Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 1 of 2010

Dated: **1st October, 2010**

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

Maharashtra State Electricity Distribution Co. Ltd.
Plot No. G-9, Prakashgad, Bandra (E),
Prof. Anant Kanekar Marg,
Mumbai-400 051

… Appellant

Versus

1. **Maharashtra State Electricity Regulatory Commission**
   Mumbai Centre-1, 13th Floor,
   World Trade Centre, Cuffe Parade,
   Mumbai-400 005

2. **The President,**
   M/s. Renewable Energy Association of Maharashtra,
   Empire House, 214, Dr. D.N. Road,
   Ent. A.K. Nayak Marg,
   Fort, Mumbai-400 001

3. Prayas (Energy Group),
Amrita Clinic, Athawale Corner,
Lakdipool-Karve Road Junction,
Deccan Gymkhana, Karve Road,
Pune-411 004

4. Mumbai Grahak Panchayat,
Grahak Bhavan, Sant Dyaaneshwar Marg,
Behind Cooper Hospital,
Vile Parle (West),
Mumbai-400 055

… Respondent(s)

Counsel for Appellant **Mr. Dev Dutt Kamath,**
Mr. Abhishek Mitra &
Mr. Varun Pathak

Counsel for Respondent(s) **Mr. Chetan Sharma, Sr.Adv**
Mr. Buddy A. Ranganadhan
for MERC, R-1
Mr. Saurabh Misra for R-2.

JUDGMENT

1. Maharashtra State Electricity Distribution Company Limited is the Appellant herein.

2. Aggrieved by the order dated 17.09.2009 passed by the Mahasrashtra Electricity Regulatory Commission (**State**

Commission), holding that the Respondent-2 (Developers Association) is entitled to claim Joint Meter Reading amount as well as the interest even without raising any bill from the Appellant, this Appeal has been filed.

3. The facts of this case are as follows.

4. The Appellant, the successor of Mahrashtra State Electricity Board, is the distribution company. The State Commission is the first Respondent herein. M/s Renewable Energy Developers Association of Maharashtra is the 2nd Respondent herein.

5. The Government of Maharashtra in 1998 issued a policy for development of renewable energy projects. As per this policy, the State Electricity Board was under an obligation to purchase energy from the Wind Energy Developers. In pursuance of the said policy, Wind Energy Developers started their projects. On 05.10.2001, the State Electricity Board issued a circular prescribing the modalities

for evacuation of energy and the system and the procedure to be followed for payment. As per the above circular, the bills have to be raised every quarter by the Developers and the payment was to be made by the State Electricity Board within 45 days from the date of the bills. In case of delay beyond 45 days, interest has to be paid at the savings bank rate.

6. The Renewable Energy Developers' Association of Maharashtra, the 2nd Respondent herein filed an application in 2002 before the State Commission complaining that the payments were not being made by the Electricity Board for the electricity which had been injected into the grid by the said developers. The State Commission by the interim order dated 03.06.2002 directed the Electricity Board that 70% payment of the bill be made to the Developers till the application for approving tariff revision proposal filed by the State Electricity Board for the FY 2001-02 is disposed of.

7. On 17.06.2002, the State Electricity Board sought a clarification from the State Commission as to whether in all cases and in all the categories of Developers, payment of 70% of the bill amount is to be made. The State Commission on 19.07.2002 issued a clarification that the interim order of 03.06.2002 is not applicable across the board and that individual developers could approach the State Commission, if they so desire. Again on 29.08.2002, the State Electricity Board, the predecessor of the Appellant sought clarification from the State Commission as to whether 70% of the payment can be released in other similar cases. In that clarification application the State Commission, on 18.10.2002 passed order directing the State Electricity Board to release 70% of the payment on ad-hoc basis to all the Developers of the Wind Energy Association.

8. In accordance with the said order, the State Electricity Board on 30.04.2003 directed its field officers to release 70% payment of

the 44 cases of Indian Wind Energy Association and 39 cases of the Renewable Energy developers, REDAM.

9. On 24.11.2003, the State Commission passed the detailed tariff order for Wind Power Generation. Through this order it was directed that the Developer shall raise monthly energy bill based on the joint meter reading (JMR) taken by the Developer and the State Electricity Board and the due date for payment shall be within 45 days from the date of the bill and in case of delay the Developer shall be entitled to interest on delayed payment at the rate of 2% above the SBI short-term lending rate.

10. On 03.05.2006, the Renewable Energy Developers Association, Respondent-2 herein, filed an application before the State Commission seeking for direction for the implementation of the order of the State Commission dated 24.11.2003. In this application, on 12.09.2006, the State Commission passed order

directing the Appellant namely, the successor of the Electricity Board to pay interest on delayed payment within one month of the date of the order to Wind Developers having any type of valid NOC for the period since the date of commissioning of the project.

11. This order was challenged by the Appellant before the Tribunal in Appeal No. 15 of 2007. On 05.02.2008, the Tribunal dismissed the Appeal observing that the Appellant is liable to pay interest and there was no reason as to why the Appellant should not pay interest from the date when the payment becomes due. Even then, these orders have not been complied with.

12. Hence, on 16.01.2009, the Renewable Energy Developers Association (R-2) filed Application before the State Commission seeking for implementation of the orders of the State Commission dated, 24.11.2003, 12.09.2006 and the order of the Tribunal dated 05.02.2008 contending and complaining that the Appellant had not made payments from the time the energy is fed into the grid and

for this the distribution company, the Appellant has stopped accepting the invoices. In the reply to this Application, the Appellant contended that it had made payment only to the Wind Energy Developers who had raised invoices based on the joint meter reading; they have not received the bills from the Developers, therefore, the liability of the Appellant for making payment to other developers would not arise till they receive the bills or invoices from them.

13. The State Commission ultimately, by the impugned order dated 17.08.2009, has held that wherever invoices have not been issued after joint meter reading, 30 days from the joint meter reading would be deemed to be the date of the bill and the last due date of payment by the Appellant would be 45 days thereafter and for payment beyond 45 days, interest would become due. By this order, the State Commission directed the Appellant to pay joint meter reading amount as well as penal interest to the developers

even without issuance of the bill. Aggrieved by this order, the Appellant has filed this Appeal.

14. The core issue which arises for consideration before this Tribunal is whether the Energy Developers Association is entitled to claim Joint Meter Reading amount and the interest without raising any bill as prescribed in the existing policy and applicable orders of the State Commission.

15. According to the Appellant, under the policy/circular dated 05.10.2001 issued by the Appellant and the order dated 24.11.2003 passed by the State Commission, it is mandatory that the developer shall first raise a demand in the form of a bill/invoice and only when there is a failure to pay within 45 days of the said demand the interest would be attracted and if there is no demand, through the bill or invoices, there is no failure on the part of the Appellant to adhere to the demand and as such the penal interest cannot be attracted and hence the direction and finding given by the State

Commission that wherever invoice or demands have not been issued, the 30th day from the Joint Meter Reading would be deemed to be the date of the bill and as such due date of payment by the Appellant distribution company would be 45 days thereafter and for beyond 45 days, interest would become due is not legally valid.

16. It is further submitted by the Appellant that the Appellant is not disputing the entitlement to receive interest by the Developer but in cases where the procedure relating the demand for claiming entitlement of interest has not been followed, the penal interest cannot be levied retrospectively from the date of injection of electricity into the grid.

17. Let us deal with this issue now.

18. There are 2 parts contained in the case put forwarded by the Appellant: (1) The entitlement of the Respondent Developer to

receive interest is not disputed (2) The claim of the Respondent without following the procedure relating to the demand is evident from the fact that the Developer slept over his rights and did not care to raise any bill or notice of demand and therefore, the Developer cannot be said to be entitled to penal interest from the date of injection.

19. The entire case rests on the finding given by the State Commission in the Wind Power Tariff Order dated 24.11.2003. The relevant observations contained in para 1.6.7, 2.4.6 and 3.4.10 of the said order dated 24.11.2003 are as follows:

> "**1.6.7** ***Billing and Payment*** *The developer shall raise a monthly energy bill based on the Joint Meter Reading taken by the developer and the MSEB/ utility at the end of each month. The due date for the payment by the utility shall be 45 days from the date of the bill. In case of delay in payment beyond 45 days the developer shall be entitled for an interest*

on delayed payment at the rate of 2% above SBI, short-term lending rate.”

“*2.4.6* ***<u>Commission’s Ruling</u>***

The Commission appreciates that timely payment by the utility for the energy purchased by it is an essential requirement without which the Developer cannot meet his liabilities in time. The Commission also notes that the main cost component for generation of wind power is the interest liability on the debt. Any delay in payment of debt and/or interest would have substantial impact on the wind power tariff and if the tariff were to be maintained as constant it would adversely affect the viability of the project. The Commission understands the need for the security of payment and need for compensation to the Developer in case of delay in payment. The Commission, therefore, has decided that a Revolving Irrevocable Letter of Credit, at the option of the Developer, with a nationalized bank should be provided to the Developer as security for payment to ensure timely

payment. The Commission also prescribes that the expenses involved in opening the LC, for an amount equivalent to the average monthly bill, should be borne by the Developer. Further to provide the compensation in case of inordinate delay in payment, the utility will pay penal interest on any outstanding amount at the rate of 2% above the short-term lending rate of the State Bank of India."

"3.4.10 ***Billing and Payment*** *The developer shall raise a monthly energy bill based on the Joint Meter Reading taken by the developer and the MSEB/utility at the end of each month. The due date for the payment by the utility shall be 45 days from the date of the bill. In case of delay in payment beyond 45 days the developer shall be entitled for an interest on delayed payment at the rate of 2% above SBI, short-term lending rates."*

20. These directions given by the State Commission, as referred to above, would reveal the following aspects:

(i) The Developer shall raise a monthly energy bill based on the Joint Meter Reading (JMR). The due date for payment by the utility shall be 45 days from the date of the bill. In case of delay in payment beyond due date, the Developer shall be entitled to interest @ 2%

(ii) The monthly energy bill has to be raised based on the JMR taken by the Developer and the utility at the end of each month.

(iii) In order to ensure timely payment, Utility should provide for the Revolving Irrevocable Letter of Credit at the option of the Developer with a nationalized bank as a security for payment.

(iv) The State Commission appreciates that the timely payment by the utility to the Developer for the energy purchased by it is an essential requirement for the Developer. Without this payment, the Developer cannot

meet its liabilities in time. Any delay in payment of debt or interest would have substantial impact on the wind power tariff.

21. It is the case of the Respondent Association that despite the directions of the State Commission given in the order dated 24.11.2003, the State Electricity Board and its successor, the Appellant herein, did not make the payment for the price of the energy fed into the grid. In fact, reiterating the said directions, the State Commission passed another order dated 30.09.2004. Despite these orders, it is alleged that no attempt had been made by the Appellant to comply with the orders of the State Commission

22. Under these circumstances, the Association (Respondent) filed another petition before the State Commission on 03.05.2006 seeking for implementation of the orders of the State Commission earlier passed. The said petition was disposed of by the State Commission by the order dated 12.09.2006 directing for the

implementation of the earlier orders. The relevant potion of the order dated 12.09.2006 is as follows:

"***Payment of interst on delayed payment:***

17. The petitioner submitted that despite sending reminders and making several requests to MSEDCL, the wind farm developers have not been paid interest on delayed payments which they are entitled to claim in light of the Commission's Order dated 24th November, 2003, wherein it has been clearly stipulated in paragraph 1.6.7 that 'in case of delay in payment beyond the due date, the Developer shall be entitled for an interest on delayed payment @ 2% above the State Bank of India short-term lending rate'. Also para 2.4.6 of the said order stipulated that '……the utility will pay penal interest on any outstanding amount at the rate of 2% above the short-term lending rate of State Bank of India'.

20. Further, paragraphs 1.6.7 and 2.4.6 of Order dated 24th November 2003 are clear and unambiguous and do no

distinguish payment of interest on the basis of nature of NOC.

21. Further, it should be noted that as and when the energy is generated and fed into grid, it is sold and appropriate revenue is realized by the MSEB/MSEDCL. Therefore, it is inappropriate on part of MSEDCL to hold back payment for purchase of power as mandated by the Commission. Therefore, the Commission hereby directs the MSEDCL to make payment of interest within one month of the date of his order to all wind developers, having any type of valid NOC for the period since the date of commissioning of the plant.

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29. The Commission directs MSEDCL to pay interest on delayed payment within one month of the date of this order, to all wind developers having any type of valid NOC, for the period since the date of commissioning of the plant."

23. The reading of the above order dated 12.09.2006 given by the State Commission would show that it gave the following directions.

(i) Paragraph 1.6.7 and 2.4.6 of the order dated 24.11.2003 are clear and unambiguous They do not distinguish the payment of interest on the basis of nature of energy.

(ii) It is to be noted that as and when the energy is generated and fed into the grid, it is sold and appropriate revenue is realized by the distribution company. Therefore, it is not proper on the part of the distribution company to hold back the payment to the Developers for the purchase of power as mandated by the State Commission in the earlier order passed on 24.11.2003.

(iii) It is directed that the distribution company should make payment to all the wind developers having any type of valid NOC for the period since the date of commissioning of the plant.

(iv) It is directed that the distribution company to pay interest on delayed payment within one month of the date of this order to all wind developers having any type of valid NOC.

24. Aggrieved by the above directions given by the State Commission in the order dated 12.09.2006, the Appellant herein, filed an Appeal before this Tribunal in Appeal No. 15/07. Ultimately, the Tribunal by the Judgment dated 05.02.2008 dismissed the Appeal filed by the Appellant, holding that the Appellant is liable to pay the interest from the date when payment becomes due, that is when the energy was received by the Appellant. The relevant observation in this Judgment is quoted below:

"Decision with reasons

(8) The tariff order dated 24.11.2003 which determined the purchase rate to be the same as notified by Government of Maharashtra in it order No. NCOP 1097/CR-75/NRG-7 dated 12.03.1998 and directed for payment of interest at 2%

above State Bank of India short-term lending rate was not challenged by the appellant. Accordingly, the appellant cannot challenge either the tariff or the direction to pay interest or rate of interest viz. 2% above the SBI short-term lending rate. The impugned order was passed on a petition filed by the Respondent No. 2 REDAM for implementation and clarification of the order. In the clarificatory order, the Commission clarified the position as extracted above in paragraph No. 4. In the first place since the appellant had not made payment despite reminders, the Commission referred to its order dated 24.11.2003 wherein it had already directed interest on delayed payment. ….. The Respondent-2 accepts that the interest is payable from the date energy is fed into the grid which according to it is the same as the date of commissioning of the plant. In other words, the Commission had made it categorical that interest is payable not only for the period after the order dated 24.11.2003 but also for the period prior to it in case the payment was due. It

is this clarification which is under challenge. What therefore, is in dispute is whether the appellant is liable for payment of interest on the dues accruing prior to 24.11.2003.

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(10) The argument of the appellant that prior to 24.11.2003, there was a grey area also does not hold any water. It is true that after the Commission came into existence and was made responsible to fix tariff, tariff was payable only at the rate fixed by the Commission. It does not mean that nothing fell due for the energy supplied to the grid by the members of the Respondent-2 for the benefit of the appellant. The appellant could have continued payment at the rate at which it was making the payment. …….. The appellant cannot say that it was not liable to make any payment since no rate at all was fixed. Section 70 of the Indian Contract Act, 1872 makes it obligatory on the person who enjoys the benefits of non-gratuitous act to pay compensation to the person who has

provided the benefit. The plea that no payment could be made because the area was grey has therefore only to be rejected.

(11) So far as the departmental circular is concerned, the same cannot bind the members of the Respondent-2. The circular does not have either any statutory force or contractual force.

(12) It is a natural corollary of any delayed payment. Sometimes different interest rats are prescribed so as to differentiate between the normal or compensatory rate of interest and a penal rate of interest. As mentioned earlier, the rate of interest as such has not been challenged in this Appeal. What has been challenged is merely the liability to make the payment of interest on the amount falling due prior to 24.11.2003.

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(14) The appellant was in fact in default in not making payment of the electricity which it had received from the

members of the Respondent-2. Therefore, it will not be wrong to say that rate of interest on amount which was long due should be payable at penal rate. Since the Commission has already fixed the rate and as mentioned earlier, the rate itself is not in challenge, the appellant is liable to paty interest at the rate so fixed.

(15) The appellant is liable to pay interest. There is no reason why the appellant should not pay interest from the date payment became due. The payment became due when the energy was received by the appellant from the members of Respondent-2".

(16) We find no flaw in the impugned order directing payment and interest from the date of commissioning, i.e. the date on which energy was first fed into the grid by the Members of the Respondent (Association). The Appeal has no force and the same is accordingly dismissed with costs.

25. The above paragraph would show that the following findings have been rendered by the Tribunal:

(i) The tariff order dated 24.11.2003 which determined the purchase rate and directed for payment of interest @ 2% above SBI short-term lending rate was not challenged by the Appellant. Therefore, the Appellant cannot challenge either the tariff order or the directions to pay interest or rate of interest @ 2% in this Appeal.

(ii) In the order passed by the State Commission on 12.09.2006, the State Commission clarified and directed that implementation of the earlier order holding that the Appellant had not made payment despite reminders and, therefore, directed interest on delayed payment. The State Commission had made it clear that interest is payable not only for the period subsequent to the order dated 24.11.2003 but also for the period prior to it in case the payment was due. This

direction and finding given by the State Commission is correct.

(iii) The Appellant relied upon the departmental circular dated 05.10.2001 by referring to clause 14. The said Circular cannot bind the members of the Association as the same does not have any statutory force or contractual force.

(iv) The Appellant was in fact in default in making payment of electricity which he had received from the members of the Developers Association. As such, the rate of interest on amount which was long due should be payable at prevalent rate. The Appellant is liable to pay the interest at the rates so fixed.

(v) The Appellant is liable to pay interest from the date the payment became due means the time when the energy was received by the Appellant from the members of the Developers Association. Hence, as directed by the State Commission, the Appellant is liable to make the

payment of interest from the date on which the energy was first fed into the grid by the Members of the Association.

26. The perusal of the above three orders dated 24.11.2003, 12.09.2006 passed by the State Commission and the Tribunal order passed on 05.02.2008 would reveal that the State Commission as well as the Tribunal gave a categorical finding that the payment becomes due as and when the electricity is generated and fed into the grid and received by the Appellant and the same amounts to sale. As indicated above, the observation "*The payment became due when the energy was received by the Appellant from the members of the Association (Respondent-2)*" would clearly indicate that the liability of the Appellant to pay the amount for the electricity received by them accrues the moment the energy generated by the Association was fed into the grid and the same is received by the Appellant. The wording contained in all the orders, referred to above, would clearly reveal that the mandate was given

to the Appellant not to hold back the payment for purchase of power which had already been received by them. Admittedly, these directions which have been given by both the State Commission and the Tribunal have not been challenged before the appropriate forum and as such this aspect, has to be given due consideration while appreciating the issue raised in this case.

27. While taking note of the above factual situations, the following factors would deserve consideration:-

(i) The direction is to raise the monthly energy bill based upon the Joint Meter Reading by both the parties.

(ii) The latter part of para 1.6.7 is mandatory as the consequence of non-payment within 45 days is clearly stipulated. There is no such indication that the non-raising of the bill will preclude the payment of interest in any manner.

(iii) When the wind developers supplied energy into the grid of the Appellant, the supply is sale. For every sale payment is natural.

(iv) In term of the conclusive and binding judgment in Appeal No. 15/07 dated 05.02.2008 by the Tribunal, the plea of the Appellant that the developer is not entitled to interest has been negated. It is a specific finding given by the Tribunal in the said order that the Appellant cannot say it was not liable to make any payment since no rates were fixed, as the section 70 of the Indian Contract Act makes it obligatory on the person who enjoys the benefit of non-gratuitous act to pay compensation to the person who has provided the benefit. Admittedly this order has not been challenged.

28. So these aspects would reveal that quantum has never been in dispute.

29. As a matter of fact, subsequent to the order that has been passed by the Tribunal dated 05.02.2008, the Appellant did make the payment of interest. However,it is alleged that after the Joint Meter Reading, the Appellant stopped issuing the credit note and therefore the developer was unable to issue invoices as it actually did not have any control as to when the Appellant would issue the credit notes. Under these circumstances, the Association had to file a fresh Petition for implementation by bringing to the notice of the State Commission that the Appellant for a period of time had arbitrarily and without any valid reasons refused to accept the invoices. This aspect was taken into consideration by the State Commission which in turn directed through its impugned order dated 17.08.2009 that wherever invoices have not been issued or accepted, considering 30 days from the Joint Meter Reading be deemed to be the date of the bill and thereafter 45 days to be added for the due payment date and if the payment is delayed beyond 45 days, interest is to be paid.

30. This order passed by the State Commission is based upon the observation of the Tribunal in Appeal No. 15/07 precluding the Appellant from refusing the payment of interest, holding that the Appellant is liable to pay interest and that the payment becomes due from the time when the energy is fed into the grid. It is also stated in the said order that it is grossly incorrect on the part of the Appellant to state that the payment becomes due only from the date of issuance of the bill. From this it is clear the issuance of the bill is not pre-condition to entire billing and the payment regime.

31. It cannot be disputed that quantum of the unit for which bill is to be raised as per Joint Meter Reading is known to the Appellant and equally the tariff fixed by the State Commission was also known to the Appellant. Therefore, the Appellant, even without waiting for any bill should be in a position to make payment within 45 days and pay interest for delayed payment beyond the said due date. Therefore, to put the onus of raising the bill on the Developer based on the Joint Meter Reading has no real

consequence so far as the quantum of the claim is concerned. Furthermore, it cannot be construed to be a deviation of procedure, that too, when the credit notes have not been issued by the Appellant. The Appellant relied upon its circular which refers to the issuance of bill. This cannot be construed to be binding on the members of the Respondent Association as the circular does not have any statutory force. Further, the same cannot be held to the effect that it was a bona fide intention of the Appellant to always follow the scheme for the payment enunciated by the State Commission through its order dated 24.11.2003. It is specifically stated by the Respondent Association in the counter which has not been disputed, that some of the members of the Respondent Association forwarded the invoices on quarterly basis for August, September and October 2001 and the Appellant issued the credit notes for these invoices only in December 2001 and January 2002 and such delay in issuing the credit note continued till much later. It is further submitted by the Respondent Association that the Appellant later stopped accepting the invoices from the members

of the Association with an oblique motive to project the plea that it is not liable to pay interest as it has not received the invoices.

32. As pointed out by the Respondent, this Tribunal in the order passed in Appeal No. 15/07 indicated the inoperatibility of the circular. Further, the said circular stands superseded by para 1.6.7 and 3.4.10 of the tariff order which stipulates 45 days from the date of the bill, which bill is taken on the basis of monthly basis, as opposed to quarterly basis.

33. The Appellant have cited various authorities. The first decision is 1986 (62) STC 227 (Ker) *Joy Varghese V. State of Kerala*. In this decision, the Kerala High Court has held while dealing with a sales tax case that it is only on the failure to make the payment in accordance with the demand that the liability to pay penal interest will occur. This decision of the High Court was also affirmed by the Hon'ble Supreme Court in 1999(9) SCC 124. The next decision is 2004(8) SCC 524 *Clariant International Ltd. V.*

Securities & Exchange Board of India. In this decision the Hon'ble Supreme Court held that interest cannot be awarded unless there is a written demand when the interest is payable by way of damages. The same principles have been reiterated in the (2008) 9 SCC 515 in *Union of India Vs. Shreeji Colour Chem Industries*. On the strength of these decisions it is contended that unless thre is a demand through the bill, the liability of the Appellant to make the payment would not accrue. On going through these decisions, we are of the view that they have no relevance to the issue raised in this Appeal as those authorities relate to the specific statutory provisions contained in the Income Tax Act and the Sales Tax Act. The same have no bearing on the instant case which is a private commercial agreement based on the provisions of Sale of Goods Act and section 70 of the Indian Contract Act, 1872, as referred to by this Tribunal in its judgment dated 05.02.2008 in Appeal No. 15/07.

34. Further, it is to be pointed out, the Respondent Association before approaching the State Commission by filing an application seeking for implementation of the earlier orders dated 24.11.2003 and 12.09.2006 passed by the State Commission as well as the judgment rendered by the Tribunal in Appeal No. 15/07 on 05.02.2008, had sent several reminders to the Appellant insisting on the payment since credit notes were not issued in time by the Appellant to the Developers. These facts are clearly mentioned in the Petition filed by the Association in Case No. 148/08 before the State Commission which culminated into the impugned order dated 17.08.2009. This would be clear from what the Commission said at paras 7,8 and 9 of their impugned order with reference to the averments made by Respondent-2 Association which is as follows:

> "7. *The Petitioner claims that MSEDCL made the payment of interest to some of the Wind Farm Developer members of the Petitioner. However, these payments were calculated from the day MSEDCL received and accepted the invoices from the Petitioner members. The Petitioner is aggrieved by*

the way the payments have been calculated. It relies on the Commission's and Appellate Tribunals' view that the payment becomes due to Wind Farm Developers from the time when the energy is fed into the grid i.e. when it is ready to be off-taken for use by MSEDCL. It thus claims that Wind Farm Developers have incurred financial loss due to such calculation.

8. The Petitioner alleges that MSEDCL insisted on quarterly submission of invoices. This made the Wind Farm Developers loose out on the interest that should be payable from the date the energy is fed into the grid. Such demand was contrary to the directions of the Commission and the Tribunal. Even when the Petitioner forwarded the invoices on quarterly basis for August, September and October 2001, MSEB issued credit notes for these invoices only in December 2001 and January 2002. Such delay in issuing credit notes continued till much later. Credit notes for August, September and October 2003 were released in

February and March 2004. Moreover, based on their own calculations MSEB computed the interest for these payments from 31.3.2005. It is alleged that MSEDCL later stopped accepting invoices from the Wind Farm Developers. All this resulted in major losses to the member Petitioners. The Petitioner alleges that it communicated the issue to MSEDCL by its letter dated 2.12.2008 and a reminder dated 18.12.2008. However, MSEDCL reverted on 29.12.2008 without throwing any light on the issue of payment calculation. Instead, it directed the Petitioners to approach its respective Operation and Management circle. Nothing came out of approaching its Operation and Management circle as it had plainly released payments for the invoicing period up to March, 2004, as per the calculations best understood to them.

9. In the circumstances, the Petitioner has prayed as follows:

iv) The Commission may issue necessary order and direction to MSEDCL to review payments that have been made to the members of the Petitioner as also the payment being made currently and in future so as to make payment of interest in cases where the payment for energy received has been delayed beyond 45 days from the Joint Meter Reading.

v) The Commission may issue necessary order and direction to MSEDCL to pay interest on delayed payments, if any, for all periods and not restricted to period upto March 2004".

35. The above facts would clearly reveal that even after the Joint Meter Reading the members of the Association (Respondent-2) were not given the credit notes with the result they were virtually prevented from issuing invoices to the Appellant. Thus the conduct of the Appellant would clearly show that by not issuing credit notes in time to the Developers, they were not allowed to issue invoices or bills and the said situation has now been taken

advantage of by the Appellant to make a plea that the bills were not issued and, therefore, they are not liable to pay the amount due. Under the above situation, the impugned order has been passed by the State Commission, giving a practical solution to the effect "wherever invoices have not been issued, 30th day from the Joint Meter Reading would be taken to be the date of the bill and the last due date of payment by the Appellant would be 45 days thereafter and for payment beyond 45 days, interest would become due".

36. The conclusion arrived at by the State Commission giving a practical solution, in our view, cannot be said to be wrong. Consequently we have to hold that there is no flaw in the findings of the State Commission

37. **SUMMARY OF OUR FINDINGS**

(i) **The Appellant relied upon the departmental Circular dated 05.10.2001 by referring to clause 14 in order to substantiate its plea that the bill is a condition**

precedent to fasten the liability on the Appellant to pay the bill amount. This Circular would not bind the Members of the Association (R-2) as the same does not have any statutory force or contractual force. To this effect, already finding has been given by the Tribunal by the order dated 05.02.2008 dismissing the Appeal filed by the Appellant in Appeal No. 15/07. Therefore, the reliance on the departmental circular by the Appellant is misconceived.

(ii) The perusal of the order dated 12.09.2006 passed by the State Commission and also the Judgment of the Tribunal passed on 05.02.2008 would reveal that both have given a categorical finding that the payment becomes due as and when the electricity is generated, fed into the grid and received by the Appellant, which amounts to sale. The categorical observation by the Tribunal "The payment became due when the energy

was received by the Appellant from the Members of the Association" would clearly indicate that the liability of the Appellant to pay the amount for the electricity received by them accrues the moment the energy generated by the Members of the Association was fed into the grid and the same is received by the Appellant. Consequently, it is to be held that the Appellant, distribution company, cannot hold back the payment for purchase of power which has already been received by them by simply stating that the bills have not been received.

(iii) There is no controversy over the fact that the quantum of energy for which bill is to be raised as per the Joint Meter Reading is known to the Appellant and the rate of energy is as per tariff fixed by the State Commission, which is again known to the Appellant. Therefore, the Appellant

should be in a position to make the payment within 45 days without waiting for any bill and to pay the interest for delayed payment beyond the said due date. Therefore, to put the onus of raising the bill on the Developers based on the Joint Meter Reading has no real consequence so far as the quantum of the claim is concerned.

(iv) It is specifically stated by the Respondent Association that some of the Members of the Respondent Association forwarded the Joint Meter Readings (JMR) for August, September and October 2001 immediately after the JMR and the Appellant issued the credit notes for those invoices not in time but only in December 2001 and January 2002. This was not disputed. It is further stated by the Respondent Association that the Appellant during some periods stopped accepting

the invoices from the Members of the Association with an oblique motive to project the plea that it is not liable to pay interest as it has not received the invoices. Therefore, the Respondent Association have clearly mentioned in the Petition filed by the Association before the State Commission that the Appellant stopped accepting the invoices from the Developers which resulted in major losses to the Members of the Association and there was no response from the Appellant despite several reminders claiming for the payment. These things would show that even after the Joint Meter Reading, the Members of the Association were not given the credit note by the Appellant with the result they were virtually prevented from issuing invoices to the Appellant. Thus, the conduct of the Appellant would show that in order to make the plea that the bills were not issued, they have not

issued the credit notes to the Developers resulting in issuance of the invoices. Under these circumstances, the State Commission in the impugned order dated 17.09.2009 has held in giving a practical solution "wherever invoices have not been issued, the 30th day from the Joint Meter Reading would be taken to be date of the bill and as such the due date of payment by the Appellant would be 45 days thereafter and for payment beyond 45 days interest would become due. This conclusion, in our view, is correct.

38. **CONCLUSIONS:**

In view of our findings, as referred to above, we conclude that the Appeal has no merit and the same is liable to be dismissed and accordingly dismissed.

39. Before parting with this case, we shall record about the conduct of the Appellant in not making prompt payment to the Developers despite several orders passed by the State Commission as well as by the Tribunal. On the other hand, the Members of the Association were driven from pillar to post to get the fruits of the orders of the Commission and the Judgment by the Tribunal. Consequently, we deem it fit to impose an exemplary cost on the Appellant. Accordingly, the Appellant is directed to pay the cost of Rs. 1 lakh (Rupees One lakh) to the Respondent-2. This payment must be made within 4 weeks from the date of this order.

(Justice P.S. Datta)	**(Rakesh Nath)**	**(Justice M. Karpaga Vinayagam)**
Judicial Member	**Technical Member**	**Chairperson**

REPORTABLE/NON-REPORTABLE

Dated: 1st October, 2010