

**BEFORE THE KARNATAKA ELECTRICITY REGULATORY COMMISSION,  
BANGALORE**

**Dated : 28<sup>th</sup> November, 2014**

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|-------------------------------|----------|
| 1. Sri M.R. Sreenivasa Murthy | Chairman |
| 2. Sri H.D. Arun Kumar        | Member   |
| 3. Sri D.B. Manival Raju      | Member   |

**OP No.8/2014**

**BETWEEN:**

VSL Mining Projects Private Limited,  
House of Lad's  
Palace Road,  
Sandur,  
Bellary District – 583 119

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**PETITIONER**

*(Represented by M/s. Link Legal India Law Services, Advocates)*

**AND**

- 1) Hubli Electricity Supply Company Limited,  
Navanagar,  
P.B. Road,  
Hubli – 580 025
- 2) State Load Desptch Centre – Karnataka,  
Ananda Rao Circle,  
Bangalore – 560 009
- 3) Gulbarga Electricity Supply Company Limited,  
Station Road,  
Gulbarga – 585 101
- 4) Karnataka Power Transmission Corporation Limited,  
Kaveri Bhavan,  
Bangalore – 560 009.

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**RESPONDENTS**

*[Respondents represented by M/s. Induslaw, Advocates]*

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**OP No.9/2014****BETWEEN:**

VSL Mining Projects Private Limited,  
House of Lad's,  
Palace Road,  
Sandur,  
Bellary District – 583 119

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**PETITIONER**

*(Represented by M/s. Link Legal India Law Services, Advocates)*

**AND**

- 1) Hubli Electricity Supply Company Limited,  
Navanagar,  
P.B. Road,  
Hubli – 580 025
- 2) State Load Desptch Centre – Karnataka,  
Ananda Rao Circle,  
Bangalore – 560 009
- 3) Gulbarga Electricity Supply Company Limited,  
Station Road,  
Gulbarga – 585 101
- 4) Karnataka Power Transmission Corporation Limited,  
Kaveri Bhavan,  
Bangalore – 560 009.

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**RESPONDENTS**

*[Respondents represented by M/s. Induslaw, Advocates]*

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**COMMON ORDERS**

- 1) In the above two Petitions, the parties and the question of law and facts involved for consideration are the same. Hence, this common Order is being rendered.

- 2) In each of these Petitions, the Petitioner has prayed for a declaration that the respective Power Purchase Agreement (PPA) dated 29.9.2006 (ANNEXURE - P1 in both the Petitions) had been validly terminated, and for consequential relief of grant of open access for sale of electricity to third parties, and also for recovery of the amounts claimed in the Supplementary Invoices along with interest, and for costs of the proceedings.
  
- 3) The facts relevant for the disposal of these two Petitions may be stated as follows :
  - (a) The Petitioner has established two Projects of Wind Energy-based Electric Power Generating Stations of a gross capacity of 2.5 Mega Watts (MW) and 6.25 MW at Masthikoppa Village and Kalkeri Village, respectively, in Mundargi Taluk, Gadag District, Karnataka State, and has executed the PPA in respect of each of these Projects with the 1<sup>st</sup> Respondent (HESCOM), for sale of electricity as per the terms and conditions contained therein. The Project relating to 2.5 MW capacity Generating Station at Masthikoppa Village is the subject-matter of OP No.8/2014 and the Project relating to 6.5 MW capacity Generating Station at Kalkeri Village is the subject-matter of OP No.9/2014.

**OP Nos. 8/2014 and 9/2014**

- (b) The Petitioner issued the Notice dated 7.1.2014 (ANNEXURE-P2) to the 1<sup>st</sup> Respondent, in respect of each of these Projects, stating that upon scrutiny of the accounts and records, its internal Auditors had pointed out that certain sums were due to the Petitioner towards interest on delayed payments in respect of the tariff invoices, and intimating the 1<sup>st</sup> Respondent to arrange payment of the dues towards the interest as per the supplementary invoices, sent along with the said Notices, within fifteen days from the date of receipt of the Notices. In OP No.8/2014, along with Notice dated 7.1.2014 (ANNEXURTE-P2), the Petitioner has attached a Supplementary Invoice dated 7.1.2014 for Rs.35,56,766/- towards interest due for delay in payment for supply of electricity for the years from 2006-07 to 2011-12. In OP No.9/2014, along with Notice dated 7.1.2014 (ANNEXURTE-P2), the Petitioner has attached a Supplementary Invoice dated 7.1.2014 for Rs.75,01,616/- towards interest due for delay in payment of supply of electricity for the years from 2006-07 to 2011-12. The Petitioner has also attached a Statement to each of the Invoices, giving details of the calculation of interest arrived at on the delayed payments of Tariff Invoices.
- (c) Subsequently, the Petitioner issued the Default Notice dated 6.2.2014 (ANNEXURE-P3) to the 1<sup>st</sup> Respondent, in respect of each of these Projects, stating that the amounts due towards interest, claimed in the earlier Notice (ANNEXURE-P2), had not been paid by the 1<sup>st</sup> Respondent and that the non-payment of these amounts constituted refusal on the part of the

- 1<sup>st</sup> Respondent to perform its financial obligations under the PPA, and calling upon the 1<sup>st</sup> Respondent to pay the said amounts within thirty days from the date of the said Default Notices.
- (d) The 1<sup>st</sup> Respondent, in its reply dated 12.2.2014 (ANNEXURE-P4) to the Default Notices, in respect of each of these Projects, stated that the Petitioner's claims towards interest were belated and barred by time, and that the delay in payments towards tariff invoices were not intentional, but it was due to the delay in receipt of subsidy from the Government of Karnataka, and that the 1<sup>st</sup> Respondent was open for discussion in the matter.
- (e) Being not satisfied with the reply, the Petitioner issued the Termination Notice dated 10.3.2014 (ANNEXURE-P5), in respect of each of these Projects, stating that the amounts claimed by it under the Default Notices had not been paid by the 1<sup>st</sup> Respondent within the stipulated time, and hence, the PPAs stood terminated.
- (f) Thereafter, the Petitioner addressed the letter dated 11.3.2014 (ANNEXURE-P6), in respect of each of these Projects, to the 2<sup>nd</sup> Respondent (SLDC), requesting for approval for a Wheeling & Banking Agreement (W&BA) for sale of electricity to third party.

- (g) The Petitioner has filed both these Petitions before this Commission on 18.3.2014. In the Petitions, the Petitioner has urged that none of its claims was barred by time in view of the fact that the Electricity Act, 2003 is a complete Code, which does not bar any claim on the ground of limitation. It is further contended that the transactions between the Petitioner and the 1<sup>st</sup> Respondent were in the nature of a mutual, open and current account, and therefore, the limitation starts from the close of the year in which the last item, admitted or proved, is entered in the account. Therefore, it is contended that the claim of the Petitioner is not barred by limitation, even assuming that the Limitation Act, 1963 is applicable.
- (h) The Respondents have appeared through their counsel in both the Petitions, and have filed Statements of Objections on behalf of the Respondents-1 and 4. It is contended therein that the Petitioner, for the first time, has chosen to raise the Supplementary Invoices on 7.1.2014 for the period commencing from 2006-07, after expiry of period of seven years, and that the claims made by the Petitioner towards interest on delayed payments is barred by limitation. The Respondents have denied that there has been any delay on their part in making payments of tariff invoices and that the delay, if any, has been for the reasons which were beyond the control of the Respondent-1, and it was never willful. It is further contended that, even otherwise, the Petitioner has clearly waived the right to claim any interest, as the Petitioner had received the

payments subsequently made by the 1<sup>st</sup> Respondent towards various invoices without any protest or demur. Further, it is contended that the 1<sup>st</sup> Respondent was open for further discussions in this regard and the same was intimated to the Petitioner. It is further urged that that payment of interest cannot be considered to be a 'material obligation' under the PPA, and therefore failure to pay interest, or delayed payment of interest, cannot be a ground for termination of the PPA. It is denied that the Petitioner and the 1<sup>st</sup> Respondent have got a mutual, open and current account. Therefore, the Respondents have prayed for dismissal of the Petitions.

- 4) We have heard the oral submissions made by the counsel for both the parties and have considered the respective pleadings on records.
- 5) From the facts of these cases and the rival submissions of the parties, the following issues would arise for our consideration:
  - (1) Whether the claims made by the Petitioner for interest on the interest, for the delayed payment of amounts due under the tariff invoices, are as per the terms of the PPA?
  - (2) If the answer to issue No.(1) above is in negative, what would be the quantum of interest, which the Petitioner is not entitled to claim?

- (3) Whether the claim, or any part thereof, of the Petitioner is barred on the principles of delay and laches?
- (4) Whether the termination of the PPA by the Petitioner is valid and legal?
- (5) What Order?
- 6) After considering the material on records, the legal provisions and the submissions of the parties, our findings on the above issues are as follows :
- 7) **ISSUE No.(1) :**
- (a) In OP No.8/2014, in the Supplementary Invoice dated 7.1.2014, the Petitioner has claimed the year-wise interest due for the delay in payment of the Tariff Invoices as detailed below :

<u>Particulars</u>	<u>Year</u>	<u>Amount (in Rs.)</u>
Interest due for delay in payment of WPTG power for the years:	2006-07	5,31,581
	2007-08	4,10,712
	2008-09	5,23,088
	2009-10	11,71,224
	2010-11	7,63,335
	2011-12	1,56,826
<b>Grand Total ..</b>		<b>35,56,766</b>



**OP Nos. 8/2014 and 9/2014**

- (b) Along with the Supplementary Invoice dated 7.1.2014 for Rs.35,566,766/-, the Petitioner has produced the working sheets showing the details of the Tariff Invoice Date, Due Date for Payment of Tariff Invoice, Tariff Invoice Amount, Date of payment of Tariff Invoice Amount and No. of Days' Delay in Payment of Tariff Invoice. The Petitioner has then calculated the interest on delayed payment on Tariff Invoices, considering the rate of interest at 14% per annum, from the 'Due Date of Payment' to the 'Actual Date of Payment'. The Petitioner has also claimed interest at the rate of 14% per annum, up to 31.12.2013, on the interest on the interest accrued on the delayed payments of Tariff Invoices, arrived at in the above manner.
- (c) In OP No.8/2014, the year-wise break-up figures of interest on the delayed payment of Tariff Invoices, and the interest on interest, up to 31.12.2013, are detailed as follows :

<b>Year</b>	<b>Interest on Delayed Payment of Tariff Invoices (in Rs.)</b>	<b>Interest on Interest (up to 31.12.2013) (in Rs.)</b>
2006-07	2,73,090	2,58,492
2007-08	2,21,645	1,89,067
2008-09	3,05,919	2,17,169
2009-10	7,56,736	4,14,487
2010-11	5,42,139	2,21,196
2011-12	1,19,977	36,850
<b>Total ..</b>	<b>22,19,506</b>	<b>13,37,261</b>

**Grand Total .. Rs.35,56,767/-**

- (d) In the same manner, in OP No.9/2014, in respect of Supplementary Invoice dated 7.1.2014 for a sum of Rs.75,01,616/-, the Petitioner has given the following break-up figures of the interest on the delayed payments of Tariff Invoices, and interest on the said interest, up to 31.12.2013 :

<b>Year</b>	<b>Interest on Delayed Payment of Tariff Invoices (in Rs.)</b>	<b>Interest on Interest (up to 31.12.2013) (in Rs.)</b>
2006-07	4,69,031	4,43,938
2007-08	5,37,938	4,57,039
2008-09	7,62,784	5,42,028
2009-10	13,43,418	7,27,942
2010-11	13,29,111	5,28,555
2011-12	2,75,343	84,487
<b>Total ..</b>	<b>47,17,625</b>	<b>27,83,989</b>
<b>Grand Total .. Rs.75,01,614/-</b>		

- (e) Article 6.1 of the PPA provides for issuance of a Monthly Tariff Invoice for each Billing Period to the 1<sup>st</sup> Respondent, setting forth the amounts payable by the 1<sup>st</sup> Respondent for the Delivered Energy. Article 6.2 provides that the 1<sup>st</sup> Respondent shall make payment within fifteen days from the date of receipt of the Monthly Tariff Invoice. Article 6.3, which provides for Late Payment, states that, *"if any payment from HESCOM is not paid when due, there shall be due and payable to the Company interest at the rate of SBI medium term lending rate per annum for such*

*payment from the date such payment was due until such payment is made in full.*" The 'Due Date of Payment' is defined in the PPA as, "*'Due Date of Payment' in respect of a Monthly Invoice means the date, which is 15 (fifteen) days from the date of receipt of such invoices by the designated official of HESCOM.*" The conjoint reading of Articles 6.1, 6.2 and 6.3 of the PPA, along with the definition of 'Due Date of Payment', would show that these provisions do not authorize the Petitioner (generator) to claim 'interest on interest'. Unless there is a specific provision in the PPA for charging of interest on interest, the Petitioner is not entitled to do so. The opening phrase in Article 6.3, "*If any payment from HESCOM is not paid when due*" clearly refers to the amount claimed in the Monthly Tariff Invoice. The further phrases, "*such payment*" used in Article 6.3 would also clearly refer to the amounts mentioned in the Monthly Tariff Invoices. Therefore, we are of the view that the claim of the Petitioner in both the Petitions regarding charging of interest on interest becoming due on the delayed payments of Tariff Invoices, is not sustainable. During the relevant period, the Petitioner went on issuing the Monthly Tariff Invoices to the 1<sup>st</sup> Respondent, but did not receive payments towards the same within the stipulated time, and as and when payments were made by the 1<sup>st</sup> Respondent, the same were adjusted towards the amounts due under the Monthly Tariff Invoices. Therefore, the Petitioner cannot now charge interest on the interest accrued on dues till the payment of the Monthly Tariff Invoices. Therefore, Issue No(1) is answered in the negative.

8) **ISSUE No.(2) :**

Since Issue No.(1) is held in negative, as noted above, the claims of the Petitioner in OP Nos.8/2014 and 9/2014, towards 'interest on interest' for the years from 2006-07 to 2011-12, amounting to Rs.13,37,261/- and Rs.27,83,989/-, respectively, are not legally sustainable, as there is no clause in the PPA providing to claim such payments. Therefore, Issue No.(2) is held accordingly.

9) **ISSUE Nos.(3) & (4) :**

- (a) The 1<sup>st</sup> Respondent has contended in its Statement of Objections that the alleged claims of the Petitioner are barred by limitation. On the other hand, the Petitioner has contended that the Electricity Act, 2003 is a complete Code, which does not bar any claim made before this Commission, on the ground of limitation. The Petitioner has contended that the Limitation Act, 1963 cannot be applied to the present Petitions, unless a specific provision is made in the Electricity Act, 2003 to that effect. The Petitioner has further contended that the Petitioner and the 1<sup>st</sup> Respondent have a mutual, open and current account, and therefore, the cause of action arises from the close of the year in which the last item, admitted or proved, is entered in the account.

- (b) At the outset, it may be stated that the Petitioner has not laid its claim on the basis of the mutual, open and current account. There are no pleadings in the Petitions to the effect that the transactions between the Petitioner and the 1<sup>st</sup> Respondent were based on any claims and cross-claims between them. Therefore, we hold that the accounts maintained by the Petitioner relating to the energy transactions in these Petitions do not amount to a mutual, open and current account.
- (c) Now, it is established that, though the Limitation Act is not applicable for the claims made before the Commission, the principles of delay and laches are applicable. On the question as to what is 'reasonable time' to file a claim before any Forum, for which the Limitation Act is not applicable, the principles stated in the decision reported in **(2000) 2 SCC 628**, between *Corporation Bank and another -Vs- Navin J. Shah*, read thus:

*"...What is reasonable time to lay a claim depends upon the facts of each case. In the legislative wisdom, three years' period has been prescribed as the reasonable time under the Limitation Act to lay a claim for money. We think that period should be appropriate standard adopted for computing reasonable time to raise a claim in a matter of this nature. For this reason also we find that the claim made by the respondent ought to have been rejected by the Commission."*

- (d) In the decision reported in **(2013) 10 SCC 627** in the case of *Londhe Prakash Bhagwan –Vs- Dattatraya Eknath Mane and others*, at paragraph-9 of its Judgment, the Hon'ble Supreme Court has held thus:

*“..... If no time limit has been prescribed in the statute to apply before the appropriate forum, in that case, he has to come before the Court within a reasonable time. This Court on a number of occasions, while dealing with the matter of similar nature held that where even no limitation has been prescribed, the petition must be filed within a reasonable time. ....”*

- (e) In the present cases, the Petitioner has demanded a sum of Rs.35,56,756/- in OP No.8/2014 and a sum of Rs.75,01,616/- in OP No.9/2014, under the Supplementary Invoices dated 7.1.2014, towards the purported interest due on the delayed payments of the Monthly Tariff Invoices, for the period from 2006-07 to 2011-12. The period prescribed for recovery of the interest due is three years from the date when the interest becomes due. Therefore, one can say that any claim made by the Petitioner relating to the period prior to 7.1.2011 is barred on the principles of delay and laches. The Petitioner, in its Notice dated 7.1.2014 (ANNEXURE-P2), has stated that, *“... upon scrutiny of accounts and records, our internal auditors have pointed out that certain sums were due to us from HESCOM Limited towards the power supply made by our Company under the PPA under reference. We have been advised to raise Supplementary Invoice for the interest due for the delay in receipt of payments ...”* The said version of

the Petitioner may lead to an inference that the Petitioner was ignorant of the said claims till it was pointed out by its internal auditors, and soon thereafter it raised the Supplementary Invoice for interest. This excuse stated by the Petitioner appears to be far from truth. In the said Notice dated 7.1.2014, it is not stated by the Petitioner as to when its internal auditors pointed out this short claim. Even if this were to be the fact, one has to say that this was only a negligent act on the part of the Petitioner, which cannot be put forth for claiming condonation of any delay or laches. The Petitioner has not taken this ground in the Petitions.

(f) As already noted, the Petitioner is not entitled to claim 'interest on interest'. Therefore, the amount towards interest that could have been claimed by the Petitioner was Rs.1,64,398/- in OP No.8/2014 and Rs.3,88,053/- in OP No.9/2014, for the period from January, 2011 to March, 2012. Even assuming that the Petitioner could claim 'interest on interest' for the above-said period, the total claim that could have been made by it in OP No.8/2014 was Rs.1,83,972/- and in OP No.9/2014 was Rs.5,12,806/-. However, the Petitioner has claimed in the Default Notices in OP Nos.8/2014 and 9/2014, the amounts of Rs.35,56,767/- and Rs.75,01,614/-, respectively.

(g) The 1<sup>st</sup> Respondent has raised its objection to the Default Notice (ANNEXURE-P3), contending that some of the claims towards interest were belated and barred by time. This objection of the 1<sup>st</sup> Respondent could

not have been brushed aside by the Petitioner, while issuing the Termination Notice, by coming to the conclusion that the 1<sup>st</sup> Respondent had not remedied the purported payment defaults mentioned in the Default Notice. The 1<sup>st</sup> Respondent, in its reply, had intimated the Petitioner that it was open for discussion with the Petitioner in the matter. We are of the opinion that the present disputes were fit cases for resolving the differences between parties amicably under Article 10 of the PPA. We have found that a substantial part of the claims made by the Petitioner in these two Petitions are not legally sustainable. Consequently, it cannot be held that the 1<sup>st</sup> Respondent has failed to remedy the purported defaults mentioned in the Default Notice. In that event, the issuance of a Termination Notice by the Petitioner does not have the effect of terminating the PPAs in these two cases. In other words, the defects stated by the Petitioner in the Default Notice should be substantially found to be proved, before holding that a right has accrued to the Petitioner to terminate the PPA, by way of issuing a Termination Notice. The Petitioner has failed to establish a substantial part of the defects mentioned in the Default Notice. Accordingly, we answer Issue No.(3) in affirmative and Issue No.(4) in negative.

10) **ISSUE No.(5) :**

For the foregoing reasons, we pass the following :



**ORDER**

- (1) The prayer for declaration that the Petitioner has validly terminated the Power Purchase Agreements in OP No.8/2014 and OP No.9/2014, is rejected. The Petitioner is not entitled to claim open access for sale of electricity to third party; and
- (2) The 1<sup>st</sup> Respondent shall pay to the Petitioner a sum of Rs.1,64,398/- (Rupee One Lakh Sixty Four Thousand Three Hundred and Ninety Eight only) in OP No.8/2014 and Rs.3,88,053/- (Rupees Three Lakhs Eighty Eight Thousand and Fifty Three only) in OP No.9/2014, towards the interest found due on the Monthly Tariff Invoices of the Petitioner, for the period from January, 2011 to March, 2012.

Office is directed to keep the original Order in OP No.8/2014 and a copy of the same in OP No.9/2014.

Sd/-

(M.R. SREENIVASA MURTHY)  
CHAIRMAN

Sd/-

(H.D. ARUN KUMAR)  
MEMBER

Sd/-

(D.B. MANIVAL RAJU)  
MEMBER