



TELANGANA STATE ELECTRICITY REGULATORY COMMISSION
5th Floor, Singareni Bhavan, Red Hills, Lakdi-ka-pul, Hyderabad 500 004

O.P.No.12 of 2022

&

I.A.No.4 of 2022

Dated 08.08.2022

Present

Sri. T. Sriranga Rao, Chairman
Sri. M. D. Manohar Raju, Member (Technical)
Sri. Bandaru Krishnaiah, Member (Finance)

Between:

M/s Mahabubnagar Solar Parks Private Limited,
H.No.7-1-414-35/A&A1,
3rd Floor, Srinivasa Colony East,
S.R.Nagar, Ameerpet, Hyderabad 500 038.

... Petitioner.

AND

1) Southern Power Distribution Company of Telangana Limited,
Corporate Office, H.No.6-1-50, Mint Compound,
Hyderabad 500 063.

2) Telangana State Power Coordinate Committee,

TSTRANSCO, 5th Floor, Vidyuth Soudha,

Khairatabad, Hyderabad 500 082.

... Respondents 1 & 2.

(2nd respondent is deleted by the Commission on the ground that it is neither a statutory body nor is recognized authority under the Electricity Act, 2003 or the regulations made thereof by the Commission)

The petition came up for hearing on 02.02.2022, 04.04.2022, 20.04.2022 and 23.05.2022. Sri. Aditya K.Singh, Advocate representing Link Legal Advocates for petitioner and Sri. Mohammad Bande Ali, Law Attaché representing for respondent have appeared through video conference on 02.02.2022 and present on 04.04.2022,

20.04.2022 and 23.05.2022. The matter having been heard and having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s Mahabubnagar Solar Parks Private Limited (petitioner) has filed a petition, on 09.12.2021 under Section 86(1)(b), (e) & (f) of the Electricity Act, 2003 (Act, 2003) and in terms of Power Purchase Agreement dated 17.06.2014 and its amendment dated 26.09.2014 (PPA) seeking release of payments due also with interest for late payment and consequential relief of payment of future bills in a timely manner in accordance with the PPA in respect of its 10 MW connected to 33 kV side at the 132/33 kV Marikal substation in Mahabubnagar District. The petition has been taken on record of the Commission duly striking off the 2nd respondent i.e., TSPCC (party) from the array of respondents, as it is neither a statutory body nor is recognized authority under the Act, 2003 or the regulations made thereof by the Commission.

2. The averments in the petition are extracted below:
 - a. It is stated that the petitioner is a generating company within the meaning of Section 2(28) of the Act and has established and operates 10 MW of solar energy generating station, connected to 132/33 kV Marikal SS in Mahabubnagar District, Telangana (Project).
 - b. It is stated that the erstwhile Government of Andhra Pradesh (GoAP) (which later bifurcated into Telangana and Andhra Pradesh by way of the Andhra Pradesh Reorganisation Act, 2014, commonly known as the Telangana Act in March, 2014) vide Government Order in G.O.Ms.No.39, dated 26.09.2012 had pronounced the Andhra Pradesh Solar Power Policy 2012 (policy) wherein it provided incentives for development of solar power plant in the state. This G.O. was amended vide G.O.Ms.No.46, dated 27.11.2012. As per this amended policy the DISCOMS had to ensure the following:
 - (i) the DISCOMS had to ensure the promotion of solar power plants with aggregate quantum of 1000 MW before June, 2013.
 - (ii) the DISCOMS should select the solar power developers through the process of competitive bidding.

- (iii) the Chairman and Managing Director of Transmission Corporation of Andhra Pradesh Limited (“APTRANSCO”) would conduct the bidding process duly notifying the substations near which the solar power developers setup the solar power plants to facilitate the easy evacuation and the CMD, APTRANSCO would develop a bidding document for selection of developers with the process of competitive bidding duly providing pre-bid conference to hear and address difficulties of the potential bidders before the final bid received and also authorized the CMD, APTRANSCO to take the necessary action accordingly.
- c. It is stated that accordingly, APTRANSCO issued open offer dated 31.08.2013, to which the petitioner applied for setting up of 10 MW solar power project. Consequently, a Letter of Intent (LoI) dated 10.10.2013 was issued to the petitioner r/w its amendment dated 05.02.2014 for setting up of the solar power plant at Rs.6.49 per unit.
- d. It is stated that in terms of the LOI issued to the petitioner, TSSPDCL (formerly Central Power Distribution Company of Andhra Pradesh Limited i.e., before the notification of the AP Reorganization Act, 2014) executed the PPA dated 17.06.2014 with the petitioner for purchase of energy generated from the 10 MW project for a period of 20 years. However, PPA was amended vide an amendment dated 26.09.2014 pursuant to the changes suggested by the then Andhra Pradesh Electricity Regulatory Commission’s (APERC) model draft PPA approval order dated 15.07.2014. As per the said order certain drafting changes were suggested by the then APERC to simplify operational procedure and minimize the scope for litigation. Accordingly, the PPA was amended with its changes deemed to have been made from 17.06.2014 onwards itself. The relevant terms of the PPA are reproduced herein below:

“ARTICLE 1

DEFINITIONS

“Delivered Energy” shall mean, with respect to any Billing Month, the kilo watt hours (kWh) of electrical energy generated by the Project and delivered to the DISCOM at the Interconnection Point, as measured by

both energy meters at the Interconnection Point during that Billing Month at the designated substation of TSTRANSCO/DISCOM.

Explanation 1:

... ..

Explanation 3: Energy will be procured at Rs.6.49 per unit per unit up to 25% CUF calculated over a year. Beyond the same, the energy will be purchased at a flat rate of Rs.3.00/(kWh) unit (without escalation) during the entire agreement period. [as amended]

“Due Date of Payment” shall mean the date on which the amount payable by the DISCOM to the Solar Power Developer hereunder for Delivered Energy, if any, supplied during a Billing Month becomes due for payment, which date shall be thirty (30) days from the Meter Reading Date, and in the case of any supplemental or other bill or claim, if any, the Due Date of Payment shall be thirty (30) days from the date of the presentation of such bill or claim to the designated officer of DISCOM. If the last date of payment falls on a holiday, the next working date shall be considered as last date.

“Scheduled COD” shall mean 12 months from the date of signing of this Agreement;

AMENDED ARTICLE 2

PURCHASE OF DELIVERED ENERGY AND TARIFF

2.1 All the Delivered Energy, as mentioned in Schedule 1, at the Interconnection Point for sale to DISCOM will be purchased at the Tariff provided for in Clause 2.2 limited to capacity of the Project only after the Date of Commercial Operation of the Project and title to Delivered Energy purchased shall pass from the Solar Power Developer to the DISCOM at the Interconnection Point. [as amended]

2.2 The DISCOM shall pay a tariff of Rs.6.49 per Unit (“Tariff”) up to 25% CUF calculated on annual basis.

Explanation: The tariff is firm and is Rs.6.49 per Unit for a period of 20 years from the date of COD as per the definition of delivered energy. Any energy delivered in excess of 25% CUF during the

Financial year shall be purchased by DISCOM at Rs.3.00 per kWh.

ARTICLE 3

INTERCONNECTION FACILITIES, SYNCHRONIZATION, COMMISSIONING AND COMMERCIAL OPERATIONS

3.10 Synchronization, Commissioning and Commercial Operation

... ..

3.10.5 The Solar Power Developer shall commission the Project within twelve (12) Months of the date of signing of this Agreement, and any delayed commissioning of the same is subject to the penalties and incentives stated in Clause 10.5 and Clause 3.11 respectively.

ARTICLE 5

BILLING AND PAYMENT

5.1 For the Delivered Energy purchased, Solar Power Developer shall furnish a bill to the DISCOM calculated at the Tariff provided for in Article 2, in such form as may be mutually agreed between the DISCOM and the Solar Power Developer, for the billing month on or before the 5th working day following the Meter Reading Date.

5.2 The DISCOM shall be entitled to get a rebate of 1% of the total amount billed in any billing month for payments made before the Due Date of Payment. Any payment made beyond the Due Date of Payment, DISCOM shall pay interest at prevailing SBI bank rate and in case this rate is reduced, such reduced rate is applicable from the date of reduction.

5.3 The DISCOM shall pay the bill on monthly basis as per Clause 5.1 by opening a one month revolving Letter of Credit in favour of the Solar Power Developer.

5.4 **Letter of Credit:** Not later than 30 days prior to the Scheduled COD of the Generating Unit, DISCOM shall cause to put in place an irrevocable revolving Letter of Credit issued in favour of Solar Power Developer by a Scheduled Bank (the "Letter of Credit") for one month's billing value. [as amended]

ARTICLE 10
EVENTS OF DEFAULT AND TERMINATION

... ..

10.2 DISCOM Event of Default

10.2.1 The occurrence and the continuation of any of the following events, unless any such event occurs as a result of a Force Majeure event or a breach by the Solar Power Developer of its obligations under this Agreement, shall constitute the Event of Default on the part of defaulting DISCOM ("DISCOM Event of Default"):

- (i) DISCOM fails to pay (with respect to payments due to the Solar Power Developer according to Article 5), for a period of ninety (90) days after the Due Date of Payment and the Solar Power Developer is unable to recover the amount outstanding to the Solar Power Developer through the Letter of Credit

... ..

ARTICLE 11
DISPUTE RESOLUTION

... ..

11.4 Failing resolution of the dispute in terms of the above provisions or even otherwise, any party may approach APERC to resolve the dispute in terms of Section 86 (1) (f) of the Electricity Act, 2003.

A bare perusal of the aforementioned provisions of the PPA makes the following abundantly clear –

- i. The petitioner is obligated to sell the 10 MW of energy generated to TSSPDCL and TSSPDCL is obligated to pay Tariff for the energy supplied at the Delivery Point.
- ii. The Tariff rate that is Rs.6.49 per unit shall be firm for the entire term of the PPA and will not vary.
- iii. The billing has to be carried out on a monthly basis.
- iv. The settlement period of the invoice of the petitioner for the energy supplied to TSSPDCL shall be 30 days from the meter reading date.
- v. If TSSPDCL has any dispute in relation to a bill raised by the petitioner, it shall notify the petitioner of such dispute.

- vi. In case payment of bill is delayed beyond the 'Due Date of Payment', TSSPDCL is obligated to pay late payment surcharge as specified in Article 5.2.
- vii. Not later than 30 days prior to the Scheduled COD of the Generating, TSSPDCL/TSPCC must open an irrevocable revolving Letter of Credit for one month's billing value in favour of the petitioner.
- vii. If the DISCOM fails to make payments for a period of ninety (90) days after the Due Date of Payment for the energy supplied by the petitioner and the petitioner is unable to recover the outstanding amount through the Letter of Credit, the event will qualify as a 'DISCOM Event of Default'.
- e. It is stated that pursuant to the execution of the PPA, the petitioner set up and commissioned the Project in the State of Telangana within the time period stipulated in the PPA. The petitioner invested huge amounts in setting up the 10 MW project on the basis that TSSPDCL will pay the tariff discovered in the transparent competitive bid process and as specified in the PPA. Accordingly, the 10 MW Project was commissioned on 15.06.2015.
- f. It is stated that the facts stated below demonstrate that the DISCOM has been acting in an arbitrary, unfair and illegal manner and misusing their dominant position. TSSPDCL, in view of the monopolistic nature of business being undertaken by them and being instrumentalities of the State, are obligated to operate in a fair and transparent manner within the mandate of the Article 14 of the Constitution of India.
- g. It is stated that since the commissioning of the 10 MW Project, the entire electricity generated by the Project is being supplied to TSSPDCL in terms of the PPA. Till the date of filing of the instant petition, entire electricity generated from Project has been supplied and billed by the petitioner and further sold to the consumers by TSSPDCL. While the petitioner has been fulfilling its obligations under the PPA, TSSPDCL has repeatedly acted against the mandate of the Act, 2003, the objectives of and in contravention of the provisions of the PPA.

- h. It is stated that the petitioner has been, in terms of the provisions of the PPA, issuing monthly invoices to TSSPDCL/TSPCC for the energy supplied. As per Article 5.5 of the PPA, TSSPDCL/TSPCC is mandated to pay for the energy purchased from the petitioner within the due date. Due date, in terms of the PPA, is the date on which the amount payable by the DISCOM to the petitioner for energy supplied during a billing month becomes due, which is 30 days from the meter reading date provided the bill is received by the DISCOM within 5 working days from the meter reading date or 30 days from the date of presentation of such bill or claim to the DISCOM. Further, the petitioner is entitled to LPS in terms of Article 5.2 of the PPA which provides that in case of delay in payment for the energy purchased by TSSPDCL beyond the 30 days, TSSPDCL shall pay interest at prevailing SBI bank rate on the outstanding amount. TSSPDCL is therefore, liable to pay LPS on the outstanding invoices to the petitioner. While the petitioner has time and again requested TSSPDCL to comply with its contractual obligation to clear outstanding invoices including LPS payable thereon, TSSPDCL/TSPCC has, acting in a high-handed manner, completely ignored such requests.
- i. It is stated that the details of monthly bills for the period from December, 2020 to September 2021 amounting to Rs.10,25,93,660/- that are currently overdue and unpaid, and the LPS applicable are set out below:

Sl. No.	Invoice No.	Invoice month	Principle due amount	Delay in making payment (Considering 10.11.2021 as cut-off date)	Late payment Surcharge (as on 10.11.2021)
1	MSPPL/TSSPDCL/MBNR /10 MW/Inv/2020-12/01	Dec, 20	1,01,57,239	284	958654
2	MSPPL/TSSPDCL/MBNR /10 MW/Inv/2020-01/01	Jan, 21	1,02,16,234	261	886864

Sl. No.	Invoice No.	Invoice month	Principle due amount	Delay in making payment (Considering 10.11.2021 as cut-off date)	Late payment Surcharge (as on 10.11.2021)
3	MSPPL/TSSPDCL/MBNR /10 MW/Inv/2020-02/01	Feb, 21	1,15,44,996	228	876218
4	MSPPL/TSSPDCL/MBNR /10 MW/Inv/2021-03/01	Mar, 21	1,12,03,103	201	749580
5	MSPPL/TSSPDCL/MBNR /10 MW/Inv/2021-04/01	Apr, 21	1,20,39,534	168	673290
6	MSPPL/TSSPDCL/MBNR /10 MW/Inv/2021-05/01	May, 21	1,13,53,152	135	510192
7	MSPPL/TSSPDCL/MBNR /10 MW/Inv/2021-06/01	Jun, 21	1,03,38,895	104	357924
8	MSPPL/TSSPDCL/MBNR /10 MW/Inv/2021-07/01	July, 21	81,90,575	75	204484
9	MSPPL/TSSPDCL/MBNR /10 MW/Inv/2021-08/01	Aug, 21	88,25,037	45	132194
10	MSPPL/TSSPDCL/MBNR /10 MW/Inv/2021-09/01	Sep, 21	87,24,896	11	31947
Total			10,25,93,660		53,81,348

- j. It is stated that pertinently, the TSSPDCL/TSPCC has not even paid the any LPS on the delayed payments made prior to December, 2020 and therefore, is liable to pay Rs.3,06,19,904/-. A table showing total LPS payable on the delayed payments received for invoices raised before December, 2020 is provided below.

Sl. No.	LPS Invoice Month	LPS Invoice No.	LPS Due Amount	Payment Due Date
1	Aug, 18	MSPPL/TSSPDCL/MBNR/10 MW/ LPSC/2018-08/01	23,41,459	04-Oct-18

Sl. No.	LPS Invoice Month	LPS Invoice No.	LPS Due Amount	Payment Due Date
2	Jun, 19	MSPPL/TSSPDCL/MBNR/10 MW/ LPSC/2019/06/01	29,47,831	27-Jul-19
3	Jan, 20	MSPPL/TSSPDCL/MBNR/10 MW/ LPSC/2020/01/01	81,36,214	08-Feb-20
4	Jan, 20	MSPPL/TSSPDCL/MBNR/10 MW/ LPSC/2020/01/02	12,25,017	01-Mar-20
5	July, 20	MSPPL/TSSPDCL/MBNR/10 MW/ LPSC/2020/07/01	86,63,861	30-Aug-20
6	Jan, 21	MSPPL/TSSPDCL/MBNR/10 MW/ LPSC/2021-01/01	14,69,121	10-Feb-21
7	Apr, 21	MSPPL/TSSPDCL/MBNR/10 MW/ LPSC/2021-04/01	36,75,880	30-May-21
8	Oct, 21	MSPPL/TSSPDCL/MBNR/10 MW/ LPSC/2021-10/01	21,60,521	10-Nov-21
Total			3,06,19,904	

- k. It is stated that the petitioner has been writing to the respondents, GoTS, TSTRANSCO, Ministry of New and Renewable Energy (MNRE) and such concerned authorities regarding its concern of non-payment by the DISCOM seeking payment of the unpaid energy invoices and the LPS applicable thereon. However, the respondent neither made payments nor responded to the letters issued by the petitioner.
- l. It is stated that Clause 5.4 of the PPA provides that the TSSPDCL is also required to open a revolving Letter of Credit equivalent to one month's generation which can be invoked by the petitioner if TSSPDCL fails to make timely payment of the monthly invoice, which TSSPDCL has failed to open. It has been requesting respondent to open the letter of credit vide various communications.
- m. It is stated that it is pertinent to mention here that along with the communications regarding non-payment of the outstanding amounts by the TSSPDCL, the petitioner also wrote to it on 08.10.2021 for opening of the revolving Letter of Credit, however, of no avail. TSSPDCL never

responded to the letters and communications sent by the petitioner nor has been complying with the terms of the PPA.

- n. The petitioner has raised the following grounds in the petition.
- i) It is stated that the action of the respondents in withholding payments for energy supplied from the 10 MW Project post December 2020 and significantly delaying payments on invoices raised prior to December 2020 (as highlighted in the above table) is a gross violation of the provisions of the PPA which is a statutory document and binding on both parties. PPA, in order to protect the rights of the parties, stipulates a cut-off date by which TSSPDCL must make payments for the energy supplied from the Solar project, additionally in case payments are not made in a timely manner as per the provisions of the PPA TSSPDCL shall be required to pay LPS on delayed payments in accordance with Clause 5.2. However, in total disregard of the said provisions, and despite repeated requests and communications issued by the petitioner, the respondents, arbitrarily and illegally, continue to withhold payments for the invoices. It is also pertinent to state that the respondents have till date not disputed any invoice raised by the petitioner. As such, the invoices have become conclusive and TSSPDCL is bound to make payments for the said invoices. In the present case, TSSPDCL is misusing its dominant position in withholding payments legally admitted and due to the petitioner without any basis whatsoever.
 - ii) It is stated that TSSPDCL entered into the PPA, on its own volition, knowing fully well the obligations it entailed, to meet its energy requirement and also to fulfil its mandatory renewable purchase obligation. The parties have since acted upon the PPA and have taken respective burden and benefit thereof. The petitioner has been providing uninterrupted supply of power from its solar power project to TSSPDCL and raising invoices against such supply while TSSPDCL has been off-taking the power for supply to its consumers. It is settled law that once a contract has been executed, acted upon and taken benefit of by the parties,

the same is binding in law on the parties. In view thereof, TSSPDCL must be pinned to its obligations under the PPA. TSSPDCL's conduct is not only arbitrary and unfair but also demonstrates its high handedness.

- iii) It is stated that while the respondents have not been making any payments to the petitioner for the energy invoices raised since December, 2020, they are recovering the tariff for the energy procured from the Project from the ultimate consumers. Pertinently, the cost of procurement of power from the petitioner has been accounted for in the tariff being charged by TSSPDCL from its consumers. Despite recovering these amounts, payments to the petitioner are being withheld. This action not only amounts to unjust enrichment of TSSPDCL but is also contrary to TSSPDCL's legal obligation to remit such monies to the petitioner. It is stated that this is not only a fraud on the consumers bearing the burden of this cost, but is also illegal, unfair and arbitrary.
- iv) It is stated that it is settled law that as a party to the contract, TSSPDCL is bound to discharge its functions as per the contract that it has entered into till the same is varied, modified, or set aside. A party to a contract cannot state that it will not follow the terms of the contract as it is bound by the same. In this case, TSSPDCL being "State" under Article 12 of the Constitution is expected to behave as a model employer, however, unfortunately, it has acted completely contrary to the said standards.
- v) It is further stated that the intent behind a Clause of 'Late Payment Surcharge' is essentially to compensate the non-defaulting party as per the 'Time Value of Money' whereby, it becomes an obligation of the defaulting party to put the non-defaulting party in a position where the defaulting party would have made timely payments to the non-defaulting party for the bills raised by the non-defaulting party. The concept of 'Time Value of Money' states that money that is available at present time is worth more than the

same amount in the future, due to its potential earning capacity or the inflation that decreases the value of the money. The actual time value of money gets lost if the payment of LPS is delayed or not paid at all. In order to do justice to the intention of LPS and the concept of 'Time Value of Money', in case of delay in the payments of LPS, the same should be paid along with an interest so as to put the non-defaulting party in a position had the LPS payment was received by it on time.

- vi) It is stated that Clause 5.2 of the PPA provides that in case of delay in payment for the energy purchased by TSSPDCL beyond the time period specified in the PPA TSSPDCL shall pay interest at prevailing SBI bank rate on the outstanding amount. However, despite the petitioner's repeated requests, TSSPDCL has failed to comply with its contractual obligation of paying LPS on delayed payments.
- vii) It is stated that TSSPDCL, which is an instrumentality of State under Article 12 of the Constitution of India, is duty bound to act in a fair and reasonable manner and within the four walls of the powers and functions conferred on them. That while on one hand the GoTS has invited private investments into the State for development of the renewable energy sector by offering incentives under the State Solar Policy, on the other hand, the TSSPDCL, by the aforestated actions, has clearly and consistently been acting in complete disregard of the aim and objective of the GoTS as well as its own responsibilities in the capacity of being a 'State Instrumentality' and a distribution licensee under the Act, 2003. Its aforestated high-handed actions has resulted in a destabilized regulatory environment. The petitioner submits that it has hitherto patiently and amicably engaged with TSSPDCL in an attempt to resolve the aforestated issues.
- viii) It is stated that in fact, the respondents have financially strangled the petitioner from all sides. The non-payment/delayed payment of dues by the respondent has a cascading effect which not only

adversely impacts the Solar Project of the petitioner, thereby causing tremendous loss to the investors for no fault of theirs, but also the banks and financial institutions which have financed the Solar Project, including through public money. It is pertinent to note that financing documents have strict payment schedules which the petitioner is bound to abide by. Due to the non-payment of the outstanding amount by TSSPDCL, even the operational expenditure of the petitioner is not be sufficiently realized, and the petitioner faces challenges in keeping the Solar Project afloat.

- ix) It is further stated that the respondent has not even opened the Letter of Credit as is required under Clause 5.2 of the PPA, thereby acting in contravention of the terms of the PPA.
 - x) It is stated that such actions of respondents are in contravention of the Act, 2003, National Electricity Policy (NEP) and National Tariff Policy, 2016 (NTP) issued by the Central Government under Section 3 of the Act, 2003. The Act, NEP and NTP, which are statutory policies, mandate the promotion of generation of electricity from renewable sources. However, the actions of respondent have a contrary impact. By delaying payment of undisputed invoices, withholding payments for undisputed invoices, refusing and to make complete payments, and failure to open the LC, the only payment security mechanism available to the petitioner under the PPA, the respondents are in effect pushing the petitioner towards bankruptcy and the Solar Project towards a complete shutdown.
- o. The petitioner has sought the following prayer in the petition for consideration.
- “i) direct the respondents to strictly comply and abide with the provisions of the PPA entered into between the petitioner and the respondent(s);
 - ii) direct the respondents to immediately release payments due to the petitioner, amounting to Rs.10,25,93,660/- which have been outstanding for an unduly extended period along with the applicable interest for late payment, thereon;

- iii) direct the respondents to pay the due Late Payment Surcharge for the energy invoices raised prior to December, 2020 amounting to Rs.3,06,19,904/-;
- iv) direct the respondents to make all future payments of valid invoices in a timely manner as per the provisions of the PPA.
- v) direct the respondents to open an irrevocable revolving Letter of Credit in favour of the petitioner in terms of Article 5.4 of the PPA.”

3. The petitioner along with the original petition has also filed an Interlocutory Application (I.A.) under Clause 24 and 38 of the Conduct of Business Regulations, 2015 and the averments of it are similar/identical to the pleadings of the original petition. The applicant/petitioner prayed the following relief in the application.

“Pending final adjudication of the petition, direct the respondents to pay 75% of the overdue amounts along with interest for late payment to the petitioner within one week.”

4. The respondent No.1 has filed a memo on 25.03.2022 stating the following:
- a) The Commission has directed to file counter affidavit on or before 14.03.2022 and posted the matter for hearing on 04.04.2022.
 - b) Due to non-availability of certain records and due to engagement of officials in filing ARR petition and furnishing reply to the objections raised by the objectors, the respondent could not file counter affidavit in time.
 - c) Finally, requested to extend one month time for filing counter affidavit.
5. The respondent has not filed its counter affidavit despite giving ample time.

6. The Commission has heard the parties to the present petition extensively and also considered the material available to it. The submissions on various dates are noticed below, which are extracted for ready reference.

Record of proceedings dated 02.02.2022:

“... ..The counsel for petitioner stated that the petition is filed for recovery of the amounts payable by the licensee for electricity supplied by the petitioner. The payments have been held up for more than a year now. They have already filed an interlocutory application for payment of 75% of the amounts due to the petitioner. The counsel for petitioner sought to explain the urgency in the case. He also stated that unless payment is made, the petitioner will suffer serious

financial crises, as it is a small company. The representative of the respondent stated that the petition along with notice has been received only on 25.01.2022 and therefore, he needs time to file counter affidavit by at least four weeks. The counsel for petitioner opposed the grant of such length of time for filing counter affidavit as the payments are long overdue. However, the Commission expressed its inability to schedule the hearing in the month of March, 2022 due to the exercise of retail supply tariff determination for FY 2022-23.

Accordingly, it is inclined to adjourn the matter to April, 2022. The counsel for petitioner insisted on an early date. Considering the request and the time needed to file counter affidavit, the matter is adjourned. The counter affidavit shall be filed by 02.03.2022 and reply, if any, thereof by 31.03.2022.

Record of proceedings dated 04.04.2022:

“... .. The counsel for petitioner stated that the petition is filed for recovery of the amounts payable by the licensee for electricity supplied by the petitioner and also filed application for interim direction for payment pending adjudication of the original petition. The representative of the respondent sought time for filing counter affidavit in the matter, as the licensee was engaged in attending to the determination of the tariff exercise for retail supply. The Commission observed that the payment of the dues involved in the petition is a necessary payment and cannot be denied. The Commission made it clear that the time is being granted for two weeks for filing counter affidavit and in the absence of the same, it will proceed to pass appropriate orders in the matter. The advocate representing the petitioner agreed with the suggestion of the Commission.

Accordingly, the matter is adjourned with the express condition that the counter affidavit in the petition as well as the interlocutory application filed by the petitioner, shall be filed.”

Record of proceedings dated 20.04.2022:

“... .. The counsel for petitioner stated that the petition is coming up for filing counter affidavit and arguments. The amount involved in the petition is undisputed claim, which is due from the respondent. Neither counter affidavit is filed till date nor efforts made to make payment. The counsel for petitioner insisted that interim orders may be passed as prayed for or the Commission may observe that some amount be paid pending filing of counter affidavit to safe guard the interest of the petitioner. The representative of the respondent

sought further time to file counter affidavit by four weeks, as he is out of station for the period. The Commission, while expressing displeasure for not filing the counter affidavit despite giving sufficient time, has observed that the matter is being adjourned finally with a condition that the counter affidavit shall be filed on or before 02.05.2022 duly serving a copy of the same on the counsel for petitioner and also directing the counsel for petitioner to file rejoinder, if any, by 18.05.2022 duly serving a copy of the same on the respondent. The Commission made it clear that the matter will be heard finally and there will be no further adjournments.”

Record of proceedings dated 23.05.2022:

“... .. The counsel for petitioner stated that the petition has been coming up for filing counter affidavit and arguments. The amount involved in the petition is undisputed claim, which is due from the respondent. Neither counter affidavit is filed till date nor efforts made to make payment despite the observations made by the Commission earlier. The counsel for petitioner insisted that interim orders may be passed as prayed for or the Commission may observe that some amount be paid pending filing of counter affidavit to safe guard the interest of the petitioner. In this regard, the counsel for petitioner brought to the notice of the Commission that in a similar matter pending before the APERC, the said Commission had directed payment of 75% of the amount due immediately or else the concerned CMD of the DISCOM should appear before it on the next date of hearing. The representative of the respondent sought further time to file counter affidavit. The Commission, while finding fault with the action of the respondent for not filing the counter affidavit despite giving sufficient time, has observed that the matter is reserved for orders while giving an opportunity of one week to pay atleast 20% of the undisputed amount or else the original petition itself will be disposed of by the Commission.

If the licensee pays the above said amount, the Commission will consider granting time to file counter affidavit, which information should reach the Commission within a week.”

7. Though the Commission was considerate and magnanimous in granting time for filing the counter affidavit by keeping in mind the Memo dated 25.03.2022 filed by respondent who requested one month time to file counter affidavit but, the respondent

has failed to respond to the petition and also did not place any information either acceding to or refusing the claims made by the petitioner. The Commission being constrained not to give further time, even attempted to put the respondent on terms, yet the respondent did not adhere to the observations of the Commission. Thus, the Commission has no other option but to proceed with the matter to decide the same.

8. The petitioner has also filed Interlocutory Application as mentioned supra, however, the Commission is now proceeding to decide the matter itself and as such, would not dwell into the prayer made in the Interlocutory Application.

9. The Commission notes that the Telangana State Power Coordination Committee (TSPCC) is an Apex Committee put in place by Government vide G.O.Ms.No.21, Energy (Power-II) Department, dated 12.05.2014 as an institutional arrangement for power trading by DISCOMs in Telangana State to carryout functions like examining all commercial issues related to bulk supply and all legal issues related to IPPs and other generators and advise the DISCOMs suitably, etc. Intrinsicly, the functions of TSPCC are not statutory in nature. As such it is neither a statutory body nor is recognized authority under the Act, 2003 or the regulations made thereof by the Commission. It is also relevant to state that just because correspondence is being done by TSPCC, it has no authority to contest or defend for the lapses or omissions committed by the DISCOM, which is in agreement with the petitioner. Therefore, TSPCC cannot be a party to the proceedings. Accordingly, the Commission decided to strike-off the said party from the array of respondents.

10. From the pleadings it is noticed that the petitioner is having a long-term Power Purchase Agreement (PPA) with the respondent vide PPA No.0168/2014 dated 17.06.2014 r/w its first Amendment dated 26.09.2014 for setting up of the Solar Power Project of 10 MW capacity connected to at 132/33 kV Marikal substation in Mahabubangar District for sale of Solar Power to the respondent for a period of 20 years from the Date of Commercial Operation (i.e., 15.06.2015) at a tariff of Rs.6.49 per unit upto 25% CUF calculated on annual basis (the parties thereto, intending to legally bound and agrees the terms and conditions of the PPA). The terms & conditions of the PPA stipulates that –

- a) 5.1 For the Delivered Energy purchased, Solar Power Developer (petitioner) shall furnish a bill to the DISCOM (respondent) for

the billing month on or before the 5th working day following the Meter Reading Date;

- b) 5.2 Any payment made beyond the Due Date of Payment, the respondent shall pay interest at prevailing SBI bank rate; [Late Payment Surcharge (LPS)]
- c) 5.3 The respondent shall pay the bill on monthly basis;
- d) 5.4 The respondent shall cause to put in place an irrevocable revolving Letter of Credit issued in favour of petitioner by a Scheduled Bank for one month's billing value;
- e) 5.5 The respondent shall make payment for the eligible bill amount by the due date of payment;
- f) 5.6 The respondent shall pay the bills of petitioner promptly;
- g) 11.4 any party may approach TSERC to resolve the dispute under Section 86(1)(f) of the Electricity Act, 2003;

11. Prima facie, the prayer in this petition is about action of the respondent in not making the payment in accordance with the provisions of the PPA. The petitioner has identified the outstanding amount due against monthly bills for the period from December 2020 to September 2021 as Rs.10,25,93,660/- along with LPS amount thereof Rs.53,81,348/- as on 10.11.2021 and an amount of Rs.3,06,19,904/- towards LPS against monthly bills prior to December 2020 in terms of Article 5.2 of the PPA payable by respondent.

12. The petitioner further contends that the respondent is yet to open the Letter of Credit as provided in Clause 5.4 of Article 5 of the PPA, as such, it is alleged that the payments are delayed. Therefore, the prayer is sought not only for release of payments due along with interest thereon for late payment and interest for the payment made beyond the 'Due Date of Payment' but also for directions to the respondent for opening of irrevocable revolving Letter of Credit in favour of petitioner by respondent and for making all future payments in a timely manner, though there is no mention of the amount for subsequent period.

13. The Commission is of the view that in the absence of any contest made by the respondent as to the veracity of the claims made by the petitioner, there shall not be any dispute on the amounts payable by the respondent to the petitioners. However,

as per the provisions of the PPA, when the petitioner has complied with its part to the PPA by delivering the electricity energy to the respondent, the respondent is bound to make payment for the same without any demur. Further, in terms of the PPA such occurrence and continuation of event of non-payment of dues by the respondent to the petitioner and the petitioner is unable to recover the outstanding amount, shall constitute "DISCOM (Respondent) Event of Default".

14. The Commission takes judicial notice of a decision rendered by the Hon'ble APTEL in the matter of Bangalore Electricity Supply Company Ltd. Vs. Devangere Sugar Company Limited [Appeal No.176 of 2009]. The observations made by the Hon'ble APTEL are extracted below:

"23. Besides this, there is one more breach. Under Clause 6.6, the Corporation (Appellant) shall establish and maintain transferable, sustainable and irrevocable revolving Letter of Credit (LOC) in favour of the company (Respondent).

... ..

25. In the instant case, admittedly, neither the amount due were paid in time, nor the penal interest was paid as per Clause 6.3 of the contract, nor the LOC was established within the stipulated time as per Clause 6.6 of the Contract.

26. In every Power Purchase Agreement (PPA), the opening of a LOC is a vital part of the contract. It is fundamental financial obligation cast upon the Appellant by the contract to honour the same. In other words, to open an LOC forms an integral part of the contract. It is, therefore, clear that there is a failure on the part of the Appellant to honour its obligation under the contract. "

15. In the present case, the Clause 5.4 of the PPA stipulates opening of irrevocable revolving Letter of Credit in favour of petitioner by the respondent and the same is not complied with according to the pleadings. In the absence of any statement from the respondent as to the reasons or compliance of providing Letter of Credit in terms of the PPA, the Commission has no other option to infer that the respondent did not provide Letter of Credit to the petitioner, which it is required to comply with.

16. Therefore, the Commission is inclined to grant the relief as prayed for in the original petition, both for the billed amount and interest claims and directs the respondent to put in place an irrevocable revolving Letter of Credit issued in favour of

the petitioner by a Scheduled Bank for one month's billing value as per Clause 5.4 of the PPA.

17. In the light of the above, the petition stands allowed and the respondent shall comply with this order within forty five (45) days from the date of receipt of this order. While complying with the order, the respondent would ensure that the amounts are settled completely upto date and shall endeavour to make payment for the eligible bill amount against the bills raised by the petitioner promptly in accordance with the provisions of the PPA.

18. The original petition is disposed of on the above terms and in the circumstances without any costs. Since the original petition is itself being disposed of, the Interlocutory Application would not survive and accordingly stand closed.

This order is corrected and signed on this the 8th day of August, 2022.

Sd/-	Sd/-	Sd/-
(BANDARU KRISHNAIAH)	(M. D. MANOHAR RAJU)	(T. SRIRANGA RAO)
MEMBER	MEMBER	CHAIRMAN

// CERTIFIED COPY //