M,﻿ IN THE HIGH COURT FOR THE STATE OF TELANGANA

AT: HYDERABAD

IA. No. Of 2021

IN

IA. No. 01 of 2021

IN

WP.No. **9241 of 2021**

**Between:**1. M/s Sri Suryanarayana Swamy Solar ,

Power Private Limited,

Azad Nagar, Kodad, Telangana-508206

Rep by its Managing Director,

Mr. Ch. Venkateshwara Swamy S/o Ch. Subbarao.

**Plant Address:**

Venkatramapuram & Syed Mujavarpeta Village,

Munagala Mandal,Suryapet District,

Capacity of Plant:2.208 MW

2. M/s Indira Constructions,

Paigah House,156-159,

Sardar Patel Road, Secunderabad-500003

Rep, by its Authorized Signatory,

K.Srinivas Reddy S/o K.Venkat Reddy

**Unit Address:**

Banjarahills,Hyderabad,

Service connection No:HDN-1262

…Petitioners

And

1. Telangana State Southern Power

Distribution Company Limited,

Mint Compound, Hyderabad,

rep. by its Chairman & Managing Director,

1. Superintending Engineer,

Operation Circle, Banjarahills,

Hyderabad, Telanagana.

1. The State of Telangana,

Energy (RES-A1) Department,

Telangana Secretariat, Hyderabad,

rep. by its Principal Secretary

 …Respondents

      COUNTER AFFIDAVIT FILED BY RESPONDENT No.1 and 2

I, Sri. , S/o , age: years, Occ: , Southern Power Distribution Company of Telangana Limited (TSSPDCL) residing at Hyderabad do here by solemnly affirm and state on oath as follows:

1. I am working as the , the Southern Power Distribution Company of Telangana limited (TSSPDCL), and as such I am well acquainted with the facts of the case. I am authorized to file this affidavit on behalf of the Respondents 1 and 2.
2. The above writ petition is filed to declare the action of the respondents 1 and 2 in demanding Cross Subsidy Surcharge on the energy Drawn and consumed by the 2nd petitioner from the 1st Petitioner in Pursuance to the Demand Notice vide Lr. No. SE/OP/BJH/Hyd/ SAO/JAO(HT)/ D.No.319/2020 dated 25.03.2021 issued by the 2nd respondent as arbitrary illegal unauthorized, contrary to Andhra Pradesh Solar Power Policy 2012, orders issued by TSERC and Provisions of Electricity Act 2003 besides violative of petitioners rights guaranteed under Article 14 and 10 (1)(g) of the Constitution of India, consequently to set aside the same and to restrain respondents 1 & 2 from levying and demanding Cross Subsidy Surcharge for the balance incentive period.
3. It is submitted that the main issue in the present writ petition is period of operation of the AP Solar Power Policy 2012. The AP Solar Power policy came into effect on 26-09-2012 and shall be in force for the period of five years from the said date and it has been specifically stated in the policy that the policy shall expire by the end of September 2017. The Petitioner company has synchronized the Solar power plant on 25-02-2014. The Solar Power Plant of first petitioner has been established under AP Solar Power Policy-2012 and he is entitled to the incentives under the policy only upto September 2017 as the policy specifically states that the benefits shall be extended only upto five years from the date of implementation of the policy ie., the date of coming into operation of the policy.
4. It is submitted that the 1st petitioner being the generator has concluded the Long Term Open Access agreement with the 2nd Petitioner and others for transmission of 2.2 MW Solar Power from its plant located at Venkatramapuram (V), Munagala (M), Nalgonda (District) at 33 KV level under the jurisdiction of TSSPDCL under third party sale for a period from 21-05-2014 to 20-05-2016 which was later extended upto 31-05-2020.
5. The averments of paragraph 3 of the Affidavit under reply are borne out by record and hence do not call for reply.
6. In reply to para 4 of the affidavit it is submitted that the contention of the petitioner that the Solar Power Projects which have been established under the AP Solar Power Policy 2012 are entitled for incentives for a period of seven years from the date of commissioning /implementation of the project is incorrect. As per Clause 8 of the said policy the incentives will be in force for a period of seven years from the date of implementation of the policy. As the solar power policy came into operation on 26-09-2012 the incentives if any granted shall be only for a period of seven years from 26-09-2012. As the said policy has already expired the petitioner cannot plead that the matter should be placed before the High Level Committee for clarification.

7. In reply to para 5 it is submitted that the contention of the petitioner that they have established the solar power project based on the assurances and the promises of 3rd Respondent is false and the same is denied. The 3rd Respondent has never promised or indicated that the Petitioner and similarly situated persons are entitled to incentives granted by AP Solar Power Policy for a period of seven years from the date of commissioning of the project. The communication/letter addressed by the 3rd Respondent to the TSERC clearly state that the benefits granted under the AP Solar Power Policy shall be only for a period of five years from the date of coming into operation of the policy.

8. In reply to para 6 it is submitted that the Telangana Solar Power Policy - 2015 (TSPP) has clearly stated in clause 4 that the operative period shall be for a period of five years and that all the solar power projects that are commissioned during the operative period shall be eligible for incentives declared under the policy for a period of ten years from the date of commissioning of the project. But whereas in AP Solar Power Policy clause 8 stipulates that the incentives shall be in force for a period of seven years from the date of implementation of the policy. Hence, the incentives under AP Solar Power Policy shall expire by end of September 2019 irrespective of the date of commissioning of the project. There is no ambiguity in respect of the contents of the AP solar Power Policy and does not require any other interpretation. If the state government of the erstwhile state of Andhra Pradesh had that intention it could have been specifically stated in the AP Solar Power Policy that the incentives are extended to the Generators upto seven years from the date of commissioning of the project. The petitioners have never questioned the AP solar Power Policy hence are bound by the contents of the same.

9. In reply to para 7 it is submitted that the 3rd Respondent addressed a letter dated 17-12-2016 to TSERC by exercising powers under Section 108 of the Electricity Act, 2003 directed the TSERC to adopt Telangana Solar Power Policy 2015 and AP Solar Power Policy 2012 and make necessary amendments. The contents of the letter are extracted hereunder :

*“I am to invite attention to the references cited and in reply to the TSERC Lr. No. L-46 / DD (LAW) / 4, Dt: 19.11.2016, the Government after careful consideration of the matter hereby clarifies that the Government agree to reimburse the loss caused to the TSDISCOMs due to exemption of cross subsidy surcharge & wheeling charges as required u/s 65 of Electricity Act,* *2003* ***subject to the availability of funds and as per the provision of the Solar Policy, 2015.***

*With reference to the para 14(b) of the TSERC letter 4th cited, it is further clarified that the wheeling charges for units consuming within the State has to be exempted as per the provisions of “Telangana Solar Power Policy, 2015”. The plants that have been commissioned under “A.P. Solar Power Policy, 2012” shall also be exempted from payment of wheeling charges as per A. P. Solar Power Policy, 2012.*

*Therefore, it is requested to place the matter before the Hon’ble Commission for passing the appropriate orders urgently regarding exemption of cross subsidy surcharge and wheeling charges.”*

The letter does not state that the incentives granted under AP solar Power policy 2012 are extended for a period of seven year from the date of commissioning of the project hence the contention of the petitioner that the 3rd Respondent has intended to extend the said benefits for seven years from the date of commissioning of the project is false and the same is denied.

Pursuant to aforesaid letter of the government, the Hon’ble TSERC amended the Wheeling Tariffs order dated 27-03-2015 and Cross Subsidy Surcharge Order dated 23-06-2016 vide orders dated 31-12-2016 in O. P. No. 78 of 2015 & O. P. No. 79 of 2015 and in O. P. No. 6 of 2016 & O. P. No. 7 of 2016 considering the policy directives in respect of exemption of Wheeling Charges and Cross Subsidy Surcharge Charges as per AP Solar Power Policy 2012 and Telangana Solar Power Policy-2015. The relevant portion of the order of Hon’ble TSERC is extracted below:

Wheeling Tariffs amendment in O. P. No. 78 of 2015 & O. P. No. 79 of 2015

Therefore, the order dated: 27.03.2015 is hereby amended to the extent given below:

After paragraph 49, the following paragraphs shall be added, namely:

*“Provided that the wheeling charges shall not be applicable to the Solar Power Projects as per the policy directive of the Govt. of Telangana as given below:*

|  |  |  |
| --- | --- | --- |
| ***A.P. Solar Power Policy, 2012*** | | ***Telangana Solar Power Policy, 2015*** |
| *Wheeling Charges* | | |
| *There will be no wheeling and transmission charges for wheeling of power generated from the Solar Power Projects, to the desired location/s for captive use/third party sale within the state through 33 KV system subject to industries maintaining their demand within its contracted demand. However, wheeling and transmission charges for wheeling of power generated from the Solar Power Projects for sale outside the state will be as per APERC regulations.* | *The wheeling and transmission charges are exempted for captive use within the state. They will be charged as applicable for third party sale. The transmission and distribution losses however is fully applicable for both third party within the state as well as captive use within the state.* | |
|  |  |  |

*Provided further that the Govt. of Telangana shall reimburse the Discoms, the sum of money due to the exemption of the wheeling charges to the Solar Power Projects as stated in first proviso to the para 49.* ***In the event of non-reimbursement by the Govt. of Telangana of the wheeling charges so exempted, the Discoms shall continue to levy the wheeling charges as applicable before this amendment plus the sum accrued as arrears from such consumers who are exempted under this amended order****”.*

Cross Subsidy Surcharge amendment in O. P. No. 6 of 2016 & O. P. No. 7 of 2016

Therefore, the order, dated: 23.06.2016 is hereby amended to the extent given below:

After paragraph 2.27 the following paragraph shall be added, namely:

*“Provided that this Cross Subsidy Surcharge shall not be applicable to the Solar Power Projects as per the policy directive of the Govt. of Telangana as given below:*

|  |  |  |
| --- | --- | --- |
| ***A.P. Solar Power Policy, 2012*** | | ***Telangana Solar Power Policy, 2015*** |
| ***Cross Subsidy Surcharge*** | | |
| *Cross subsidy surcharge shall not be applicable for Open Access obtained for third party sale within the state subject to the industries maintaining their demand within its contracted demand with the DISCOMs. It is not applicable for captive use.* | *For SPP located within the state and selling power to third parties within the state, 100% exemption shall be provided on the cross subsidy surcharge as determined by TSERC for five years from the date of commissioning of the SPP.”* | |
|  |  |  |

*Provided further that The Govt. of Telangana shall reimburse the Discoms, the sum of money accrued due to the exemption of the Cross Subsidy Surcharge to the Solar Power Projects as stated in the first proviso to the para 2.27.* ***In the event of non-reimbursement by the Govt. of Telangana of the Cross Subsidy Surcharge so exempted, the Discoms shall continue to levy the Cross Subsidy Surcharge as applicable before this amendment plus the sum accrued as arrears from such consumers who are exempted under this amended order.***

10. It is submitted that, the Hon’ble TSERC vide order dated 27-03-2018 in the matter of determination of Cross Subsidy Surcharge and Additional Surcharge for FY 2018-19 also clearly detailed the applicability of the order under clause 6.2 stating as follows which is herewith reproduced for kind perusal:

*6.2 Provided that the CSS shall not be applicable to the solar power projects as per the policy directive of the then Government of Andhra Pradesh and Government of Telangana State as given below:*

|  |  |  |
| --- | --- | --- |
| ***A.P. Solar Power Policy, 2012*** | | ***Telangana Solar Power Policy, 2015*** |
| ***Cross Subsidy Surcharge*** | | |
| *Cross subsidy surcharge shall not be applicable for Open Access obtained for third party sale within the state subject to the industries maintaining their demand within its contracted demand with the DISCOMs. It is not applicable for captive use.*  ***These incentives will be in force for a period of seven years from the date of implementation of the Policy.*** | *For SPP located within the state and selling power to third parties within the state, 100% exemption shall be provided on the cross subsidy surcharge as determined by TSERC for five years from the date of commissioning of the SPP.”* | |

*6.4 Provided further that the Government of Telangana State shall reimburse the DISCOMs, the sum of money foregone by them due to the exemption of the CSS to the solar power projects.* ***In the event of non-reimbursement by the Government of Telangana State of the CSS so exempted, the DISCOMs shall continue to levy the CSS as applicable.***

11. It is submitted that as per clause 6.2 of above order issued by TSERC, the Solar Power developers who have synchronized their plants under the AP Solar Power Policy-2012 by June, 2014 are only eligible to avail the incentives i.e., the incentives in respect of exemption of Wheeling Charges for Captive and Third party sale and Cross Subsidy Surcharge Charges for Third party sale for a period upto **7 years from the date of implementation of the policy** (i.e., 26-09-2019) but not from the date of commissioning/synchronization of the plant. The said interpretation by the petitioner is untenable and against the contents of the AP Solar Power Policy.

12. It is further submitted that as per Sec 14 of the Electricity Act, 2003, the TSERC has to issue the distribution license and on application of TSSPDCL the said license has been issued and the licensee has to follow the directions of TSERC.

*“****4: DIRECTIONS***

*4.1****The Licensee shall comply with the Regulations, orders and directions issued by the Commission****from time to time and shall also act in accordance with the terms and conditions of this Licence, except where the Licensee obtains the approval of the Commission for any deviation there from.”*

Therefore, TSSPDCL being a distribution licensee is obligated to comply with the conditions or direction or orders of Hon’ble State Commission and cannot act against the directions of State Commission.

13. It is further submitted that the Hon’ble TSERC in its order dated   
31-12-2016 has categorically specified that in the event of non-reimbursement by the Govt. of Telangana the Cross Subsidy Surcharge and Wheeling Charges so exempted, the Discoms shall continue to levy the Cross Subsidy Surcharge and Wheeling Charges as applicable before this amendment plus the sum accrued as arrears from such consumers who are exempted under this amended orders.  As the State government has not reimbursed the incentive amounts granted to the petitioners the Respondent company is entitled to levy the Wheeling Charges, Cross Subsidy Surcharge and other charges as determined by the TSERC.    The Respondent company has included the cross subsidy surcharge in CC Bills for the month of November 2019 payable by the 2nd Petitoners and another company by name M/s. Vedadri Paper Mills Limited. The 1st and 2nd Petitioners and M/s. Vedadri Paper Mills Ltd have filed Writ Petiiotn bearing WP. No. 362 of 2020 against the said demand and the Writ Petition is pending. The present writ petitioners again raised the same issue also in the present writ petition hence, the contents which are already covered in the WP. No. 362 of 2020 have also been replied to in the present Counter Affidavit.

14. In the alternative it is submitted that even if the petitioner is found to be entitled to the benefits under AP Solar Power Policy for a longer period of time the Respondent company is entitled to recover the same from the petitioners as the said amount has not been reimbursed by the 3rd Respondent.

15. It is further submitted that, one of the petitioners in WP.No.27655 of 2019 i.e. M/s Pragati Group has synchronized his solar plant under AP solar Power Policy-20 but the Interim Order issued in the said petitions is applicable to solar Plants synchronized under Telangana Solar Power Policy-2015 only, Whereas the Interim order issued in IA.No. 1 of 2020 in WP.362/2020 & WP.No.2633 of 2020 filed by the 1st petitioner earlier was issued with the misconception that the both the AP solar Power Policy-2012 & Telangana Solar Power Policy-2015 were effective from date of commissioning of the solar plant.

16. It is submitted that, the respondent company and has not initiated any coercive action against the petitioner in obedience of the stay order of the Hon’ble High Court in WP.NO.362/2020 && WP.No.2633 of 2020 but only issued the bills intimating the CSS amount and has also filed vacate stay petition in the said petitions, which are still pending before the Hon’ble High Court. As a result of the non-disposal of the stay vacate petitions this respondent company is facing huge financial distress as it being a Govt. owned company does business on no profit no loss basis.

17. It is further submitted that, as the incentive period under AP solar Power Policy-2012 stood lapsed by 25.09.2019, notices were issued to the petitioner’s consumers and others informing the amount due towards Cross Subsidy Surcharge should be paid as the incentives granted AP Solar Power Policy can only be extended upto end of September 2019.

18. The Petitioner suppressing the aforesaid order with reference to the applicability of incentives is trying to mislead the Hon’ble High Court contending that, the incentives are applicable for a period of 7 years from the date of synchronization/Commissioning.

19. In reply to Para (10) of the affidavit, it is once again submitted that, as per the A.P Solar Power Policy 2012 the incentives are applicable for a period of seven years from the date of its implementation, but not 7 years from the date of synchronization/Commissioning as wrongly interpreted by the petitioner. The period of applicability is also clarified by the TSERC in its CSS order wherein, it is clearly mentioned that, “the incentives will be in force for a period of seven years from the date of implementation of policy”.

20. In the circumstances mentioned above, the 3rd respondent has issued notices to the petitioner to pay the cross subsidy surcharge for the month of September, 2019 to January, 2021 as the incentive period is applicable up to September-2019 only. After September-2019, the petitioner is liable to pay the cross subsidy surcharge as per Section 42 of Electricity Act.

21. It is respectfully submitted that, TSSPDCL has been continuously addressing letters to Govt. of Telangana for reimbursement of the amount forgone by TSSPDCL towards exemption of CSS from time to time. But the Govt. has not released the said amount till date.

22. Hence, in view of the aforementioned categorical and specific order of the Hon’ble TSERC and section 65 of Electricity Act, 2003, the 3rd respondent is left with no option except levying of the CSS & wheeling charges. Accordingly, notices were issued to the petitioner who is covered by the A.P Solar Power Policy, 2012.

23. In the circumstances mentioned above, this respondent respectfully submits that the petitioners are liable to pay the Cross Subsidy Surcharge charges demanded by this respondent company. 1st Respondent Company is established by the State Government with the sole purpose of distributing / supplying power to the citizens at large on “No Loss No Profit Basis”.  The petitioners cannot be shown any indulgence as the incentives under the AP Solar power policy have expired by the end of September 2019.

24. In reply to the grounds raised by the petitioner it is submitted that there is no ambiguity in the AP Solar Power Policy and the interpretation of the said policy by the Respondent is legally correct. The contents of the policy do not raise to any confusion. The petitioners do not have any legitimate expectation as the contents of the policy are very clear.

It is submitted that the Honorable Court by order dated 09-04-2021 in WP. No. 9241 of 2021 has stayed the recovery of cross subsidy surcharge incentive for the period from September, 2019 to December 2020 as demanded by the Respondents vide letter dated 25-03-2021 including disconnection of the power supply to the petitioner company. If the order dated 09-04-2021 in WP. No. 9241 of 2021 are not vacated it will cause irreparable loss and injury to the Respondent company.

It is submitted that all the allegations made in the affidavit under reply, that are not specifically dealt with herein are denied and the petitioner is put to strict proof of the same.

It is therefore prayed that this Honorable Court may be pleased to vacate the interim orders dated: 09.04.2021 in WP. No. 9241 of 2021 and dismiss the writ petition and be pleased to pass such other order/s as this Honorable Court deems fit and proper in the circumstances of the case.

Sworn and signed before me DEPONENT

on this the day of June, 2021

At Hyderabad

Advocate: Hyderabad

VERIFICATION

I, Sri , S/o , age: years Occ: , do hereby verify and declare that the facts stated in the above paragraphs of the affidavit are true to my personal knowledge, belief, information and also legal advice from my counsel.

               Hence verified on this the    day June, 2021 at Hyderabad.

DEPONENT

Counsel for the Respondent