

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

Petition No. 14 of 2016 &
IA No. 6 of 2016
Date of Order:14.02.2017

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

In the matter of: Petition under Section 94 of the Electricity Act, 2003 directing PSPCL/PSTCL to make the bay ready for synchronization and restraining PEDDA from forfeiture of Performance Bank Guarantees in terms of clause 10.1.0 of Power Purchase Agreement and article 7A of Implementation Agreement and extension of the date of commissioning of Petitioners' projects till bay is ready for synchronization.

And

In the matter of: 1. Magnificent Power Private Ltd., SCF No. 61-62, Third Floor, Phase-7, Industrial Focal Point, SAS Nagar, Punjab, India.

.....Petitioner

2. Nextgen Solux Power Private Ltd., SCF No. 61-62, Third Floor, Phase-7, Industrial Focal Point, SAS Nagar, Punjab, India.

.....Co-Petitioner

3. Aster Solar Power Private Ltd., Bhullar Farms, Fatehgarh Churian Road, Amritsar, Punjab, India.

.....Co-Petitioner

Versus

1. Punjab State Power Corporation Ltd., Office of SE/Investment Promotion Cell, T-8, Thermal Design Complex, PSPCL, Patiala-147001.

2. Punjab Energy Development Agency, Solar Passive Complex, Plot No. 1 & 2, Sector 33-D, Chandigarh-160034.
3. Punjab State Transmission Corporation Ltd., PSEB Head Office, The Mall, Patiala.

.....Respondents

ORDER

This petition was filed jointly by Magnificent Power Private Limited (Magnificent) as petitioner and Nextgen Solux Power Private Limited (Nextgen) & Aster Solar Power Private Limited (Aster) as co-petitioners under section 94 of the Electricity Act, 2003 (Act) read with Regulation 69 (Saving of inherent power of the Commission), 71 (Power to remove difficulties) and 73 (Extension or abridgment of time allowed) of the PSERC (Conduct of Business) Regulations, 2005 and Regulation 85 (Power to Relax) of CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2012 for directing PSPCL/PSTCL to make the bay ready for synchronization and restraining PEDDA from forfeiture of Performance Bank Guarantees (PBGs) in terms of clause 10.1.0 of the Power Purchase Agreement (PPA) and article 7A of the Implementation Agreement (IA) and extension of date of commissioning of projects till bay is ready for synchronization. The Application for early hearing and Application for stay on invocation of Performance Bank Guarantees (PBGs) were also filed along with the petition.

2. The petition and Applications were admitted vide Commission's Order dated 16.03.2016. PSPCL, PSTCL and PEDDA were directed to file reply to the petition and Interlocutory Applications with copy to the petitioners and each other by

08.04.2016. Meanwhile, PEDDA was restrained from forfeiture of PBGs till the next date of hearing. The next date of hearing was fixed as 12.04.2016.

The petition was taken up for hearing on 12.04.2016. In response to the directions of the Commission, PSTCL filed reply dated 08.04.2016 with copy to the petitioners, PSPCL and PEDDA. PSPCL vide letter dated 06.04.2016 submitted that four weeks time be granted to file its reply to the petition. PEDDA neither filed reply nor filed any application for extension of time to file the reply. The Commission vide Order dated 18.04.2016 directed PSPCL and PEDDA to file their replies by 03.05.2016 with copy to the petitioners, PSTCL and each other. Meanwhile, PEDDA was restrained from invocation/encashment of PBGs till the next date of hearing. The next date of hearing was fixed as 10.05.2016.

During the hearing of petition no. 17 of 2016 (Oasis Green Energy Pvt. Ltd.) on 03.05.2016, the petitioner prayed that petition no. 14 of 2016 be clubbed with petition no. 17 of 2016, as common questions of law and facts were involved in both the cases and both can be argued together. After hearing the petitioner, PEDDA and PSPCL, the Commission vide Order dated 04.05.2016 directed PEDDA to file its reply to the petition (petition no. 17 of 2016) by 10.05.2016 through e-mail as well as hard copy to the petitioner as well as other respondents. The petitioners was directed to file a rejoinder, if desired, to the replies of the respondents in both the petitions by 13.05.2016 with copy to the respondents through e-mail as well hard copy. The Commission held that the petition no 14 of 2016 shall be taken up for hearing the arguments of the parties on 17.05.2016 instead of 10.05.2016 along with petition no. 17 of 2016. Meanwhile, PEDDA was

restrained from invocation/ encashment of PBGs till the next date of hearing on 17.05.2016.

The petition was taken up for hearing on 17.05.2016. The petitioner prayed for an extension in time of 15 days for filing rejoinder vide application dated 13.05.2016. During the hearing the petitioner was directed to file his rejoinder by 24.05.2016 (e-mail and hard copy) with copy to the respondents (e-mail and hard copy). The Commission vide Order dated 18.05.2016, restrained PEDDA from invocation/encashment of PBGs till the next date of hearing scheduled for 07.06.2016. The petitioners were directed to ensure that validity of the PBGs, if needed, be extended upto 30.06.2016. The next date for hearing the final arguments of the parties was fixed as 07.06.2016.

The hearing which was fixed for 07.06.2016 was postponed by the Commission to 09.06.2016. The petition was taken up for hearing on 09.06.2016. The petitioner filed 2 Nos. rejoinders to replies filed by both the respondents. PEDDA vide email dated 07.06.2016 prayed for an adjournment of the hearing of the petition till 16.06.2016. The Commission vide Order dated 15.06.2016, considered the prayer and fixed the next date for hearing the final arguments of the parties on 12.07.2016. PEDDA was restrained from invocation/encashment of PBGs till the next date of hearing. The petitioner was also directed to ensure that the validity of the PBGs be extended upto 15.07.2016, if needed.

During the hearing on 12.07.2016, the petitioners argued the matter at length. The petitioners took the Commission through various clauses of the RfP, IAs and PPAs in support of the petition and concluded their arguments in the petition. The Commission directed PEDDA vide Order dated 21.07.2016 to authenticate the

veracity of the reports dated 03.03.2016 issued by District Manager, PEDDA (Annexure R-1/14 of PEDDA reply) by way of affidavit by 19.07.2016 with a copy to the petitioners and other respondents through e-mail as well as hard copy. PSPCL was also directed to submit the status report regarding the commissioning of 11 kV breakers installed at 220 kV sub-station, Jhunir, by 19.07.2016 with a copy to other respondents and the petitioners through e-mail as well as hard copy.

PEDDA was restrained from invocation/encashment of PBGs till the next date of hearing. The petitioners were directed to ensure that the validity of the PBGs, if needed, was extended up to 28.08.2016. The next date for hearing the final arguments of the respondents was fixed as 18.08.2016.

PSPCL requested for an adjournment of the hearing fixed for 18.08.2016 to 13.09.2016. The Commission acceded to the prayer and fixed the next date for hearing as 13.09.2016. Govt. of Punjab declared a holiday on 13.09.2016 on account of Id-ul-Zuha (Bakrid). Therefore, the Commission fixed the next date of hearing on 14.09.2016. PEDDA vide email dated 12.09.2016 requested the Commission for an adjournment. Acceding to the prayer of PEDDA, the Commission fixed the next date of hearing on 27.09.2016.

During the hearing on 27.09.2016, the learned counsels for the petitioner and PSPCL, Officers of PSTCL and PEDDA argued their respective cases at length. The Commission reserved the Order vide Order dated 04.10.2016. PEDDA was restrained from invocation/ encashment of PBGs for one month. The petitioners were directed to ensure that the validity of the PBGs, if needed, be extended up to 30.10.2016.

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

- i) Magnificent, Nextgen and Aster were allotted solar PV power project of 1 MW each vide Letters of Award (LoAs) dated 25.02.2015 by PEDDA. Subsequently, IAs were signed by Magnificent and Aster with PEDDA on 20.03.2015 and by Nextgen on 24.03.2015 and PPAs were signed by PSPCL on 31.03.2015.
- ii) Magnificent, Nextgen and Aster applied for a technical grid feasibility clearance on 25.06.2015 to PSPCL. PSPCL took three months for granting grid feasibility clearance and finally granted it on 07.09.2015. The delay in granting grid feasibility clearance delayed the loan sanction by IREDA. Grid feasibility clearance was the main document, without which IREDA does not start the scrutiny of the loan application.
- iii) Magnificent, Nextgen and Aster completed the work within the scheduled time and installed the conductors to Jhunir sub-station to connect it to the breaker panel for commissioning of the projects. The approvals from Protection Division, PSPCL and Chief Electrical Inspector (CEI), Punjab have been obtained, which was informed to PEDDA via email dated 29.02.2016. Respondents failed to provide the breaker panel in the 11 kV bay of the sub-station even after a lapse of seven months from the issue of feasibility clearance. PSPCL/PSTCL have still not been able to extend the bay and complete the requisite civil and electrical work for synchronization of the projects with the grid.

iv) Magnificent, Nextgen and Aster being not at fault at any point of time but there is every likelihood that respondents will initiate action as per terms of clause 10.1.0 of the PPA and article 7A of the IA i.e. forfeiture of PBGs. Article 7A of the IA and clause 10.1.0 of the PPA are reproduced as hereunder:

Article 7A of the IA

“Article 7.0: CONSEQUENCES OF DELAY IN COMMISSIONING BY THE COMPANY

A. Encashment of Performance Security:

The Solar PV Project shall be commissioned within 10 (Ten) months from the date of signing of PPA. In case of failure to achieve this time limit, PEDDA shall encash the Performance Guarantee in the following manner:

- i) Delay upto one month: PEDDA will encash 30% of the total Performance Bank Guarantee proportionate to the Capacity not commissioned.*
- ii) Delay of more than one month and upto two months: PEDDA will encash remaining 70% of the total Performance Bank Guarantee proportionate to the Capacity not commissioned.”*

Clause 10.1.0 of the PPA

“10.1.0 The Generating Company shall commission the Generating Facility (which shall be Scheduled Date of Commercial Operation) and synchronize with the PSPCL/PSTCL's Grid within 10 months from the Effective Date i.e date of signing of this PPA which is 31st March 2015. Therefore, the scheduled date of commissioning for this project is 30th January, 2016.

In case of delay after the scheduled date of commissioning within grace period of further two months i.e. 12 months from the date of signing of PPA, with forfeiture of performance B.G. by PEDDA, the

commissioning date for the project shall be 30th March, 2016.

In case of further delay in commissioning beyond 12 months but within 15 months from the date of signing of PPA, with applicable liquidated damages payable to PSPCL as per Clause 10.1.1, the revised commissioning date of the project shall be 30th June, 2016.”

v) As per clause 35.0.0 of the PPA:

“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 PPA was approved by the Commission on 11.05.2015, hence effective date starts from 11.05.2015 and last date after 10 months falls on 12.03.2016 and even in case of delay of one month the penalty for the same can be started only after 12.04.2016. Any action of the respondents, even issuance of any letter, for forfeiting/encashment of PBGs before 12.04.2016 is illegal, uncalled for and arbitrary and is against the provisions of IA/PPA.

vi) The Commission is vested with the inherent power (under section 151 of Code of Civil Procedure) and Regulation 69 of its Conduct of Business Regulations as well as with the power to remove any difficulty which appears to be necessary or expedient, can give extension or abridgment of time allowed and has the power to relax. This petition has been filed under these provisions. The relevant extracts of PSERC (Conduct of Business) Regulations, 2005 read as under:

“69. Saving of inherent power of the Commission:

- 1. Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission.*
- 2. Nothing in these Regulations shall bar the Commission from adopting a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient.*
- 3. Nothing in these Regulations shall, expressly or impliedly, bar the Commission to deal with any matter or exercise any power under the Act for which no Regulations have been framed, and the Commission may deal with such matters and exercise powers and functions in a manner it thinks fit.*

.....

71. Power to remove difficulties:

If any difficulty arises in giving effect to any of the provisions of these Regulations, the Commission may, by general or special order, do anything not being inconsistent with the provisions of the Act or rules framed thereunder which appears to it to be necessary or expedient for the purpose of removing the difficulty.

.....

73. Extension or abridgment of time allowed:

Subject to the provisions of the Act, the time allowed by these Regulations or by order of the Commission for

doing any act may be extended or abridged by order of the Commission."

CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 (adopted by Hon'ble Commission in its Order dated 19.07.2012 in Suo-Motu Petition No. 35 of 2012)

.....

"85. Power to Relax

The Commission may by general or special order, for reasons to be recorded in writing, and after giving an opportunity of hearing to the parties likely to be affected may relax any of the provisions of these regulations on its own motion or on an application made before it by an interested person."

vii) It is prayed to the Commission to:

- a) direct PSPCL/PSTCL to make the bay ready for synchronization.
- b) restrain PEDDA from forfeiture of performance Bank Guarantee in terms of clause 10.1.0 of the PPA and article 7A of the IA till bay is not ready for synchronization.
- c) extend the date of commissioning of the projects till the bay is ready for synchronization.
- d) pass any order as deemed appropriate in the interest of justice.

4. PSTCL's reply dated 08.04.2016 in brief is as hereunder:

- i) PPAs were signed by PSPCL with Magnificent, Nextgen and Aster on 31.03.2015, but no copies of the PPAs were received by PSTCL till 08.04.2016. As per the PPAs, the said developers have to commission their respective project by 30.01.2016.

- ii) The nearest sub-station available for evacuation of power was 220 kV Grid Sub-Station, PSTCL, Jhunir. The request of PSPCL dated 21.08.2015 for feasibility clearance was received on 01.09.2015 almost five months after the signing of the PPAs. PSTCL on 04.09.2015 intimated that the control room of the sub-station needs to be extended for installation of 3 nos. 11 kV breakers at 220 kV sub-station, Jhunir.
- iii) A team of officers from TS Design visited the sub-station on 08.11.2015 for knowing the actual ground position for the feasibility of provision of 11 kV circuit breakers in the control room for evacuation of power. Necessary instructions for extension of control room were issued on 11.12.2015 and amendment in the drawing of the sub-station was issued on 14.12.2015. Accordingly, the work of extension of the control room was carried out. Thereafter no request was received by PSTCL regarding non-availability of space to install 11 kV breakers at 220 kV sub-station, Jhunir, which is delaying the project.
- iv) The works at the projects were not completed by the scheduled date i.e. 30.01.2016 as is evident from the provisional approval for commissioning of electrical installations and 11 kV lines by CEI, Punjab to Magnificent, Nextgen and Aster on 29.02.2016, 26.02.2016 and 29.01.2016 respectively.
- v) The space for installation of 11 kV breakers was provided as and when PSPCL approached for the same and these stand commissioned since 23.03.2016.

5. PEDA's reply dated 21.04.2016 in brief is 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 petitioners have not demonstrated the true factual matrix of the matter and in order to evade their bounden obligation of achieving the Scheduled Date of Commissioning (COD) well within time, as stipulated in the RfP, LoAs and IAs, 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 petitioners could not achieve COD in terms of RfP, LoAs and IAs on various pretexts, which otherwise are unsustainable. However, from the petition, it is per se apparent that the petitioners filed the petition while misusing the process of law.
 - iii) The IAs signed by PEDA with Magnificent, Nextgen & Aster are the main contractual documents, which provides that the petitioners were to setup the project and to achieve full capacity CoD by 30.01.2016 (mentioned wrongly as 31.01.2016 by PEDA), however, the petitioners have failed to achieve COD of the projects as provided in the IAs.
 - iv) The petitioners while misleading the Commission have wrongly sought interim order dated 16.03.2016 (mentioned wrongly as 29.02.2016 by PEDA) passed by the Commission, to restrain PEDA from encashing the PBGs deposited by Magnificent, Nextgen & Aster with PEDA, which is against the settled cannons of law laid down by Hon'ble Supreme Court of India in a catena of judgments.

Hence, the interim order dated 16.03.2016 granted by the Commission in favour of the petitioners, restraining PEDDA deserves to be vacated. Since the petitioners have failed to fulfill their obligation of setting up the complete projects uptill 30.01.2016 (mentioned wrongly as 31.01.2016 by PEDDA), in line with the provision of RfP/LoAs/IAs, therefore, the petitioners are liable to be levied with penalty and PEDDA becomes entitled to encash the PBGs deposited by the petitioners projects in line with the contractual terms agreed between the parties, on account of the same.

- v) The feasibility clearance was issued by PSPCL to Magnificent, Nextgen and Aster on 07.09.2015 on their respective applications dated 25.06.2015 submitted to PSPCL (received by PSPCL on 08.07.2015), as per the information provided by the petitioners to PEDDA.
- vi) On 21.08.2015, PEDDA in continuation to its email dated 04.08.2015 vide which it sought the submission of various documents from the petitioners including financial closure documents, issued respective communication to Magnificent, Nextgen and Aster, for submission of financial closure for setting up the project(s) by 31.08.2015, as Magnificent, Nextgen and Aster had failed to submit the requisite documents within 120 days of signing of the PPA i.e. 31.07.2015.
- vii) Magnificent, Nextgen and Aster vide their respective letters dated 17.08.2015 to PEDDA sought extension of date for financial closure of the project(s), on the pretext that IREDA is flooded with loan applications and the processing of the

loan applications is consuming time. The petitioners never pointed out to the alleged fact as purportedly brought in the petition that the loan sanction by IREDA was delayed on account of delay in issuance of feasibility clearance by PSPCL. Hence, the purported plea of the petitioners in this regard falls flat and carries no substance.

viii) The projects allocated to the petitioners are build, own and operate projects, for which the RfP nowhere stipulates that the developer needs to avail loan for setting up of the allocated projects. As per the RfP, it has been obligated upon the developer to arrange the funds for the projects at its own level.

ix) The last date for the submission of the financial closure document was 31.07.2015, however, in the interest of the projects the petitioners were allowed to submit the document by 31.08.2015. Further, in order to help the petitioners to perform financial closure as per their desired arrangements, on their request, PEDDA issued respective letters dated 26.08.2015 to IREDA informing that the IAs and PPAs are valid as on date. Despite, the best possible cooperation rendered by PEDDA, the petitioners still failed to submit the financial closure document by 31.08.2015.

x) PEDDA in line with agreed terms and conditions between the parties, issued respective default notices dated 03.09.2015 to the petitioners of 30 days, seeking submission of financial closure documents before expiry of the same, failing which the petitioners were informed that further action for termination of LoAs, IAs and PPAs shall be taken.

- xi) As per the land documents submitted by the petitioners the land lease deed for the period of 30 years is dated 17.04.2015. The petitioners have failed to show as to what prevented them to apply for grid feasibility clearance after obtaining land lease in the month of April 2015, however, the petitioners applied for grid feasibility after the delay of more than 2½ months.
- xii) Aster vide letter dated 01.10.2015 informed PEDDA with regard to the completion of financial closure, that it has sought unsecured loan from its Director.
- xiii) Magnificent and Nextgen vide their respective letters dated 30.09.2015 sought relaxation for 10 days in submission of financial closure documents on the pretext of issuance of sanction letter by IREDA shortly. Further, Magnificent and Nextgen vide their respective letters dated 12.10.2015, changed their stands and submitted their financial closure by arranging unsecured loan from the Directors and relatives of the Directors. In the said letters dated 30.09.2015 the petitioners mentioned that the grid feasibility clearance was applied on 08.07.2015 and the same was granted on 07.09.2015. The petitioners while submitting letters dated 12.10.2015 had categorically undertaken to commission the projects within the time as provided in the IAs.
- xiv) Magnificent and Nextgen vide their respective letters dated 24.11.2015 again changed their stands and informed PEDDA about the sanction of respective loan by IREDA.
- xv) Magnificent, Nextgen and Aster alongwith other developers requested for extension in time period for the scheduled date

of commissioning of the projects by way of joint representation dated 06.01.2016.

xvi)PEDA vide its letter dated 18.01.2016, declined to extend the scheduled date of commissioning of the allocated projects and requested for timely commissioning of the projects, failing which clause 3.23 of the RfP (mentioned wrongly as 2.23) shall prevail for any delay beyond scheduled date of commissioning.

xvii)Magnificent and Nextgen vide letters dated 25.01.2016 for the first time informed PEDA about the unavailability of breaker panel in the 11 kV bay of the sub-station of PSTCL and informed PEDA about their inability to meet time line for the projects. In response to letter dated 25.01.2016, PEDA vide its letter dated 08.02.2016 requested PSPCL to take immediate action in this regard. No such request as to non-availability of breaker panel on behalf of Aster was received.

xviii)PEDA on 24.02.2016 informed the petitioners as to the levy of penalty on account of delay in commissioning of the projects in line with the provisions of the IAs.

xix)District Manager, PEDA on the basis of its project reports dated 03.03.2016 informed that the solar PV modules installation of the plants including other equipments were in progress, meaning thereby, plants were incomplete in nature and are not ready for commissioning as on the date of report. Further, the report also mentioned that sub-station of PSTCL was also not ready.

- xx) District Manager, PEDDA vide report dated 21.03.2016 again informed that the installation of solar PV modules was in progress. Meaning thereby, uptill 21.03.2016 the installation work of the plants was incomplete.
- xxi) The projects of Magnificent and Aster were commissioned on 23.03.2016 and the project of Nextgen was commissioned on 24.03.2016. The delay in the commissioning of the projects is primarily attributable to the petitioners.
- xxii) The petitioners in no manner were prevented to seek requisite CEI and PSPCL protection clearance before 31.01.2016. Infact seeking the ibid statutory clearance at belated stage further goes to show that the delay in commissioning of the projects is attributable to the petitioners.
- xxiii) The letters of the petitioners with respect to non-availability of breaker panel with PSTCL were informatory in nature and upon which PEDDA immediately took up the matter with PSPCL. PSPCL, further on receipt of the same, issued a letter to PSTCL for necessary action on the issue. So far as the representation dated 06.01.2016 is concerned, the same was duly responded by PEDDA vide its letter 18.01.2016, whereby the petitioners and other developers were duly conveyed that no extension in scheduled date of commissioning can be granted.
- xxiv) The projects of the petitioners were incomplete as on 03.03.2016 and 21.03.2016 and could not be commissioned on or before the scheduled date of commissioning i.e.

30.01.2016 (wrongly mentioned as 31.01.2016). Hence, as per the agreed terms and conditions, the petitioners are liable to the levy of penalty on account of delay in commissioning. Accordingly, PEDDA has rightly initiated for the encashment of PBGs submitted by the petitioners.

xxv) In case the assertion of the petitioners is believed then in such eventuality the petitioners will not be entitled for the tariff awarded to the project under the reverse bidding process as the control period of the generic tariff of ₹ 7.72 per kWh is valid upto 31.03.2016. Even otherwise, in no eventuality, the petitioners cannot be permitted to run away from their bounden obligation as provided and agreed to under the IAs entered between the parties.

xxvi) The petitioners while misusing the process of law have filed the petition which deserves to be dismissed at the very outset.

xxvii) The petitioners are not at all entitled for any relief as prayed for in the petition. In light of the facts and submissions, the Commission is prayed to dismiss the petition with exemplary costs and direct the petitioner to deposit the amount of penalty with PEDDA for the non-commissioned/short commissioned capacity of the project, in line with the contractual documents entered between the parties in the interest of justice, equity and fair play.

6. PSPCL's reply dated 28.04.2016 in brief is as hereunder:
 - i) The petition has been filed purblindly by the petitioner with an endeavour and intention to cause delay and save skin

from their liability as mentioned under clause 10.1.1 of the PPA. The plants were synchronized as per the permission given by PSPCL on 21.03.2016. The prayer for extension of date of commissioning of projects from 30.01.2016 to 30.06.2016 is baseless. Therefore, the petition is liable to be dismissed and an exemplary cost may be imposed on the petitioners for filing the frivolous petition.

- ii) The petitioners have never approached PSPCL with regard to the request for providing them with a bay for synchronization. The issue of synchronization was raised when the petitioners themselves were satisfied that they would not be in a position to complete the commissioning of project on time. If they would have completed all the formalities before asking for the bay for synchronization they should not have requested PSPCL for providing the bay. The petitioners have not approached the Commission with clean hands and concealed material facts with regard to their request for providing them with the bay for synchronization. There is no delay on the part of PSPCL for providing the bay for synchronization as the petitioners have never requested the same. The projects have already been commissioned and the petition has been filed by concealing this fact for getting the unnecessary extension just to save their skin from penalty which is to be imposed because of delay in commissioning.
- iii) The petition has been filed tumultuously so as to delay their own projects which can reduce the capital cost on commissioning of the project as it has already seen that with

every year the cost of commissioning reduces. The tariff applicable after the Commission's Order is already on a higher side and thus, while dismissing the petition, the Commission should reduce the tariff rates also in the interest of justice so that the end users i.e. the consumers should not be fleeced of extra costing which is caused due to non-fulfilment of commitment on the part of the petitioners.

iv) It is the primary duty of the petitioners to look into the technicalities and take proper remedial measures for the commissioning of the project and any problems arising thereon with regard to the synchronization of the project. The delay has been caused by the petitioners and unnecessarily allegations are being imposed on PSPCL. Although, it was mentioned by the petitioner that they have requested for grid technical feasibility clearance on 25.06.2015 but the application attached with the petition shows that the same was received by PSPCL on 08.07.2015. Meaning thereby, the petitioners have not approached the Commission with clean hands and have concealed material facts to buy the time unreasonably. The PPAs were signed on 31.03.2015 then why the application for grid technical feasibility clearance was made on 25.06.2015. The delay of more than three months has not been explained and the same is unreasonable. There is no bar with regard to the time period for applying for grid technical feasibility clearance. PSPCL verily believes that the conduct of the petitioners is uncalled for and the petition should be dismissed.

- v) If the unreasonable and illegal extension would be provided to the petitioner, this would affect the pockets of the customers harshly as PSPCL has to purchase the expensive RECs for its RPO compliance. PSPCL would unnecessarily be saddled with the cost of expensive RECs just because of the delay which has been caused by the petitioners. The time taken by PSPCL is within the procedural frame work and no delay has been caused for giving grid feasibility clearance to the petitioners.
- vi) The non-submission of the request for synchronization of the projects shows the inefficiency and incapability of the petitioners. The petitioners cannot make PSPCL liable for not providing the bay for synchronization of the projects as it is the fault of the petitioners to not to raise their projects upto that level.
- vii) It is the prima-facie duty of the petitioners to apply for the extension of bay for synchronization. PSPCL can only provide the bay for synchronization if there is any request to that effect.
- viii) It is PSPCL's right to initiate action against the petitioners for non-compliance of the terms and conditions as provided in PPAs. There is an undertaking given by the petitioners, that if, they will not be in a position to commission the project on time, they would be responsible and PSPCL would be at liberty to initiate action against them under clause 10.1.1 of the PPAs.
- ix) The calculation as mentioned by the petitioners is incongruous and does not hold good and therefore the same

is liable to be rejected. As far as forfeiting or encashment of PBGs is concerned, the same is to be dealt by PEDDA and not by PSPCL.

- x) The non-commissioning of project on time does not affect PEDDA at all but it affects PSPCL directly and consumers at large indirectly. By taking into consideration the above submissions, the petition should be dismissed with exemplary cost on the petitioner, in the interest of justice.

7. The petitioners in the rejoinder dated 31.05.2016 to the reply of PSTCL dated 08.04.2016, while reiterating their earlier submissions further submitted in brief as hereunder:

- i) The petitioners applied for technical grid feasibility clearance to PSPCL on 25.06.2015 for all the three projects. As per PSPCL, it has received the requests for grid feasibility clearance on 08.07.2015. The 220 kV grid sub-station, Jhunir is under the control of PSTCL and as such PSPCL was required to forward the request to PSTCL. But for the reasons best known to the PSPCL, they sat over the request of the petitioners and then sent letter dated 21.08.2015 to CE/TS & Planning, PSTCL, Patiala, requesting to supply the technical detail report about space availability at 220 kV grid sub-station, Jhunir and space for 11 kV circuit breakers for all the three plants. As per PSTCL they have received this letter on 01.09.2015. PSPCL wasted 53 days in just forwarding the request letter to PSTCL (i.e. from 09.07.2015 to 31.08.2015).

- ii) PSPCL issued feasibility clearance to the petitioners on 07.09.2015 and after a delay of 2 months the officers from TS Design visited the 220 kV grid sub-station, Jhunir though they could visit the same earlier.
- iii) PSTCL vide letter dated 13.11.2015 to Chief Engineer/Planning, PSPCL withdrew the technical concurrence given earlier and informed that space for installation of 3 nos. 11 kV circuit breakers for injection of power of 3 nos. projects at 220 kV sub-station, Jhunir is not available.
- iv) PSTCL wasted 73 days in telling that they do not have space for installation of 3 nos. 11 kV circuit breakers at 220 kV sub-station, Jhunir. Thereafter, the Chief Engineer Planning, PSPCL vide letter dated 19.11.2015 requested PSTCL to reconsider the issue. PSTCL reconsidered the issue and vide letter dated 11.12.2015 allowed to connect 3 nos. 11 kV lines at 220 kV sub-station, Jhunir for injection of solar power. Thereafter the petitioners started works at the sites. It is clear from the above said letters that 28 days were wasted by the PSPCL and PSTCL in just taking a decision whether the evacuation would be allowed at Jhunir sub-station or not.
- v) PSTCL made amendments in the drawing of the sub-station on 14.12.2015 and vide letter dated 28.12.2015, general layout plan of proposed extension in Switch House Building (SHB) at 220 kV sub-station, Jhunir was issued. Thereafter PSTCL gave advertisement of tender for construction of extension in SHB at 220 kV sub-station, Jhunir in the newspaper dated 31.12.2015. The last date of sale of tender

document was 15.01.2016. The tender was opened on 19.01.2016. The work on construction of extension in SHB was completed on 22.03.2016.

vi) The works at the plants were not complete upto 31.01.2016. PSPCL and PEDDA caused a delay of 150 days in getting the PPA approved, granting feasibility clearances etc, and for this delay the petitioners cannot be penalized.

vii) PSTCL first gave consent and feasibility clearance was given to the petitioner by PSPCL vide letter dated 07.09.2015 and thereafter vide letter dated 13.11.2015, PSTCL refused to give space and again after reconsidering the issue gave consent for space vide its letter dated 11.12.2015. PSTCL caused a delay of three months in giving consent for space.

8. The petitioners in the rejoinder dated 31.05.2016 to the reply of PSPCL dated 28.04.2016, while reiterating their earlier submissions further submitted in brief as hereunder:

i) The projects of Magnificent & Aster were synchronized on 23.03.2016 and the project of Nextgen was synchronized on 24.03.2016. At the time when the petition was filed, PSPCL and PSTCL were causing delay in commissioning of the projects and as such the petitioners sought extension of time/control period upto 30.06.2016. The petitioners tried their best and persuaded the respondents and got the projects commissioned on 23.03.2016 and 24.03.2016. As such now the petitioners are seeking extension of time of commissioning from 30.01.2016 to 23.03.2016 and 24.03.2016.

- ii) PSPCL is intentionally concealing the actual facts from the Commission and putting the blame of delay in commissioning of the project on the petitioners. The petitioners applied for technical grid feasibility clearance to PSPCL on 25.06.2015 for all the three projects. As per PSPCL they have received the request of the petitioners for grid feasibility on 08.07.2015. The 220 kV grid sub-station, Jhunir is under control of PSTCL and as such PSPCL was required to forward the request letter of the petitioner to PSTCL. PSPCL did not send the request of the petitioners and vide letter dated 21.08.2015 PSPCL requested PSTCL to supply the technical detail report about space availability at said Jhunir sub-station and space for 11 kV circuit breakers for all the three plants. In case of non-availability of space in the existing set up at Jhunir sub-station, alternate ways of adding 11 kV circuit breakers may be forwarded. PSTCL in its reply mentioned that the request for feasibility clearance dated 21.08.2015 was received from PSPCL on 01.09.2015. PSPCL wasted 53 days in forwarding the request letter of the petitioners to PSTCL (from 09.07.2015 to 01.09.2015) [mentioned wrongly as 31.09.2015 by the petitioner]. PSPCL vide letters dated 07.09.2015 granted the technical feasibility clearance. In the absence of technical feasibility clearance the petitioners could not start their work because in case the grid feasibility is not available then the petitioners would be liable to go for another location.
- iii) The petitioners started activities for taking land after 07.09.2015 but the petitioners got information that PSTCL is

not going to allow them to evacuate the electricity at the said sub-station. The petitioners accordingly stopped all work and visited the respondents to know the truth and got the knowledge that PSTCL is denying the permission. Thereafter, PSTCL vide letter dated 13.11.2015 to PSPCL withdrew the technical concurrence given earlier. It was mentioned in this letter that space for installation of 3 nos. 11 kV circuit breakers for injection of power of 3 nos. solar based generating stations at 220 kV sub-station, Jhunir is not available.

- iv) CEI inspected the projects and issued approval on 29.01.2016, 26.02.2016 & 29.02.2016 for Aster, Nextgen & Magnificent respectively. The protection team of PSPCL visited and checked the premises and gave its report on 15.02.2016, 26.02.2016 and 29.02.2016 for Aster, Nextgen & Magnificent respectively. The two projects of the petitioners were completed on 29.02.2016 and one on 26.02.2016 and were ready to inject electricity into the PSPCL system. Thereafter, PSPCL gave permission to synchronize the plants on 21.03.2016 and transmission line was charged on 22.03.2016. Accordingly the projects of Magnificent & Aster were commissioned on 23.03.2016 and the project of Nextgen was commissioned on 24.03.2016. PEDDA has also issued commissioning certificates for the solar projects of the petitioners.
- v) The projects have been commissioned before 31.03.2016, the date upto which the tariff determined by the Commission was effective. It is denied that the petitioners have delayed the

project to reduce the capital cost. It is denied that the tariff arrived on the basis of bidding is on higher side. The Commission after going through the facts and submissions of PSPCL and PEDDA approved the tariff vide Order dated 11.05.2015 in petition no. 21 of 2015.

vi) The delay in commissioning is not due to any fault on the part of the petitioners. PSPCL invited the solar developers, including the petitioners to sign the PPA on 31.03.2015. The petitioners were shocked and surprised that PSPCL has inserted a new clause no. 35 in the PPA, which was not the part of the PPA provided in the RfP.

The petitioners & 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 petitioners were assured by the respondents that the approval from the Commission shall be obtained in 5-7 days. The petitioners were however made aware of the fact that they have to sign the PPA in the current form as the approval of the PPA from the Commission is yet to be obtained by PSPCL. Petitioners were left with no option but to sign the PPA. The insertion of clause 35 in the PPA rendered it practically ineffective and non bankable, until it was approved by the Commission. PSPCL filed petition no. 21 of 2015 before the Commission seeking its approval to procure electricity and also to approve the PPA. The Commission vide Order dated 11.05.2015 allowed the petition and

approved the PPA. During this period, the project and financial closure activities could not be progressed due to uncertainty/non-bankability of the PPA i.e. for reasons beyond the control of the petitioners.

vii)PSPCL and PSTCL were never serious in fulfilling their duties for putting the solar power projects of the petitioners. The intention of the respondents should have been to ensure that the successful bidders including the petitioners are assisted in timely commissioning of the said power projects. On the contrary, it was the default on the parts of PEDDA and PSTCL which resulted in the delay in commissioning of the said power plants. For the default of PEDDA and PSTCL the petitioners cannot be penalized.

viii)PSTCL mentioned in para no. 3 of its reply to the petition that first request from PSPCL for feasibility clearance dated 21.08.2015 was received by them on 01.09.2015.

ix) In the absence of technical feasibility clearance the petitioners could not start their work because in case the grid feasibility was not available then the petitioners would have been liable to go for another location. As mentioned above, 150 days delay is on the part of PEDDA and PSTCL but PSPCL has courage to say that there is no delay on their part.

x)The petitioners could complete the work well within the time schedule in case complete 10 months had been provided by PSPCL to the petitioners and further the grid feasibility clearance had been given to the petitioners by PSPCL and PSTCL without wasting time.

xi) The delay occurred due to the fault of the respondents. A contract cannot provide that one party will be arbiter to decide whether it committed breach or the other party committed breach. The matter can only be decided by the Commission. It is settled principle of law that the Commission has inherent powers to pass an appropriate order to provide justice to the affected party. PSPCL has never given explanation as to how its own default can give it a right to invoke contract performance guarantee of the petitioners. As per section 72 of the Indian Contract Act, 1872 irrespective of the clause in the 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 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.

9. The petitioners in the rejoinder dated 03.06.2016 to the reply of PEDDA dated 21.04.2016, while reiterating their earlier submissions further submitted in brief as hereunder:

i) The petition is not bad in terms of de-jure and de-facto, as PEDDA failed to demonstrate or provide reasons to justify the said allegations. It is a settled principle of law that denial has to be specific. It is denied 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, LoAs and IAs, of achieving the COD well within time, has tried to setup a false and frivolous case.

- ii) It is denied that the petition is not maintainable as there exists an arbitration clause in the documents entered between the parties. This issue was decided by Hon'ble Supreme Court of India vide its judgment dated 13.03.2008 in Appeal (Civil) No. 1940 of 2008 in Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Limited.
- iii) There are defaults on the part of the respondents and the petitioners have rightly filed the petition before the Commission. A contract cannot provide that one party will be the arbiter to decide whether it committed breach or the other party committed breach. The matter can only be decided by an adjudicatory forum i.e. the Commission. It is settled principle of law that the Commission has inherent powers to pass an appropriate order to provide justice to the affected parties.
- iv) It is wrong that the IA entered into between PEDDA and the developers, is the main contractual document. As per recital of the PPA, IA is the integral part of the PPA. The petitioners were required to set up the projects and to achieve full capacity by 30.01.2016 (mentioned wrongly as 31.01.2016 by the petitioner) but due to the faults of the respondents which were beyond the control of the petitioners the same could not be achieved.

v) It is wrong that the petitioners got the interim order dated 16.03.2016 (mentioned wrongly as 29.02.2016 by the petitioner) while misleading the Commission. It is correct that as per RfP and IA, the developers were required to commission the plant on or before 30.01.2016 and failing which the PBGs submitted by the developers shall be encashed. The PPAs were signed by PSPCL on 31.03.2015 and as per IAs and PPAs the total period allowed for commissioning the project was 10 months. But as per clause no. 35, the PPA was effective its approval by the Commission.

The PPA was approved by the Commission on 11.05.2015 and as such upto 11.05.2015 this PPA could not be acted upon and the petitioners virtually got 8½ months only instead of 10 months. The respondents caused a delay of 217 days in commissioning of the project. There was no fault of the petitioners. The petitioners have filed the petition before the Commission for extension of date of commissioning on these grounds. Requests were also made to PEDDA for extension of time of COD but PEDDA acting against the mandate of the provisions of NRSE Policy, 2012 decided to invoke the PBGs. PEDDA, being a nodal agency never informed the petitioners before signing of the PPA that it would be effective only after it is approved by the Commission. PEDDA did not disclose material facts regarding acceptance of PPA by the Commission and rather played a fraud in obtaining bank guarantees from the petitioner.

vi) The invocation of PBGs is subject to the terms and conditions of the IA. The Article 10.5 (ix) of the IA shows that the Article 7 of the IA is not absolute and it is qualified by clause 10 of the IA. As such once the matter is pending before the Commission, PEDDA has no right to invoke the PBGs. Clause 10.5 (ix) is reproduced here under:

“In case the commissioning of the project is delayed due to force majeure conditions stated above and the same are accepted by the competent authority, the due dates for encashment of performance security and imposition of liquidated damages shall be extended accordingly. In case the delay affects the COD of the project and it gets extended to the next financial year then the tariff payable shall as determined by the PSERC.

vii) It is settled principle of law that a stay can be granted by the Commission against encashment of PBGs. The Commission has inherent power to pass an appropriate order and extend the period of commissioning the project as the delay occurred is not due to any fault of the petitioners and it is due to sole fault of the respondents. The petition has been filed for condonation of delay in commissioning of the projects.

viii) The delay in granting grid feasibility caused delay not only in loan sanctioning but also in completion of the plants. Till the grid feasibility was granted by the respondents, the petitioners could not start any work of the solar plant.

ix) Though the petitioners applied for grid feasibility on 08.07.2015 but it was granted on 07.09.2015. Without grid feasibility, IREDA did not give loan approval and until the grid

feasibility was granted no work could be started at the project.

- x) The developer is required to arrange funds at its own level which means that the funds may be from loan or to be arranged by the developer. But it does not mean that the funds have to be raised by the developer from its own means. There is difference between own level and own means.
- xi) As per clause 35, the PPA was not effective until it is approved by the Commission and as such the same was not bankable. The petitioner took the land on lease because the land was available at that time but as the PPA was not approved due to which the petitioner could not do any work. After the PPA was approved, the petitioner applied for loan etc. to the financial institutions and thereafter applied for grid feasibility on 08.07.2015. PSPCL took more than 2 months in granting grid feasibility and this caused a delay in commissioning of the project.
- xii) The petitioners tried their best to get the loan from IREDA but when IREDA failed to issue approval, Magnificent and Nextgen arranged the unsecured loans from their directors and submitted their financial closures. The petitioners tried their best to complete the project within the time as per the IA and the delay was on the part of the respondents.
- xiii) The petitioners in their letters to PEDDA stated that they were trying to get funds from IREDA. After the financial closure, the petitioners got intimation from IREDA about the sanction

of their loans and the petitioners accordingly informed the same to PEDDA.

xiv) PEDDA vide letter dated 18.01.2016 declined to extend the date of commissioning as mentioned in the IA.

xv) The petitioners vide letter dated 25.01.2016 submitted that the grid feasibility was applied on 08.07.2015 and PSPCL granted the same vide letter dated 07.09.2015 and caused a delay of 2 months. The petitioners had laid the conductors to Jhunir sub-station to connect it to the breaker panel and were ready to connect the plant to the sub-station. The 11 kV bay of the sub-station did not have space though PSTCL approved for extension of the 11 kV bay building to accommodate more breakers but tender has not been allotted to any contractor and the civil work had not yet started.

xvi) In response to letter dated 25.01.2016 of Magnificent and Nextgen, PEDDA after 10 days vide letter dated 08.02.2016 requested PSPCL to take immediate action regarding breaker panel in the 11 kV bay of the sub-station. These 10 days could have been saved by PEDDA .

xvii) The grid sub-station was not ready for synchronization. PEDDA wrongly and illegally sent the letter dated 24.02.2016.

xviii) District Manager, PEDDA never joined the petitioners or their representative in any such alleged checking. The petitioners have completed their projects and these were inspected by CEI who gave approval on 29.02.2016, 26.02.2016 and 29.01.2016 for Magnificent, Nextgen & Aster respectively.

Thereafter, the protection teams of PSPCL physically visited the projects and checked the premises and gave its report on 26.02.2016 and 29.02.2016 for Nextgen & Magnificent respectively. From these reports, it is very much clear that the projects of the petitioners were completed on 26.02.2016 and 29.02.2016 and were ready to inject electricity in PSPCL system. Thereafter PSPCL gave permission to synchronize the plants on 21.03.2016 and transmission line was charged on 22.03.2016 and accordingly the solar plants were commissioned on 23.03.2016 and 24.03.2016. From the reports it is clear that PSTCL/PSPCL has not completed the work at grid sub-station. The delay occurred in commissioning due to faults of the respondents and the petitioners cannot be penalized for the same.

xix) PSPCL, vide letter dated 21.08.2015 requested PSTCL to supply the technical detail report about space availability at said sub-station and space for 11 kV circuit breakers for all the three plants. It was also mentioned in the letter that in case of non-availability of space in the existing set up at Jhunir sub-station, alternate ways of adding 11 kV circuit breakers may be forwarded. PSTCL in its reply to the petition have mentioned that first request for feasibility clearance dated 21.08.2015 was received from PSPCL on 01.09.2015. Meaning thereby that PSPCL wasted 53 days in just forwarding the request letter of the petitioners to PSTCL (from 09.07.2015 to 01.09.2015). PSPCL vide letter dated 07.09.2015 granted technical grid feasibility clearance. In the absence of technical grid feasibility clearance the petitioners could not start their work because in case the grid feasibility

was not available then the petitioners would be liable to go for another location.

xx) PSTCL received the letter dated 21.08.2015 sent by PSPCL on 01.09.2015 and thereafter feasibility clearance was granted to the petitioners on 07.09.2015. Thereafter the petitioners started activities for taking land but the petitioners got information that the PSTCL is not going to allow them to evacuate the electricity at the said sub-station. The petitioners accordingly stopped all work and visited the respondents to know the truth and got knowledge that PSTCL is denying the permission. Thereafter, PSTCL vide letter dated 13.11.2015 to PSPCL withdrew the technical concurrence given earlier. It was also informed that space for installation of 3 nos. 11 kV circuit breakers for injection of power of 3 nos. solar based generating stations at 220 kV sub-station, Jhunir is not available. PSTCL wasted 73 days in just telling that they do not have space at the site. Thereafter, PSPCL vide letter dated 19.11.2015 requested PSTCL to reconsider the issue. PSTCL allowed the petitioners to connect 3 nos. 11 kV lines at 220 kV sub-station, Jhunir vide letter dated 11.12.2015 for injection of solar power. From these letters, it is very much clear that 28 days were wasted by PSPCL and PSTCL in just taking a decision whether the evacuation would be allowed at Jhunir sub-station or not. Thereafter the petitioners started work at the site.

xxi) The amendments were made in the drawings of the sub-station on 14.12.2015 by PSTCL and vide letter dated

28.12.2015, PSTCL submitted general lay out plan of proposed extension in switch house building at 220 kV sub-station, Jhunir.

xxii)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 liquidated damages/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 liquidated damages/penalty amount by way of invocation of the PBGs.

xxiii)The reply filed by PEDDA to the relief sought by the petitioners is wrong. The total delay of 217 days has occurred due to fault of the respondents. There is fault on the part of the respondents which caused delay in commissioning of the projects and the petitioners can not be penalized for the same. The request made by PEDDA is wrong and illegal and it is not entitled to any relief from the Commission. It is prayed that in view of the submissions made above, the commissioning period of the projects of the petitioners may kindly be extended upto 23.03.2016 for Magnificent & Aster and 24.03.2016 for Nextgen, in the interest of justice.

10. PSTCL vide letter dated 13.07.2016 filed its reply to the directions conveyed by the Commission during hearing on 12.07.2016 regarding commissioning details of the extension of

SHB at 220 kV sub-station, Jhunir for accommodating the 3 nos. 11 kV VCBs. PSTCL submitted that the testing of 3 nos. 11 kV VCBs was carried out on 18.03.2016 by the protection team. The work of extension in control room building was completed on 20.03.2016.

11. PSPCL vide letter dated 21.07.2016 also intimated that the 3 nos. 11 kV breakers were installed on 16.03.2016 and testing of the same was carried out on 18.03.2016 by the protection team.

Commission's Observations, Findings and Decision

12. The Commission has carefully gone through the joint petition filed by three petitioners namely Magnificent, Nextgen and Aster, applications for early hearing and stay on forfeiture of PBGs by PEDDA, replies thereto by PEDDA, PSTCL & PSPCL and rejoinders by the petitioners. The observations, findings and decision of the Commission are as hereunder:

I. The submissions in the petition in brief are as hereunder:

- i) PEDDA allotted 1 MW solar PV power project to each of the three petitioners vide LoAs dated 25.02.2015. Subsequently, IAs were signed by Magnificent and Aster with PEDDA on 20.03.2015 and by Nextgen on 24.03.2015 and PPAs were signed with PSPCL on 31.03.2015.
- ii) Grid feasibility clearance was applied by the petitioners on 25.06.2015 and the same was granted by PSPCL after 3 months on 07.09.2015. The delay in granting grid feasibility clearance delayed the loan sanction by IREDA.
- iii) The work of the three projects was completed within the scheduled time including the erection of 11 kV lines for each

of the project upto 220 kV sub-station, Jhunir and the projects were ready for commissioning.

- iv) PEDA was informed on 29.02.2016 that approvals from CEI and Protection Division, PSPCL have been obtained. PSPCL/PSTCL have not been able to extend the bay and complete the requisite civil and electrical work for synchronization of the projects with the grid till the date of filing the petition on 16.03.2016.
- v) There is no delay on the part of the petitioners. The PPA was approved by the Commission on 11.05.2015, hence the effective date is 11.05.2015 and last date after 10 months falls on 12.03.2016 and even in case of penalty for delay of one month, the same can be levied only after 12.04.2016. Any action by the respondents for forfeiture/encashment of PBGs before 12.04.2016 is illegal, uncalled for, arbitrary and against the provisions of IA/PPA.
- vi) It is prayed to the Commission to (a) direct PSPCL/PSTCL to make the bay ready for synchronization, (b) restrain PEDA from forfeiture of PBGs in terms of clause 10.1.0 of the PPA and article 7A of the IA till bay is not ready for synchronization and (c) extend the date of commissioning of the projects till the bay is ready for synchronization.

II. PSTCL's reply dated 08.04.2016 in brief is as hereunder:

- i) PPAs were signed by PSPCL on 31.03.2015, but copies of the PPAs were not received by PSTCL till the date of filing reply to the petition.
- ii) The request of PSPCL dated 21.08.2015 for feasibility clearance was received on 01.09.2015 after five months from

the date of signing of the PPAs. PSPCL was intimated on 04.09.2015 that the control room of the sub-station needs to be extended for installation of 3 nos. 11 kV breakers at 220 kV sub-station, Jhunir. Amendment in the drawing of the sub-station for extension of control room was issued on 14.12.2015 and accordingly the work of extension of the control room was carried out.

iii) Works at the projects were not completed by the scheduled date i.e. 30.01.2016 which is evident from the provisional approval given by CEI, Punjab for the 11 kV lines of Magnificent, Nextgen and Aster on 29.02.2016, 26.02.2016 and 29.01.2016 respectively.

III. PEDA's reply dated 21.04.2016 in brief is as hereunder:

- i) The petition is not maintainable as there exists an arbitration clause in the IA entered between the parties.
- ii) The petitioners could not achieve COD upto 30.01.2016 as provided in the IAs.
- iii) The petitioners while misleading the Commission have wrongly sought interim order dated 16.03.2016 passed by the Commission restraining PEDA from encashing the PBGs deposited by the petitioners. The said Order of the Commission deserves to be vacated as PEDA is entitled to encash the PBGs deposited by the petitioners in line with the contractual terms agreed between the parties and due to the failure of the petitioners to complete the projects uptill 30.01.2016.
- iv) PEDA vide communication dated 21.08.2015 asked the petitioners to submit various documents including financial closure for setting up the projects by 31.08.2015 which were

to be submitted within 120 days of signing of PPA i.e. upto 31.07.2015. The petitioners sought extension of date for financial closure on 17.08.2015 on the pretext that IREDA is flooded with loan applications and the processing of the loan applicants is consuming time. The petitioners were allowed to submit the financial closure document by 31.08.2015 but they failed to submit the same.

The petitioners never informed that the loan sanction by IREDA was delayed on account of delay in issuance of feasibility clearance by PSPCL. The land lease deed for the period of 30 years is dated 17.04.2015. However, the petitioners applied for grid feasibility clearance after a delay of 2½ months on 25.06.2015. Hence, the purported plea of the petitioners in this regard carries no substance.

- v) The projects allocated to the petitioners are on build, own and operate basis, for which the RfP nowhere stipulates that the developer needs to avail loan for setting up of the allocated projects. As per the RfP, it has been obligated upon the developer to arrange the funds for the projects at its own level.
- vi) PEDDA issued default notice of 30 days on 03.09.2015 seeking submission of financial closure documents. Aster vide letter dated 01.10.2015 informed PEDDA that it has sought unsecured loan from its director. Magnificent and Nextgen vide their respective letters dated 12.10.2015 submitted their financial closure by arranging unsecured loan from the directors and undertook to commission the projects within time as provided in the IAs. However, vide their letters dated 24.11.2015, Magnificent and Nextgen informed PEDDA

about the sanction of respective loans for their projects by IREDA.

- vii) Magnificent, Nextgen and Aster alongwith other developers requested for extension in time period for the scheduled date of commissioning of the projects by way of joint representation dated 06.01.2016. PEDA on 18.01.2016 declined to extend the scheduled date of commissioning of the allocated projects and requested for timely commissioning of the projects, failing which clause 3.23 of the RfP shall prevail for any delay beyond scheduled date of commissioning.
- viii) Magnificent and Nextgen vide letters dated 25.01.2016 informed about the unavailability of breaker panel in the 11 kV bay of the sub-station of PSTCL and their inability to meet timeline for the projects. In response, PEDA vide its letter dated 08.02.2016 requested PSPCL to take immediate action in this regard. No such request as to non-availability of breaker panel on behalf of Aster was received.
- ix) PEDA on 24.02.2016 informed the petitioners as to the levy of penalty on account of delay in commissioning of the projects in line with the provisions of the IAs.
- x) District Manager, PEDA vide its reports dated 03.03.2016 and 21.03.2016 informed that the installation of solar PV modules was in progress meaning thereby that plants were incomplete and not ready for commissioning. The report dated 03.03.2016 also mentioned that sub-station of PSTCL was also not ready. The requisite CEI and PSPCL protection clearance was sought at belated stage after 30.01.2016 by the petitioners. The delay in commissioning of the projects is

attributable to the petitioners. Hence, the petitioners are liable to the levy of penalty and PEDDA has rightly initiated for encashment of PBGs.

xi) The petitioners are not entitled for the tariff awarded to the project under the reverse bidding process as the control period of the generic tariff of ₹7.72 per kWh is valid upto 31.03.2016.

xii) It is prayed to dismiss the petition with exemplary costs and direct the petitioner to deposit the amount of penalty with PEDDA for the non-commissioned/short commissioned capacity of the project, in line with the contractual documents entered between the parties in the interest of justice, equity and fair play.

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

i) The prayer for extension in date of commissioning of projects from 30.01.2016 to 30.06.2016 is baseless. The permission to synchronize the plants was granted on 21.03.2016.

ii) The petitioners have not approached the Commission with clean hands and concealed material facts with regard to their requests for providing the bay for synchronization. The petitioners never requested for providing the bay for synchronization and there is no delay on the part of PSPCL.

iii) The projects have already been commissioned and the petition has been filed by concealing this fact to avoid the penalty leviable for delay in commissioning.

iv) The Commission should reduce the tariff rates applicable to the projects as capital cost is reducing every year and the commissioning of the projects has been delayed.

- v) The petitioners were required to look into the technicalities and take proper remedial measures with regard to synchronization and commissioning of the projects. The request for technical grid feasibility clearance was received by PSPCL on 08.07.2015 and not 25.06.2015 as claimed by the petitioners. The delay of more than 3 months in applying for the technical grid feasibility clearance has not been explained by the petitioners. The time taken by PSPCL for giving grid feasibility clearance is within the procedural framework and no delay has been caused.
- vi) Due to delay in commissioning of the projects, PSPCL shall have to purchase the expensive RECs for its RPO compliance which would affect the customers.
- vii) The petitioners did not make any request for synchronization of the projects and as such PSPCL cannot be made liable for not providing the bay for the same.
- viii) Due to delayed commissioning of the projects, it is PSPCL's right to initiate action against the petitioners under terms & conditions of the PPA including clause 10.1.1.
- ix) The petition should be dismissed with exemplary costs on the petitioners in the interest of justice.

V. The petitioners' submissions in the rejoinders to the replies of PSTCL, PSPCL and PEDDA, are summarized as hereunder:

Rejoinder to the reply of PSTCL

- i) The petitioners' request for grid feasibility clearance received by PSPCL on 08.07.2015 was forwarded to PSTCL vide letter dated 21.08.2015, which was received by PSTCL on 01.09.2015. PSPCL took 53 days to forward the request

letter to PSTCL for technical grid feasibility clearance. PSPCL issued technical grid feasibility clearance to the petitioners on 07.09.2015. However, PSTCL vide letter dated 13.11.2015 to PSPCL, withdrew the technical concurrence given earlier and informed that space for installation of 3 nos. 11 kV circuit breakers for injection of power of 3 nos. projects at 220 kV sub-station Jhunir is not available. Therefore, further 73 days were taken by PSTCL to inform that space at 220 kV sub-station was not available. PSPCL vide letter dated 19.11.2015 requested PSTCL to reconsider the issue. PSTCL vide letter dated 11.12.2015 allowed to connect 3 nos. 11 kV lines at 220 kV sub-station Jhunir for injection of power. So, further 28 days were taken by PSPCL and PSTCL for allowing evacuation at 220 kV sub-station Jhunir. The issue for evacuation of power was finalized on 11.12.2015 and petitioners could start work at the site thereafter. PSTCL caused a delay of 3 months in giving consent for space.

- ii) PSTCL made amendments in the drawing of the sub-station on 14.12.2015 and general lay-out plan of proposed extension in control room at 220 kV sub-station Jhunir was issued vide letter dated 28.12.2015. The extension of control room was completed on 22.03.2016.
- iii) The work of the plants of the petitioners was not completed upto 30.01.2016 and the reasons for the same have already been explained. PSPCL and PEDA caused a delay of more than 150 days in getting the PPA approved, granting feasibility clearances etc. and petitioners cannot be

penalized for this delay. It is prayed to extend the commissioning period of the said projects upto 23.03.2016, 24.03.2016 and 23.03.2016 respectively.

Rejoinder to the reply of PSPCL

- i) The projects of Magnificent and Aster were synchronized on 23.03.2016 and the project of Nextgen was synchronized on 24.03.2016. As such the petitioners are seeking extension of time of commissioning from 30.01.2016 to 23.03.2016 (Magnificent and Aster) and 24.03.2016 (Nextgen) instead of 30.06.2016 sought earlier.
- ii) PSPCL granted technical grid feasibility clearance vide letter dated 07.09.2015 and uptill then the petitioners could not start their work because in case the grid feasibility clearance is not available, then the petitioners would have to go for another location. Thereafter, the petitioners started activities for taking land and meanwhile got information that PSTCL is not going to allow evacuation of power at 220 kV sub-station Jhunir, due to which the petitioners stopped all the work.
- iii) The petitioners completed their projects and the same were checked by CEI who gave his approval dated 29.02.2016 to Magnificent, 26.02.2016 to Nextgen and 29.01.2016 to Aster. Protection teams of PSPCL checked the premises of the projects and gave its reports dated 29.02.2016, 26.02.2016 and 29.02.2016 respectively. PSPCL granted permission to synchronize the plants on 21.03.2016 and 11 kV lines were charged on 22.03.2016. The solar PV power projects were synchronized and commissioned on 23.03.2016, 24.03.2016 and 23.03.2016 respectively.

- iv) The tariff determined by the Commission was applicable upto 31.03.2016 and the projects have been commissioned before 31.03.2016. It is wrong that the petitioners have delayed the projects to reduce the capital cost.
- v) PSPCL inserted a clause no.35 in the PPA, which was not the part of the PPA provided in the RfP document. It was stated in this clause that PPA shall be effective and binding on the parties only upon approval of the PPA by the Commission and the PPA shall be subject to such conditions as may be stipulated by the Commission while granting such approval. The petitioners and other solar developers objected to it as PSPCL should have got the PPA approved from the Commission before its date of execution. The petitioners were assured by PSPCL that the approval from the Commission shall be obtained in 5-7 days time. The petitioners were left with no option except signing of the PPA. The insertion of clause no.35 in the PPA rendered it practically ineffective and non-bankable until it was approved by the Commission. The Commission vide Order dated 11.05.2015 in petition no.21 of 2015 filed by PSPCL approved the PPA. Due to uncertainty/non-bankability of the PPA, the projects and financial closure activities could not progress during this period of nearly 1½ months.
- vi) The details of delay caused by the respondents are as under:
 - a) The PPA was signed on 31.03.2015 and the same was approved by the Commission on 11.05.2015 i.e. after 41 days.

- b) Request for feasibility clearance was made by petitioners on 25.06.2015 (received by PSPCL on 08.07.2015) and the same was granted on 07.09.2015 i.e. after 60 days (09.07.2015 to 07.09.2015).
- c) PSTCL withdrew the permission to connect the 11 kV lines of the projects at 220 kV sub-station Jhunir on 13.11.2015 and again gave permission on 11.12.2015 after reconsidering the issue, causing a further delay of 95 days (08.09.2015 to 11.12.2015).
- d) The protection teams of PSPCL checked the projects on 29.02.2016, 26.02.2016 and 29.02.2016 respectively. Thereafter, PSPCL gave permission for synchronization on 21.03.2016 i.e. after 21 days (01.03.2016 to 21.03.2016).
- e) The total delay due to faults of respondents is 217 days.

Rejoinder to the reply of PEDDA

- i) It is wrong that the petition is not maintainable as there exists an arbitration clause in the IA signed with PEDDA. This issue was decided by Hon'ble Supreme Court of India in its judgment dated 13.03.2008 in Appeal (Civil) No. 1940 of 2008 in Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Limited. The petitioners have rightly filed the petition before the Commission due to defaults on the part of the respondents. A contract cannot provide that one party will be the arbiter to decide whether it committed breach or the other party committed the breach. The matter can only be decided by the Commission. IA signed with PEDDA is not the main contractual document. As per recital of the PPA, IA is the integral part of the PPA.
- ii) It is wrong that the petitioners misled the Commission and got the interim order dated 16.03.2016 restraining PEDDA

from encashing the PBGs deposited by the petitioners with PEDDA. In the PPA signed on 31.03.2015, the commissioning period for the project was 10 months but as per clause no.35 of the PPA, it was effective only after the approval by the Commission. The PPA was approved by the Commission on 11.05.2015 and petitioners virtually got 8½ months only instead of 10 months for commissioning of the projects. The defaults on the part of the respondents caused a delay of about 217 days in commissioning of the projects. PEDDA was requested for allowing extension in time for commissioning of the projects but it decided to invoke the bank guarantees. PEDDA never informed the petitioners that PPA would be effective only after its approval by the Commission. Further, article 10 of the IA provides that if the delay in commissioning of the projects is due to force majeure conditions and the same are accepted by the competent authority, the due dates for encashment of the PBGs and imposition of liquidated damages shall be extended accordingly. The article 7 of the IA which provides for encashment of PBGs is qualified by article 10 of the IA and as such PEDDA does not have the absolute right to invoke the PBGs.

- iii) PEDDA stated that the developers were required to arrange the funds at their own level. Arranging funds at the own level means that the funds may be from loan to be arranged by the developers but it does not mean that the developers have to raise the funds from their own sources.

- iv) The petitioners took the land on lease as the same was available at that time but the work could not be started as the PPA had not been approved by the Commission. After the approval of PPA, the petitioners applied for the loan to the financial institutions and technical grid feasibility clearance to PSPCL. The feasibility clearance was granted by PSPCL after a delay of more than 2 months, which delayed the commissioning of the projects.
- v) The delay in commissioning of the projects has occurred as IREDA was not sanctioning the loan in the absence of feasibility clearance.
- vi) The District Manager of PEDDA never joined the petitioners or their representatives for inspection carried out at the project sites.
- vii) PEDDA, vide letter dated 18.01.2016, replied to the representation dated 06.01.2016 of the petitioners and other developers. The perusal of the reply shows that it is totally non-speaking and the submissions made by the petitioners and other developers were not dealt with.

VI. PEDDA in its reply to the petition 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.**

VII. The Commission notes that the petitioners' projects were scheduled to be commissioned on 30.01.2016 and were required to be connected to 3 nos. 11 kV breakers at 220 kV sub-station Jhunir under the jurisdiction of PSTCL, for evacuation of power generated by the three solar PV power projects. In the prayer, the petitioners have sought extension in the date of commissioning of the projects till the bays are ready for synchronization. However, in the rejoinder dated 30.05.2016 to the reply of PSPCL, the petitioners revised their prayer and sought extension in time of commissioning from 30.01.2016 to 23.03.2016 for the projects of Magnificent & Aster and 24.03.2016 for the project of Nextgen. The projects of Magnificent and Aster were synchronized/commissioned on 23.03.2016 and that of Nextgen on 24.03.2016. The projects of Magnificent and Aster were commissioned with a delay of 53 days and that of Nextgen with a delay of 54 days from the scheduled date of commissioning of the projects i.e. 30.01.2016. The petitioners have alleged this delay on account of approval of PPA by the Commission on 11.05.2015 after 41 days of its signing with PSPCL on 31.03.2015, delay in granting grid feasibility clearance by PSPCL/PSTCL and non-completion of civil & electrical works at 220 kV sub-station, Jhunir to extend the control room for synchronization of the projects.

The Commission notes that clause 10.1.0 and clause 35 run concurrently and co-exist in the PPA. Also as per para (d) on page-2 of the PPA, IA shall be treated as an integral part of the PPA. The Commission further notes that petitioners arranged the land for the projects in the month of April 2015 and the lease deeds for the same were signed on 17.04.2015 as submitted by PEDDA in its reply. The petitioners were in a

position to apply for the technical grid feasibility clearance to PSPCL as on 17.04.2015. Also, there was no bar on the petitioners to apply for loans etc. from IREDA/financial institutions. In fact Magnificent and Nextgen at one point of time confirmed to have arranged funds from their directors though later informed that IREDA has sanctioned the loan for their projects. As such, the preliminary/preparatory works for execution of the projects do not appear to have suffered for want of approval/acceptance of the PPA by the Commission on 11.05.2015, as alleged by the petitioners. The Commission has carefully considered the matter and is of the opinion that in the absence of any documentary evidence as to the projects having suffered loss/delay on this account, no benefit for the same is admissible to the petitioners.

The Commission further notes that the financial closure of the projects was required to be achieved within 120 days after signing of the PPA i.e. by 31.07.2015. The petitioners were allowed by PEDDA to submit the financial closure documents by 31.08.2015. Aster vide letter dated 01.10.2015 informed PEDDA that it has achieved the financial closure for its project by taking unsecured loan from directors of the company. Magnificent and Nextgen informed PEDDA vide letters dated 12.10.2015 that the financial closure of the projects has been achieved by arranging funds in the form of unsecured loans from directors of the companies. However, Magnificent and Nextgen informed PEDDA on 24.11.2015 that IREDA has sanctioned the loan for their projects.

The petitioners alleged that IREDA was not sanctioning the loan in the absence of technical grid feasibility clearance

for the projects. The Commission notes that the request for technical grid feasibility clearance was made by the petitioners to PSPCL on 25.06.2015 which as per PSPCL was received by it on 08.07.2015. The Commission considers the same as quite late considering that it was required to be submitted to PEDDA within 90 days of signing the PPA. The technical grid feasibility clearance to the petitioners' projects was granted by PSPCL on 07.09.2015 i.e. after 61 days (09.07.2015 to 07.09.2015). Thereafter on 13.11.2015, PSTCL withdrew the permission to connect the 11 kV lines of the projects meant for evacuation of power at 220 kV sub-station Jhunir and informed that space for installation of 3 nos. 11 kV circuit breakers for injection of power of 3 nos. projects was not available. On PSPCL's request to reconsider this issue, PSTCL again gave permission on 11.12.2015 to connect the aforesaid lines at 220 kV sub-station Jhunir, which caused a delay of 28 days from 13.11.2015 upto 11.12.2015. Considering 25 to 30 days time period as reasonable for grant of technical grid feasibility clearance to the petitioners' projects by PSPCL/PSTCL, the Commission holds that the delay of 59 (61 + 28 - 30) days is to the account of PSPCL/ PSTCL.

The Chief Electrical Inspector granted the provisional approval for commissioning of electrical installations including 11 kV lines from solar PV power projects to 220 kV sub-station Jhunir for the projects of Magnificent, Nextgen and Aster on 29.02.2016, 26.02.2016 and 29.01.2016 respectively. The protection teams of PSPCL tested the installations at the projects of Magnificent, Nextgen and Aster

on 29.02.2016, 26.02.2016 and 29.02.2016 and found the protection results satisfactory.

The Commission notes that PSTCL initiated the process for extension in switch house building after 11.12.2015 for the installation of 3 nos. 11 kV breakers of the petitioners' projects. The breakers were installed on 16.03.2016 and testing of the same was carried out by the protection team on 18.03.2016 as submitted by PSPCL/PSTCL. The work of extension in control room building was completed on 20.03.2016 as intimated by PSTCL vide letter dated 13.07.2016. PSPCL gave permission for synchronization of the projects on 21.03.2016 and the projects of Magnificent & Aster were commissioned on 23.03.2016 and that of Nextgen on 24.03.2016.

As such, the delay from 29.02.2016 to 21.03.2016 (21 days) in case of Magnificent & Aster and 26.02.2016 to 21.03.2016 (24 days) in case of Nextgen is due to default on the part of PSPCL/PSTCL. Thus, the total delay due to default of PSPCL/PSTCL is 80 (59+21) days in case of Magnificent & Aster and 83 (59+24) days in case of Nextgen.

The projects of Magnificent and Aster were commissioned on 23.03.2016 i.e. with a delay of 53 days from 30.01.2016. The Commission has held that PSPCL/PSTCL are responsible for delay of 80 days in their case. Further, the project of Nextgen was commissioned on 24.03.2016 i.e. with a delay of 54 days from 30.01.2016 where delay of 83 days has been held to the account of PSPCL/PSTCL. As such, there is neither a case for the forfeiture and encashment of PBGs by PEDDA nor levy of liquidated damages by PSPCL in terms of

IA/PPA. On the same grounds, it is held that there shall be no change in the tariff as provided in their respective PPAs for any of the three projects payable to the petitioners by PSPCL for purchase of electricity from these projects.

Accordingly, the stay granted by the Commission for forfeiture and encashment of PBGs is hereby vacated. PEDDA is directed to forthwith release the PBGs within seven working days from the date of this Order, failing which PEDDA will be liable to pay penal interest on the remaining amount to the petitioners at the rate of 1.25% per month payable on pro-rata basis for each day's delay beyond seven working days.

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

Sd/-

**(S.S. Sarna)
Member**

Chandigarh
Dated:14.02.2017

Sd/-

**(D.S. Bains)
Chairman**