



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

O.P.No.17 of 2022

&

I.A.No.9 of 2022,

I.A.No.33 of 2022

&

I.A.No.34 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:

1) M/s ACME Solar Holdings Private Limited,
Regd. Office at, Plot No.152, Sector 44,
Gurugram – 122 002.

2) M/s Dayakara Solar Power Private Limited,
Regd. Office at, Plot No.152, Sector 44,
Gurugram – 122 002.

... Petitioners.

AND

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

... Respondent.

The petition came up for hearing on 02.02.2022, 04.04.2022, 20.04.2022 and 23.05.2022. Sri. Hemanth Sahai, Senior Advocate along with Sri. Shreshth Sharma and Sri. Saurobroto Dutta, Advocates for petitioners have appeared through video conference on 02.02.2022, Sri. Pavan Kumar Rao Polkampally, Advocate representing M/s HSA Legal counsel for petitioner is present on 04.04.2022, Sri. Shreshth Sharma, Advocate representing M/s HSA Legal counsel for petitioners is

present on 20.04.2022 and Sri. Nitish Gupta, Advocate representing M/s HSA Legal counsel for petitioner is present on 23.05.2022. Sri. Mohammad Bande Ali, Law Attaché for respondent has appeared through video conference on 02.02.2022, 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 ACME Solar Holdings Private Limited and M/s Dayakara Solar Power Private Limited (petitioners) have filed a petition under Section 86(1)(f) of the Electricity Act, 2003 (Act, 2003) and the provisions of power purchase agreement (PPA), seeking release of payments due to the petitioners by the respondent and consequently payment of future bills in a timely manner in accordance with PPA.

2. The averments of the petition are extracted below.
 - a. It is stated that M/s ACME Solar Holdings Private Limited (petitioner No.1) is a company incorporated under the Companies Act, 1956 (Act, 1956) and is an independent power producer and a generator within the meaning of Section 2(28) of the Act, 2003 (Act, 2003), engaged in the business of generating and supplying of electricity. The petitioner No.1 is the holding company of the special purpose vehicles (SPV) that is the petitioner No.2, which has come into being pursuant to having participated and being declared as the successful bidder under request for selection dated 27.08.2014.
 - b. It is stated that M/s Dayakara Solar Power Private Limited (petitioner No.2) is a company incorporated under the provisions of the Act, 1956 and is engaged in the business of solar power generation by setting up solar power generation plant and generating electricity using photovoltaic solar modules and selling the generated power to the State electricity distribution companies. It is submitted that the petitioner No.2 has its generating facility of 30 MW capacity situated near 132/33 kV Maddur SS, Mahabubnagar District, Telangana for generation and sale of electricity within the State of Telangana.
 - c. It is stated that Southern Power Distribution Company of Telangana Limited (TSSPDCL/respondent) is a company incorporated under the

Act, 1956. The respondent is a 100% government owned company and is a distribution licensee under Section 14 of the Act, 2003, which is entrusted with the function of distribution of electricity in the southern districts of the State of Telangana.

- d. It is stated that the Government of Telangana (GoTS) vide letter dated 18.07.2014 had directed the Chairman and Managing Director of Transmission Corporation of Telangana Limited (TSTRANSCO) and the Chairman of Telangana State Power Coordination Committee (TSPCC) to initiate the process of floating tender on behalf of Telangana State Electricity Distribution Companies (TSDISCOMs) for the purchase of 500 MW solar power. Further the CMD, TSTRANSCO and the Chairman, TSPCC vide letter dated 25.07.2014 had instructed the TSSPDCL to initiate the process of floating tenders on behalf of TSDISCOMs for purchase of 500 MW solar power.
- e. It is stated that on 27.08.2014, the respondent on behalf of TSDISCOMs issued the Request for Selection (RFS) for procurement of 500 MW solar power through e-procurement platform as per the directions of Energy Department, GoTS.
- f. It is stated that the petitioners were selected as the successful bidders through an open competitive bidding process conducted by the authorized representative of the TSDISCOMs and the petitioners have set up a solar power projects in the State of Telangana and commissioned the same for supplying electricity for a period of 25 years from the date of commercial operation at a tariff rate as defined under the PPAs.
- g. It is stated that the relevant provisions of the PPA executed between the petitioner No.2 and respondent are as under:

“ARTICLE 1

DEFINITIONS

1.8 “Billing Date” means the fifth (5th) Working Day after the meter Reading Date.

1.9 "Billing Month" means the period commencing from 25th of the calendar month and ending on the 24th of the next calendar month.

1.14 "Conciliation Period" means the period of sixty (60) days or such other longer period as the parties may agree, commencing from the date of issuance of a Solar Power Developer Preliminary Default Notice or DISCOM Preliminary Default Notice as provided in Article 10 of this Agreement, for conciliation between the parties to mitigate the consequence of the relevant event having regard to all the circumstances.

1.19 "Due Date of Payment" means 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 provided the bill is received by DISCOM within 5 working days from 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 the DISCOM. If the last date of payment falls on a statutory holiday, the next working day shall be considered as last date.

1.20 "Effective Date" means the date of execution of this Power Purchase Agreement (PPA) by both the parties;

1.35 "Meter Reading Date" means the 25th (twenty fifth) day of each calendar month, at 12:00 hours, at the Interconnection Point.

1.43 "Scheduled Commercial Operation Date (SCOD) or Scheduled date of Commercial Operations" means the date whereupon the SPD is required to start injecting power from the power project to the Delivery Point i.e., shall mean twelve (12) months from the Effective Date for projects connecting at 33 kV level and shall mean fifteen (15) months from the Effective Date for projects connecting at 132 kV or 220 kV level.
[SCOD: 25.02.2017]

ARTICLE 5

BILLING AND PAYMENT

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, the DISCOM shall pay simple interest at prevailing base prime lending

rate of State Bank of India and in case this rate is increased/reduced, such an increased/reduced rate is applicable from the date of such notification.

5.4 Letter of Credit: Before 30 days prior to the due date of first monthly bill of the generating unit, the DISCOM shall cause to put in place an irrevocable revolving Letter of Credit issued in favour of the solar power developer by a scheduled bank for one month's billing value. Provided that any increase in the delivered energy on account of commissioning of additional capacity after the first month's billing or in subsequent billing months, the DISCOM shall revise the revolving letter of credit in favour of the solar power developer covering the latest previous month billing upto achieving of COD.

a. Provided further that the Letter of Credit shall not be invoked for any disputed or objected bill amount.

b. Provided further that the Letter of Credit can be invoked only when DISCOM fails to pay the current month bill amount by the due date.

5.5 Payment for bills raised: The solar developer shall submit bills for the energy delivered during the billing period as per the provision of this Agreement and there upon the DISCOM shall make payment of the undisputed amount of the bill by the due date of payment.

5.6 Billing disputes:

... .. If the resolution of any dispute requires the DISCOM to reimburse the solar power developer, the amount to be reimbursed shall bear simple interest at prevailing base prime lending rate of State Bank of India and in case this rate is reduced/increased, such a reduced/increased rate is applicable from the date of reduction/increase from the date of disallowance to the date of reimbursement.

5.9 Where the DISCOM finds at any time, that amount is due from solar power developer either under this agreement the DISCOM is entitled to recover the said due amount by adjusting from the bill amount payable to the solar power developer.”

h. It is stated that pursuant to the execution of the PPA, the petitioners commissioned solar power project in the State of Telangana. The

petitioners stated that they have invested huge sum in setting up the solar power project. Details of the project is provided in the table below:

Name of ACME Entity	PPA Capacity in MW	Commissioned Capacity in MW	PPA Date	COD post extension and consequent amendment)
M/s Dayakara Solar Power Private Limited	30	30	03.03.2015	31.12.2016

- i. It is stated that as per the terms of the PPA, the respondent purchased delivered energy from the petitioners and in lieu of the same, the petitioners duly raised invoices on TSSPDCL in terms of Article 5 of the respective PPA. The said invoices/bills were strictly raised in accordance with the tariff mentioned under Article 2 of the PPA. Further, the said invoices were to be cleared by the respondent and the said amounts were to be remitted to the petitioners on the respective due dates of payment as defined under the PPA and in terms Article 5.5 of the PPA.
- j. It is stated that since the raising of such debts, the petitioners have been financially healthy and committed to servicing their debt obligations in respect of the aforementioned loans/debts and timely paying the amounts in terms of the agreements with the lenders. Admittedly, the petitioners have only received part payment of invoices from the respondent. Despite the same, the petitioners have continued to make payments to its lenders.
- k. It is stated that the PPAs have been duly acted upon by the parties, and the petitioners have been fulfilling all their obligations envisaged thereunder. The entire electricity generated from petitioners' power project is being supplied to the respondent in terms of the PPA, which is not only being accepted by the respondent but also being sold further to its consumers in the State of Telangana. However, since November 2020, the respondent has been defaulting in making complete payments due under the PPA to the petitioners, which is against the mandate of the Act 2003, the objectives of the National Electricity Policy, (NEP)

National Tariff Policy (NTP) and in contravention of the provisions of the PPAs.

- I. It is stated that the petitioners have till date raised several invoices upon the respondent (the last invoice being for the month of October, 2021) and the respondent has till date made payments only till October, 2020. It is stated that as on date an amount of Rs.40.75 crore is outstanding in terms of the Invoices raised.
- m. It is stated that the respondent in terms of Article 5(4) of the PPA are contractually obligated to furnish an irrevocable revolving letter of credit (LC) in favour of the petitioners. However, despite repeated reminders, the same has not been provided till date. Such non-compliance of unequivocal obligation is not just in contravention of the terms of the PPA but is also against directives of the Ministry of Power (MoP), Government of India (GoI) dated 28.06.2019, 17.07.2019, 23.07.2019 and 09.08.2019. Failure of the respondent in issuance of LC has also led to an in-turn failure for the petitioner to secure its payments and the same is in clear violation of PPA.
- n. It is stated that it is imperative that the respondent has not replied to any of the communications issued by the petitioners seeking to release payments and have not provided a single reason for their current action of non-payment for a year. It is this reluctant, non-responsive and obtuse approach of the respondent that has left the petitioners clueless about its own state of finances. The respondent has deprived the petitioners of the knowledge of reason of such repeated defaults and non-payments, making it almost impossible for petitioners to assure of payments to its lenders or apprise them of the current scenario.
- o. It is stated that at this juncture, it is pertinent to highlight that the RBI Master Circular dated 01.07.2015 vide DBR.No.BP.BC.2/21.04.048/2015-16 titled 'Prudential norms on Income Recognition, Asset Classification and provisioning pertaining to Advances', defines a 'Non-Performing Asset' as *follows*:
 - "2.1 Non-performing Assets
 -
 - 2.1.2 A non-performing asset (NPA) is a loan or an advance where;

- i) interest and/or instalment of principal remain overdue for a period of more than 90 days in respect of a term loan,
- ii) the account remains 'out of order' as indicated at paragraph 2.2 below, in respect of an Overdraft/Cash Credit (OD/CC),

... ..

2.1.3 In case of interest payments, banks should, classify an account as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter.”

- p. It is stated that therefore, in light of the non-payment by the respondent, for no fault or reasons attributable to the petitioners, there is an imminent threat of the petitioners defaulting not only in terms of their contractual obligations but their accounts being declared as NPAs unless the respondent releases the outstanding. The default by the petitioners will entitle the lenders to initiate precipitative actions against the petitioners, including without limited to initiating legal proceedings for insolvency or recovery. The petitioners have been running pillar to post to continue their operations as a going concern and provide electricity for the State of Telangana. However, it is now near impossible to raise any further funds to meet the obligations to the lenders and to the respondent under the PPAs.
- q. It is stated that the petitioners have issued notices dated 28.10.2021 under the provision of Article 11 of the PPA to the respondent thereby demanding the outstanding amounts and requesting the respondent to undertake corrective measures towards the payment of the dues and opening of LC. It is submitted that the respondent has failed to respond to the said notices and has also abstained themselves from taking any further action pursuant to the same. The petitioners had also called upon the respondent to take necessary corrective action within 15 days of receipt of notice in terms of the provisions of the PPAs, however, the respondent failed to undertake any such action and has not even replied to petitioners' notice. It is stated that since the respondent has failed to take any corrective measures towards the repayment of the present dues, hence the cause of action for filing the present petition arises.

- r. The petitioners have stated on the basis of the above submissions the following grounds for consideration of the Commission.
- i) It is stated that the unlawful and illegal act of TSSPDCL in not honouring its contractual and legal obligation of making due and complete payments qua the power supplied by the petitioners through the respective PPAs and utilized by the respondent and having recovered such amounts from its end consumers, is arbitrary and unsustainable in law and a clear violation of the terms of the PPA.
 - ii) It is stated that not only is the respondent not honouring the terms of payments as provisioned under the PPA but has also failed to furnish a letter of credit as it is obliged under the contractual terms of the PPAs, in order to secure the payments in favour of the petitioners herein which are the mutually agreed terms of the PPA and for such act is against the settled principles of reciprocal promise under the Indian Contract Act, 1872.
 - iii) It is stated that the petitioners are constrained to approach the Commission for the reasons including failure on part of the respondent to not to pay any heed to multiple reminders as issued by the petitioners to the respondent from time to time and it is the undue, unlawful and defying act(s) of the respondent that not only are they unduly enriching itself with the payments as due upon the petitioners but also are refusing to respond to several reminders and requests of the petitioners to make such payments and furnish the letter of credit.
 - iv) It is stated that the petitioners are also constrained to approach the Commission since the lack of payments for a prolonged period of 12 months has cumulatively created an outstanding of Rs.40.75 crore for the period from November 2020 to October 2021, which in turn is not just creating a financial stress on the petitioners to operate its projects and comply with its obligations therein but is also pushing the petitioners into a financial crisis/distress which will shortly lead to the petitioners being

pushed to financially adverse position including where they will not be able to honour their financing agreements.

- v) It is stated that in absence of the payments of tariff under the PPAs which are the only source of revenue for the petitioners, they are being pushed to a financially unstable and unsustainable position which will not only cause an irreparable financial harm but also a severe reputational loss. It is also not out of place to mention that the project of the petitioners are funded by the financial institutions/banks for which the petitioners have a monthly debt servicing obligation in terms of their respective financing agreements, which are currently being made by the petitioners with grave difficulty in absence of any payments towards PPA tariff from the respondent.
- vi) It is stated that in absence of payments as due from the respondent, the projects of the petitioners will become financially unviable leading to underserving and untimely closure of such project and in-turn leading to a collateral demolition of public monies as well.
- vii) It is stated that the petitioners for no fault of theirs are being led to a financially stressed status which has created a question on their existence and their performance of obligations under the PPAs failing which, it is bound to cause undue harm to the consumers of the respondent.
- viii) It is stated that the respondent despite being contractually obliged under the PPA through Article 5.4 to furnish a LC has till date not provided the same. It would not be out of place to mention that such non-furnishing of LC is for ulterior motives including the reason for not enabling the petitioner to utilize such LC towards the pending payments.
- ix) It is stated that it is settled law that the obligations under an agreement/contract must not be breached by a party unlawfully and deliberately to the clear detriment of the other party to the said contract. However, as is clear from the facts enumerated

- herein above, the respondent is in gross violation of the terms of the PPAs and of applicable law to the detriment of the petitioners.
- x) It is stated that the petitioners committed and made a substantial investment by way of setting up solar power projects in the State of Telangana based on the main premise that it will be paid the tariff by the respondents under the PPA in a timely manner. However, breach on the part of the respondent of its obligations in terms of the PPA has severely impacted the business operations of the petitioners.
 - xi) It is stated that the petitioners entered into long term PPAs and submitted the PPA to their investors who have relied on the representations therein and have advanced the finances. Thereafter, the PPAs have been acted upon and few of the bills/invoices raised were also honoured by the respondent.
 - xii) It is stated that in these circumstances, promissory estoppel will bind the respondent since the petitioner have altered their positions based on the contractual promises made by the respondent under the PPA and if the respondent does not perform these obligations; immense and irreparable losses would be caused to the petitioners.
 - xiii) It is stated that the key objectives of the Act, 2003, the NEP and the NTP includes promoting the generation and co-generation of energy from wind and other sources of renewable energy. By withholding the legitimate dues of the petitioners under the PPA, the respondent is in effect acting as a catalyst in discouraging private participation in the power sector in the State of Telangana. Thus, non-payment by the respondent is against the spirit of the Act, 2003, the NEP and the NTP.
 - xiv) It is stated that the act of not furnishing the letter of credit in favour of the petitioners is not just a contravention of the provisions of the PPAs but also is against the directives of the MoP, Gol.
 - xv) It is stated that the action of the respondent in collecting the tariff from the consumers, but not paying the dues of the petitioners is unsustainable in law and amounts to unjust enrichment.

- xvi) It is stated that the petitioners have sold valuable commodity to the respondent, which has admittedly been consumed, as electricity once generated cannot be stored and now the respondent is attempting to evade its liability to pay the petitioners for the said valuable commodity.
- xvii) It is stated that the sanctity of the PPA and adherence to the same is of supreme importance and the conduct of the respondent in disregarding the provisions of the PPAs cannot be countenanced in law.
- xviii) It is stated that the petitioners are suffering from financial burden as till date it is running the project and is bearing the entire cost of operation without receiving any payments for almost a year.
- xix) It is stated that the respondent has failed to respond or take any action towards the said outstanding expenses and has also failed to respond to the reminder correspondences issued by the petitioners.
- xx) It is stated that non-payment of the outstanding dues has increased the overall cost of the solar projects as there is a constant infusion of funds and refinancing of loans due to non-repayment of existing loans. Therefore, if the petitioners are not allowed to claim appropriate relief from the respondent, the same will have an adverse impact on the solar project and will make the whole project unviable thereby making the same to be an NPA.
- xxi) It is stated that the failure by the petitioners to meet their financial obligations under the appropriate agreements would not only impact the solar power projects but would also have cascading effects on the entire financial arrangement, including penal consequences. Accordingly, such circumstances will also hamper the ability of the petitioners' group companies to raise financing for their future businesses and adversely affect the petitioners' rights to carry on its trade and business.
- xxii) It is stated that the funding from the lenders to set up the solar power projects was obtained by factoring in the tariff and the timely payment of the same by the respondent, at the time of

bidding and execution of the PPA. The aforesaid actions of the respondent of delaying the legitimate payment of power sale under the PPA would necessarily affect the servicing of loans granted by the lenders, which consist of public money, and the same will have a cascading effect on the public exchequer as well.

xxiii) It is stated that it is settled principle of law that cancelation of financial facilities involves civil consequences and the same cast a slur on the reputation of the affected person. In the present case, the arbitrary and mala fide acts of the respondent threatens the hard-earned reputation of the petitioners. The aforesaid actions will affect the business of the petitioner companies in great respect and the petitioners and their employees will be subjected to negative reputation only due to arbitrary and mala fide acts of the respondent.

xxiv) It is stated that an instrumentality of the State that is the respondent is acting in an arbitrary manner by not making payment of the outstanding invoices under the PPAs, which is the only source of revenue for the petitioners. Further, the action that will be taken by the lenders upon classification of the petitioners' accounts as NPA would be pursuant to the RBI circular.

xxv) It is stated that the respondent has evidently failed to adhere with its obligations under the PPAs which in turn has not only led to financial stress but is also causing financial impact of time value of money that are due on the respondents but are not being honoured. Hence the petitioners along with the outstanding amounts are also rightfully entitled to late payment surcharge.

xxvi) It is stated that for the reasons stated above, the actions of the respondent is arbitrary and unlawful and the petitioners have no other alternative or effective remedy except to approach the Commission.

s. The petitioners through the present petition requests the Commission that since the respondent has an outstanding amount of 12 months, therefore, in order to prevent any further financial difficulty to the petitioners, the relief as

sought under the present petition should be allowed by this Commission on urgent basis.

4. Therefore, the petitioners have sought the following prayer in the petition for consideration.

- “(i) hold and declare that the act of non-payment of the timely and complete payments (leading to an outstanding amount of Rs.40.75 crore as on the date of filing the present petition) is in direct contravention of the provisions of the PPA, which is unlawful and unsustainable.
- (ii) direct the respondent to immediately pay an amount of Rs.40.75 crore in terms of the invoices raised by the petitioners from November, 2020 till the date of filing of the present petition along with late payment surcharges in terms of Article 5.2 of the respective PPA.
- (iii) direct the respondent to make timely and complete payments in future as per the mutually agreed terms of the PPA.
- (iv) direct the respondent to pay litigation expenses, which shall incur upon the petitioners due to the adjudication of the present petition.”

5. The petitioners have also filed three Interlocutory Applications (IAs) under Section 94(2) of the Act, 2003. The petitioners/applicants have sought the following reliefs in the applications.

I.A.No.9 of 2022

“Direct the respondent to not to take any precipitative/coercive/adverse action against the petitioners/applicants during the pendency of the present petition.”

I.A.No.33 of 2022

“Direct the respondent to forthwith make the payment of Rs.33.84 crore being the outstanding amount for the period of 10 months out of the total amount of Rs.46.40 crore (being the total amount outstanding for a period of 14 months).”

I.A.No.34 of 2022

“Allow the amendment to the petition as set out herein above (in particular being the amended prayers in para 9 above of the present application) i.e.,

- “a. Hold and declare that the act of non-payment of the timely and complete payments (leading to an outstanding amount of Rs.46.40 crore as on 31.01.2022) is in direct contravention of the provisions of the PPA which is unlawful and unsustainable;

- b. Direct the respondent to immediately pay an amount of Rs.46.40 crore in terms of the invoices raised by the petitioners from December, 2020 till January, 2022 along with late payment surcharges in terms of Article 5.2 of the respective PPA;
- c. Direct the respondent to make timely and complete payments in future as per the mutually agreed terms of the PPA;
- d. Direct the respondent to pay litigation expenses which shall incur upon the petitioners due to the adjudication of the present petition;
- e. Direct the respondent to issue an irrevocable revolving letter of credit in terms of Article 5.4 of the PPA.“

6. The respondent 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.
7. The respondent has not filed its counter affidavit despite giving ample time.
8. The Commission has heard the parties to the present petition 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 filed an interlocutory application seeking direction to the respondent not to take any precipitative/coercive/adverse action against the petitioners/applicants during the pendency of the present petition. The counsel for petitioner sought to explain the urgency in the case. He also requested the leave of the Commission to file another interlocutory application within next few days. 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. The representative of the respondent required the service of the fresh I. A. proposed to be filed by the petitioner. Considering the request and the time needed to file counter affidavit as also taking up the fresh interlocutory application to be filed, the matter is adjourned.

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 applications for interim directions 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 applications 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.”

9. The petitioners have filed an additional affidavit after reserving of the matter and stated as follows.
 - a. The captioned petition has been filed on behalf of the petitioners under Section 86(1)(f) of the Act, 2003 read with Article 11 of the PPA dated

03.03.2015 entered into between M/s Dayakara Solar Power Private Limited and TSSPDCL, being aggrieved by the persistent and continued failure of the respondent to honour its legal and contractual obligation of:

- (i) making due and complete payments qua the power supplied by the petitioner No.2 that is Dayakara Solar Power Private Limited under the PPA from its 30 MW solar power project situated in Mahabubnagar District, Telangana and utilised by the respondent, despite recovering such amounts from consumers; and
 - (ii) opening a LC as it is obliged to do under the terms of the PPA, in order to secure the payments in favour of the petitioner No.2.
- b. Therefore, by way of the captioned petition, the petitioners are seeking direction to the respondent to pay the outstanding dues in terms of the invoices raised by the petitioners from January 2021 onwards, along with applicable late payment surcharge and issue LC in terms of the PPA. Further, by way of the captioned petition, the petitioners are also seeking direction to the respondent to make all future payments against invoices raised by the petitioners in a timely manner, as per the mutually agreed terms of the PPA.
- c. In this regard, it is pertinent to highlight that the captioned petition was taken up for hearing before the Commission on 23.05.2022, during the course of which the Commission held that:
- “... .. 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.”
- d. From the above, it is evident that the Commissions vide its daily order for the hearing held on 23.05.2022, directed the respondent to make

payment of at least 20% of the undisputed amount claimed by the petitioners within one week and only then would the Commission consider granting further time to the respondent to file its counter affidavit. Further, the Commission vide the aforesaid daily order categorically observed that in case the respondent does not make payment of 20% of the undisputed outstanding dues, the respondent's right to file counter affidavit shall stand closed and the petition shall be reserved for orders.

- e. In view of the above, the respondent was obligated to make payment of 20% of the undisputed amount by or before 31.05.2022, being one week from the day of hearing 23.05.2022. However, till date that is as on 10.06.2022, no payment has been received by the petitioners from the respondent in relation to the present matter.
- f. It is stated that the respondent has continued to act unlawfully and illegally by consistently failing to honour its contractual, valid and binding obligations under the PPA despite several requests by petitioner for payment of outstanding energy bills. The malafide conduct of the respondent qua the petitioners is further aggravated by the fact that the respondent has in utter and absolute wilful disregard of the Commission's aforesaid order dated 23.05.2022 not made any payments to the petitioner towards 20% of the undisputed amounts.
- g. Accordingly, the present additional affidavit is being filed by the petitioners to bring on record the continued unlawful conduct of the respondent, which obviously is in blatant and wilful disregard of the directions issued by the Commission.
- h. It is stated that the non-payment of the undisputed outstanding dues by the respondent is not just creating a financial stress on the petitioners to optimally operate their project and comply with its obligations therein, but is also pushing the petitioners into a financial crisis/distress, in which case the petitioners shall be unable to honour their financing agreements. Further, if such a situation continues, soon the project of the petitioners might become financially unviable, leading to undeserving and untimely closure of such solar power project and in turn leading to a collateral demolition of public monies as well.

- i. In view of the aforesaid facts and circumstances, it is prayed that the Commission may graciously be pleased to take on record this additional affidavit; close the right of the respondent to file its counter affidavit to the petition; and allow the present petition by allowing the prayers therein.

10. 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 petitioners. 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.

11. The Commission is proceeding to dispose of the original petition itself, however, the petitioners have filed three interlocutory applications seeking various reliefs as mentioned above. Insofar as the, first and second relief are concerned, the same being part of the main relief need be decided as the main petition is itself being disposed of. Further the third application is with regard to amendment of the prayer, is being allowed as the matter itself is being dispose of and it would not alter substantially the relief claimed against the respondent. Thus the said application is allowed and the Commission proceeds to consider the original petition in terms of the amended prayer.

12. From the pleadings it is noticed that the petitioner No.2 is having a long-term Power Purchase Agreement (PPA) with the respondent vide PPA No.190/2015 dated 03.03.2015 r/w its amendment dated 29.10.2016 for setting up of the Solar Power project of 30 MW capacity connected to at 132/33 kV Maddur substation in Mahabubnagar District for sale of Solar Power to the respondent for a period of 25 years from the Date of Commercial Operation at a tariff of Rs.6.848 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, Solar Power Developer (petitioner No.2) 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 simple interest at prevailing base prime lending rate of State Bank of India; [Late Payment Surcharge (LPS)]
- c) 5.3 The respondent shall pay the bill on a monthly basis;
- d) 5.4 The respondent shall cause to put in place an irrevocable revolving Letter of Credit issued in favour of the petitioner No.2 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 No.2 promptly;
- g) 11.4 any party may approach TSERC to resolve the dispute under Section 86(1)(f) of the Electricity Act, 2003;

13. 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 No.2 has identified as indicated in the Annexure A / 2 of I.A.No.34 of 2022, the outstanding amount due against monthly bills for the period from December 2020 to January 2022 as Rs.46,40,11,944/- and an amount Rs.2,76,69,417/- towards LPS as on 31.01.2021 in terms of Article 5.2 of the PPA payable by respondent.

14. The petitioners 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 No.2 and for making all future payments in a timely manner, though there is no mention of the amount for subsequent period.

15. 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 petitioners, 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 No.2 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 No.2 and when the petitioner No.2 is unable to recover the outstanding amount, shall constitute "DISCOM (Respondent) Event of Default".

16. 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. "

In the present case, the Clause 5.4 of the PPA stipulates opening of irrevocable revolving Letter of Credit in favour of petitioner No.2 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 No.2, which it is required to comply with.

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

in favour of the petitioner No.2 by a Scheduled Bank for one month's billing value as per Clause 5.4 of the PPA.

18. 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 undisputed amount against the bills raised by the petitioner No.2 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 Applications relating prayers other than amendment of the original petition would not survive and accordingly stand closed. The Interlocutory Application seeking amendment of the prayer stands allowed as observed earlier.

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 //