

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH**

Petition No. 20 of 2016 &

IA No. 13 of 2016

Date of Order: 21.03.2017

Present: Shri D.S. Bains, Chairman
Shri S.S. Sarna, Member

In the matter: Petition under section 86(1)(f) of the Electricity Act, 2003 read with Regulation 10, 69, 71 and 73 of the PSERC (Conduct of Business) Regulations, 2005 and Regulation 85 of CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 (adopted by the Commission vide its Order dated 19.07.2012 in Petition No. 35 of 2012 (Suo-Motu) read with clause 19.1.0 of the Power Purchase Agreement dated 31.03.2015, article 10 of the Implementation Agreement dated 24.03.2015 and section 94 of the Electricity Act, 2003, for seeking project specific extension of period of commissioning of the project upto 30.04.2016 with applicable tariff of ₹ 7.45 per kWh.

And

In the matter: PL Sunshine Limited (SPV Company of M/s Punj Lloyd Infrastructure Limited) having its Regd. office at 17-18, Nehru Place, New Delhi through its authorized signatory of Shri Amit Gupta.

.....Petitioner

Versus

- 1.Punjab State Power Corporation Limited (PSPCL), through its Managing Director having its office at the Mall, Patiala.
- 2.Punjab Energy Development Agency (PEDA) through its Director having its office at Solar Passive Complex, Plot No.1 & 2, Sector 33-D, Chandigarh.

.....Respondents

ORDER

PL Sunshine Limited, a SPV Company of Punj Lloyd Infrastructure Limited, filed this petition on 22.03.2016 under section 86(1)(f) of the Electricity Act, 2003 (Act) read with Regulation 10, 69, 71 and 73 of the PSERC (Conduct of Business) Regulations, 2005 and Regulation 85 of CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 (adopted by the Commission vide its Order dated 19.07.2012 in petition no. 35 of 2012 (Suo-Motu) read with clause 19.1.0 of the Power Purchase Agreement (PPA) dated 31.03.2015, article 10 of the Implementation Agreement (IA) dated 24.03.2015 and section 94 of the Act, for seeking project specific extension of period of commissioning of the project upto 30.04.2016 with the applicable tariff of ₹ 7.45 per kWh. The petitioner also filed an Interlocutory Application under section 94 (2) of the Act for grant of interim stay restraining PEDA from invoking the Performance Bank Guarantees (PBGs) given by the petitioner and further restraining PEDA from getting the cheque dated 17.03.2016 for ₹ 48 lakh encashed. This cheque was handed over to PEDA under protest as a security deposit to avoid the invocation of the PBGs. The said cheque should be returned back to the petitioner.

2. The Commission admitted the petition and interlocutory application vide Order dated 22.03.2016. PSPCL and PEDA were directed to file their reply to the petition and application by 26.04.2016 with an advance copy to the petitioner and to each other. PEDA was restrained from invoking/encashing the PBGs given by the petitioner till the next date of hearing of the petition

i.e. 03.05.2016. PEDA was further directed to maintain the status quo regarding encashment of the cheque dated 17.03.2016 for ₹ 48 lakh which was handed over to PEDA under protest to avoid the invocation of the PBGs till the next date of hearing i.e. 03.05.2016.

The petition was taken up for hearing on 03.05.2016. PSPCL filed its reply to the petition dated 28.04.2016 with copy to the petitioner and PEDA. PEDA failed to file its reply. During the hearing, PEDA was directed to file its reply through e-mail and hard copy alongwith a copy to the petitioner and to PSPCL by 16.05.2016 through e-mail as well as hard copy. The Commission vide Order dated 04.05.2016 directed the petitioner to file a rejoinder, if desired, by 23.05.2016 through e-mail as well hard copy to the respondents.

The petitioner submitted during the hearing that its plant stands commissioned subsequent to the filing of this petition. The petitioner was directed to file an additional affidavit affirming the date of commissioning of plant, supported by documents, by 26.05.2016.

Meanwhile, PEDA was restrained from invoking/encashing the PBGs given by the petitioner and to maintain the status quo of the cheque dated 17.03.2016 of ₹ 48 lakh handed over to PEDA till the next date of hearing which was fixed for 31.05.2016.

The petition was taken up for hearing on 31.05.2016. The petitioner filed a status report of commissioning of the project by way of a short affidavit of the authorized signatory of the petitioner company affirming that the full commissioning of the project was done on 24.03.2016. PEDA filed its reply dated 24.05.2016 with a

copy to the petitioner and to PSPCL. The petitioner filed the rejoinder dated 30.05.2016 on 31.05.2016 to the reply filed by PEDA dated 24.05.2016.

When the matter came up before the Commission, the parties requested that hearing of the petition be adjourned for hearing the arguments of the parties to 07.07.2016. Accordingly, the Commission vide Order dated 09.06.2016 fixed the next date for hearing on 07.07.2016. Meanwhile, PEDA was restrained from invoking/ encashing the PBGs given by the petitioner and to maintain the status quo of the cheque dated 17.03.2016 of ₹ 48 lakh handed over to PEDA till the next date of hearing which was fixed for 07.07.2016. The petitioner was directed to ensure the extension of the validity of the PBGs, beyond 07.07.2016, if needed.

Subsequent to the Order dated 09.06.2016 of the Commission, the counsel for the petitioner submitted that both he and the counsel for PEDA shall be busy in a matter listed before the Hon'ble APTEL on 07.07.2016 at Delhi and prayed that the hearing of the petition be adjourned for a later date. The Commission considered the prayer and vide Order dated 27.06.2016 fixed the next date for hearing the final arguments of the parties on 21.07.2016. Meanwhile, PEDA was restrained from invoking/encashing the PBGs given by the petitioner and to maintain the status quo of the cheque dated 17.03.2016 of ₹ 48 lakh handed over to PEDA till the next date of hearing which was fixed for 21.07.2016. The petitioner was directed to ensure extension of the validity of the PBGs, beyond 21.07.2016, if needed.

The Commission postponed the date for hearing the arguments from 21.07.2016 to 30.08.2016.

During the hearing on 30.08.2016, PSPCL submitted that the copy of rejoinder was not yet supplied to it. The petitioner was directed to supply the same via email. The Commission vide Order 31.08.2016 directed PSPCL to file its reply by 08.09.2016 through email as well as hard copy with an advance copy to the petitioner and PEDA. It was further directed that if any of the parties want to file written submissions, the same may be filed by 13.09.2016 with an advance soft copy as well as hard copies to the other parties. It was held that interim stay shall continue and the status quo shall be maintained regarding the cheque amounting to ₹ 48 lakh handed over to PEDA till the next date of hearing. The next date for hearing the arguments was fixed as 20.09.2016.

Counsel for the petitioner vide email dated 16.09.2016 requested for an adjournment for a week. Acceding to the request of the petitioner, the Commission fixed the next date for hearing on 04.10.2016 instead of 20.09.2016. The Commission further postponed the date of hearing fixed for 04.10.2016 to 20.10.2016.

The petition was taken up for hearing the arguments on 20.10.2016. During the hearing, the counsels for PSPCL and PEDA stated that the petitioner has filed the reply dated 18.10.2016 to the final submissions of PSPCL. Both the respondents prayed that they may be allowed to file their submissions. The Commission vide Order dated 24.10.2016 directed PEDA and PSPCL to file their submissions with a copy to each other and the petitioner by 27.10.2016 (through e-mail as

well as hard copy). The next date for arguments was fixed as 03.11.2016.

The petition was taken up for the arguments on 03.11.2016. The petitioner's representative stated that counsel for the petitioner is not well and an email to this effect was sent to the Commission seeking an adjournment. Counsel for PSPCL as well as the representative of PEDA stated that they have not come prepared for the arguments in view of the email received from counsel of the petitioner and requested for an adjournment. The Commission vide Order dated 04.11.2016, acceded to the prayer of all the parties and fixed the next date for arguments on 08.12.2016.

Subsequent to the Order dated 04.11.2016, the counsel for the petitioner vide email dated 06.12.2016 requested for an adjournment of the hearing from 08.12.2016 to 15.12.2016 stating that Shri Amit Gupta, Legal Head of the company, who is aware about all the facts of the case has to attend a meeting of solar developers at Dehradun on 08.12.2016. It was further submitted by the Counsel for the petitioner that the presence of Shri Amit Gupta, being the Legal Head of the company, would be required for preparation of arguments being well conversant with the facts of the case. Acceding to the request of the petitioner, the Commission fixed the next date for hearing on 20.12.2016 instead of 08.12.2016. The Commission further postponed the date of hearing from 20.12.2016 to 24.01.2017.

The matter came up for arguments on 24.01.2017. All the parties advanced their arguments at length. During the hearing, the counsel appearing on behalf of the petitioner supplied a copy of the Judgments passed by Hon'ble APTEL in Appeal No.100 of

2013 and Appeal No. 98 of 2014 and the Order of Uttrakhand Electricity Regulatory Commission in the matter of UREDA Vs UPCL & Ors. Both the aforementioned judgments were taken on record.

The Commission noted that the following documents/details were required to be filed by the petitioner:

- a) purchase orders for solar PV modules and structures for the 16 MW capacity commissioned on 28.02.2016 and the balance 4 MW commissioned on 24.03.2016.
- b) cost of laying the 66 kV line on single circuit towers from the petitioner's plant upto PSPCL substation including stringing of the conductor.
- c) cost of stringing/fixing the conductors/material on the 66 kV double circuit towers from the petitioner's plant upto PSPCL substation.
- d) loan agreement and the date on which the petitioner approached the financial institution for execution of the same.

The Commission in its Order dated 27.01.2017 directed that PSPCL shall submit the information as mentioned at sr. no. (b) & (c) above. PEDA was directed to intimate the date on which the cheque dated 17.03.2016 of ₹ 48 lakh handed over by the petitioner was deposited in the bank and the date on which the amount was credited in the account of PEDA. The Commission directed that the aforesaid information/documents shall be submitted by the concerned parties within one week of the issue of the Order. All the parties were heard and it was held that after the

receipt of the requisite documents, the final Order in the petition shall be pronounced.

3. Submissions made by the petitioner are summarized in brief as hereunder:

- i) The petitioner is a limited liability company duly registered under the provisions of Companies Act, 1956. The petition pertains to the PPA dated 31.03.2015 executed between the petitioner and PSPCL. The petitioner seeks extension of the Commercial Operation Date (COD) for un-commissioned capacity out of the total capacity of 20 MW for a period upto 30.04.2016 with the applicable tariff of ₹ 7.45 per kWh and seeks further direction that no coercive action shall be taken by the respondents with regard to PBGs deposited by the petitioner. The delay in achieving the COD was solely attributable to force majeure events which were beyond the control of the petitioner.
- ii) PEDA issued the Request for Proposal (RfP) dated 24.12.2014 for inviting solar power developers for establishment of an aggregate 250 MW capacity solar projects under phase-II in the State of Punjab. This capacity was divided in three categories i.e. Category-I: 1 to 4 MW (aggregate capacity 50 MW), Category-II: 5 to 24 MW (aggregate capacity 100 MW) and Category-III: 25 to 50 MW (aggregate capacity 100 MW). The selection of bidders was based on net availed tariff after providing discount on generic tariff notified by the Commission for solar PV power projects for FY 2014-15, irrespective of availing normal rate of

depreciation/accelerated rate of depreciation. The petitioner was declared as a successful bidder for solar PV power project of 20 MW capacity at a net tariff of ₹ 7.45 per kWh after providing a discount on generic tariff of ₹ 7.72 per kWh. PEDA issued the Letter of Award (LoA) dated 25.02.2015 to the petitioner. As per the LoA, the petitioner was required to submit a performance security by way of irrevocable bank guarantee at the rate of ₹ 40 lakh per MW totaling to ₹ 8 crore and was required to sign the IA with PEDA within 30 days from the date of signing of LoA and further was required to sign the PPA with PSPCL. The petitioner was also required to report the tie up of financing arrangements for the project in a time bound manner. An IA was signed between the petitioner and PEDA on 24.03.2015. The petitioner submitted the PBGs to PEDA of ₹ 8 crore in terms of article 6.2(iv) of the IA. The PPA was signed on 31.03.2015 between PSPCL and the petitioner. As per the IA/PPA the project was to be commissioned within 10 months from the date of signing of the PPA. As per the PPA, the Scheduled Date of Commissioning (SCOD) for the project was 30.01.2016.

- iii) The time allowed by PEDA/PSPCL for implementation of these projects without any damages and penalties was 10 months as against 13 months for the projects allotted under phase-I and 12 months for the project allotted under phase-III. This is the shortest time allowed by any authority for implementing large scale grid connected solar PV power projects in India.

- iv) As per the terms of clause 19.4 of the PPA, the relevant provisions of the IA with regard to the force majeure events occurring during the commissioning period of the project will be applicable. The recital of the PPA clearly stipulates that all the clauses and regulatory norms applicable to the IA shall be unequivocally applicable to the PPA in its true letter and spirit. Therefore, the IA is to be read as part and parcel of the PPA.
- v) The petitioner despite its best efforts commissioned only 16 MW capacity out of the total 20 MW allocated capacity on 28.01.2016. The petitioner, due to occurrence of the following force majeure events, which were beyond its control was not able to achieve the commissioning of remaining capacity by the SCOD:
 - a) approval of PPA by the Commission on 11.05.2015 though PPA was signed on 31.03.2015;
 - b) sub-registrar staff strike;
 - c) unrest due to desecration holy Sri Guru Granth Sahib in Punjab;
 - d) jat agitation in Haryana;
 - e) route approval of transmission line by PSPCL.
- vi) The petitioner while signing the PPA found that PSPCL inserted a new clause 35 in the PPA, which was not part of the PPA provided in the RfP. Clause 35 is reproduced as under:

"The PPA shall be effective & binding on the parties only upon approval of the PPA by the Hon'ble PSERC & the PPA shall be subject to such conditions as may be

stipulated by the Hon'ble PSERC while granting such approval.”

The petitioner and other solar developers objected to the same as PSPCL should have got the PPA approved from the Commission before its date of execution and it was now uncertain as to how much additional time will be required by PSPCL in obtaining the approval of the Commission. The petitioner was assured by the respondents that the approval from the Commission shall be obtained in 5-7 days time. The insertion of clause 35 in the PPA rendered it practically ineffective and non bankable, until it was approved by the Commission. PSPCL filed the petition no. 21 of 2015 before the Commission seeking its approval to procure the electricity and also to approve the PPA. The Commission vide its Order dated 11.05.2015 allowed the petition and approved the PPA. During this period of nearly one and a half month, the project and financial closure activities could not be progressed due to uncertainty/non-bankability of the PPA. Out of ten months implementation period, the petitioner could not do any work for more than one month and eleven days. The effective implementation period left with the developers was reduced from 10 months to 8½ months.

- vii)The staff of revenue department went on pen down strike in different spans of time due to which the petitioner was not able to complete the formalities with regard to lease of land. Therefore, the land documents could not be submitted to respondents in time, which caused delay in commissioning of

the project. The said event is a force majeure event since the strike was not in the control of the petitioner.

- viii) There was unrest in the State of Punjab on account of desecration of holy Sri Guru Granth Sahib at various places and section 144 was imposed in almost whole of the State from 14.10.2015 to 22.10.2015. The occurrence of this event is an event of force majeure since the same was beyond the control of the petitioner.
- ix) Jat agitation in the State of Haryana started in the middle of February and turned violent around 20.02.2016, which ended around 24.02.2016. Due to the said agitation, the entry and exit points of the State were put under curfew, which restrained the petitioner from receiving the materials for structure and balance of system to reach the site of the power plant to enable its construction.
- x) The petitioner requested PSPCL for the approval of 66 kV transmission line route through existing double circuit transmission towers of PL Surya Urja Limited on which single circuit transmission line has been installed. PSPCL delayed the approval for the same on the ground that its rules currently do not permit the same and assured the petitioner that it is revising the rules to allow the same. The petitioner wrote many letters in this regard and meetings were held between the petitioner, PSPCL and PEDA for immediate issue of the circular in the interest of timely commissioning of the project. PSPCL issued Commercial Circular No. 42 of 2015 dated 12.10.2015 after four and a half months. This

was a change in law and falls under the political force majeure. Due to delay in the approval of route of transmission line by PSPCL, the petitioner could not take various decisions on time and this caused delay in completion of the entire project.

- xi) In response to the joint representation dated 06.01.2016 vide which PEDA was requested for grant of extension in the SCOD of the solar PV projects upto 31.03.2016, PEDA vide letter dated 18.01.2016 informed the developers that as per the RfP terms and conditions, it is not possible to grant any extension in the SCOD of the allocated solar PV power projects and clause 3.23 of the RfP shall prevail for any delay beyond the SCOD.
- xii) The respondents are acting contrary to the terms of the IA/PPA and public interest. The action of PEDA is also contrary to its statutory obligations and terms of its license. The petitioner having no other recourse was compelled to file the petition.
- xiii) By granting the extension of the COD, no loss is going to be caused to the respondents. The respondents have granted the tariff to the petitioner after calling competitive bids and PSPCL has agreed to purchase the power at such tariff. Due to delay in commissioning of the project, if tariff is reduced, then it would adversely affect the petitioner as the reduced tariff would be applicable for 25 years and shall result in irreparable harm, injury and grave injustice to the petitioner as the delay in commissioning is solely attributable to the

force majeure events beyond the control of the petitioner, whereas no loss is going to be caused to the respondents because PSPCL would get the electricity for complete 25 years at the rates which have been already approved.

xiv)Without prejudice to the submissions of the petitioner in the petition, as per section 72 of the Indian Contract Act, 1872 irrespective of a clause in a contract/PPA for quantifying the liquidated damages, an aggrieved party can only claim actual damages sustained by it as a result of any default by the other party in fulfilling its obligations under the contract. The LD/penalty amount is only an upper limit on the said actual damages. Hence, without adducing evidence and demonstrating the actual damages suffered, a party cannot unilaterally proceed to invoke the LD/penalty amount by way of invocation of the PBGs.

xv)PEDA sent a letter to its bankers to invoke the PBGs to the extent of 30% for un-operational capacity i.e. 4 MW out of the total allocated 20 MW capacity. The petitioner to avoid the invocation of PBGs handed over a cheque of ₹ 48 lakh under protest towards security in lieu of invocation of PBGs as invocation of PBGs in currently depressed financial sector may adversely affect the banking relationship of the petitioner.

xvi)The petitioner is also claiming interim relief for restraining PEDA from invoking the PBGs and also to return the cheque of ₹ 48 lakh given by the petitioner.

xvii) It is prayed to the Commission to:

- a) set aside and/or quash the letters dated 18.01.2016 of PEDA;
- b) hold and declare that the COD of the project of the petitioner qua un-operational capacity stands extended till 30.04.2016 in accordance with clause 10 of the PPA read with article 7.0 of the IA on account of force majeure events, in the interest of justice;
- c) hold and declare that the petitioner is entitled to tariff of ₹7.45 per kWh in terms of the PPA during the extended COD period;
- d) direct PEDA not to invoke the PBGs and to not take any coercive actions whatsoever against the petitioner;
- e) restrain PEDA from getting the cheque of ₹ 48 lakh, encashed given by the petitioner to PEDA on 17.03.2016, as deposit security to avoid invocation of PBGs and further direct PEDA to return the said cheque to the petitioner, in the interest of justice; and
- f) pass such or further orders as the Commission may deem just and proper in the circumstances of the case.

4. PSPCL's reply dated 28.04.2016 in brief is as hereunder:

- i) The petitioner is seeking extension in the COD upto 30.04.2016 with applicable tariff of ₹ 7.45 per kWh and stay on invocation of PBGs by PEDA. The plant of the petitioner was synchronized on 01.02.2016 with PSPCL system as per permission given by PSPCL on 27.01.2016. The prayer of

the petitioner for extension of the COD from 30.01.2016 to 30.04.2016 is baseless. PSPCL is a performa respondent and has no major role to play at this stage.

- ii) The grounds of delay in COD of the project as taken by the petitioner are vague and technically incorrect, legally defective and concocted ones. All the grounds taken by the petitioner on account of force majeure events do not fall under the clause 19.1.0 of the PPA. The clause 19.1.0 of the PPA deals with the natural calamities or events like unrest, epidemics, any court order, change in law or any act of God. The grounds taken in the petition *inter alia*, deals with the approvals, an incident which happened in Faridkot, some agitation in another state and a self-created alibi of non-availability of staff of Sub-Registrar at District, Mansa. The grounds taken by the petitioners do not hold ground and are liable to be dismissed, which would entitle the present petition to be dismissed with exemplary costs to be imposed on the petitioner.
- iii) The petition was filed purblindly with an intention to hide the incapability and incapacity of the petitioner in commissioning of the project by SCOD, seeking an illegal and unrealistic Order from the Commission by not disclosing the true facts and concealing the material facts which were relevant for the just disposal of the petition.
- iv) The Commission has set the target of Renewable Purchase Obligation (RPO) compliance for procurement of power from renewable sources of energy and for compliance to the same, the tenders were invited. If the petitioner would delay

the commissioning of the project it would defeat the purpose of tendering to comply with the Commission's Order regarding RPO compliance of the year, meaning thereby, PSPCL has to purchase the expensive RECs to comply with the target without its any fault. Keeping into consideration the compliance of RPO and delay in commissioning of the project by the petitioner, either the respondent may be allowed to encash the PBGs or carry forward the RPO by saddling the petitioner with heavy cost to be paid to PSPCL.

- v) The petitioner requested for grid feasibility clearance on 08.05.2015 after more than one month of signing of the PPA. The delay of 38 days in applying for grid feasibility has not been explained and the same was unreasonable. There is no bar with regard to the time period for applying grid feasibility clearance.
- vi) As per the clause 10.1.0 of the PPA the generating company was under an obligation to commission and synchronize the project with PSPCL grid within 10 months from the date of signing of PPA i.e. 31.03.2015. Therefore as per the PPA, the SCOD for the project was 30.01.2016. The time schedule for commissioning and synchronization of the project was mentioned at the time of bid.
- vii) The issue with regard to approval of PPA by the Commission is not only a practice but is also a legal binding on both the parties. The petitioner should have done the due diligence before entering into the PPA with PSPCL or before bidding for the project. The plea with regard to the assurance by

PSPCL that approval of the PPA would be obtained in 5-7 days is false and concocted. PSPCL did not give any such assurance to the petitioner. If the petitioner was having problem with clause 35 of the PPA, the same should have been challenged or they should have objected to it or should not have signed the PPA.

- viii)The delay in commissioning of the project is on the part of the petitioner and PSPCL has no role in the same. The petitioner is taking the alibi of force majeure events therein due to certain unavoidable circumstances. As per clause 19.1.0 of the PPA, Grounds of force majeure events do not fall under the categories mentioned in the clause 19.1.0 of the PPA.
- ix) Although the approval of the Commission was required after signing of the PPA but there was no bar that the petitioner cannot initiate other processes and formalities for the commissioning of the project.
- x) It is wrong that there was strike by the staff of the sub-registrar as mentioned by the petitioner. The incident of desecration of holy Sri Guru Granth Sahib took place in district Faridkot which is more than 110 kms from the project. Therefore, there was no effect of the situation prevailing in district Faridkot in district Mansa.
- xi)Jat agitation initiated in District Rohtak, Haryana which is 220 kms away from the project of the petitioner. The agitation did not have any effect in State of Punjab. The plea as taken by the petitioner is wrong.

- xii)The petitioner has not mentioned that on which date it applied for approval of transmission line to PSPCL. The plea taken by the petitioner is not only vague but also non-believable and is liable to be dismissed. PSPCL made all endeavor to assist the generating companies in all the formalities with regard to the synchronization or grid feasibility on urgent basis as the delay in providing the same would cause loss to PSPCL itself as it would have to purchase the expensive RECs for the RPO compliance.
- xiii)In case the extension in the COD is granted, then the tariff as imposed should be reduced so that PSPCL and the public at large should not suffer. It is the sole responsibility of the petitioner to fulfill the terms and conditions as agreed to by it while signing the PPA.
- xiv)The bank guarantee and the cheque submitted by the petitioner was against the non-compliance of the terms of IA and PPA. It is a self-attested document of the petitioner wherein it has agreed that if the petitioner would not be in a position to commission the project on time, PSPCL and PEDA would be at liberty to encash the PBGs and the cheque.
- xv)The petitioner has failed to comply with the terms and conditions as mentioned in the PPA. It is requested to dismiss the petition in the interest of justice with exemplary costs on the petitioner as it has not disclosed the clear facts.

5. The petitioner in its rejoinder dated 23.05.2016 to the PSPCL's reply dated 28.04.2016 while reiterating its earlier submissions further submitted as hereunder:

- i) PSPCL is admitting that there is delay on its part and have submitted that seeking approval of the PPA from the Commission is the practice prevalent in Punjab. At the time of execution of PPA it was found that there was a new clause 35 in the PPA and as per this clause the PPA shall be effective & binding on the parties only upon its approval by the Commission & the PPA shall be subject to such conditions as may be stipulated by the Commission while granting such approval. There is no doubt that the PPA has to be approved by the Commission but before signing of the PPA it was never informed by PSPCL or PEDDA that the PPA was yet to be approved. In the PPA attached with the RfP, clause 35 did not exist. The petitioner & other solar developers objected to the same as PSPCL should have got the PPA approved from the Commission before its date of execution and it was now uncertain as to how much additional time will be required by PSPCL in obtaining the approval of the PSERC. Moreover, PSPCL invited the petitioner to sign the PPA only on the last day of tariff validity knowingly that petitioner cannot afford to miss the signing of the PPA. It is wrong that PSPCL had not assured that the approval of the PPA would be obtained in 5-7 days. It is now very easy for the PSPCL to deny this fact as the petitioner has not taken this assurance in writing. The petitioner would have challenged the clause 35 of the PPA in case PSPCL

had told that approval of the PPA would take long time. As the petitioner was assured by the respondents that the approval from the Commission shall be obtained in 5-7 days time so the petitioner and other similarly situated developers signed the PPA. The petitioner objected to the clause 35 of the PPA as this could potentially delay the implementation period which was already under the tight time lines of 10 months, but since it was the last day for signing of PPA, the petitioner was left with no other option but to sign the PPA on the assurance of PSPCL that it would get the PPA approved from the Commission within a week's time. PSPCL should have got the draft PPA approved from the Commission before getting it signed. The averments made by PSPCL are in contradiction with clause 35 of the PPA wherein it was specifically mentioned that the PPA would be effective & binding on the parties only upon its approval by the Commission. So until the PPA was approved by the Commission, the petitioner could not be expected to start any major work as the PPA was not bankable and it was not effective.

- ii) The recital of the PPA clearly stipulates that all the clauses and regulatory norms applicable to the IA dated 24.03.2015 shall be unequivocally applicable to the PPA in its true letter and spirit. Therefore, the IA is to be read as part and parcel of the PPA. PSPCL cannot deny the contents of the IA by merely saying that it was not executed by it though as per recital of the PPA the IA is an integral part of the PPA.

- iii) Upto 11.05.2015 the petitioner could not start any work because the PPA was yet to be approved by the Commission and the same was ineffective and non-bankable. In fact, PSPCL was required to get the draft PPA approved before it is executed by the parties. But the PSPCL filed petition after the PPAs were executed. So out of total 10 months implementation period, the petitioner could not do any work for one month and 11 days. The effective implementation period left with the developers was thus reduced from 10 months to nearly 8½ months. So the petitioner is entitled to get benefit of extension of control period by the period this matter of approval of PPA was pending before the Commission.
- iv) PSPCL delayed the project by initially not getting the PPA approved from the Commission before getting it signed and then again took four months time in making necessary changes in its rules. These are change of law situations and falls under force majeure clause.
- v) If PSPCL is aware of the fact that they would suffer a huge loss and also public at large as RPO compliance as directed by the Commission would not be met then PSPCL would not have committed any default and given all possible assistance to the developers for commissioning the projects in time. PSPCL failed to get the draft PPA approved from the Commission before the PPAs were executed by the parties and thereafter put a clause in the PPAs that these would be effective from the date these are approved by the Commission and in this way caused a delay of 41 days.

Thereafter again PSPCL took more than four months in issuing the commercial circular no. 42 of 2015. This Circular could be issued earlier and thus precious time could be saved. Now PSPCL is trying to put the blame of its mistakes on the petitioner. There is no issue of reducing tariff as the plant has been commissioned before 31.03.2016.

- vi) The Commission has power to conduct prudence check with regards to the occurrence of the said force majeure events and subsequently extend the SCOD. For arguments sake it is presumed that the incidents which caused the delay in commissioning of the project does not fall under the force majeure, then the Commission has inherent powers to extend the control period as the delay occurred due to the whole fault of the PSPCL and for the fault of the PSPCL, the petitioner cannot be punished.
- vii) As per section 72 of the Indian Contract Act, 1872 irrespective of a clause in a contract/PPA for quantifying the Liquidated Damages (LD), an aggrieved party can only claim actual damages sustained by it as a result of any default by the other party in fulfilling its obligations under the contract. The LD/penalty amount is only an upper limit to the said actual damages. Hence, without adducing evidence and demonstrating the actual damages suffered, a party cannot unilaterally proceed to invoke the LD/penalty amount by way invocation of the PBGs.
- viii) The prayer made by PSPCL was wrong. PSPCL is not entitled to get any relief from the Commission. In view of the

submissions made above and in the petition, it is prayed that the petition filed by the petitioner may be allowed and the relief claimed in the petition may be granted, in the interest of justice.

6. PEDA in its reply dated 24.05.2016 submitted in brief as hereunder:

- i) The petition is bad both in terms of de-jure & de-facto and is based on conjunctures and surmises and is not maintainable in the eyes of law. The petitioner has not demonstrated the true factual matrix of the matter and in order to evade its bounden obligation of achieving the SCOD well within time, as stipulated in the RfP, LoA and IA, has tried to setup a false and frivolous case. The petition is not maintainable as there exists an arbitration clause in the IA entered between the parties.
- ii) The petitioner could not achieve the COD in terms of the RfP, LoA and IA on various pretexts, which otherwise are unsustainable. However, from the petition, it is per se apparent that the petitioner while misusing the process of law in order to invoke section 86(1)(f) of the Act has purported as if a dispute between the petitioner and PSPCL has arisen, despite there been a conceded case of the petitioner that the petitioner could not achieve full COD of allocated capacity of 20 MW qua the project by the scheduled date of commissioning i.e. 30.01.2016 (mentioned wrongly by PEDA as 31.01.2016). The petitioner completed and commissioned the full capacity of 20MW of the project on 24.03.2016.

- iii) The IA entered into between PEDA and the petitioner is the main contractual document, which provides that the petitioner was to set up the project and to achieve COD by 30.01.2016, however, the petitioner has failed to achieve COD for the full capacity of the project as provided in the IA.
- iv) The petitioner while misleading the Commission has wrongly sought interim order dated 22.03.2016 passed by the Commission, as to restraining PEDA from encashing the PBGs deposited by the petitioner with PEDA, which is against the settled cannons of law laid down by Hon'ble Supreme Court of India in catena of judgments. Since the petitioner has failed to fulfill its obligation of setting up the complete project up till 30.01.2016, in line with the provisions of the RfP/LoA/IA, therefore, the petitioner is liable to be levied with penalty and PEDA becomes entitled to encash the PBGs deposited by the petitioner in line with the contractual terms agreed between the parties.
- v) In line with the terms and conditions of the RfP, the petitioner deposited two unconditional PBGs dated 03.01.2015 & 10.02.2015 amounting to ₹ 8 crore, with PEDA. As per the terms and conditions of the RfP/IA, the developer was under a bounden obligation to commission the plant on or before 30.01.2016. It has been provided in the contractual documents that the PBGs submitted by the developer shall be encashed/invoked to the tune of 30% of the PBGs for delay upto one month for the un-commissioned project capacity, on account of penalty. Further delay of more than

one month shall attract the encashment of remaining 70% of the PBGs on account of penalty.

- vi) The petitioner could not commission the full capacity of the project well within the stipulated date i.e. 30.01.2016. The petitioner commissioned the partial project capacity of 16MW on 28.01.2016 and commissioned the full allocated project capacity of 20MW at a much later stage on 24.03.2016, hence, PEDA, while giving various prior intimations as to the timely commissioning of the project, rightly initiated the process of invocation/encashment of the PBGs.
- vii) The petitioner vide letter dated 17.03.2016 requested PEDA for accepting the amount of penalty leviable upon the petitioner by way of cheque bearing no. 593250 dated 17.03.2016 amounting to ₹ 48 lakh and further requested not to invoke the PBGs. From the perusal of letter dated 17.03.2016, it would be revealed that the petitioner itself requested for accepting a cheque for the penalty amount thereby requesting that their PBGs should not be invoked. While handing over the said cheque to PEDA, the petitioner assured PEDA as to the encashment/honoring of the cheque. The said cheque was encashed and deposited in PEDA's account on 21.03.2016 before the Order dated 22.03.2016 of the Commission. PEDA did not issue the PBGs invocation letter in view of the aforesaid fact that the penalty amount was deposited by the petitioner.
- viii) The petitioner while misleading the Commission filed the petition having false, frivolous and misleading assertions and

sought interim order dated 22.03.2016, whereby the Commission has restrained PEDA from invoking/encashing the PBGs and to maintain status quo of cheque dated 17.03.2016, amounting to ₹ 48 lakh handed over by the petitioner to PEDA under protest to avoid invocation of the PBGs.

- ix) The petition deserves to be dismissed as there exists an arbitration clause in the contractual document(s) and as per the settled canons of law, in case there exists an arbitration clause in the contractual documents entered between the parties the matter can be adjudicated upon by arbitration in case any dispute arises.
- x) The petitioner is liable to pay the penalty for delay in commissioning of the complete capacity of the project. Hence, PEDA is entitled to encash the PBGs submitted by the petitioner on account of 24 days delay in the month of March 2016 as the full capacity of the project was commissioned on 24.03.2016.
- xi) Hon'ble Supreme Court of India as well as Hon'ble Punjab and Haryana High Court in catena of judgments have held that in case of breach of contract the encashment of the bank guarantee cannot be restrained. Therefore, the interim order dated 22.03.2016 of the Commission deserves to be vacated and PEDA is entitled to seek/charge the amount of penalty on account of delay in commissioning of the complete capacity of the project.

- xii)The assertion of the petitioner as to purported occurrence of force majeure events are concerned the same is belied from the fact that in the same phase of allocated projects, 7 solar power projects with total 62 MW capacity have been successfully commissioned by similarly placed developers. Hence, no reliance can be placed upon the false and purported assertions made by the petitioner.
- xiii)The petitioner has failed to give notice to PEDA in line with the force majeure clauses of the IA. No reliance can be placed upon the false and purported assertions made by the petitioner in petition as to delay in commissioning of the project due to the purported occurrence of the force majeure events. Hence the petition needs to be dismissed with exemplary costs.
- xiv)The petitioner has already commissioned the complete plant of 20MW on 24.03.2016 and thus prayer of the petitioner for extension in the COD for un-commissioned capacity upto 30.04.2016 is redundant and in-fructuous.
- xv)The petitioner has failed to commission the full capacity of the project on or before the SCOD i.e. 30.01.2016. The plea of the petitioner with respect to implementation of the project within 10 months from the date of signing of the PPA without penalty as against 13 months allocated under phase-I and 12 months under phase-III are concerned, the same are denied being twisted in nature. As the petitioner at the time of participating in the bidding process carried out by PEDA under the RfP document, was very well aware of the

timelines to be achieved for the commissioning of the project. The petitioner was further made aware of the timelines at the time of issuing LoA and thereafter the petitioner at the time of entering into the contractual document i.e. IA has duly acknowledged all the terms and conditions mentioned therein. Hence, the petitioner at this stage cannot be permitted to raise any purported grievance as to setting up of the project in question within the stipulated timeline i.e. on or before 30.01.2016.

xvi)It is wrong that PEDA inserted the clause 35 in the PPA. As per the LoA, the petitioner was to achieve the financial closure within 120 days from the date of signing of the PPA i.e. by 31.07.2015. However, as per documents submitted by the petitioner the financial closure was achieved and the IREDA issued sanction letter for loan approval vide letter dated 31.03.2015 and this document was submitted to PEDA by the petitioner vide its letter dated 19.10.2015. Therefore, the petitioner's claim that the financial closure activities got delayed by nearly one and half month is totally frivolous and false as IREDA issued loan sanction letter to the petitioner on 31.03.2015. The in-principle approval of the IREDA nowhere indicates that the petitioner was faced with any such difficulty as purported above and neither the petitioner while submitting these documents has stated any difficulty with regard to financial closure.

xvii)The IA in light of the clauses of the PPA does not loses its sanctity and happens to be a primary contractual document entered between the petitioner and PEDA, as the same

happens to be the very basis of allocation, setting up and running of the project under the provisions of PPA.

xviii)The petitioner has mentioned six force majeure events, which the petitioner purportedly claims to have delayed the commissioning of the project by the scheduled date. The force majeure clause provided there under the IA, stipulates that the affected party shall give written notice to the other parties describing the particulars of the force majeure event as soon as reasonably practicable after its occurrence but not later than 5 days after the date on which such party knew of the commencement of the force majeure event or of its effect on such party. Similarly, the PPA also provides for issuance of notice as to the occurrence of force majeure event within a period of 7 days. However, the petitioner has failed to issue any such notice invoking the aforesaid clause as to the occurrence of force majeure event(s) if any, in line with the terms and conditions of the IA. Hence, no reliance can be placed upon the plain assertions made by the petitioner.

xix)The reasons for incorporating clause 35 in the PPA and signing the conditional PPA on 31.03.2015 and finally getting approval of the Commission on 11.05.2015 relates to PSPCL. The plea of the petitioner with respect to the signed PPA being non-bankable is wrong, as the loan sanctioned letter was issued by IREDA on 31.03.2015 and accordingly the financial closure was achieved on 31.03.2015. However, the financial closure document was submitted to PEDa on 19.10.2015. The in-principle approval of IREDA nowhere

indicates that the petitioner faced any difficulty as purported by the petitioner. The petitioner while submitting financial closure document to PEDA did not mentioned any difficulty faced by it in achieving financial closure. In view of the Disclaimer clause in the RfP, it is submitted that the RfP clearly states that the IA and PPA attached with the RfP were indicative in nature and were as available at the time of issue of the RfP and could be changed at any time. The petitioner has failed to produce on record any letter written under article 10.4 of the IA and/or clause 19.2.0. of the PPA for the occurrence of force majeure event due to delay in signing the PPA or due to conditional PPA.

xx)The petitioner has failed to demonstrate any occurrence of the purported events by way cogent evidence in support thereof. The petitioner has no where intimated the happening of the strikes to PEDA. The petitioner has failed to issue notice to PEDA in line with the conditions of the IA as to the occurrence of force majeure events. Hence, no reliance can be placed upon the false and purported assertions of the petitioner. The purported plea set up by the petitioner is an afterthought so as to enable the petitioner to circumvent its obligation of setting up the project in a time bound manner. When the petitioner realized that it has failed to set up the project within the stipulated time frame, the petitioner in order to run away from imposition of penalty levied due to delay in commissioning, as provided under the IA, it has set up the false plea of occurrence of the purported events by wrongly mentioning the same to be force majeure events.

xxi)The purported force majeure events referred by the petitioner is an afterthought, as the petitioner just in order to run away from its bounden obligation to set up the project in a time bound manner as provided there under the IA and in order to escape from the consequential penal action stipulated there under the RfP and IA, has tried to set up false and frivolous pleas as to the occurrence of the force majeure events.

Further, the petitioner submitted that the desecration of holy Sri Guru Granth Sahib took place in village Bargari, Faridkot, however, the project site falls in district Fazilka, Punjab and hence the purported plea of the petitioner is also belied from this fact.

Further, the Jat agitation took place in the State of Haryana which is far away from the project site and has no relevance/effect on the setting up of the project by the petitioner in a time bound manner. The petitioner has also failed to demonstrate as to which obligation the petitioner could not perform due to the occurrence of the purported force majeure event(s). Hence, no reliance can be placed upon the false and frivolous pleas set up by the petitioner.

xxii)PEDA took up the issue with PSPCL for its resolution with regard to the approval of 66 kV transmission line route in order to provide facilitation for the project.

xxiii)The petitioner has got the grid feasibility clearance to evacuate the power at 66 kV sub-station Boha on 15.05.2015. The petitioner was also in possession of the required land as on 25.05.2015. The petitioner could easily

go ahead and set up the project and the matter for transmission lines could have been approved in parallel manner and as such could not have affected the work of construction of the project. The petitioner has failed to demonstrate/place on record the notice, compulsorily to be issued by the petitioner, for invocation of force majeure clause of the IA, in case of occurrence of any of the force majeure events.

xxiv) Since the petitioner has failed to commission its project well within the stipulated time i.e. on or before 30.01.2016, PEDA issued letter dated 18.01.2016 for levy of penalty as per agreed contractual terms.

xxv) As per the agreed contractual terms between the parties, PEDA is entitled to levy penalty upon the petitioner in case of delay in commissioning of the project beyond the stipulated date i.e. 30.01.2016. It is wrong that PEDA was aware as to the occurrence of any of the force majeure events as purported by the petitioner.

xxvi) By granting extension in the COD, a huge loss would be caused to PSPCL as delay in commissioning of the project is affecting the RPO compliance. Any delay in the commissioning of the project results in adding liability of RECs on the state licensee and therefore, there is a loss to the State and resultantly load is on the consumers of the State. The delay in commissioning of the project is directly attributable to the petitioner. Further the petitioner was able to complete only the 16MW capacity of the project on

28.01.2016 complete in all respects which was synchronized with the PSPCL grid on 28.01.2016. However, the petitioner in its letter dated 30.01.2016 to PSPCL with a copy to PEDA wrongly intimated that it has synchronized 20 MW capacity of the project on 28.01.2016, whereas the project capacity synchronized was 16 MW. Further the petitioner in its letter dated 08.03.2016 to PEDA intimated that it has synchronized the 20 MW capacity of the project on 28.01.2016 and requested for issue of commissioning certificate for the same. The request of the petitioner was wrong and it was through PEDA's District Manager report dated 04.02.2016 that it was confirmed that the actual project capacity installed and commissioned was 16 MW. The remaining 4 MW capacity of the project could have also been completed and synchronized by the petitioner on 28.01.2016. Though there have been no force majeure events as claimed by the petitioner, however, even if the petitioner's contention is to be believed in this regard, then also it is not possible that the force majeure conditions will affect only the commissioning of partial 4 MW capacity of the project. Hence, the petition deserves to be dismissed with exemplary costs.

xxvii)The petitioner has intentionally intermingled the imposition of penalty and imposition of liquidated damages. In fact, penalty and LD are two different terminologies having different nature. In case of penalty, no evidence as to the actual loss suffered is required as the imposition of the same has been provided under the contract agreed to by both the parties i.e. the petitioner and PEDA.

xxviii)PEDA has acted in line with the terms and conditions of the IA. However, the petitioner wants to evade its bounden obligations provided under the IA.

xxix)In good faith and believing the petitioner, PEDA did not issue its request for invocation of the bank guarantee to the issuing bank of the bank guarantee i.e. Bank of Baroda. The cheque no. 593250 dated 17.03.2016 amounting to ₹ 48 lakh was presented to PEDA bankers and the same was encashed on 21.03.2016, before the orders dated 22.03.2016 of the Commission.

xxx)The petitioner failed to give any notice for invocation of force majeure clause, therefore no reliance can be placed upon the false assertions made by the petitioner. As the project was commissioned on 24.03.2016, the prayer for grant of extension of the COD uptill 30.04.2016 is rendered infructuous.

xxxi)The petitioner is not entitled for any relief as prayed in the petition. The Commission may dismiss the petition with exemplary costs and PEDA be allowed to invoke the PBGs deposited by the petitioner on account of levy of remaining 70% penalty applicable on the un-commissioned capacity due to delay in the commissioning of the project or in alternate, the petitioner be immediately directed to deposit the amount of the penalty for delay in commissioning of the project with PEDA, in line with the contractual documents entered between the parties in the interest of justice, equity and fair play.

7. The petitioner in its rejoinder dated 30.05.2016 to the PEDA's reply while reiterating the earlier submissions further submitted in brief as hereunder:

- i) It is wrong that the petition is bad both in terms of de-jure and de-facto. It is also wrong that the petition is based on conjectures & surmises and not maintainable in the eyes of law. It is wrong that the petitioner has not demonstrated the true factual matrix of the matter and in order to evade its bounden obligation, as stipulated therein, the RfP, LoA and IA, for achieving the COD well within time, has tried to setup a false and frivolous case.
- ii) The implementation period of the project cannot be deemed to have been commenced before PPA comes into force and is legally binding on the parties and is effective. Generally, any contract is fully effective and enforceable from the date of its signing but in the present case, the date of signing of the PPA is different from the date it became effective, legally binding on the parties and acquired force of law. The PPA was though signed on 31.03.2015 but became effective, legally binding on the parties and acquired force of law only on 11.05.2015, the date when it was finally approved by the Commission.
- iii) It is wrong that the petition is not maintainable as there exist an arbitration clause in the document entered between the parties. This issue already stands decided by Hon'ble Supreme Court of India vide its judgment dated 13.03.2008 in Appeal (Civil) 1940 of 2008 in Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Limited.

- iv) It is settled principle of law that any dispute between a generator and a distribution licensee has to be adjudicated under section 86(1)(f) of the Act by the respective State Commission. The present dispute requires adjudication by the Commission. Whether or not the other party to a contract committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether it committed breach or the other party committed breach. The question can only be decided by only an adjudicatory forum i.e. the Commission. The Commission has inherent powers to pass an appropriate order to provide justice to the affected person.
- v) It is wrong that the IA entered into between PEDA and the petitioner is the main contractual document. As per recital of the PPA, the IA is the integral part of the PPA. Though the petitioner was required to set up the project and to achieve full capacity by 30.01.2016 but due to the force majeure events and faults of the respondents, which were beyond the control of the petitioner, only 16 MW could be considered commissioned out of the total 20 MW capacity. Despite all constraints, the petitioner tried to implement the project in least possible time as is evident from the progress achieved by it during the implementation period. The project was synchronized with PSPCL's 66 kV grid at Boha on 28.01.2016. Substantial work was also completed on the balance capacity but despite all efforts of the petitioner, balance capacity could not be considered operational on or before 30.01.2016. The progress of the project was duly

acknowledged by PSPCL vide letter dated 03.02.2016 and also in the joint inspection report dated 04.02.2016 where the joint monitoring committee acknowledged that substantial work on the balance 4MW capacity has also been completed. The petitioner was continuously adding the capacity to PSPCL grid since 28.01.2016 in respect of the remaining 4 MW capacity. However, monitoring committee certified full commissioning on 24.03.2016 after its physical inspection as per their convenience inspite of petitioner's repeated reminders to PEDA. PEDA finally issued letter dated 05.04.2016 certifying that the total capacity of 20 MW solar PV power project stands commissioned on 24.03.2016.

- vi) It is wrong that the petitioner got the interim order dated 22.03.2016 while misleading the Commission.
- vii)The developer was required to commission the plant on or before 30.01.2016 (mentioned wrongly by the petitioner as 31.01.2016) and failing which the PBGs could be encashed as per the provision contained in the IA/RfP. As per IA and PPA, the total period allowed for commissioning the project was 10 months. As per clause 35 of the PPA, the PPA was specified to become effective, legally binding and enforceable only after it was approved by the Commission.
- viii)The PPA was approved by the Commission vide its Order dated 11.05.2015 and as such upto 11.05.2015 the PPA could not be acted upon by the petitioner. This period ran out of the petitioner's hand without any of its fault and for no reasons attributable to the petitioner and petitioner thus

virtually got 8½ months only instead of 10 months to implement the project as envisaged in the bidding documents and the PPA. Since, there was no fault of the petitioner to delay the commissioning of the project, the petitioner has filed the petition before the Commission for extension of date of commissioning on these grounds. Requests were also made to PEDA for extension of time of the COD but PEDA acting against the mandate of the provisions of NRSE Policy, 2012 and instead of helping out and considering the genuine concerns of the petitioner proceeded to invoke the PBGs without any proper justification. PEDA never informed the petitioner before signing of the PPA that it would be effective only after it was approved by the Commission. PEDA did not disclose material facts regarding approval of the PPA by the Commission and obtained bank guarantee by concealing the material facts from the petitioner. The PBGs were given by the petitioner as per clause 3 of the RfP.

- ix) As per the RfP, the petitioner was entitled for 10 months for commissioning of the project. The petitioner was informed at the time of signing of PPA that the PPA is not effective at the time of its signing and it would be effective and binding only after its approval by the Commission. The PPA was finally approved and ratified by the Commission only on 11.05.2015 and as such period of 41 days during the implementation period of the project was made not available to the petitioner for none of its fault specially when the time of implementation was too strict. PEDA did not do anything to curtail this period.

This delay was totally beyond the control of the petitioner. Even before invoking the PBG, no prior notice was given by PEDA to the petitioner. 16 MW capacity of the project was commissioned on 28.01.2016 and remaining 4 MW was commissioned on 24.03.2016.

- x) When the petitioner got information that PEDA is in a process to invoke PBGs for an amount of ₹ 48 lakh, the petitioner immediately met the officials of PEDA on 17.03.2016 to understand the issue and informed the reasons for alleged delay in commissioning of the project and also informed that the petitioner is approaching the Commission by way of filing a petition for extension of the COD. When PEDA refused to accept reasons for delay in commissioning and confirmed that it is going to invoke PBGs, in order to prevent an irreparable damage on its credibility in the depressed banking environment, petitioner had no other option but to offer a cheque of ₹ 48 lakh to PEDA under protest with a request not to invoke its bank guarantee. In the letter dated 17.03.2016 it was specifically mentioned that the petitioner has issued a cheque of ₹ 48 lakh as security/deposit to PEDA under protest. This cheque was given to PEDA with an understanding that the amount shall be kept by PEDA as the deposit of the petitioner and adjust the same towards penalty only if the Commission holds the decision of PEDA to levy penalty on the petitioner justified and correct or return the amount without any dispute if petitioner succeeds in its claim before the Commission or in legal battle before any appropriate authority/court. The

cheque was handed over to PEDA as a security and nothing more. The petitioner has never acknowledged its liability to pay any penalty for delayed commissioning of the project as the delays are attributable to reasons beyond the reasonable control of the petitioner.

xi) PEDA has no defence and filed vague reply. The invocation of the PBGs is subject to other terms and conditions of the IA. The perusal of article 10.5 (ix) of the IA would show that the article 7 of IA is not absolute and it is qualified by article 10 of the IA. As such once the matter is pending before the Commission, PEDA has no right to invoke the PBGs.

xii) It is settled principle of law that the stay can be granted by the Hon'ble Court from encashment of PBGs on the merits of each case. The facts of each case are different and thus needs to be seen separately. In the present case, article 7 of the IA is qualified by article 10 and as such PEDA does not have absolute right to invoke the bank guarantee.

PEDA allotted total 250 MW capacity and out of this only 62 MW capacity has been successfully commissioned. This fact itself belies the stand of the PEDA. There exists force majeure events and defaults on the part of the respondents which caused delay in commissioning of the project by the petitioner and other developers.

xiii) The facts of the petition no. 27 of 2016 in the matter of Talwandi Sabo Power Ltd. Vs. PSPCL are different than the facts of the present case. Even if for arguments sake it is presumed that the Commission comes to conclusion that

there exists no force majeure, still the Commission has inherent powers to pass an appropriate order to provide justice to the affected person, provided the Commission is satisfied that the reasons of delay were not attributable to the petitioner.

xiv)It is correct that IREDA sanctioned loan vide letter dated 31.03.2015 but final loan documents and disbursements were not released for the want of a legally binding and effective PPA, as the PPA was considered non bankable till it was finally approved by the Commission. The sanction of loan is merely a non binding intention of the financial institution to finance a project and financial institution is free to specify any additional stipulation or cancel the same at its own discretion before final disbursements. IREDA signed the loan agreement only after the PPA was approved by the Commission. No disbursement was released by IREDA before PPA was made effective/acquired force of law i.e after it was approved by the Commission.

xv)The force majeure events of Jat agitation and desecration of holy Sri Guru Granth Sahib were widely reported in the media reports and its impacts and disturbances needs no explanations. The recital of the PPA clearly stipulates that all the clauses and regulatory norms applicable to the IA shall be unequivocally applicable to the PPA in its true letter and spirit. Therefore, IA is to be read as part and parcel of the PPA.

xvi)The averments made by PEDA are totally in contradiction to the clause 35 of the PPA wherein it was specifically mentioned that the PPA would be effective & binding on the parties only upon approval of the PPA by the Commission. So until the PPA was approved by the Commission, the petitioner could not be expected to start any work as the PPA was not effective and binding on the parties. By mentioning Disclaimer clause in the RfP, PEDA cannot shirk away from its responsibilities as mentioned in NRSE Policy, 2012. The disclaimer talks about any mistake etc. done in good faith but it does not give power to add a new clause 35 in the PPA which makes the PPA ineffective and non binding. After the PPA was approved by the Commission the petitioner tried its best to commission full capacity of the project within the stipulated time line i.e. 30.01.2016 but due to the fault of PSPCL, 16MW was commissioned on 28.01.2016 and the full plant was commissioned on 24.03.2015. In case the PPA had been approved at the time of signing the PPA, the petitioner would have got 41 days more i.e. clear 10 months as envisaged in the PPA/RfP. The petitioner raised this issue before PEDA on various occasions and in the joint representation dated 06.01.2016 but PEDA failed to give any relief. The Commission has the power to conduct prudence check with regards to the occurrence of the said force majeure events and subsequently extend the SCOD.

xvii)In whole of the Punjab section 144 of the CPC was imposed and in view of this no work could be done. Jat agitation was initiated in the State of Haryana and that too from district

Rohtak and that the project is located fairly away from Rohtak but this is evident from the media reports that it was violent in other parts of Haryana connecting Punjab including Hisar, Sonipat etc. The Plant is situated in district Mansa which is located just 3 to 4 kms away from Haryana Border and Hisar is close to it. However, it is wrong that the agitation was not so violent or loud that it did not have any effect in the State of Punjab. Due to the said agitation the materials to be supplied to the petitioner got stuck at the borders of the State.

xviii)It is correct that on the request of the petitioner PEDA took up with PSPCL the issue with regard to approval of 66 kV transmission line route in order to provide facilitation for the project. The petitioner approached PSPCL for getting approval of 66 kV transmission line route through existing double circuit transmission towers of PL Surya Urja Limited. PSPCL delayed the grant of the necessary approval on the ground that its rules currently does not permit the same and assured that the petitioner that it is revising its rules. The petitioner wrote many letters in this regard and meetings were also held between PSPCL, petitioner and PEDA to highlight the necessity for immediate issue of the relevant circular in the interest of timely completion of the project. PSPCL issued commercial circular no. 42 of 2015 nearly after four and a half months and after that law was amended and the necessary approval was given to the petitioner. This was a change in law and falls under political force majeure. Due to delay in approval of route of transmission line by

PSPCL, the petitioner could not take various decisions on time and this caused delay in completion of the entire project.

xix)PEDA cannot absolve itself from its obligation to act as facilitator of the NRSE projects by replying that matter pertains to PSPCL. PEDA charged a facilitation fee of ₹ 50 lakh for the same from the petitioner. PEDA submitted that the petitioner was in possession of land and also had technical feasibility clearance and could easily go ahead and set up the project and the matter for transmission lines could have been approved in parallel manner. PEDA has failed to realize that construction of transmission line needs to be approved by state utility being a transmission authority as per the Act and the route approval need to be published in the gazette before it can be constructed. The transmission line was completed by the petitioner in a proper legal manner only after obtaining approval of PSPCL which took 4-5 months unreasonable time, which added to the delay in commissioning.

xx)PEDA was required to appreciate the problems faced by the petitioner as per the terms of the IA but it failed to do so. The petitioner may be allowed the reliefs claimed in the petition in the interest of justice.

8. PSPCL in its final submissions dated 14.09.2016 submitted as hereunder:

- i) The contentions raised by the petitioner are specious, untenable and are contrary to the expressed provisions of law and agreed terms of the IA and the PPA.
- ii) The petitioner has sought extension of the COD upto 30.04.2016 with applicable tariff of ₹ 7.45 per kWh and stay on invocation of PBGs by PEDA. As far as the extension of the COD is concerned, PSPCL is only a performance respondent and has no role to play. The petitioner is putting the onus of delay caused at its end on the respondents.
- iii) The Commission should follow the established principles of law of natural justice by considering the facts before hand and should aid to act "*ex-debito justitiae*" for doing real and substantial justice to the aggrieved party as the petitioner has not approached the Commission with clean hands.
- iv) Grid feasibility clearance was granted on 15.05.2015 to evacuate power at 66 kV sub-station Boha and the petitioner was in possession of the land on 25.05.2015. The petitioner has itself admitted to the fact that the plant was only partially completed before 30.01.2016, meaning thereby that there was delay on its own part and there was no hindrance caused by PSPCL. The failure on the part of the petitioner to intimate PSPCL 30 days prior to the date of synchronization is lapse on the part of the petitioner.
- v) The petitioner has misled the Commission by stating that due to various force majeure events, the project was delayed but has failed to provide any proof regarding the same. According to article 10.4 of the IA and clause 19.2.0 of the

PPA which specifically deals with these events, it is mandatory for the petitioner to give prior notice within 7 days of occurrence of such events to PSPCL/PEDA. No such notice was ever served by the petitioner as per the agreed terms and conditions. The plea taken by the petitioner is belated and is barred by limitation as per the agreed terms of the IA and the PPA. The petitioner sent a false intimation to PEDA that 20 MW capacity had been commissioned whereas it was confirmed that only 16 MW capacity was completed before 30.01.2016. The petitioner deliberately tried to mislead the Commission for gaining the undue benefits.

- vi) The allegation of the petitioner that PSPCL has delayed the approval for use of existing 66 kV single circuit transmission line on double circuit towers is not only false but is also against the facts. It is brought to the notice of the Commission that this is a technical issue which takes time to resolve. However, the permission for stringing the second circuit on existing double circuit towers was given in time and 16MW capacity out of 20 MW was evacuated on 28.01.2016. The firm could not evacuate the balance 4 MW capacity in PSPCL system as the plant was not ready at that time. The petitioner injected the balance power from their plant on 24.03.2016. The petitioner has not given any reason as to why work was delayed at their end.
- vii) The petitioner has nowhere mentioned on which date they applied for approval of route of the transmission line to PSPCL. The plea taken by the petitioner is vague, non-

believable and liable to be dismissed. PSPCL made all endeavor to assist the generating companies in all the formalities with regard to the synchronization or grid feasibility on urgent basis as the delay in providing the same would cause loss to PSPCL itself.

- viii) According to article 14 of the IA and clause 16.0.0 of the PPA, the resolution of disputes is to be handled mutually by discussions and in case such discussions fail, then the same is to be adjudicated by way of Arbitration under Arbitration and Conciliation Act, 1996. In the present case, the petitioner never opted for the same and instead approached the Commission for adjudication of its grievances. When an alternative remedy was available to the petitioner, approaching the Commission would be out of jurisdiction and demands for the dismissal of the petition on this score alone.
- ix) As per clause 5.5.0 and 6.2.0 of the PPA, the petitioner had to give 30 days prior notice of synchronization to PSPCL. This period of 30 days could have been used to settle the minor issues like readiness of bay, meters on GSS etc. but the said notice was never served. As per clause 6.3.0 of the PPA, all equipments with regard to transmission line upto PSPCL grid sub-station including clearance/NOC from the concerned agencies like Forest Department, CEI, Government etc. had to be obtained by the petitioner at its own cost and level. PSPCL has no role and interference in the same and the plea taken on this count is false and unwarranted. There are certain duties and responsibilities being imposed on the petitioner as mentioned in clauses

5.5.0 and 8.2.0 of the PPA which saddles the petitioner with responsibility to inform PSPCL a month in advance from the date of commencement of delivery of power for testing and commissioning of the project for synchronization. No such intimation was ever given by the petitioner which is against the settled terms of agreement.

- x) The delay as mentioned by the petitioner was a result of its own lackadaisical attitude. The delay in commissioning of the project would also mean that the RPO compliance as directed by the Commission would not be fully met and therefore, PSPCL would be bound to purchase the expensive RECs for the compliance of the same. The purchasing of expensive RECs would mean that the consumers throughout the state would be saddled with expensive power without any fault on their part.
- xi) It is the sole responsibility of the petitioner to fulfill the terms and conditions as entered into by it while signing the PPA. The delay has been caused by the petitioner and the plea of force majeure events does not hold ground and therefore is liable to be dismissed. The bank guarantee submitted by the petitioner is against the non-compliance of the terms of the IA and PPA. It is a self-attested document of the petitioner wherein it has been agreed that if the petitioner would not be in a position to commission the project on time, PSPCL and PEDA would be at liberty to encash the PBGs kept with them.

9. The petitioner filed reply dated 18.10.2016 to the final submissions of PSPCL and submitted that the grid feasibility was applied on 12.03.2015 (as per PSPCL applied on 08.05.2015) and was granted on 15.05.2015. Grid feasibility clearance required independent power producer to lay an independent transmission line for evacuation of power from the project to the nearest feasible grid. The petitioner intended to use part of spare circuit in transmission line of its sister concern i.e. PL Surya Urja Limited, which also has an operating solar PV power plant in the vicinity implemented for PEDA in the first phase of NRSE projects and this was one of the prime reasons for the petitioner to bid for second phase projects which were to be implemented in strict time lines of 10 months as this transmission line had double circuit tower with single circuit in use and it terminates at the same grid and thus the vary intention was to partially utilize it for the second plant as it does not affect the independence of the line contemplated in the grid feasibility and would save substantial time, right of way issue, efforts and costs.

Moreover, it was technically and legally feasible to utilize the spare circuit of the existing line without affecting the independence of line for the new project. When the matter was taken up with PEDA and PSPCL, the petitioner was informed that PSPCL is amending its guidelines to allow sharing of transmission line among other things for smooth implementation of NRSE projects. PSPCL issued commercial circular no. 23 of 2015 dated 08.06.2015 permitting sharing of transmission line. PEDA vide email dated 10.06.2015 advised the petitioner to approach PSPCL for route survey/grid feasibility issues. The petitioner vide its letter

dated 06.07.2015 requested PSPCL to conduct a route survey for shared line. The petitioner was advised to deposit the route survey fees which was deposited on 07.07.2015.

The petitioner regularly followed up this issue with PSPCL, PEDA and Govt. of Punjab but neither permission was given nor refused creating a huge uncertainty. However the petitioner was informed by PSPCL, that the guidelines of PSPCL again need to be amended because as per commercial circular dated 08.06.2015, the amended clause 123(a)(iii) permits sharing of State agencies/Discoms/STU existing transmission line and not the line of IPP. PSPCL neither processed nor refused to achieve the connectivity through shared line.

Thereafter, a circular no. 42 of 2015 dated 12.10.2015 was issued by PSPCL amending clause 123(a)(iii) to permit sharing of transmission infrastructure/line among IPP for carrying multiple lines without compromising the independence of circuits as it was legally and technically possible to share the existing transmission line of either State owner or of IPPs. Thereafter, the transmission line route was approved by PSPCL on 19.10.2015 causing a delay of 156 days in granting transmission line route approval.

10. PSPCL filed short reply dated 25.10.2016 and submitted that the erection of line was assigned by the petitioner to PSPCL (as a contractor), which in no way stopped the petitioner to complete its work on the plant side. CEI had given its clearance for the line on 22.01.2016 i.e. before 30.01.2016. The issue is being used to divert attention from the actual issue of delay on the part of the petitioner due to which the firm could not evacuate the balance 4 MW capacity in PSPCL system as their plant was not ready at that

time and after completion of balance 4 MW capacity, the petitioner injected the balance power from their plant on 24.03.2016. The petitioner has failed to comply with the terms and conditions as mentioned in the PPA and allowing of the petition would mean burdening PSPCL and public at large. It is requested to the Commission that petition be dismissed in interest of justice.

11. PEDA filed additional submissions dated 22.11.2016 to reply filed by petitioner in respect of final submissions of PSPCL and submitted that the petitioner has made an attempt to purport the occurrence of force majeure events resulted in delay in commissioning of the project, which is in fact unsustainable and of un-warranted nature as once the petitioner on the same transmission line has been able to part commission the project with 16 MW capacity on 28.01.2016 i.e. within the SCOD, hence the petitioner cannot be permitted to agitate that the delay in commissioning of the remaining capacity to the tune of 4 MW is attributable to any other party. The delay in part commissioning of the project is solely attributable to the petitioner. It shows that the complete project of 20 MW capacity of the petitioner was not fully ready and only 16 MW capacity was installed & synchronized with PSPCL grid within the SCOD. The petition is devoid of merits and deserve to be dismissed with exemplary cost.

12. As per the directions given in the Commission's Order dated 27.01.2017, the petitioner vide letter dated 30.01.2017 submitted its explanation and documents as under:

- i) Copy of Purchase Order for supply of 21 MW solar PV modules placed on Renesola vide P.O. no. PSIN02/408505

by Punj Lloyd Limited, who was appointed as an EPC contractor for 21 MW solar PV project. Copies of Purchase Orders for other critical items i.e. structures, inverters, inverter transformer, power transformer for 21 MW solar PV project which were issued by Jakson, the sub-contractor for the project.

- ii) Calculations of cost of laying 66 kV single circuit transmission line from petitioner's plant to PSPCL's nearest sub-station at Boha having a distance of 1.5 km including stringing of conductor which works out to ₹ 41,35,135. This may be noted even if we go by PSPCL estimate of ₹ 1,02,54,671 for double circuit towers for our sister concern transmission line of 2.5 kms, the proportionate cost works out to be ₹ 61,52,803.
- iii) Cost of modification of existing line by addition of two towers and cost of stringing/fixing of conductor/material on 66 kV existing double circuit towers from petitioner's plant upto PSPCL sub-station at Boha was ₹ 35,00,000.
- iv) Financial sanction was released on 31.03.2015 by IREDA. However, the addition of clause 35.0.0 to the PPA by PSPCL made the PPA not effective & binding and non-bankable. Further, all critical approvals including grid feasibility and transmission line route approval were insisted by IREDA before execution of loan documents due to stricter funding norms imposed due to rising financial scams and distressed financial market sentiments. However, upon persistent request the loan agreement was finally signed on 02.09.2015

and submission of all approvals was kept as pre-disbursement condition listed out in clause (xxi) of 'General Conditions as applicable to Borrower' and item no. 15 and 20 of 'Terms and Conditions to be complied with by the borrower before first disbursement of loan'.

13. The Commission in its Order dated 27.01.2017 directed PSPCL to supply the cost of 66 kV line on single circuit towers and cost of stringing of second circuit on double circuit tower line from petitioner's plant upto PSPCL sub-station.

PSPCL submitted the information vide letter dated 08.02.2017 as under:

- i) Cost of 66 kV single circuit transmission line on single circuit towers with 0.2 sq. inch ACSR is ₹ 16.64 lakh per km as per standard cost data of 2016-17.
- ii) Cost of 2nd single circuit with 0.2 sq. inch ACSR on already existing double circuit towers is ₹ 6.99 lakh per km.
- iii) The length of 66 kV transmission line from the existing solar plant in the name of PL Surya Urja Limited upto 66 kV substation, Boha is 2.534 km as per approved route plan vide TL Design memo. no. 430/31 TSR-178 dated 16.02.2015.

Commission's Observations, Findings and Decision

14. The Commission has carefully gone through the petition, application for stay to restrain PEDA from invoking the PBGs and encashing the cheque deposited by the petitioner as security for not encashing the PBGs, additional submissions, replies thereto by PEDA and PSPCL and rejoinders by the petitioner. The

observations, findings and decision of the Commission are as hereunder:

I. PSPCL in its reply to the petition submitted that in so far as the present dispute is concerned, PSPCL is only a performance respondent and has no major role to play at this stage. PEDA submitted that the petitioner has wrongly invoked the jurisdiction of the Commission under section 86(1)(f) of the Act which empowers the Commission to adjudicate disputes between distribution licensee and the generating company. PEDA also submitted that the petitioner failed to commission the full capacity of 20 MW of the project by 30.01.2016, as provided in the IA, which is the main contractual document.

In this regard, the Commission notes that in para 14 of its Order dated 11.05.2015 in petition no. 21 of 2015, the Commission expressed its view as under:

“.....Also, since IA is a part of the PPA as submitted by PSPCL during the hearing on 05.05.2015, the Commission is of the view that various clauses of IA and PPA are to be read together and are complimentary.”

In the recital on page-2 of the PPA under clause (d), it is clearly mentioned that IA signed by the petitioner with PEDA shall be treated as an integral part of the PPA and all the clauses and regulatory norms applicable to the IA shall be unequivocally applicable to the PPA in letter and spirit. In view of the above, the Commission holds that the submissions made by PSPCL and PEDA in this regard are

devoid of merit and no cognizance of the same is required to be taken.

PEDA further submitted that the petition is not maintainable as there exists an arbitration clause in the contractual documents.

The Commission notes that the said issue has already been decided by the Commission in its Order dated 12.04.2016 in IA no. 19 of 2016 in petition no. 21 of 2016 & IA no. 14 of 2016 wherein it was held that the same was devoid of any merit. The Commission holds the same view in the instant petition as well.

II. The Commission notes that the petitioner's project was scheduled to be synchronized with the PSPCL grid on 30.01.2016. 16 MW capacity out of the total allotted capacity of 20 MW was commissioned on 28.01.2016. The petitioner has sought extension in the commercial operation date of the remaining 4 MW capacity upto 30.04.2016 at the same tariff of ₹ 7.45 per kWh as provided in the PPA. The petitioner further requested for issuing directions to PEDA for not invoking the PBGs and not encashing the cheque dated 17.03.2016 amounting to ₹ 48 lakh deposited as security to avoid invocation of PBGs.

In this regard, the Commission notes that PEDA was restrained not to invoke the PBGs vide Interim Order dated 22.03.2016 and the status quo in this regard continued till date. Further, the Commission directed PEDA to maintain status quo in respect of the cheque dated 17.03.2016. In its reply dated 24.05.2016, PEDA submitted that the said cheque was encashed and deposited in PEDA's account on 21.03.2016 before the Interim Order dated 22.03.2016 of the Commission.

III. In support of its contention for allowing extension in the COD for the remaining 4 MW capacity upto 30.04.2016, the petitioner submitted that as per the PPA, the project was to be commissioned within 10 months from the date of signing the PPA. This period of 10 months was less as compared to 13 months and 12 months for the Phase-I and Phase-III projects. PSPCL submitted that the plea of the petitioner in this regard is belated. PEDA submitted that the petitioner was aware at the time of participation in the bidding process that implementation of the project is within 10 months from the date of signing the PPA. As such, petitioner's submission in this regard is uncalled for at this stage.

In this regard, the Commission feels that the submission of the petitioner with regard to the time period of 10 months for completion of the project from the date of signing the PPA being less, is not tenable as this was a part of the RfP and the petitioner and many others bid for the projects of their own free will. Furthermore, PEDA submitted that 7 similarly placed projects were commissioned in time. Accordingly, no cognizance can be taken on account of this plea of the petitioner.

IV. The petitioner submitted that despite best efforts, it could commission only 16 MW capacity on 28.01.2016, out of the 20 MW capacity allocated by PEDA. The remaining 4 MW capacity could not be commissioned upto the SCOD i.e. 30.01.2016 due to occurrence of following force majeure events which were beyond its control:

- a) approval of PPA by the Commission on 11.05.2015;

- b) strike by the staff of Sub-Registrar's office;
- c) unrest due to desecration of holy Sri Guru Granth Sahib in Punjab;
- d) Jat agitation in Haryana;
- e) Route approval of transmission line by PSPCL.

Approval of PPA by the Commission on 11.05.2015

The PPA was signed by the petitioner with PSPCL on 31.03.2015. The petitioner submitted that PSPCL added clause 35.0.0 in the PPA which was not part of the draft PPA annexed with the RfP. The petitioner and other solar developers at the time of signing the PPA objected to the same stating that the PPA including the said clause should have been got approved from the Commission by PSPCL before its date of execution. The petitioner further submitted that PSPCL assured that the approval from the Commission shall be obtained in 5 to 7 days. However, the PPA was approved by the Commission on 11.05.2015. The insertion of clause 35.0.0 in the PPA practically rendered it ineffective and non-bankable until approved by the Commission. The petitioner submitted that the financial closure and other project activities could not progress due to the same. The sanction letter for the loan was issued by IREDA on 31.03.2015. The petitioner submitted that IREDA did not execute the loan agreement on the pretext that the PPA was considered ineffective and not binding due to clause 35.0.0 in the PPA. The petitioner further pleaded that despite its best efforts, it could commission only 16 MW capacity on 28.01.2016 out of 20 MW allocated by PEDA.

PSPCL submitted that as per clause 10.1.0 of the PPA, the generating company was under an obligation to synchronize the project with the PSPCL grid and commission it within 10 months

from the date of signing the PPA i.e. by 30.01.2016 as also mentioned in the bidding documents. Approval of PPA by the Commission is legally required. The petitioner should have exercised due diligence at the time of bidding and before signing the PPA. PSPCL submitted that it did not assure the petitioner that the PPA would be approved by the Commission in 5 to 7 days. The petitioner should have objected and challenged the addition of clause 35.0.0 in the PPA or not signed the same.

PEDA submitted that the plea of the petitioner with respect to the PPA being non-bankable is wrong, as the loan was sanctioned by IREDA on 31.03.2015 and accordingly the financial closure was achieved on the said date. The in-principle approval of loan by IREDA was not conditional. Moreover, the petitioner while submitting the financial closure document to PEDA on 19.10.2015, did not mention about any difficulty faced by it in achieving the financial closure. PEDA further submitted that the disclaimer clause in the RfP clearly states that the IA and PPA annexed with the RfP were indicative in nature and could be changed later. The petitioner failed to produce on record any letter written under article 10.4 of the IA and/or clause 19.2.0 of the PPA with regard to the occurrence of force majeure event due to delay in signing the PPA or that the PPA was conditional.

The Commission notes that the loan for the petitioner's project was sanctioned by IREDA vide letter dated 31.03.2015. Accordingly, the financial closure of the project was achieved on 31.03.2015. As per the sanction letter issued by IREDA, the execution of the Loan Agreement was scheduled for 30.04.2015. However, the same was executed by the petitioner

on 02.09.2015. The financial closure document was submitted by the petitioner to PEDA vide letter dated 19.10.2015 despite having achieved the same on 31.03.2015 as submitted by PEDA. The Commission notes that the pre-disbursement condition listed out in clause (xxi) of 'General Conditions as applicable to Borrower' and item no. 15 & 20 of 'Terms and Conditions to be complied with by the borrower before first disbursement of loan' of the loan agreement deals with submission of various clearances/approvals/NOCs regarding the project land, pollution control board, local body/gram panchayat and permission for grid connectivity from the concerned authority of the State Govt., if required for the implementation of the project. There is no reference with regard to the PPA being ineffective and non-bankable. The Commission notes that the technical grid feasibility clearance for the project was applied to PSPCL by the petitioner on 08.05.2015 and the same was granted by PSPCL on 15.05.2015. The petitioner arranged the land for the project in the month of May 2015. This clearly shows that the preliminary/preparatory works for execution of the project were not hampered for want of approval/acceptance of the PPA by the Commission on 11.05.2015, as alleged by the petitioner. The Commission further notes that clause 10.1.0 and clause 35.0.0 are concurrent and co-exist in the PPA. Article 7 of the IA signed by the petitioner with PEDA on 24.03.2015 stipulated the commissioning period of the project as 10 months from the date of signing the PPA. Further, as

per para (d) on page-2 of the PPA, IA shall be treated as an integral part of the PPA.

The Commission has carefully considered the matter. The Commission is of the opinion that in the absence of documentary evidence to prove any loss/delay suffered by the petitioner due to the time elapsed between the submission of petition by PSPCL on 30.03.2015 and acceptance of the PPA by the Commission on 11.05.2015, no benefit on this account is admissible to the petitioner.

Strike by the staff of sub-registrar's office, unrest due to desecration of holy Sri Guru Granth Sahib in Punjab and Jat agitation in Haryana

The petitioner submitted that the staff of revenue department was on pen down strike in different spans of time due to which it was not able to complete the formalities with regard to lease of land. Further, there was unrest in the State of Punjab on account of desecration of holy Sri Guru Granth Sahib at various places. Section 144 was imposed in almost whole of the State from 14.10.2015 to 22.10.2015. Also, due to Jat agitation in the State of Haryana which started in the middle of February and ended around 24.02.2016, the entry and exit points of the State were put under curfew which restrained the petitioner from receiving the materials at the project site.

PSPCL in its reply submitted that the alleged force majeure events as brought out above do not fall under the relevant clause 19.1.0 of the PPA. The said clause deals with the natural calamities or events like unrest, epidemics, any court order, change in law or an act of God. The grounds taken in the petition

inter alia, deal with the approvals, an incident happened in Faridkot, agitation in another state and self-created alibi of non-availability of staff of the office of the concerned sub-registrar for registration of land lease. The grounds taken by the petitioner do not hold good and are liable to be dismissed.

PEDA submitted that the petitioner failed to issue notice to it in line with the conditions of the IA as to the occurrence of the said force majeure events. The purported force majeure events referred to by the petitioner is an after thought. The petitioner in order to run away from its bounden obligation to set up the project in a time bound manner and to escape from the consequential penal action stipulated in the RfP and IA, has tried to set up false and frivolous pleas as to the occurrence of the said force majeure events. The incident of desecration of holy Sri Guru Granth Sahib took place in village Bargari, district Faridkot whereas the project site falls in district Fazilka. Further, the Jat agitation took place in the State of Haryana which is far away from the project site of the petitioner and did not affect the setting up of the project.

The Commission notes that the claim of the petitioner with regard to alleged force majeure events i.e. unrest in the State of Punjab due to desecration of holy Sri Guru Granth Sahib, Jat agitation in the State of Haryana and pen down strike by the staff of the office of sub-registrar has been strongly opposed by both PEDA and PSPCL. The Commission feels that the petitioner has failed to show what material difference these events made to the implementation of the project. Neither did the petitioner bring these issues up before PEDA/PSPCL at the relevant time nor submitted any

documentary evidence to justify their claim that these events affected/delayed the execution of the project in terms of article 10 of the IA and clause 19.0.0 of the PPA. The claim for relief on these grounds is therefore rejected.

Route approval of transmission line by PSPCL

The petitioner submitted that PSPCL was requested vide letter dated 12.03.2015, which was contested by PSPCL as 08.05.2015 and not pressed upon otherwise by the petitioner, to grant technical grid feasibility clearance to the project. The same was granted by PSPCL on 15.05.2015 with the condition that the power shall be evacuated from the petitioner's project through 66 kV independent line to the 66 kV sub-station, Boha as per standard design of PSPCL and the cost of the line shall be borne by the developer as per PPA. Further, NOCs/clearances from other departments like Chief Electrical Inspector, Forest Department, Railways and other Govt. bodies, change of land use, wherever applicable and all the right of ways etc. were required to be arranged by the developer. The petitioner submitted that it intended to use the existing single circuit line on double circuit towers which had been earlier laid to evacuate the power from the project of its sister concern PL Surya Urja Limited to 66 kV sub-station Boha, by stringing the conductor for the second circuit as the petitioner's project is in the vicinity of the aforesaid project. It would save the petitioner substantial time, right of way issues, efforts and costs. PSPCL issued a commercial circular (23/2015) on 08.06.2015 permitting sharing of the transmission lines. The petitioner vide letter dated 06.07.2015 requested PSPCL to conduct a route survey for sharing of the existing line. PSPCL

intimated that as per the said commercial circular, the amended clause 123(a)(iii) permits sharing of the existing transmission lines of the State Agencies/Discoms/STU and not the transmission lines of Independent Power Producers (IPPs). At the behest of the petitioner, PSPCL issued another commercial circular (42/2015) on 12.10.2015 further amending the clause 123(a)(iii) to permit sharing of transmission infrastructure/ line among IPPs without compromising the independence of circuits. The petitioner submitted that thereafter, the route of the transmission line was approved by PSPCL on 19.10.2015 which caused a delay of 156 days by PSPCL in granting the route approval of the transmission line for the project. Consequently, the petitioner could not take various decisions on time causing delay in completion of the entire project.

PSPCL submitted that the technical grid feasibility clearance was applied by the petitioner on 08.05.2015. The same was granted by PSPCL on 15.05.2015 for evacuation of power through a 66 kV independent line from the project site to 66 kV sub-station, Boha. However, the petitioner vide letter dated 06.07.2015 requested PSPCL for allowing it to share the existing transmission line of PL Surya Urja Limited in the vicinity of the petitioner's project, by stringing the second circuit on the existing line with single circuit on double circuit towers terminating at the same 66 kV sub-station, Boha. The permission for the same was granted by PSPCL on 19.10.2015 after amending its Regulations in this regard on 12.10.2015 after completing the due process. PSPCL submitted that the work of erecting the line was assigned to it as a contractor of the petitioner and the same was completed in time

and CEI accorded its clearance on 22.01.2016. Subsequently, 16 MW capacity out of 20 MW allocated to the petitioner by PEDA was synchronized with PSPCL grid on 28.01.2016 before the scheduled commercial operation date i.e. 30.01.2016. The balance 4 MW capacity was completed by the petitioner later and synchronized with PSPCL system on 24.03.2016.

PEDA submitted that the issue of 66 kV transmission line is related to PSPCL. PEDA took up the matter with regard to the approval of the route of the transmission line with PSPCL in order to facilitate timely execution of the project. The petitioner got the grid feasibility clearance on 15.05.2015 to evacuate the power at 66 kV sub-station, Boha and was in possession of land as on 25.05.2015. Therefore the petitioner could have easily proceeded to set up the project. The issue with regard to the transmission line could have been dealt and got approved simultaneously without affecting the construction work of the project.

The Commission notes that the petitioner submitted its request to PSPCL for the grant of technical grid feasibility clearance on 08.05.2015. The same was granted by PSPCL on 15.05.2015 for evacuation of power from the petitioner's project to 66 kV sub-station, Boha through an independent 66 kV line. The Commission further notes that later, the petitioner, on 06.07.2015, requested PSPCL to allow sharing of the existing 66 kV line on double circuit towers, evacuating power from the project of PL Surya Urja Limited existing in the vicinity of the petitioner's project, by stringing the second independent circuit on it, in order to save cost, time and obtaining other statutory clearances. PSPCL allowed the

same on 19.10.2015 in terms of its commercial circular 42/2015 issued on 12.10.2015 amending the existing provisions to accede to the request of the petitioner made on 06.07.2015. Thereafter, the petitioner engaged PSPCL as a contractor for erecting the line, which was completed by PSPCL well in time and the same was cleared by Chief Electrical Inspector on 22.01.2016 well before the scheduled commercial operation date of the project i.e. 30.01.2016. Evidently, the 66 kV transmission line was available to the petitioner for evacuation of full capacity of 20 MW well before the SCOD. Accordingly, the delay of 156 days in respect of granting technical grid feasibility clearance allegedly attributed to PSPCL by the petitioner is not justified. It is amply clear that the technical grid feasibility clearance was granted by PSPCL on 15.05.2015. Thereafter, it was at the behest and in the sole interest of the petitioner that on the basis of a request made by the petitioner on 06.07.2015, PSPCL allowed sharing of the existing 66 kV line by issuing a commercial circular afresh. In view of the above, the Commission holds that no relief on this account can be granted to the petitioner.

The petitioner vide letter dated 30.01.2016 to PSPCL with a copy to PEDA intimated that it has synchronized 20 MW solar project with PSPCL grid and started injecting power into 66 kV sub-station Boha on 28.01.2016. However, District Manager, PEDA and Additional SE/DS, PSPCL, Budhlada in the joint report dated 04.02.2016 pointed out that only 16 MW capacity is operational. PEDA further submitted that despite

the joint report dated 04.02.2016 of PEDA and PSPCL, the petitioner in its letter dated 08.03.2016 addressed to PEDA claimed that it has synchronized the 20 MW capacity of the project on 28.01.2016 and requested for issue of commissioning certificate for full capacity.

The Commission notes that as per submissions made by the petitioner, the balance capacity of 4 MW was commissioned on 24.03.2016. In the prayer also, the petitioner has requested for extension in the date of commissioning of the remaining 4 MW capacity upto 30.04.2016. The Commission feels that the letters of the petitioner dated 30.01.2016 and 08.03.2016 intimating synchronization of the 20 MW capacity with PSPCL grid are misleading. The joint report of District Manager, PEDA and ASE/DS, PSPCL dated 04.02.2016 clearly indicated that only 16 MW capacity was operational. Admittedly, the petitioner synchronized the remaining capacity of 4 MW with PSPCL grid on 24.03.2016. The petitioner has been unable to justify the reasons for not commissioning the remaining 4 MW capacity along with the 16 MW capacity commissioned on 28.01.2016. The Commission opines that the above conduct of the petitioner is inappropriate. The Commission is not taking cognizance of the misleading submissions made by the petitioner and inappropriate conduct. On merits, the Commission has no hesitation to hold that the delay in commissioning of the remaining 4 MW capacity is solely attributable to the petitioner. The Commissions opines that as the petitioner commissioned 16 MW capacity on 28.01.2016, it could have

easily commissioned the remaining 4 MW also on the same date, especially when purchase order for solar modules for 21 MW capacity was placed on 13.08.2015 as per information furnished by the petitioner vide letter dated 30.01.2017. Similarly, purchase orders for other equipments like structures, inverters, inverter transformer, power transformer etc. were also placed for entire 20 MW capacity.

Keeping the above in view, the Commission holds that petitioner's project is not entitled for extension in commercial operation date in respect of the remaining 4 MW capacity upto 30.04.2016 as prayed by the petitioner. Accordingly, PEDA is directed to forfeit and encash the PBGs in respect of delayed commissioning of 4 MW capacity on 24.03.2016 in terms of IA/PPA. The PBGs for the remaining amount be released to the petitioner within seven working days from the date of this Order, failing which PEDA will be liable to pay penal interest on the remaining amount to the petitioner at the rate of 1.25% per month payable on pro-rata basis for each day's delay beyond seven working days. However, the amount of ₹ 48 lakh already recovered by PEDA on 21.03.2016 by encashment of the cheque dated 17.03.2016 deposited by the petitioner as a security deposit for non-encashment of the PBGs, shall be adjusted while encashing the PBGs.

There is no case for levy of liquidated damages by PSPCL. It is further held that there shall be no change in the tariff of the project as provided in the PPA, which is payable to the petitioner by PSPCL for purchase of electricity from the project.

The petition and application are disposed of in terms of above.

Sd/-
(S.S. Sarna)
Member

Sd/-
(D.S. Bains)
Chairman

Chandigarh
Dated: 21.03.2017