



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

O. P. No. 35 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 Neemuch Solar Power Private Limited,
Regd. Office at, Commercial Block-1,
Zone 6, Golf Course Road, DLF City Phase-V,
Gurugram, Haryana 122 009.
- 2) M/s ReNew Power Private Limited,
Corporate Office at, Commercial Block-1,
Zone 6, Golf Course Road, DLF City Phase-V,
Gurugram, Haryana 122 009.

... Petitioners.

AND

Northern Power Distribution Company of Telangana Limited,
Corporate Office, H.No.2-5-31/2, Vidyut Bhavan,
Nakkalagutta, Hanamkonda,
Warangal, Telangana 506 001.

... Respondent.

The petition came up for hearing on 04.04.2022, 20.04.2022 and 23.05.2022. Sri. Deepak Chowdary, Advocate representing Ms. Mazag Andrabi, Advocate for petitioners is present on 20.04.2022, Ms. Mazag Andrabi, Advocate for petitioners is present on 23.05.2022 and Sri. Siripuram Keshava Advocate representing Ms. Mazag Andrabi, Advocate for petitioner is present on 23.05.2022. Sri. Mohammad Bande Ali, Law Attaché for respondent is present on 04.04.2022, 20.04.2022 and 23.05.2022. The matter having been heard physically on

04.04.2022, 20.04.2022 and 23.05.2022 and having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s Neemuch Solar Power Private Limited and M/s ReNew Power Private Limited (petitioners) have filed a petition on 18.02.2022 under Section 86(1)(b) & (f) of the Electricity Act, 2003 (Act, 2003) in terms of the Power Purchase Agreement dated 26.02.2016 r/w its amendment dated 04.12.2018 (PPA), seeking release of payments due along with late payment surcharge and consequential relief of payment of future bills in a timely manner in accordance with PPA in respect of its 15 MW connected to 132/33 kV Godhur substation at Jagityal District.

2. The averments in the petition are extracted below.
 - a. It is stated that the petitioner No.1 is a generating company as defined in Section 2(28) of the Act, 2003 and is engaged in the business of generation and sale of solar energy. The petitioner No.1 owns and operates a solar power-based generating plant of 15 MW capacity in the State of Telangana. The entire energy from the said project is being off-taken by the Northern Power Distribution Company of Telangana Limited (TSNPDCL).
 - b. It is stated that the petitioner No.2 is the ultimate parent company of petitioner No.1 and a generating company as defined in Section 2(28) of the Act, 2003. The petitioner No.2 and is engaged in the business of generation and sale of solar energy through special purpose vehicles (SPVs) such as petitioner No.1.
 - c. It is stated that the respondent is the TSNPDCL, a government owned company entrusted with the function of distribution of electricity in certain districts of the State of Telangana. TSNPDCL has entered into PPA dated 26.02.2016 with the petitioner No.1 to off-take the entire energy generated from petitioner No.1's 15 MW solar power project.
 - d. It is stated that the Government of Telangana (GoTS) with a view to tide over the shortage of power and in line with its vision to make the State of Telangana self-sufficient in power and ensure provision of reliable and quality power to all consumers in a sustainable manner at an affordable cost, took the decision to increase the installed capacity

of Solar Projects from 119 MW in FY 2014-15 to 6,135 MW by FY 2018-19. Further thereto, the GoTS by way of letter dated 18.03.2015 directed the Chairman & Managing Director, Transmission Corporation of Telangana Limited (TSTRANSCO) and the Chairman, Telangana State Power Coordination Committee (TSPCC) to initiate the tender process for procurement of 2000 MW solar power on behalf of the distribution companies of the State of Telangana (TSDISCOMs). Southern Power Distribution Company of Telangana Limited (TSSPDCL) was designated as the "Authorised Representative" of the TSDISCOMs to procure 2000 MW of solar power through competitive bidding route.

- e. It is stated that the TSSPDCL by way of Request for Selection No.RfS (Bid) No.TSSPDCL/01/LTSP/2015 dated 01.04.2015 invited proposals for setting up grid connected solar PV projects of aggregate capacity of 2000 MW on Build Own Operate (BOO) basis in the State of Telangana. In terms of the RfS, the TSDISCOMs were to enter into PPAs with the successful bidders for a period of 25 years.
- f. It is stated that the Energy Department, GoTS on 01.06.2015 with a view to harness the vast solar power generation potential of the State of Telangana and add/increase Solar Power capacity to meet the escalating demand notified the 'Telangana Solar Power Policy 2015' (Solar Policy). The operative period of the 2015 Solar Policy was 5 years from the date of notification thereof and all Solar Projects commissioned during the operative period of the Policy would be eligible for the incentives declared thereunder for a period of ten (10) years from the date of commissioning.
- g. It is stated that acting upon the aforementioned representations, petitioner No.1 participated in the bid process and emerged as a successful bidder at a tariff of Rs.5.7249 per unit. Further thereto, TSSPDCL issued Letter of Intent (LoI) dated 31.12.2015 to M/s ACME Fazilka Power Private Limited, the then parent company of petitioner No.1, for development of 15 MW grid connected solar generating plant near 132/33 kV Godhur substation at Jagityal District, Telangana (Solar Project).

- h. It is stated that TSNPDCL executed PPA dated 26.02.2016 with petitioner No.1 for purchase of entire energy generated from the Solar Project for a period of 25 years from the Commercial Operation Date. The relevant terms of the PPA are reproduced herein below:

**“ARTICLE 1
DEFINITIONS**

1.15 **“Contracted Capacity”** means 15 MW contracted with DISCOM for supply by the solar power developer to the DISCOM at the Interconnection Point from the Project and same shall not be more than the Installed Capacity. Contracted Capacity shall be in MW measured in Alternate Current (AC) terms and shall not change during the tenure of this Agreement.

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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 DISCOM. If the last date of payment falls on a holiday, the next working date shall be considered as last date.

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1.41 **“Quoted Price”** means charges for each year of supply of power as per the terms of the Agreement, quoted by the SPD as a part of the Financial Bid submitted on 09.07.2015 in response to the RfS TSSPDCL / 01 / LTSP / 2015 issued by TSSPDCL on 01.04.2015.

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1.53 **“Tariff”** shall have the same meaning as ascribed in Clause 2.2 of this Agreement.

ARTICLE 2

PURCHASE OF DELIVERED ENERGY AND TARIFF

2.1 Entire Delivered Energy, as mentioned in Schedule 1, at the Interconnection Point for sale to the DISCOM shall be purchased at the Tariff as provided in Clause 2.2 limited to the contracted capacity of the Project after the Date of Commercial Operation. Title to the Delivered Energy purchased shall pass from the Solar Power Developer to the DISCOM at the Interconnection Point.

Provided the units of energy generated by the SPD prior to the COD of the Project shall be purchased by the DISCOM at tariff as provided in Clause 2.2

2.2 The DISCOM shall pay a Tariff of Rs.5.7249 per unit to the Solar Power Developer as per the tariff agreed by the Solar Power Developer vide letter dated 21.12.2015 and shall be inserted as schedule 5 of this PPA. This Tariff shall be the Tariff for the entire term of the Agreement.

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ARTICLE 4

METERING AND PROTECTION

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4.3 The meter readings of the main meter shall form the basis of billing.

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4.10 On the meter reading date of each month, the meter readings shall be taken and an acknowledgement thereof signed by the authorized representatives of both the parties.

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ARTICLE 5

BILLING AND PAYMENT

5.1 For the Delivered Energy, the 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, 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.

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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 (the "Letter of Credit") 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 the 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:** The DISCOM shall pay the bills of the solar power developer promptly subject to the Clauses 5.1 and 5.2.

The DISCOM shall notify the solar power developer in respect of any disallowed amount on account of any dispute as to all or any portion of the bill. The solar power developer shall immediately take up issue with the relevant and complete information with the DISCOM which shall be rectified by the DISCOM, if found satisfactory. Otherwise notify its (DISCOM's) rejection of the disputed claim within reasonable time with reasons therefore. The dispute may also be resolved by the mutual agreement. If the resolution of any dispute required 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.

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ARTICLE 10
EVENTS OF DEFAULT AND TERMINATION

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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 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, or

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

- i. The petitioner No.1 is obligated to sell the contracted capacity to TSNPDCL and TSNPDCL is obligated to pay Tariff for the energy supplied at the Delivery Point.
 - ii. The tariff rate 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 petitioner No.1 for the energy supplied to TSNPDCL shall be 30 days from the meter reading date.
 - v. If TSNPDCL has any dispute in relation to a bill raised, it shall notify petitioner No.1 of such dispute.
 - vi. In case payment of bill is delayed beyond the 'Due Date of Payment', TSNPDCL is obligated to pay late payment surcharge as specified in Article 5.2.
 - vii. 30 days prior to the due date of first monthly bill, TSNPDCL must open an irrevocable revolving Letter of Credit (LC) for one month's billing value in favour of petitioner No.1.
 - viii. If TSNPDCL fails to make payments for a period of ninety (90) days after the Due Date of Payment for the energy supplied by petitioner No.1 and petitioner No.1 is unable to recover the outstanding amount through the Letter of Credit, the event will qualify as a 'DISCOM Event of Default'.
- i. It is stated that pursuant to the execution of the PPA, petitioner No.1 set up and commissioned the Solar Project in the State of Telangana within the time period stipulated in the PPA. The petitioner No.1 submits that it made substantial investment in setting up the Solar Project on the basis that TSNPDCL will pay the tariff discovered in a transparent competitive bid process and specified in the PPA and within the timelines envisaged therein. The Solar Project was commissioned on 25.03.2017 and has been supplying all the energy

generated to TSNPDCL, which has utilized the energy as well as reaped its benefits towards fulfilment of the States' RPO obligations.

j. It is stated that the TSDISCOMs are in a dominant position in the State of Telangana inasmuch as they are the only two distribution licensees in the state. The facts stated below demonstrate that the TSDISCOMs have been acting in an arbitrary, unfair and illegal manner and misusing their dominant position. The business undertaken by TSDISCOMs is monopolistic in nature since it operates in an exclusive territorial jurisdiction and there are no other distribution licensees in the State with which PPAs can be executed for offtake of power. TSDISCOMs, 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.

k. It is stated that since the commissioning of the Solar Project, the entire electricity generated by the Solar Project is being supplied to TSNPDCL in terms of the PPA and further sold to the consumers by TSNPDCL. While the petitioner No.1 has been fulfilling its obligations under the PPA, TSNPDCL has repeatedly acted against the mandate of the Act, the objectives of the 2015 Solar Policy and in contravention of the provisions of the PPA. The arbitrary, illegal and unfair actions of the TSNPDCL are set out below:

Non-Payment of Tariff for the energy supply since November, 2020

i) It is stated that the petitioner No.1 has been, in terms of the provisions of the PPA, issuing monthly invoices to TSNPDCL for the energy supplied. As per Article 5.5 of the PPA, TSNPDCL is mandated to pay for the energy purchased from petitioner No.1 within 30 days from the meter reading date. petitioner No.1 stated that while until November 2020 TSNPDCL had at least been making payments (albeit belatedly) to petitioner No.1, since December 2020 TSNPDCL has arbitrarily and in contravention of the provisions of the PPA completely stopped making payments against the invoices raised by the petitioner.

- ii) It is stated that the monthly bills for the period December, 2020 to January, 2022 amounting to Rs.19,21,32,901/- are currently outstanding and unpaid, the particulars of which are set out below:

| Generation Month | Invoice Number | Submission date | Due Date | Total Billed Units (kWh) | Outstanding Amount (INR) |
|-------------------------|-----------------------|------------------------|-----------------|---------------------------------|---------------------------------|
| Dec, 2020 | 2020-21/010 | 31.12.2020 | 30.01.2021 | 22,79,000 | 1,30,56,832 |
| Jan, 2021 | 2020-21/011 | 31.12.2020 | 30.01.2021 | 25,87,250 | 1,48,22,857 |
| Feb, 2021 | 2020-21/012 | 04.03.2021 | 03.04.2021 | 26,70,200 | 1,52,98,093 |
| Mar, 2021 | 2021-22/001 | 03.04.2021 | 03.05.2021 | 26,38,450 | 1,51,19,967 |
| Apr, 2021 | 2021-22/002 | 04.05.2021 | 03.06.2021 | 26,06,200 | 1,49,35,154 |
| May, 2021 | 1300000003 | 02.06.2021 | 02.07.2021 | 26,71,250 | 1,53,07,932 |
| Jun, 2021 | 2021-22/002 | 05.07.2021 | 04.08.2021 | 25,90,250 | 1,48,28,922 |
| Jul, 2021 | 1300000008 | 04.08.2021 | 03.09.2021 | 19,24,850 | 1,10,19,574 |
| Aug, 2021 | 2021-22/004 | 02.09.2021 | 02.10.2021 | 22,97,550 | 1,31,53,244 |
| Sep, 2021 | 1300000011 | 04.10.2021 | 03.11.2021 | 21,12,350 | 1,20,92,993 |
| Oct, 2021 | 1300000014 | 29.10.2021 | 28.11.2021 | 24,19,700 | 1,38,52,541 |
| Nov, 2021 | 210021411 | 08.12.2021 | 07.01.2022 | 22,82,000 | 1,30,64,222 |
| Dec, 2021 | 210021419 | 04.01.2022 | 03.02.2022 | 21,65,200 | 1,23,95,553 |
| Jan, 2022 | 210021713 | 05.02.2022 | 07.03.2022 | 23,03,100 | 1,31,85,017 |
| Total | | | | 2,88,88,850 | 19,21,32,901 |

- iii) It is stated that in addition to the principal outstanding amount, the petitioner No.1 is entitled to late payment surcharge in terms of Article 5.2 of the PPA which provides that in case of delay in payment for the energy purchased by TSNPDCL beyond the Due Date of Payment, TSNPDCL shall pay simple interest at prevailing base prime lending rate of State Bank of India (LPS) on the outstanding amount. TSNPDCL is therefore, liable to pay Rs.1,13,28,461/- as LPS on the outstanding invoices to petitioner No.1. The details relating to LPS on the outstanding invoices are set out herein below:

| Generation Month | Invoice Number | Outstanding Amount (INR) | LPS Calculated till 31.01.2022 (INR) | Total Outstanding amount (INR) |
|-------------------------|-----------------------|---------------------------------|---|---------------------------------------|
| Dec, 2020 | 2020-21/010 | 1,30,56,832 | 15,90,751 | 1,46,47,583 |
| Jan, 2021 | 2020-21/011 | 1,48,22,857 | 18,05,911 | 1,66,28,768 |
| Feb, 2021 | 2020-21/012 | 1,52,98,093 | 15,42,991 | 1,68,41,084 |
| Mar, 2021 | 2021-22/001 | 1,51,19,967 | 13,74,032 | 1,64,93,999 |
| Apr, 2021 | 2021-22/002 | 1,49,35,154 | 12,03,119 | 1,61,38,273 |
| May, 2021 | 1300000003 | 1,53,07,932 | 10,85,374 | 1,63,93,306 |
| Jun, 2021 | 2021-22/002 | 1,48,28,922 | 8,88,517 | 1,57,17,439 |
| Jul, 2021 | 1300000008 | 1,10,19,574 | 5,50,224 | 1,15,69,798 |
| Aug, 2021 | 2021-22/004 | 1,31,53,244 | 5,29,787 | 1,36,83,031 |
| Sep, 2021 | 1300000011 | 1,20,92,993 | 3,58,267 | 1,24,51,260 |
| Oct, 2021 | 1300000014 | 1,38,52,541 | 2,95,116 | 1,41,47,1657 |
| Nov, 2021 | 210021411 | 1,30,64,222 | 1,04,37,061 | 1,31,68,593 |
| Dec, 2021 | 210021419 | 1,23,95,553 | - | 1,23,95,553 |
| Jan, 2022 | 210021713 | 1,31,85,017 | - | 1,31,85,017 |
| Total | | 19,21,32,901 | 1,13,28,461 | 20,34,61,362 |

- iv) It is also stated that the petitioners have time and again requested TSNPDCL to comply with its contractual obligation to clear outstanding invoices including LPS payable thereon, TSNPDCL has, acting in a high-handed manner, completely ignored such requests.

Failure to open the Letter of Credit (LC)

- v) It is stated that Article 5.4 of the PPA provides that 30 days prior to the due date of first monthly invoice raised by petitioner No.1, TSNPDCL shall open an irrevocable revolving LC for one month's billing value with a scheduled bank in favour of the petitioner. However, in blatant contravention of Article 5.4 of the PPA, TSNPDCL has failed to open the LC in favour of petitioner No.1 till date. It is pertinent to state that the opening of LC by TSNPDCL is a material contractual obligation under the PPA and it is therefore, not open to TSNPDCL to renege from the

same. In regard to the opening of LC under the PPAs, the Ministry of Power (MoP), Government of India (GoI) in its order dated 28.06.2019 (MoP Order) has stated as follows -

“4.0 The Power Purchase Agreements have the provision regarding maintenance of adequate Payment Security Mechanism mainly in the form of Letters of Credit by the Distribution Licensees/ Procurers of Power. A robust Payment Security System requires adequacy and validity of Letter of Credit to cover the payments due on account of drawal of power.”

- I. It is stated that aggrieved by the arbitrary and illegal actions of the respondent, the petitioner No.1, through its then and current parent company, by way of various letters repeatedly urged TSPCC to clear the outstanding dues and open the LC in favour of petitioner No.1. The details of the letters issued are set out below –
 - i. Letter dated 31.03.2021 stating inter alia that the outstanding dues towards petitioner No.1 amounted to Rs.9,41,25,277/- on 31.03.2021.
 - ii. Letter dated 20.12.2021 apprising TSPCC/TSNPDCL of petitioners’ severe financial position due to non-payment of overdue amount against pending invoices by the respondent and failure to communicate the timelines for outstanding payments which were long overdue. The outstanding payments towards pending invoices amounted to Rs.16.65 crore as on November 2021.
 - iii. Letter dated 20.01.2022 reiterating petitioners’ deteriorating financial position and intimating TSPCC/TSDISCOMS that the outstanding dues towards petitioner No.1 amounted to Rs.17.89 crore on December 2021.
- m. It is stated that that neither TSPCC nor the respondent has responded to any of the aforestated letters of the petitioners.
- n. It is stated that since the respondent neither made payments nor responded to the letters issued by the petitioners, the petitioner No.1 on 07.01.2022, in view of TSNPDCL’s failure to amicably resolve the

dispute, issued the notice for resolution of disputes under the PPA to TSNPDCL. The relevant extracts of the said notice are reproduced herein below:

“1.2 Firstly, pursuant to the PPA, NSPPL setup the project and the same was commissioned on 25.03.2017. Since the commissioning of the project, NSPPL has been supplying electricity to TSNPDCL and regularly raising invoices on TSPCC for the same. While TSPCC had been making payments towards NSPPL’s invoices, although delayed, till November 2020, TSPCC has since December 2020, in contravention of Article 5 of the PPA, stopped making payments towards the invoices for the energy supplied by NSPPL. TSPCC has not raised any dispute on these invoices in accordance with the PPA and thus, these are admitted amounts liable to be released immediately by TSPCC with late payment interest. We state that the principal outstanding liability against the invoices for the period December 2020 to November 2021 is Rs.16,64,74,654/-. In terms of Article 5.2 of the PPA, TSNPDCL is liable to pay late payment surcharge (LPS) at the prevailing base prime lending rate of State Bank of India amounting to Rs.91,02,327/- to NSPPL on the outstanding payments as on 20.12.2021.

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1.4 Secondly, in blatant contravention of Article 5.4 of the PPA and the orders issued by the Ministry of Power, Government of India dated 28.06.2019, 17.07.2019 and 23.07.2019, TSNPDCL has failed to open an irrevocable revolving Letter of Credit (LC) in favour of NSPPL. It is pertinent to state that the opening of LC by TSNPDCL is a material contractual obligation under the PPA and it is therefore, not open to TSNPDCL to renege from the same. Despite provisions under PPA, TSNPDCL has failed opening the LC in terms of the PPA. It may be appreciated that in the absence of the LC, we have been denied a payment security mechanism.

2. We regret to state that despite several representations and notices referred above highlighting the aforementioned breaches under the PPA and calling upon your good office to come forth and resolve the breaches, TSNPDCL/TSPCC has failed to respond. Further, despite several rounds of meetings and discussions with your officers, on very frequent basis, no resolution has been forthcoming.

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3. As it stands, TSNPDCL has failed to make payments to NSPPL for a period of over 300 days and in view of TSNPDCL's failure to open the LC, NSPPL is unable to recover the outstanding dues or any part thereof from the LC. The defaults and breaches by TSNPDCL are long outstanding and we have expended considerable time and effort to amicable resolution of the issues without any success.

4. However, without prejudice to our rights and remedies under the PPA, we are issuing this final notice to call upon TSNPDCL to come forward for the resolution of the instant dispute and communicate the same to us, no later than 15 days from the date of receipt of this notice, failing which it shall be deemed that TSNPDCL does not want to amicable resolve the disputes and we shall be constrained to forthwith approach the Telangana State Electricity Regulatory Commission for adjudication of aforementioned issues/disputes arising out of the PPA."

o. It is stated that in view of the factual scenario detailed hereinabove the action of the respondent in withholding payments for energy supplied from the Solar Project since December 2020 is a gross violation of the provisions of the PPA which is a statutory document and binding on both parties. The PPA, in order to protect the rights of the parties, stipulates a cut-off date by which TSNPDCL must make payments for the energy supplied from the Solar Project, failing which TSNPDCL shall be liable to pay LPS on delayed payments in

accordance with Article 5.2. However, in total disregard of the said provisions, and despite repeated requests and notice dated 07.01.2022 issued by petitioner No.1, the respondent, arbitrarily and illegally, continues to withhold payments for the invoices. It is also pertinent to state that the respondent has till date not disputed any invoice raised by petitioner No.1. As such, the invoices have become conclusive and TSNPDCL is bound to make payments for the said invoices. In the present case, TSNPDCL is misusing its dominant position in withholding payments legally admitted and due to petitioner No.1 without any basis whatsoever.

- p. It is stated that even prior to December 2020, TSNPDCL withheld and delayed the payments without any reason and did not pay the LPS for the delay.
- q. It is stated that TSNPDCL has, in blatant contravention of Article 5.4 of the PPA, failed to provide the LC i.e., the only payment security mechanism provided under the PPA to petitioner No.1. It is pertinent to state that opening of LC constitutes a material obligation under the PPA and it is therefore, not open to TSNPDCL to renege from the same. In this regard, the petitioners place reliance on the Judgment of the Hon'ble Appellate Tribunal for Electricity in *Bangalore Electricity Supply Company Ltd Vs. Devangere Sugar Company Limited* [Appeal No.176 of 2009 [APTEL] dated 18.05.2010 wherein it has been held as follows:

“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.

... ..”

- r. It is also stated that TSNPDCL entered into the PPA, duly approved by the Commission, on its own volition, knowing fully well the obligations it entailed, to meet its energy requirement and also to fulfil its mandatory RPPO under the APERC - Renewable Power Purchase Obligation (Compliance by purchase of Renewable Energy/Renewable Energy Certificates) Regulation, 2012 (Regulation No.1 of 2012) (RPPO Regulation) of the Commission. The parties have since acted upon the PPA and taken benefit thereof. The petitioner No.1 has been providing uninterrupted supply of power from its Solar Project to TSNPDCL and raising invoices against such supply while TSNPDCL 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, TSNPDCL must be pinned to its obligations under the PPA including but not limited to the opening of LC. TSNPDCL's conduct in not opening the LC is not only arbitrary and unfair but also demonstrates its high-handedness.
- s. It is stated that the action of TSNPDCL in not opening the LC has had a debilitating effect on the petitioners. It is settled law that as a party to the contract, TSNPDCL is bound to discharge its functions as per the contract that it has entered into. A party to a contract cannot state that it will not follow the terms of the contract as it is bound by the same. It is stated that without the LC, petitioner No.1 has no payment security and this has to be taken into consideration by the Commission in light of the fact that TSNPDCL is not making contractual payments to petitioner No.1 herein. Without timely realisation of payments, petitioner No.1 company faces an imminent threat of becoming an NPA which in turn will affect investor security and public interest.

t. It is stated that Article 5.2 of the PPA provides that in case of delay in payment for the energy purchased by TSNPDCL beyond the 'Due Date of Payment', TSNPDCL shall pay LPS on the outstanding amount. However, despite the petitioner's repeated requests, TSNPDCL has failed to comply with its contractual obligation of paying LPS on delayed payments. With regard to payment of LPS, it is stated that the High-Level Empowered Committee (HLEC) headed by the Cabinet Secretary in its report dated 12.11.2018, albeit in the context of thermal plants, has acknowledged an existing trend whereby the State DISCOMs are delaying the payment of monthly bills and are not paying LPS on delayed payment, despite the PPA providing for the same. Accordingly, HLEC recommended that LPS be mandatorily paid in the event of delay in payment by the DISCOMs. The recommendation 3.1 of the HLEC report provides as under:

“3.1 Mandatory payment of Late Payment Surcharge (LPS)

It has been observed that due to delay in payment by the DISCOMs, the viability of the generators get hurt severely. As one of the roles of the regulator is to ensure sustainable operation of the power sector, the Committee recommends that Ministry of Power may advise the Regulators to monitor payments by DISCOMs and frame appropriate regulations. It has also been pointed out that frequently the DISCOMs insist that generators should forgo the LPS on the delayed payments, despite its mention in the signed PPA. This again adversely affects the viability of generators and their ability to meet its obligation to service the debt and other operating expenses. Therefore, the Committee recommends that Ministry of Power may engage with the Regulators to ensure that LPS is mandatorily paid in the event of delay in payment by the DISCOMs.”

u. It is stated that the Central Government recommended the constitution of a Group of Ministers (GoM) headed by the Finance Minister, Road Transport Minister, Minister of Commerce, Minister of

Oil, Minister of Railways and the Minister of Power to examine the specific recommendations of HLEC which was constituted to address the issue of stressed power projects and forward their comments for consideration by the cabinet. The GoM thereafter submitted its recommendation to the Cabinet Committee on Economic Affairs (CCEA) on 07.03.2019. The CCEA on 07.03.2019 approved recommendations of the GoM to make payment of LPS mandatory. On 08.03.2019, MoP vide its Office Memorandum has approved the recommendations of GoM qua mandatory payment of LPS, as under:

“3.4 Approval with regards to mandatory payment of Late Payment Surcharge (LPS): Ministry of Power may engage with the Regulators to ensure that LPS is paid in case of delay in payment by DISCOMs as per the provisions of the PPA. Appropriate Regulatory Commission may ensure compliance.”

- v. It is stated that in view of the above the conduct of TSNPDCL in non-payment of LPS on petitioner No.1's invoices is in violation of the express terms of the PPA and the express directions of the Cabinet. Therefore, the Commission ought to direct TSNPDCL to pay the applicable LPS to petitioner No.1 at the earliest.
- w. It is stated that TSNPDCL, 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 2015 Solar Policy, on the other hand, the TSNPDCL, by the aforesaid 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 afore stated high-handed actions have resulted in a destabilized regulatory environment. The petitioners stated that they have hitherto patiently and amicably engaged with TSNPDCL in an attempt to resolve the aforesaid issues.

- x. It is stated that the cost of procurement of power from petitioner No.1 has been accounted for in the tariff being charged by TSNPDCL from its consumers and TSNPDCL is recovering the tariff for the energy procured from the Solar Project from the ultimate consumers. Despite recovering these amounts, payments to petitioner No.1 are being withheld. This action not only amounts to unjust enrichment of TSNPDCL but is also contrary to TSNPDCL's legal obligation to remit such monies to petitioner No.1. 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.
- y. It is stated that in fact the respondent has financially strangled petitioner No.1 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 petitioner No.1, 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 petitioners are bound to abide by which are honoured through the payments made by TSNPDCL. It is trite that power projects are commissioned after availing debt facilities from banks and financial institutions and the same must be repaid to the banks during the term of the PPA. Due to the default on payments by TSNPDCL, even the operational expenditure of petitioner No.1 is not realized sufficiently. On account of deliberate non-payment by TSNPDCL, petitioner No.1 will face financial difficulties and have to stretch its resources for ensuring payments for its expenses.
- z. It is stated that such actions of the respondent 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, 2003, NEP and NTP, which are statutory policies, mandate the promotion of generation of electricity from renewable sources. However, the actions of the respondent have a contrary impact. By withholding payments for undisputed invoices and

the LPS payable thereon, refusing to make complete payments and refund of statutory dues, and failure to open the LC, the only payment security mechanism available to petitioner No.1 under the PPA, the respondent is in effect pushing petitioner No.1 towards bankruptcy and the Solar Project towards a complete shutdown. This will not only lead to grave financial losses but also wastage of the solar resource of the State of Telangana.

3. Therefore, the petitioners have sought the following prayer in the petition for consideration to:

- “(i) Direct the respondent to immediately release payments due to the petitioner No.1, which have been unlawfully withheld along with Late Payment Surcharge.
- (ii) Direct the respondent to open an irrevocable revolving Letter of Credit in favour of petitioner No.1 in terms of Article 5.4 of the PPA.
- (iii) Direct the respondent to pay future bills in a timely manner in accordance with the PPA.”

4. The respondent has not filed its counter affidavit to the petition despite giving ample opportunity.

5. 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 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. 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 counsel for petitioner sought to state that interlocutory applications for payment of the amount due are required to be filed. The Commission observed that there is no necessity of filing interlocutory application for interim orders, as the respondent will file its counter affidavit in the matter. The Commission also 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 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.”

6. Though the Commission was considerate and magnanimous in granting time for filing the counter affidavit, the respondent has failed to respond to the petition as 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.

7. From the pleadings it is noticed that the petitioner No.1 is having a long-term Power Purchase Agreement with the respondent vide PPA No.7/2016 dated 26.02.2016 r/w its amendment dated 04.12.2018 (PPA) for setting up of the Solar Power Project of 15 MW capacity connected to at 132/33 kV Godhur substation, Jagityal District for sale of Solar Power to the respondent for a period of 25 years from the Date of Commercial Operation (i.e., 25.03.2017) at tariff of Rs.5.7249 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, the Solar Power Developer (petitioner No.1) 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 All payments shall be made into petitioner No.1's designated account;
- d) 5.4 The respondent shall cause to put in place an irrevocable revolving Letter of Credit issued in favour of the petitioner No.1 by a Scheduled Bank for one month's billing value;
- e) 5.5 The respondent shall make payment of the undisputed amount of the bill by the due date of payment;
- f) 5.6 The respondent shall pay the bills of petitioner No.1 promptly;
- g) 11.4 any party may approach TSERC to resolve the dispute under Section 86(1)(f) of the Electricity Act, 2003;

8. 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.1 has identified the outstanding amount due against monthly bills for the period from December 2020 to February 2022 as Rs.19,21,32,901/- and an amount Rs.1,13,28,461/- towards LPS as on 31.01.2022 in terms of Article 5.2 of the PPA payable by respondent.

9. 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 unable to recover the outstanding due or any part thereof from the Letter of Credit. Therefore, the prayer is sought not only for release of payments due along with interest thereon for late payment but also for directions to the respondent for opening of irrevocable revolving Letter of Credit in favour of petitioner No.1 and for making all future payments in a timely manner, though there is no mention of the amount for subsequent period.

10. 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 is no dispute on the amounts payable by the respondent to the petitioners. However, as per the provisions of the PPA, when the petitioner No.1 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.1 and when the petitioner No.1 is unable to recover the outstanding amount, shall constitute "DISCOM (Respondent) Event of Default".

11. The petitioners have brought to the notice of the Commission 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."

12. In the present case, Clause 5.4 of the PPA stipulates opening of irrevocable revolving Letter of Credit in favour of petitioner No.1 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.1, which it is required to comply with.

13. Therefore, the Commission is inclined to grant the relief as prayed for in the original petition, both for the payment of outstanding amount and interest claim and directs the respondent to put in place an irrevocable revolving Letter of Credit issued in favour of the petitioner No.1 by a Scheduled Bank for one month's billing value as per Clause 5.4 of the PPA.

14. 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 of the undisputed amount of the bills raised by the petitioner No.1 promptly in accordance with the provisions of the PPA.

15. The original petition is disposed of on the above terms and in the circumstances without any costs.

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

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