

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

Case No. HERC/PRO-5 of 2014

Case No. HERC/PRO-3 of 2016

Date of Hearing : **09.09.2019**

Date of Order : **27.09.2019**

In the Matter of

Consequential Order in terms of judgement dated 22nd May 2019 passed by Hon'ble Appellate Tribunal of Electricity in Appeal no. 308 of 2017 regarding grant of interest on the principal amount of Rs. 88.123 crore paid by HPPC as determined by HERC in its order dated 12.07.2016 against supply of power by Lanco Amarkantak Power Limited (LAPL) from its 300 MW Unit 2 to HPPC through PTC.

Petitioner: Lanco Amarkantak Power Ltd. Lanco House, Plot No. 397, Phase III Udyog Vihar, Gurgaon – 122016

V/s

Respondent No 1: PTC India Ltd., 2nd Floor, NBCC Tower15, Bhikaji Cama Place, New Delhi – 110066

Respondent No 2: Haryana Power Purchase Centre, 2nd Floor, Shakti Bhawan, Sector – 6, Panchkula 134109, Haryana

Present on behalf of the Petitioner: Deepak Khurana, Advocate, LAPL
Anil Sharma, Sr. VP, LANCO

Present on behalf of the Respondent: Sonia Madan, Advocate, HPPC
Ravi Juneja, AEE-HPPC
Vikrant Saini, AEE-HPPC

Quorum

Shri D.S. Dhesi	Chairman
Shri Pravindra Singh	Member
Shri Naresh Sardana	Member

ORDER

Brief background of the Case

1. Hon'ble Appellate Tribunal for Electricity passed judgement in Appeal no 308 of 2017 on May 22, 2019. The operative part of the said judgement is as under:

"93. Our Findings and Analysis

iii) The payment of interest was a issue framed by the State Commission, however, the State Commission did not record any reason for not granting the same. The

most important aspect in this Appeal is that the Appellant incurred additional expenditure over and above the capped tariff of Rs. 2.32/kWh and accordingly the State Commission redetermined it to Rs.2.8875/kWh for FY 2011- 12 and Rs.2.9218/kWh for the FY 2012-13. Though the differential amount have been paid by the Respondent No.3 to Appellant. No carrying cost/interest was paid.

However, it is pertinent to note that the differential amount between the capped tariff and the redetermined tariff was payable in the FY 2011-12 and FY 2012-13 but was actually paid subsequently after a gap of several years. It is a well-established fact that money not paid in time but paid subsequently at a much later stage after lapse of several years, losses its real money value to a great extent and is effectively less money paid.

iv) Therefore, for equity and restitution payments made at a later stage, of the amount, due in the past, must be compensated by way of appropriate rate of interest so as to compensate for the loss of money value. This is a proven concept of time value of money to safeguard the interest of the receiving party.

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ORDER

For the foregoing reasons, as stated supra, the instant Appeal filed by the Appellant is allowed in part.

The Impugned Order dated 12.07.2016 passed in Petition No. HERC/PRO-3 of 2016 by the first Respondent/the State Commission to the extent regarding not granting interest as indicated above is hereby set aside.

The matter stands remitted back to the first Respondent/the State Commission with the direction to pass the order in the light of the observations made in the preceding paragraphs above in accordance with law as expeditiously as possible within a period of three months after receiving the copy of this judgement.

The Appellant and the Respondents are hereby directed to appear before the 1st Respondent/the State Commission personally or through their counsel on 01.07.2019 without further notice.”

2. The matter of interest has arisen from HERC Order dated January 23, 2015 for determination of interim tariff of 300 MW Unit 2 of LAPL comprising of Fixed Charges for FY 2011-12 to FY 2014-15 and Variable Charges for the period of power supplies from 07.05.2011 till 31.03.2013 pursuant to Order dated December 16, 2011 passed by the Hon'ble Supreme Court in I.A. No. 3 of 2011 in Civil Appeal no. 10329 of 2011. Thereafter, LAPL filed a petition before this Commission for recovery of the differential amount being the difference between the tariff determined by the Learned Commission and Rs. 2.32/kWh earlier paid by HPPC to LAPL. The Commission, in its order dated 12.07.2016 directed HPPC to make payment of principal amount of Rs. 88.123 Crore.
3. As per the direction of this Commission, HPPC made the said payment of principal amount of Rs. 88.123 Crore to LAPL in three equal monthly instalments with the last instalment paid on 04.10.2016. However, this Commission in the order dated 12.07.2016 did not grant interest on the principal amount of Rs. 88.123 Crore.
4. Thereafter, LAPL on 25.10.2016 filed a review petition against HERC order dated

12.07.2016, which was disallowed by this Commission vide order dated 27.03.2017. Thereafter, LAPL on 04.05.2017 filed an appeal before the Hon'ble Appellate Tribunal for Electricity, which has been disposed of vide judgement dated 22.05.2019 as above.

5. The Commission, in accordance with the Order of the Hon'ble Appellate Tribunal, listed the case for hearing on 01.07.2019.
6. LAPL vide letter dated 20.06.2019, reiterated the above order of the Hon'ble Appellate Tribunal for Electricity and submitted that interest may be allowed to them at any of the rates mentioned below:
 - a) The Commission in its Order dated 12.07.2016, had directed that "Any delay in payment of instalment will attract simple interest @ 1.25% per month or part thereof until the amount is cleared". Therefore, the carrying cost may be allowed @1.25% per month.
 - b) In the alternative, the Commission may direct HPPC to pay interest in line with the recent Hon'ble CERC's order dated 13.06.2019 in Petition no. 251/MP/2018, wherein Hon'ble CERC has allowed carrying cost to the generators considering the actual working capital interest rate paid by the respective Generating Companies. In this regard, LAPL provided an Auditor's certificate certifying the actual year wise average rate of interest on working capital of Unit 2 for the period from FY 2011-12 till FY 2018-19.
7. Respondent HPPC filed its reply vide letter dated 30.07.2019, in the present matter as under: -
 - i) That LAPL had submitted letter dated 20.06.2019 to the Hon'ble Commission praying for passing an order directing HPPC to pay accrued interest @ 1.25% per month on differential amount of Rs. 88.123 crore, which was earlier paid by HPPC to LAPL, pursuant to HERC order dated 12.07.2016.
 - ii) That it is submitted that Section 34 of Civil Procedure Code deals with the provision of granting interest. As per the said Section where and in so far as a decree for the payment of money, the court may in the decree, order interest at such rate as the court deems reasonable to be paid on the principle sum adjudged. It is well settled that the use of the word 'may' in Section 34, CPC confers a discretion on the Court to award or not to award interest or to award interest at such rate as it deems fit. Such interest so far as future interest is concerned may commence from the date of the decree and may be made to stop running either with payment or with such earlier date as the Court thinks fit. Such discretion is expected to be exercised judiciously and reasonably considering the peculiar facts and circumstances of the case.

Central Bank of India vs. Ravindra and Others, (2002) 1 SCC 367: Award of interest pendente lite and post-decree is discretionary with the court as it is essentially governed by Section 34 CPC dehors the contract between the parties. In a given case if the court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the court may exercise its discretion in awarding interest pendente lite and post-decree interest at a lower

rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner. Reliance is placed upon the following judgments of the Hon'ble Courts, where the use of discretionary power of the court was exercised in view of the peculiar facts of the case –

Clariant International Ltd. v. Securities & Exchange Board of India, (2004) 8 SCC 524: it was held by this Court that the interest can be awarded in terms of an agreement or statutory provisions and it can also be awarded by reason of usage or trade having the force of law or on equitable considerations but the same cannot be awarded by way of damages except in cases where money due is wrongfully withheld and there are equitable grounds therefor, for which a written demand is mandatory. It was further held that in absence of any agreement or statutory provision or a mercantile usage, interest payable can be only at the market rate and such interest is payable upon establishment of totality of circumstances justifying exercise of such equitable jurisdiction.

ASJS Rice Mills Owners v. State of Punjab AIR 2004 P&H 320 (DB): It was observed that the court must balance the equities between the claim of the petitioners and the liability of the respondents to pay interest. Award of such interest is not based upon the principle of enrichment of a kind of compensation which is awarded to the petitioners against the state functionaries for their delayed action, particularly unsupported by any plausible cause.

C.K. Sasankan Versus The Dhanalakshmi Bank Ltd. AIR 2009 SC 3171: The Court reduced pendent lite interest granted from 25% to 9% stating it to be exorbitant.

Narendrabhai S. Joshi v. Post Master General, Gujarat Circle AIR 2002 Guj 180: The court held that the post office could not be saddled with the liability to pay interest, especially when they were technically justified in withholding payment.

In light of the foregoing decisions, the Commission may consider the peculiar facts of present case where the answering respondent is not at fault at any stage and may therefore, kindly reject the prayer of the LAPL for award of interest summarily.

- iii) That without prejudice to foregoing submission, if the Commission is inclined to grant interest to the LAPL, it shall allow reasonable interest as against the exorbitant interest demanded by the applicant @ 1.25% per month. It is further submitted that the Hon'ble Commission shall consider that the lowest rate of interest shall be considered in terms of interest specified in HERC regulations, actual carrying cost or prevailing market rate. The Applicant may also be directed to provide actual carrying cost certified by the Statutory Auditor. Further, if the Commission considers grant of interest to LAPL, the same shall be made prospective from the date of order only.

In view of the foregoing, HPPC has prayed that the matter of payment of interest on differential amount of Rs. 88.123 crore may be dismissed.

8. Further, a rejoinder to the reply filed by Respondent no. 2 (Haryana Power Purchase Centre) was submitted by the generator, wherein LAPL reiterated its demand for interest as per the above-mentioned submissions.

Proceedings in the Case

9. The case was scheduled to be heard on 01.07.2019, in accordance with the Order dated 22.05.2019 of the Appellate Tribunal For Electricity. However, respondents 1 and 2 requested for some time and accordingly, the matter was heard on 09.09.2019. The counsels appearing on behalf of the Petitioner and Respondents re-iterated the contents of their written submissions, which for sake of brevity not reproduced herein.

Commission's Analysis and Order

10. The Commission observes that the Hon'ble Appellate Tribunal for Electricity has decided on the matter of payment of interest as well as the period from which the payment has become due to the generator. As neither the petitioner nor the respondents have preferred any review or appeal, the judgement of the Hon'ble Appellate Tribunal for Electricity has attained finality. Resultantly, the only issue that remains for consideration of the Commission is the rate of interest on which the carrying cost is to be allowed.
11. The generator, LAPL, in support of its claim for interest, has referred to various judgements of the CERC in similar matters namely order dated 11.03.2019 in **Petition No. 251/MP/2018**. the relevant portion of the Order is reproduced below:
*"We have addressed the said issue in our order dated 11.03.2019 in **Order in Petition No. 251/MP/2018 and** Petition No. 249/MP/2018 in relation to the same PPA for the issue concerning change in law relief for domestic coal shortfall. The relevant portion of the said order is reproduced herein below:*
"20. The Petitioner has sought carrying cost at the rate of 10.89% in line with the rate sought during the remand proceedings of Petition No. 235/MP/2015. The Petitioner has also submitted that the actual interest rate claimed is cheaper as compared to SBI Base Rate + 350 basis points being considered by the Commission as interest on working capital under Tariff Regulations as well as Late Payment Surcharge (LPS) of SBAR +2% under the PPAs. Per contra, the Respondents, Haryana Utilities have contended that the claim of the Petitioner should be limited to 9% interest rate in terms of the decision of the Commission in order dated 28.9.2017 in Petition No. 97/MP/2017 where interim relief was granted subject to refund of excess amount to Haryana Utilities. Haryana Utilities have also submitted that as per the provisions of CPC, interest should not be more than 6%.
21. The Commission in its order dated 28.9.2017 in IA No. 57/2017 in Petition No. 97/MP/2017 considered interest rate of 9% for adjustment of final relief as compared to payment allowed as interim relief. The said rate cannot be taken as the guiding principle for awarding the carrying cost. Since, the Appellate Tribunal has observed that carrying cost ought to be granted following the restitution principle in terms of provision of Article 13.2 of the PPA which provides that the party affected by change in law shall be restituted to the same economic position

as if change in law has not occurred, we are of view that the interest rate of 9% does not meet the requirement of the principle of restitution.

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24. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.”

12. The generator, LAPL, has provided a statement of yearly average rate of interest on working capital from a firm of Chartered Accountants i.e. M/s Brahmayya & Co. in support of its claim. The Commission has examined the said statement and observes that the firm has issued the above-mentioned statement after considering the **“bank base rate + spread (as per last sanction) for the period June 2017 till March 2019 for computing yearly average rate of interest”**, which, in the considered view of the Commission, is entirely different from the period for which carrying/ holding cost is required to be determined i.e. the period from FY 2011-12 to FY 2016-17. The Commission is of the considered view that the statement provided by LAPL does not satisfy the ratio as per the order in petition no. 249/MP/2018. To satisfy the ratio, the computation provided by LAPL ought to have been as per audited accounts for the period in question and not the period after it. The Commission further observes that LAPL has already defaulted on its payments to its lenders (as reflected in the insolvency proceedings against LAPL) and therefore, the latest rates would be higher on account of the greater risk perception of the generator (LAPL) in view of the lenders. In light of these facts, the Commission does not find it appropriate to consider the interest statement provided by the generator in isolation and therefore, the issue requires further examination on the anvil of reasonableness of the rate of interest to be allowed on restitution principle. The Commission is of the considered view that the consumers of the state cannot be burdened with a higher rate of interest on account of financial imprudence of the generator. It is also a fact that LAPL has been defaulting on its repayments and has been admitted to Insolvency proceedings, therefore it would not be appropriate to rely on the interest computations provided by it, more so due to the fact that the calculations appear to be based on sanctions beyond the due date of payment.
13. The Commission has also perused the reference to Section 34 of CPC and also the case laws cited in the matter or reproduced as part of the present order. It is observed that while deciding the rate of interest, the Commission is required to be guided by the principles of equity. Hence, the rate of interest ought to reasonably reflect the time value of money over a given period so that the erosion in the intrinsic value of money and its purchasing power due to inflation is duly accounted for. Hence, the Commission has proceeded to determine the applicable rates as under:
- a) The Commission notes that the Hon'ble Appellate Tribunal for Electricity has also observed that the carrying cost is not in nature of a penalty, therefore, in

the considered view of this Commission, it would also not be appropriate to allow penal interest rate in the nature of Late Payment Surcharge (LPS) of 1.25% per month as suggested by LAPL.

- b) The Commission, in view of the fact that it is required to determine the reasonableness of the rate of interest to be allowed to the generator, has observed that vide Order dated 18.09.2019 in the matter of RA-8 of 2019, this Commission has allowed carrying cost to the State Generator, HPGCL @ 9.95% p.a.
- c) The Commission is of the considered view that the inefficiency of the generator (LAPL), as reflected in the higher cost of borrowings, ought not be passed on to the electricity consumers of Haryana. Given the financial imprudence and significantly higher risk perception of LAPL, the dispensation based on CERC Order cited by LAPL is also not tenable.
14. In view of the above discussions, the Commission orders HPPC to pay holding cost to LAPL at the latest rate of carrying cost allowed to the State Generator, HPGCL, by this Commission in its Order dated 18.09.2019 in case no. RA 8 of 2019 i.e @ 9.95% p.a, on simple interest basis. The Commission further directs that as the interest on working capital for the relevant year has been revised to account for additional cost, the holding cost shall accrue from the close of the relevant financial year till the date of payment of the principle amount and the payment of such interest shall be made within three months of this order. In case of failure to pay, the generator shall be allowed additional payment @1.25% per month in accordance with the regulations.

This Order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 27.09.2019.

Date: 27.09.2019	(Naresh Sardana)	(Pravindra Singh)	(D.S. Dhesi)
Place: Panchkula	Member	Member	Chairman