.1.2012 clearly indicates that the State Commission has determined tariff for both, the projects availing accelerated depreciation and those not availing accelerated depreciation. The order gives a choice to the Solar Developer to avail or not to avail the benefit of accelerated depreciation.” Hon’ble APTEL has further decided in its order dated 30.04.2013 in the matter of Gujarat Urja Vikas Nigam Ltd. and Ors. vs. Gujarat Electricity Regulatory Commission and Ors. (Appeal No. 111 of 2012) at para 27 that “it is for the petitioner which is 2nd Respondent herein has to submit all the details to establish that it is not availing the benefit of accelerated depreciation.....”.

Therefore, a choice was available to the generator to avail or not to avail the benefit of accelerated depreciation keeping an eye on the applicable tariff. The next logical step to be taken by the generator was to intimate the petitioner herein (HPPC), supported by documentary evidence, of its choice. Which the answering generator has admittedly avoided. It is reiterated that during the course of hearing also, even on the persistence of the Commission, the learned counsel for the respondent avoided making any submissions on the fact that it has claimed accelerated depreciation or not.

In view of the above discussions and the case laws cited by the petitioner (HPPC), the Commission answers this issue in the affirmative i.e. the generator is bound to submit necessary documents to establish that it has not claimed accelerated depreciation.

Conclusion

Having answered the issues framed above, the Commission is of the considered view that as per the orders of Hon’ble APTEL dated 13.12.2016 & 09.03.2018, the applicable tariff is Rs. 5.68/kWh (without accelerated depreciation). Further, in case benefit of accelerated depreciation is availed, the applicable tariff shall be Rs. 5.08/kWh (with accelerated depreciation). It appears that the respondent generator herein is deliberately avoiding the declaration to the effect that it is not claiming accelerated depreciation.

Accordingly, the Commission directs the respondent generator to submit the requisite proof evincing whether they have availed benefit of accelerated depreciation or not, as prayed for in this petition, within fifteen days from the date of this order, failing which it shall be presumed that the generator is availing accelerated depreciation and hence tariff (with accelerated depreciation) i.e. Rs. 5.08/kWh determined by Hon’ble Central

Commission for the year 2016-17 shall be applicable, subject to the judgement of the Apex court in the Civil Appeals preferred by the petitioner against Hon'ble APTEL's orders dated 13.12.2016 and 09.03.2018. Further, in such an event, HPPC shall recover the excess amount paid to the respondent herein along with interest equivalent to LPS specified in the PPA.

9. In terms of the above order, the present petition is disposed of.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 28.09.2021.

Date: 28.09.2021
Place: Panchkula

(Naresh Sardana)
Member

(R.K. Pachnanda)
Chairman

HEERC