

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SITE NO. 3, BLOCK B, SECTOR 18-A, MADHYA MARG, CHANDIGARH

Petition No.21 of 2021

Date of Order: 24.09.2021

Petition under Section 86 (1) (b),86 (1) (c),86 (1) (e), Section 86 (1) (k) and 86 (4) of the Electricity Act, 2003 read with Regulation 9(1) and Regulation 69, Regulation 72, Regulation 74 of the Punjab state Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 seeking issuance of appropriate direction(s)/ order(s) against the Respondent for illegal deduction of lawful tariff payment due and payable to solar power developers.

AND

In the matter of: Solar Power Developers Association, 910, 9th Floor Surya Kiran Building, 19 KG Marg, New Delhi- 11001.

.... Petitioner

1. Punjab State Power Corporation Ltd., the Mall Patiala, Punjab-147001.
2. Punjab Energy Development Agency, Solar Passive Complex, Plot No. 1 & 2, Sector 33-D, Chandigarh

.....Respondents

Present: Sh. Viswajeet Khanna, Chairperson
Ms. Anjuli Chandra, Member
Sh. Paramjeet Singh, Member

ORDER

1. The petition has been filed for declaration that the curtailment notices dated 30.03.2020 issued by Punjab State Power Corporation Limited (PSPCL) are illegal and for release of payments of 5% deductions made by PSPCL against the monthly energy invoices for the month of April 2020 to June 2020 of its members in the State of Punjab.
2. The petition was taken up for hearing on admission on 12.05.2021, wherein PSPCL requested time to file reply on the maintainability of the petition. PSPCL filed its reply vide memo No. 6218 dated 21.05.2021 and Punjab Energy Development Agency (PEDA) filed its reply vide letter No. 2929 dated 25.05.2021. The petitioner also filed a rejoinder dated 09.06.2021 to the reply filed by PSPCL. The petition was admitted vide order dated 28.06.2021 giving an opportunity to PSPCL & PEDA to file replies on merits. After hearing the parties on 28.07.2021, the Order was reserved.

3. Submissions by the Petitioner

It has been submitted that Solar Power Developers Association (SPDA) is a registered society under the Societies Registration Act of 1860 and is a national association representing solar energy developers. SPDA's seven (7) members own and operate power plants located in Punjab and have been supplying electricity to PSPCL under long term PPAs. The Members of the Petitioner have been strictly complying with their obligation of supply of energy under the respective PPAs and accordingly raising invoices. In the year 2020, the Government of Punjab and the Government of India recognized that the country is threatened with the spread of COVID-19 epidemic, which had already been declared a pandemic by the World Health Organization. In view of the outbreak of

COVID-19 pandemic, GoI declared a lockdown in India effective from 25.03.2020. The guidelines issued by Ministry of Home Affairs, GoI for enforcement of lockdown declared that supply of electricity has been considered as an essential service. Consequently, during the lockdown the SPDs had to face severe hardship to comply with their legal and contractual obligations to generate and supply electricity. In spite of all such hardships, they complied with all of their contractual and legal obligations. However, on 30.03.2020, PSPCL on a flimsy ground of Covid-19 invoking the Force Majeure Clause in the PPA, issued a direction to Solar Power Developers for shutting down their plants till the issuance of the next instructions.

- 3.1 That the Curtailment Notice issued by PSPCL was objected to by the Solar Power Developers on the following grounds:
- a) That notice had been issued in complete ignorance of the terms of the PPA's, provisions of the PSERC (Punjab State Grid Code) Regulations 2013 read with Central Electricity Regulatory Commission (Indian Electricity Grid Code) 2010, Ministry of Power communication dated 25.03.2020 read with MNRE communication dated 26.03.2020.
 - b) That PSPCL had vaguely submitted in the Curtailment Notice that occurrence of Covid-19 led to a crash in PSPCL's system and sought curtailment of power from members of the Petitioner. A bare perusal of schedule instructions of PSPCL reflects that it was drawing power from other sources while issuing instructions to must-run renewable power generating stations to not supply power at all. This instruction for complete non-supply of power is in contravention of the applicable laws.

- c) The contractual framework governing PSPCL and the SPDs, including the respective rights and obligation of the parties, are governed exclusively by the terms and conditions of the PPA. PSPCL is required to adhere to and strictly comply with the terms of such PPAs and any divergence from or non-compliance by PSPCL of the clear and unambiguous terms of the PPAs will constitute a breach on the part of PSPCL. Grounds taken by PSPCL in the Curtailment Notice did not constitute any ground, to refuse scheduling of power from SPDs under the PPA.
- d) PSPCL placed reliance on Article 19 read with Article 11 of the PPA to invoke Force Majeure and stated that the Covid-19 led to load crash without demonstrating the following:
- i. That Covid-19 led to load crash in PSPCL's system to the extent that 100 % power from RE generators had to be curtailed.
 - ii. That 100% curtailment of power from RE generators was issued only after all thermal generating stations had been asked to curtail to their fullest capacity till the epidemic lasts.
 - iii. That no power procurement was undertaken through Short Term Open Access or through the Power Exchange.
 - iv. That grid was endangered due to supply of the power from RE generating stations.
- e) That Clause 19 of the PPA states that to invoke a force majeure clause a party must demonstrate the impact of the force majeure on performance of its obligations and also demonstrate what steps it has undertaken to mitigate consequences of such force majeure events. PSPCL has failed to demonstrate that imposition of lockdown has

affected its obligation to supply power as both PSPCL and members of the Petitioner continued to be operational during that period, therefore lockdown due to pandemic COVID-19 will not qualify as a Force Majeure event as far as the obligations of PSPCL are concerned.

- f) PSPCL has mistakenly relied on Article 11.1.2 to issue the Curtailment Notice. Article 11.1.2 suggests that this clause can be invoked if there is load crash due to *widespread rains, cyclones or typhoons*. There was no occurrence of any widespread rains, cyclones or typhoons. The Punjab State Grid Code defines “Load Crash” as sudden or rapid reduction of electrical load connected to a system that could be caused due to tripping of major transmission line(s), feeder(s), power transformer(s) or natural causes like rain etc. Further, State Grid Code casts an obligation on the State Load Dispatch Centre to control the Load Crash by implementing measures given in the State Grid Code. Section 6.5 of the State Grid Code stipulates as under:

“6.5 Load Crash

6.5.1 In the event of load crash in the system due to weather disturbance or any other reasons, the situation would be controlled by SLDC by getting the following methods implemented from distribution licensee(s) and other concerned Users in descending priorities:-

- (i) Lifting of the load restrictions, if any;*
- (ii) Exporting the power to neighbouring regions/ states;*
- (iii) Backing down of thermal stations with a time lag of 5-10 minutes for short period in merit order;*

(iv) Closing down of hydel units (subject to non-spilling of water and effect on irrigation) keeping in view the inflow of water into canals and safety of canals/hydel channels. Any other instruction issued by NRLDC shall assume priority over all the above methods. The above methodology shall be reviewed from time to time in Operation and Co-ordination Committee.

6.5.2 While implementing the above, the system security aspects as per provisions in section 5.2 of IEGC and Section 5 of the State Grid Code should not be violated. Further, in case of hydro generation linked with irrigation requirements, the actual backing down or closing down of such hydro units shall be subject to limitations on such account & to avoid spillage of water.”

g) Thus powers and obligations with respect to managing injunction and withdrawal of energy and to take any action in case of Grid security issues are only with the SLDC. No other entity including distribution licensee has power to instruct generator for curtailment or injunction of power. PSPCL has mentioned reason of curtailment as ‘load crash’ i.e. incident of Grid security and thus has no locus to send instruction on that basis. IEGC and the State Grid Code in unequivocal terms accords ‘must run’ status to Solar Power Generating Stations and states that backing down instruction to solar power generating stations can only be given on consideration of grid security or if safety of any equipment or personnel is endangered. Notice issued by PSPCL failed to demonstrate occurrence of any such events. Rather, the fact that PSPCL continued to procure power from thermal power plants itself makes it clear that such Curtailment Notice was solely

issued for commercial and economic reasons rather than for grid safety.

- 3.2 That on 01.04.2020 MNRE vide its Office Memorandum confirmed that status of 'Must Run' granted to RE stations remains unchanged during the period of lockdown. Further, MNRE on 04.04.2020 issued a clarification w.r.t. to its OM dated 01.04.2020 clarifying that 'Must Run' status of RE will remain unchanged during the COVID-19 lockdown and any curtailment will amount to Deemed Generation. That on 07.04.2020 PSPCL issued a communication to SPDs in the state including the members of the Petitioner for allowing injection of power into the PSPCL/PSTCL system with immediate effect. Therefore, curtailment by PSPCL of solar power generated by the SPDs was arbitrary and unlawful.
- 3.3 That Article- 3 "Billing Procedure and Payments" of the respective PPAs wherein the Billing Procedure is provided for, requires Designated Representatives of the SPD and PSPCL to record joint readings of the meters at the Inter-Connection Point and at premises of third parties to whom the power is wheeled. The meter reading is to be recorded at 12:00 Hrs on the first day of every calendar month. However, during the Joint Meter Reading ("JMR") for the month of April, PSPCL officials considered 08.04.2020 as the first day of the month instead of taking the readings from 01.04.2020. That, aggrieved by the action taken by PSPCL, the members of the Petitioner raised their respective invoices, for the month of April starting from 01.04.2020 to 30.04.2020. However, at the time of payment of the same, PSPCL deducted the invoice amount corresponding to the power injected/supplied during the period 01.04.2020 to 07.04.2020.

3.4 Also, that PSPCL released only part payments towards the invoices for the months of April, May and June 2020 submitted by the members of the Petitioner without any justification for such deductions. SPDs enquired from the concerned official of PSPCL and were astonished to hear that the deductions of 5% of the invoice amount have been made due to Covid-19 pandemic. PSPCL gave neither any reason nor any justification under provisions of law or PPAs for such deduction. The action of PSPCL is arbitrary and against the covenants and provisions of the PPA and law. The SPDs objected to the unlawful and unilateral deductions made by PSPCL from the amount payable under their respective PPAs. Despite various submissions, PSPCL refused to comply with its legal and contractual obligations.

3.5 That on 06.08.2020, PSPCL requested the SPDs to allow it to deduct 5% of amount from April 2020 to June, 2020 of monthly generation invoices on the ground that it was passing through economic distress as its revenue from industrial and commercial sector had declined considerably due to COVID-19 pandemic and it was finding it difficult to honour its statutory liabilities. The Petitioner, on behalf of its member SPDs approached the MNRE for its intervention for resolution of these billing and payment issues. The SPDs have their day to day working expenses, operation and maintenance costs of running the plant and other overhead costs and such arbitrary deductions by PSPCL lead to grave financial harm to the members. A single day's default in the payment to the lenders would cause the credit rating being downgraded to Default "D" which may trigger higher interest cost and recalling of loan facilities. Thus, the SPDs require the payments to be made at the tariff agreed for in the respective PPAs to service their debts and meet other

obligations arising out of RE Projects. PSPCL's action will discourage the private sector investments in the solar industry and will deter any future investment in the state.

- 3.6 That the Petitioner vide its letter dated 09.02.2021 requested PSPCL to release payment to its members for the energy injected from 01.04.2020 to 07.04.2020 and for the arbitrarily deducted amount of 5% from the invoices of April, May and June 2020, but to no avail. PSPCL has failed to comply with its statutory obligations and the action of PSPCL is in contravention of the provisions of the Electricity Act 2003 which promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity so produced to any person.
- 3.7 That energy has been injected into the grid by the members of the SPDA for the first week of April, 2020 and as per the terms of the PPAs PSPCL is under an obligation to purchase and accept all energy made available by the SPDs, therefore, PSPCL is obligated to make payments for the electricity received and sold by it for commercial gains during the first week of April, 2020. The outbreak of COVID -19 and imposition of lockdown due to the same will not qualify as Force Majeure event in terms of PSPCL's obligations under the PPA and the clarification issued by MNRE on 04.04.2020.
- 3.8 The petitioner has prayed to:
- a) Declare that the Curtailment Notices issued by PSPCL are illegal and consequently issue direction to PSPCL to make payment for consideration of the energy injected during 01.04.2020 to 07.04.2020 by members of the Petitioner;

- b) Direct PSPCL to release payments of the 5% deductions made against the Monthly Energy Invoices for April to June, 2020 of members of the Petitioner;
- c) Direct PSPCL to make the payments alongwith late payment surcharge as per the terms of Clause 3.5.0 of the PPA from the respective due date (viz. 60 days from the invoice date as per the terms of the PPA) of each such payment.
- d) Pass any such further / other orders that the Commission may deem fit in the interest of equity and justice.

4. PSPCL's Submissions

PSPCL filed its reply to the petition submitting as under:

- 4.1 That the present petition has been filed by an Association formed by SPDs, whereas the members of the petitioner association have entered into separate PPAs with PSPCL. The petition is not maintainable as the rights, obligations and remedies qua the sale of purchase of power arise under the respective PPAs and are to be enforced individually with PSPCL with whom they have the privity of contract. The Petitioner Association may aid and assist in activities towards development of RE sector and cater to the needs of the sector by taking suitable measures. However, the same does not create any privity of contract between the Petitioner Association and PSPCL so as to approach this Commission in a 'representative Petition'. SPDs must agitate their individual grievances by approaching this Commission in separate Petitions, claiming the reliefs with respect to the sale and purchase of power under their respective PPAs. The present Petition is thus not maintainable and liable to be dismissed.

- 4.2 That the SPDs have set up their projects under the 'New and Renewable Sources of Energy Policy' of the Government of Punjab to develop and promote new and renewable sources of energy based upon technologies for power generation in Punjab. Each of the seven members of the Petitioner-Association have signed Implementation Agreements(IAs) with the PEDAF for setting up of the solar power projects allocated to them pursuant to a bidding process initiated by PEDAF. Out of the total 884.22MW solar power capacity installed in the State of Punjab, 665 MW capacities has been set up by the SPDs whose grievances are being agitated by the Petitioner Association. The obligation of PSPCL to purchase and accept all the electrical energy which is delivered by the SPDs at the interconnection point and pay tariff for the same is subject to force majeure occurrences in which PSPCL may require the SPDs to *"temporarily curtail or interrupt deliveries of energy"*. Curtailment of power supply in prescribed eventualities is therefore an agreed term under the PPAs which PSPCL is within its contractual rights to enforce together with the follow-up consequences of deductions, if any, in energy bills corresponding to the energy curtailed. Thus, the Petitioner cannot contend that there must be an absolute acceptance of all the power delivered by the SPDs even when curtailment notices have been issued to the said SPDs.
- 4.3 That the force majeure clause in the PPAs provides as under:

"19.1.0 If any party hereto shall be wholly or partially prevented from performing any of its obligations under this Agreement by reason of or on account of lightning, earthquake, fire, floods, invasion, insurrection, rebellion, mutiny, civil unrest, riot, epidemics, explosion, the order of any court, judge or civil

authority, change in applicable law, war, any act of God or public enemy or any other similar cause or reason reasonably beyond its control and not attributable to any negligent or intentional act, error or omission, then such party shall be excused of its obligations/liabilities under this Agreement and shall not be liable for any damage, sanction or loss resulting there from to the other party.

19.2.0 The party invoking this clause shall satisfy the other party of the existence of any force Majeure event and give written notice within seven (7) days of the occurrence of such Force Majeure event to the other party and also take all reasonable and possible steps to eliminate, mitigate or overcome the effect and consequence of any such Force majeure event.

19.3.0 In the event of a Force Majeure event or conditions, any payment due under this Agreement shall be made as provided herein and shall not be withheld.”

Thus a perusal of the aforesaid clause shows that on the happening of the specified events mentioned therein, the party suffering such events is “excused of its obligations/liabilities under the Agreement”. The obligation of PSPCL under the PPAs is to purchase the power from the SPDs and pay agreed tariff for the same; the SPDs enjoying the ‘Must Run’ status, the purchase obligation is with respect to the entire power injected by the SPDs at the interconnection point. But when PSPCL suffers a force majeure event, then it is excused from the said obligation to buy the entire injected power during the period the force majeure event continues. Further, if any, power is injected by the SPDs

at the interconnection point during the period of force majeure/ curtailment, the same does not fall within the contractual bindings under the PPAs and consequently, PSPCL is not obliged to pay any tariff for the same. It is a settled rule of construction that the phrase “any other similar cause or reason reasonably beyond its control” is to be read ejusdem generis with the events contemplated under the clause 19.1.0, being events such as “lightning, earthquake, fire, floods, invasion, insurrection, rebellion, mutiny, civil unrest, riot, epidemics, explosion, the order of any court, judge or civil authority, change in applicable law, war, any act of God or public enemy”; even otherwise, the clause has specifically included “epidemic” as an event of force majeure under the PPAs. It follows that if in the event of an epidemic (or a pandemic) which is a force majeure event under the PPAs, PSPCL is precluded from fulfilling its purchase obligations under the PPAs, then, it will be excused from undertaking the said purchase obligations (including the corresponding payment obligations), particularly when curtailment notices on account of force majeure occurrence have already been issued to it. This basic premise underlying the PPAs has been completely lost sight of by the Petitioner Association while claiming reliefs based solely on the ‘Must Run’ status of the SPDs.

- 4.4 That vide Order dated 22.3.2020, the Government of Punjab, Department of Health and Family Welfare, imposed restrictions to contain the spread of Covid-19 in the State of Punjab. In the wake of consequent declaration of lockdown in the State, there was a sudden decline/dip in the electricity demand due to closure of industries, commercial establishment, offices etc. which forced PSPCL to curtail its power purchase/generation. Considering that a force majeure situation

in terms of clause 19.1.0 of the PPAs had arisen, PSPCL was constrained to serve force majeure notices dated 30.3.2020 on the SPDs (as also on all RE generating companies including central sector generating companies) pursuant to clause 11.1.0 vide which it was intimated as under:

“4) You are hereby intimated that as per Force Majeure Clause no.19.1.0 of subject cited PPA, PSPCL is prevented from performing its obligation of purchasing and accepting energy from your generating company facility on account of force majeure event of epidemic (Covid-19) with immediate effect till this epidemic lasts. During this period, if any power is injected into PSPCL/PSTCL system then the same will be at your risk & cost.

5) This letter may be treated as notice in terms of Force Majeure Clause No.19.0.0 read with clause 11.0.0 of the subject cited PPA.”

The copies of the aforesaid force majeure notices were also served to the RE generators by the State Load Dispatch Centre (SLDC) to discontinue their supply of electricity during the continuance of the pandemic.

- 4.5 That the SPDs objected to the curtailment/force majeure notices, citing their ‘Must Run’ status and contending that the same were in violation of the terms of the PPAs. The said objections were not sustainable in view of the express provisions under the PPAs which entitled PSPCL to suspend its purchase obligations under the PPAs during the period of a force majeure event of the Covid-19 pandemic. PSPCL had clearly described the pandemic as a force majeure in the notices and as such,

the objection that there was no description of event which could qualify as a force majeure, was also not sustainable. However, after issuance of the aforesaid force majeure notices, PSPCL, vide its letters dated 7.4.2020, allowed all RE generators including the SPDs to inject power into the distribution/transmission system in the State with immediate effect; the said letters were issued by PSPCL 'without prejudice'.

- 4.6 As per the force majeure notices dated 30.3.2020, the SPDs (as also the RE generators in the State) had not been paid against the energy supplied/injected by them to PSPCL upto 24:00 hrs. of 7.4.2020. The power supplied to PSPCL during the force majeure period (i.e. 1.4.2020 to 7.4.2020) was 60.10 MUs and the tariff amount against this power was Rs.32.88 crores as per the respective PPA tariff rates. In its Tariff Order for FY 2020-21, this Commission also accepted the impact of Covid-19 pandemic on energy sales of PSPCL during the months of April and May, 2020. Further, the Commission in its Order dated 17.07.2020 passed in Suo-Motu Petition No.12/2020 while reducing the RPO targets of PSPCL for FY 2020-21 also recognized that PSPCL would be financially constrained due to the Covid-19 pandemic adversely affecting the sale of power to various categories of consumers.
- 4.7 That during the relevant period, PSPCL had been passing through severe economic distress as its revenue from the industrial and commercial sector had declined considerably due to Covid-19 pandemic and it was finding it difficult to honour even its statutory liabilities. In this dire situation, PSPCL was constrained to deduct 5% from the gross energy bills of the RE generators for the months of

April to June, 2020. Further, vide letters dated 6.8.2020, dated 17.8.2020 and dated 27.8.2020, PSPCL informed the SPDs as under:

- a) that from the date of commissioning of their projects, PSPCL had regularly been paying against the monthly energy invoices raised by them and the deduction of 5% amount from April to June, 2020 monthly generation invoices was a meagre sum in comparison to the amounts already paid and payable over the term of the PPAs.
- b) that in the wake of severe economic distress being faced by PSPCL, various central sector power generating companies including the Transmission Utilities 'had done their bit' in having offered rebate to PSPCL to enable it to tide over the difficult phase and that a similar gesture was also expected from the end of the RE generators.

4.8 That as discussed with different stakeholders, it was observed that most of the RE generating companies were ready and willing to share the deduction as part of their social responsibility towards sustenance of the power sector; however, in various Meetings with different stakeholders, it was presented that 5% deduction was on a higher side. The matter was deliberated in detail at various levels and it was decided that 75% amount to biomass generating companies (keeping in view the increase in input cost for biomass IPP plants due to increase in labour cost, biomass fuel price, etc.) and 50% of the amount to all other generating companies, from the already deducted amount could be refunded to those who were ready to share balance deduction of 1.25% (biomass generating companies) and 2.5% (all other generating companies) as a part of their social responsibility towards sustenance of the power sector. While some of the RE generators accepted the

offer of PSPCL and agreed to share the deduction as part of their social responsibility towards sustenance of the power sector and an amount of Rs.6.37 Cr. has been settled out of the total deduction of Rs.18.82 Cr. on this account, some others including the SPDs declined to do so.

- 4.9 That the curtailment/force majeure notices have been issued to the SPDs by PSPCL in accordance with the agreed terms of the PPAs entered into with them and as such, cannot be faulted with. At the time of entering into the said PPAs, the SPDs have already been accorded the 'Must Run' status in terms of the various Regulations cited in the present Petition and being fully conscious of this 'Must Run' status, the provision as regards curtailment of power in the event of a force majeure event has been agreed to. As such, according absolute sacrosanct to the said 'Must Run' status dehors the agreed terms under the PPAs and is not admissible. The SPDs are therefore not liable to receive payment for the energy injected by them during the period the curtailment notice has been in force i.e. from 1.4.2020 to 7.4.2020. Reliance by the Petitioner on clause 6.5(11) of the Indian Electricity Grid Code (IEGC) and clause 11.4 of the State Electricity Grid Code (SEGC) vide which the RE power plants have been granted the 'Must Run' status is inconsequential inasmuch as the same IEGC [Part-6, clause 6.2] provides in clause 6.2 that "The provisions contained in this Part are without prejudice to the powers conferred on the RLDC under section 28 and 29 of the Electricity Act, 2003"; similar provisions are contained in the SGC with reference to the powers of the SLDC under sections 32 and 33 of the Electricity Act, 2003.
- 4.10 That Sections 29 and 33 of the Electricity Act 2003 empower the RLDC and SLDC respectively to give such directions and exercise such

supervision and control as may be required for ensuring grid stability, integrated grid operations and achieving maximum economy and efficiency in the operation of the power system in the region or the State. Thus, the IEGC and SEGC is wrongly being relied upon by the Petitioner in isolation for insisting on the 'Must Run' status of the RE power plants without reading the Codes as a whole which make the said status subject to the directions as the RLDC/SLDC may give in exercise of the powers conferred on them under the Electricity Act, 2003. It is a different matter that the force majeure notices have been issued under the contractual provisions as agreed under the PPAs with the SPDs. It is important to mention in the context of the aforesaid that,

- a) No load restrictions have been put by PSPCL in the State during the relevant period;
- b) PSPCL has made bids at the power exchange to sell surplus power but the same has not materialized due to nationwide impact of Covid-19 on the demand of electricity;
- c) during the force majeure notice period, no thermal power station has been running in the State; and
- d) during the force majeure notice period, no power procurement has been undertaken through the exchange or through STOA.

4.11 Since no refund is admissible, it follows that the question of payment of any surcharge thereon also does not arise. It is pertinent to mention here that in the last few years, the interest rates have reduced considerably and the Reserve Bank of India has also extended a slew of measures to ease the financial woes of the commercial sector. Working capital loans rates considered in the tariff have not been

revised/reduced according to the present loan rates and the generators are enjoying higher tariff rate based on historical working capital loan rates, without passing on the benefit of lower interest rates on working capital (or on term loans) to PSPCL and its consumers. In addition, due to reduction in corporate tax rates in recent years, the pre-tax return on equity has increased of which, once again, no benefit is shared with PSPCL and its consumers. Moreover, the cost of RE PPAs is very high considering tariff rates as compared to present tariff rates of RE Power. PSPCL had not sought to claim the passing on of the above benefits; however, during the relevant period when PSPCL has been passing through severe economic distress and its revenues from the industrial and commercial sectors have declined considerably due to the Covid-19 pandemic, making it difficult to honour even its statutory liabilities, PSPCL has been constrained to deduct 5% from the gross energy bills of the RE generators for the months of April to June, 2020. The deduction is only 5% of 3 months energy payments out of the payments payable for 25 years which works out to be just about 0.05% of the energy payments payable over the period of contract period of 25 years. There is no merit in the present Petition and the same is liable to be dismissed.

5. PEDAs Submissions

PEDA in its reply to the petition has submitted that the petitioner has sought relief(s) against PSPCL and as such there is no role attributable to PEDA with regard to the impugned action of PSPCL. However, PEDA also submitted that:

- 5.1 PEDA's subsidiary Punjab Genco Limited, which owns and operates various RE projects, is also similarly aggrieved on account of the

impugned actions of PSPCL. PSPCL has deducted/withheld the payments arbitrarily invoking force majeure clause on account of the lockdown declared due to COVID-19 pandemic despite the fact that RE Power Projects are 'must run' projects.

- 5.2 That considering the importance of RE projects to the nation, MNRE vide office memorandum dated 20.03.2020 came out with the relief to the RE projects, where under the RE agencies were directed to consider suitable time extension in scheduled date of commissioning of RE projects due to disruption of supply chain on account of Corona Virus. However, PSPCL rather than supporting the RE power projects being 'must run' plants, issued notices on the pretext of occurrence of force majeure condition in an illegal manner to the RE Power generators in the State. In the meantime MNRE vide communication dated 01.04.2020 rendered clarification that the status of the RE Generating Stations as a must run projects shall remain unchanged during the period of lockdown and directions were issued to all the Discoms that payments to the RE generators be made on regular basis as was being done prior to lockdown. The MNRE further, vide communication dated 04.04.2020, reiterated that the status of the RE generating stations remains 'must run' and any curtailment for grid safety would amount to deemed generation.
- 5.3 That the actions by PSPCL are unsustainable in the eyes of law and deserve to be set aside.

6. Rejoinder by the Petitioner

The petitioner filed a rejoinder to the reply filed by PSPCL. While reiterating its earlier submissions, it has submitted:

- 6.1 That the Commission is bound by its Regulations and the Electricity Act 2003 is an exclusive code which is not bound by the procedures contemplated under any other procedural laws. The Electricity Regulatory Commissions can adopt any procedure as long as it satisfies two aspects i.e., Principles of natural justice and Transparency as it has been held in case of Gujarat UrjaVikas Nigam Ltd. v. GERC(Appeal 279 of 2013) and Maruti Suzuki India Ltd. vs HERC (Appeal 200 of 2011). The Petitioner has approached the Commission under the Act and PSERC (Conduct of Business) Regulations, 2005 to issue directions which are essential for the development and promotion of generation of electricity from RE sources. As per Regulation 9 of the above Regulations read with Section 2 (49) of the Electricity Act 2003 an association can file a Petition before the Commission. A bare reading of the two indicates that the Commission may initiate proceedings on a petition filed by any affected or interested person and the definition of 'person' under the Act includes any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical persons.
- 6.2 That the Commission is created by a special statute to regulate the electricity sector of the state of Punjab. If an occasion arises, this Commission may interfere with the finding of fact, finding of law or a mixed question of law and fact of the authority. That the jurisdiction of this Commission is not circumscribed in any manner whatsoever. The power to regulate procurement process of a Distribution Licensee is wide ranging power. There is no provision in the Act which overrides the said powers of the State Commission. The powers of the Commission under the Electricity Act to take measures conducive to the development of

renewable energy cannot be questioned. Hence, the Petition is maintainable in the present form.

- 6.3 That the Commission in petition No. SMP 12/2020 has also specifically directed PSPCL to honour terms of the PPA entered into with RE generating company. Therefore, PSPCL has also acted against the specific direction of the Commission by non-payment of the tariff.
- 6.4 That PSPCL is vaguely relying on the alleged load crash theory ignoring specific provisions of law which provide mechanism to deal with load crash. PSPCL has not submitted any document to show load crash during the Force Majeure Period and a bare reading of documents recording power consumption of the State of Punjab during Force Majeure Period reflects that there was no load crash.
- 6.5 That provisions of the PPA have to be read in consonance with applicable laws and if there is conflict between terms of the applicable laws and terms of the PPA, terms of the applicable laws shall prevail over terms of the PPA. The IEGC and SGC grant 'Must Run' status to RE power developers and this position cannot be altered or varied by way of any contract or agreement especially when electricity has been declared as essential services by MNRE and Ministry of Power. Even if we assume but not concede, that the provisions of the PPA are contrary to terms of the laws, it is a settled law that laws and regulations override the existing agreements, if agreements are found to be in conflict with the law.
- 6.6 That the NRSE Policy, 2012 under which these projects have been established states, under Clause 6.6, that RE power shall be accepted by the PSPCL/PSTCL even in difficult circumstances such as during high frequency hours to ensure full utilization of non-conventional energy

resources. Further, as per IEGC/SGC, solar/wind generating plants, having been granted 'Must-Run' status can only be asked to back down/curtail power on consideration of grid security or if safety of any equipment or personnel is endangered. Therefore, operation of solar projects and their 'Must Run' status cannot be curtailed unless under exceptional circumstances of maintaining grid security and safety.

6.7 That even if it is assumed that Curtailment Notice has been issued due to load crash, PSPCL was under an obligation to comply with applicable laws concerning load crash. Clause 6.5 of SGC casts an obligation on PSPCL to undertake following steps in cases of load crash:

- a) Lifting of the load restrictions, if any;
- b) Exporting the power to neighbouring regions/states;
- c) Backing down of thermal stations with a time lag of 5-10 minutes for short period in merit order;
- d) Closing of hydel units (subject to non-spilling of water and effect on irrigation)

A bare reading of the afore-stated steps reflects that even in cases of load crash there is no mention of closing/backing down of renewable energy stations. It is, thus, very clear from the above that renewable energy stations will not be asked to back down their generation in case of load crash as well.

Thus, even if PPA enables PSPCL to issue backing down instruction in cases of load crash, however for acting upon these rights, PSPCL needs to demonstrate that a load crash situation was persisting even after resorting to measures given under Clause 6.5 of SGC. Such a situation will only arise when there is zero demand of electricity.

- 6.8 That even if a pandemic like Covid-19 falls within the ambit of a force majeure clause that, by itself, would not relieve a party from performance of contractual obligations. The force majeure event must have a direct impact on non-performance and the party seeking to rely on the force majeure event is also under duty to mitigate and/or explore alternate means of performance.
- 6.9 That there was no load crash between 1st of April, 2020 and 7th April, 2020. Monthly Report of Power System Operation Corporation Limited of the month of March, 2020 and April, 2020 will reflect that there was no load crash at all. Therefore, the issuance of curtailment notice by PSPCL and consequently, non-payment for the energy injected during the curtailment period is blatantly unlawful and illegal apart from being in contravention to the terms of the PPA. The reliance placed by PSPCL on the order dated 17.07.2020 of this Commission in SMP 12 of 2020 is incorrect and misleading.
- 6.10 That PSPCL has reduced the deduction from 5% to 2.5% for those SPDs who agreed to give their rightful dues under pressure from PSPCL. It is an admitted fact that PSPCL refunded 2.5% back to those few SPDs who agreed to let go of their rightful claims and succumbed to the pressures of PSPCL. It is illegal and irrational that two similarly placed SPDs are unjustly and differently treated by PSPCL, one succumbing to the pressure tactics adopted by PSPCL and the others not. This conduct of PSPCL demonstrates that they have acted in a very unfair manner and have put unreasonable pressure upon some SPDs to accept the unauthorised and illegal deduction of 2.5% from their energy Bill for releasing the balance 2.5% of the arbitrarily deducted amount.

7. Observations and Decision of the Commission

The Commission has carefully gone through the petition, reply by the respondents, rejoinder by the petitioner, arguments made by the parties and the written submissions of the parties. The observations and decision of the Commission is as under:

7.1 Curtailment Notices issued by PSPCL for curtailing solar power during the period from 01.04.2020 to 07.04.2020:

The petitioner SPDA pleaded that the notice had been issued in complete ignorance of the terms of the PPAs and the provisions of the Grid Code Regulations. The PPAs states that to invoke a force majeure clause a party must demonstrate the impact of the force majeure on performance of its obligations and the State Grid Code accords 'must run' status to Solar Power Generating Stations stating that backing down instruction can only be given on consideration of grid security or safety of any equipment or personnel is endangered. PSPCL had mentioned in the Curtailment Notice that occurrence of Covid-19 led to crash in PSPCL system, whereas it was drawing power from other sources while issuing curtailment instructions to the must-run generating stations.

However, PSPCL while accepting that the SPDs are enjoying the 'Must-Run' status and the purchase obligation is with respect to the entire power injected by the SPDs at the interconnection, contended that its obligation to purchase and pay tariff for the same is subject to force majeure occurrences.

In order to examine the issue, the Commission refers to the relevant terms and conditions of the PPAs, which specifies as under:

a) Clause 11.0.0 (Continuity of Service) states as under:

“The PSPCL/PSTCL Load Despatch Centre may require the Generating Company to temporarily curtail or interrupt deliveries of energy only, when necessary for circumstances:

.....

11.1.5 Under Force Majeure Conditions of the PSPCL/PSTCL.

.....

b) Clause 19.1.0 (Force Majeure) states as under:

“19.1.0 If any party hereto shall be wholly or partially prevented from performing any of its obligations under this Agreement by reason of or on account of lightning, earthquake, fire, floods, invasion, insurrection, rebellion, mutiny, civil unrest, riot, epidemics, explosion, the order of any court, judge or civil authority, change in applicable law, war, any act of God or public enemy or any other similar cause or reason reasonably beyond its control and not attributable to any negligent or intentional act, error or omission, then such party shall be excused of its obligations/liabilities under this Agreement and shall not be liable for any damage, sanction or loss resulting there from to the other party.”

The Commission observes that, the terms and conditions of the PPAs specifies that, If any party is wholly or partially prevented from performing any of its obligations under this Agreement by reason of or on account of force majeure event(s) including epidemics, the order(s) of any civil authority etc., then such party shall be excused of its obligations/liabilities under this Agreement and shall not be liable for any damage, sanction or loss resulting there from to the other party.

There are no two opinions regarding the issue of Covid-19 being an epidemic and declaration of lockdown by the Government to control the same. The petitioner has also admitted to the same in its submissions. However, to absolve either of the party from performing its obligations under the Agreement, it needs to be established that the party has been wholly or partially prevented from performing its obligations under the Agreement on account of such event(s). The Commission is of the view that notwithstanding that it was a force majeure event, the terms and conditions of PPAs needs to be read in conjunction with the provisions of the State Grid Code Regulations (SGC), which specifies as hereunder:

“5.4 Special requirements for Solar/ wind generators

5.4.1 System operator (SLDC) shall make all efforts to evacuate the available solar and wind power and treat as a must-run station. However, System operator may instruct the solar /wind generator to back down generation on consideration of grid security or safety of any equipment or personnel is endangered and Solar/ wind generator shall comply with the same.”

As is evident, solar power having a ‘must-run’ status can be curtailed by the System operator (SLDC) only on consideration of grid security or safety of any equipment or personnel. The Commission observes that the SLDC has not indicated any such eventuality in its notice to the generators.

Further, the Commission observes that PSPCL had served curtailment notices to the generators indicating load crash in its system, which is defined in the State Grid Code as under:

“Sudden or rapid reduction of electrical load connected to a system that could be caused due to tripping of major transmission line(s), feeder(s), power transformer(s) or natural causes like rain etc.”

To examine the matter, the Commission referred to the data submitted by the petitioner, which has not been contested by PSPCL. It indicates that, the peak/off-peak demand of PSPCL changed from 4932/3278 MW on 21.03.2020 to 3867/2318 MW on 22/23.03.2020 i.e. on the first day of declaration of Covid lockdown and thereafter the average peak/off-peak demand was about 3000/1800 MW upto 31.03.2020. This indicates that there was a reduction in the demand of PSPCL, on account of shutdown of the commercial and Industrial establishments, upon declaration of the lockdown by the State Government to prevent spread of Covid epidemic. However, the same cannot be technically termed a load crash as per the definition contained in the State Grid Code.

After the initial reaction and thereafter due to clarity about the sectors exempted from lock down, the average peak/off-peak demand of PSPCL picked up slightly and was observed to be about 3400/2000MW during the curtailment period of 01.04.2020 to 07.04.2020. PSPCL, however opted for curtailment of solar power while continuing drawl of power from the conventional energy sources, ignoring the ‘Must-Run’ status accorded to solar power under the State Grid Code.

Thus, the Commission is of the view that PSPCL's unilateral action of curtailing solar power during the period of 01.04.2020 to 07.04.2020 is unjustified.

7.2 Payment for the energy injected by the Solar Developers during the Curtailment period of 01.04.2020 to 07.04.2020:

It has been submitted by the petitioner that, most of the solar developers continued to inject the solar power in the PSPCL's system during the period of curtailment, which was received and sold by PSPCL, for commercial gains.

The Commission is of the view that, the curtailment of solar power by PSPCL during the period from 01.04.2020 to 07.04.2020 has been held to be unjustified in the above para. Moreover, the said power injected into its system had been utilised by PSPCL to meet its demand requirements. Accordingly, PSPCL is required to make the payments for the same, along with the late payment surcharge as may be applicable, as per the provisions of the PPA.

7.3 Payments of the 5% deductions made against the Monthly Energy Invoices for the month of April to June, 2020:

The petitioner has submitted that PSPCL released part payments towards the invoices for the month of April, May and June 2020 after making deductions of 5% of the invoice amount, without giving any reason or justification which is against the provisions of the contract.

However, PSPCL tried to justify its action of making deductions citing severe economic distress due to decline in its revenue on account of shutdown of the commercial and industrial establishments due to COVID-19 pandemic. PSPCL also submitted that no refund is admissible to the

generators who have chosen to give primacy to only their commercial gains despite the considerable reduction in the interest rates in the last few years and are enjoying higher tariff rates without passing on the benefit to the consumers.

The Commission observes that PSPCL's submission regarding the severe economic distress on account of considerable decline in its revenue from the industrial and commercial sector due to COVID pandemic is a part of their business cycle and thus its alleged adverse effect on their revenues cannot be unilaterally passed on to the Generators. As it is, the payment made to the generators is a pass through to the consumers for PSPCL. PSPCL's contention about the non-passing of the benefits of reduction in interest rates by the generators to the consumers is also not tenable. Adjustment in tariff for such variation in interest upward or downward is not a part of PPA and hence cannot be resorted to unilaterally by PSPCL. PSPCL would not be expected to increase the agreed to tariff in favour of the SPD if the interest rates increase.

In view of the above, the Commission is of the view that PSPCL's action of unilateral deduction from the monthly invoices of the generators is in conflict with the provisions of the PPA, as there is no clause in the PPA which allows for such an arbitrary deduction.

Further, PSPCL's action to pay back a part of the deducted amount to only some of the generators is also arbitrary.

The Commission, however notes that some of the generators have consented to a part deduction from their monthly invoices. Such deduction(s) effected with mutual consent are a matter between the contracting parties and are not a subject matter of adjudication by the Commission. However, in cases where the deductions from the monthly invoices have been made without the consent of the generators, PSPCL is required to release the same, along with the late payment surcharge as may be applicable, as per the provisions of the PPA.

The petition is disposed of in terms of the above.

Sd/-

(Paramjeet Singh)
Member

Sd/-

(Anjuli Chandra)
Member

Sd/-

(Viswajeet Khanna)
Chairperson

Chandigarh
Dated: 24.09.2021