PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH

IA No. 28 of 2022
In Petition No. 15 of 2017
Date of Order: 31.10.2023

Application filed for passing of appropriate orders in Petition No. 15 of 2017.

AND

In the matter of: Photon Sunbeam Pvt. Ltd. Registered office 8th Floor, Statesman House, Barakahmba, Road, New Delhi-110001 through its Authorized Signatory Mr. Vaibhav Sharma.

.....Applicant/Petitioner

1. Punjab State Power Corporation Limited, the Mall, Patiala through its Chairman.
2. Punjab Energy Development Agency, Solar Passive Complex, Plot No. 01 & 02, Sector 33-D, Chandigarh, through its Chairman.
3. Syndicate Bank Limited, Arunchal Bhawan, Building 19 Barakhamba Road, New Delhi, through its Manager.

.....Respondents

Commission: Sh. Viswajeet Khanna, Chairperson
Sh. Paramjeet Singh, Member

Photon: Sh. Aashish Chopra, Sr. Advocate
Ms. Meher Nagapl, Advocate

PSPCL: Ms. Poorva Saigal, Advocate

PEDA: Sh. Aditya Grover, Advocate

Syndicate Bank: Sh. Himanshu Sharma, Advocate

ORDER

Photon Sunbeam Pvt. Ltd has filed the present application for passing of consequential orders in Petition No. 15 of 2017 upon issuance of award dated 07.12.2020 by the Sole Arbitrator appointed by the Commission. It has been submitted that:

1.1 In Petition No. 15 of 2017 filed under Section 86 (1)(f) of the Electricity Act, 2003 by the applicant/petitioner for adjudication of its disputes with the Respondents PEDA and PSPCL under the Implementation Agreement dated 30.11.2015 (**IA**) read along with the provisions of the Power Purchase Agreement dated 13.01.2016 (**PPA**), the Commission vide Order dated 10.10.2017 appointed Hon'ble Mr. Justice S.S Saron (Retd.) as the sole arbitrator to decide upon all the issues raised in the petition except the Tariff, which, if required was to be re-determined in terms of Article 3(C) of the IA by the Commission after considering the relief granted by the Arbitrator.

1.2 The Ld. Arbitrator vide an award dated 07.12.2020, copy of which made available to the Petitioner on 16.08.2022, has accepted its claim with respect to the force majeure events. The award directs PEDA to re-fix the time schedule for completion of the second project which was partially commissioned on 10.06.2017 at village Teona Pujarian with 220 KV Grid sub-station at Talwandi Sabo, after the tariff payable to the Petitioner is determined by the Commission.

1.3 It is mentioned that PSPCL filed Petition No. 31 of 2016 seeking approval of the Commission to procure electricity from 500 MW Solar PV Power Projects (including 50 MW from the impugned project) to be established in the State. The Commission disposed of the said Petition vide Order dated 10.06.2016 with the observation that the applicability of the said approved tariffs beyond 31.03.2017 will not be allowed even if punitive clauses in the PPA are made applicable barring force majeure/change in law events.

1.4 The petitioner submits that, owing to certain delays occurring due to force majeure events as held by the Ld. Arbitrator in his award, the applicant/Petitioner could only synchronize its 25 MW 66 KV Rama Mandi GSS project on 08.05.2017 and 15 MW 220 KV Talwandi Sabo GSS Project on 10.06.2017.

1.5 The Petitioner has prayed as under:

a) To hold that the tariff in respect of the already commissioned 40 MW (25MW+15MW) would remain as per the PPA.

b) To direct PEDA and PSPCL to amend relevant clauses of the IA and PPA in order to give meaningful effect to the Award dated 07.12.2020 and order(s) of the Commission as well.

c) To provide extension of nine months to the Petitioner to commission the remaining 10 MW project from the date of relevant amendments made to IA and PPA by the Respondents, whichever is later.

d) To direct that the tariff for the remaining 10 MW project to remain the same till the extended period, keeping in view the order dated 10.06.2016 passed by the Commission and the fact that the Award and the extension of time is under Force Majeure.

2. PSPCL vide its reply dated 03.03.2022, while reserving its right to file a detailed reply, objected to the maintainability of the instant application by

submitting that the same is akin to enforcement of the Arbitral Award which has not yet attained finality and hence is premature. The said arbitral award is subject to the appeal filed by PSPCL under section 34 of the Arbitration & Conciliation Act, 1996 before the District Court at Chandigarh. PSPCL also listed its contentions on various issues pertaining to the award. On the other hand, the applicant/petitioner vide its rejoinder dated 11.04.2023, while submitting that the award given by the Arbitrator cannot be adjudicated by the Commission, countered the PSPCL's aforesaid objection with the plea that it is a settled law that filing of an application shall not by itself render the award unenforceable unless the Court grants an order of stay of its operation and it is a conceded position in the present case that there is no stay of the operation of the Arbitral Award. The IA was taken up for hearing on admission on 12.07.2023. The Ld. Counsel for parties reiterated their above stated position. After hearing the parties the IA was admitted vide Order dated 17.07.2023.

3. Submissions of PSPCL

PSPCL filed its detailed reply vide memo No. 6758 dated 07.08.2023, without prejudice to its contention on the enforceability of the Arbitral Award dated 07.12.2020. PSPCL's submissions on the issue of tariff for the project and extension in the period of commissioning of the remaining 10 MW capacity are summarized as under:

3.1 On 29.06.2015, PEDA issued the request for proposal (RfP) for the new grid connected 500MW Solar PV Power Projects under Phase-III, specifying that:

a) Selection of bidders shall be based on net availed tariff i.e. the tariff arrived after providing a discount on generic tariff notified by CERC for Solar PV Power Projects for FY 2015-16 as adopted by PSERC. PEDA will shortlist the bidders based on net tariff arrived in Rs. Per kWh after reduction of discount offered by the bidder.

b) The terms and conditions for implementation of the Project shall be formalized through signing of an Implementation Agreement (IA) between the successful bidder and PEDA. The PPA shall be executed between PSPCL and the Selected Bidder within 30 days from the date of signing of IA.

c) The Project shall be commissioned within 12 months from the date of signing of the PPA. The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantees (PBG) and payment of Liquidated Damages (LD) shall be limited to 17 months from the date of signing of PPA. And, in case the Commissioning of the project is delayed beyond 17 months from the date of signing of the PPA, the PPA capacity along with the Letter of Award (LOA) and IA will stand terminated to the extent of the un-commissioned capacity.

3.2 On 24.07.2015, by way of Suo-Moto Petition No. 43 of 2015, the Commission determined the Generic RE Tariff Order FY 2015-16, specifying the per unit tariff for Solar PV projects as Rs. 7.04/6.35 (without/with accelerated depreciation) for the projects to be commissioned on or before 31.03.2017.

3.3 On 26.08.2015, the Petitioner submitted its response to PEDA wherein it provided acceptance to the terms of the RFP and offered a discount of Rs. 1.47/kWh on the applicable Generic Tariff. On the basis of the same, the LOA dated 19.10.2015 was issued by the PEDA to the Petitioner as under:

> *"2. We are pleased to inform you that your company has been selected for setting up of 50MW Solar PV Power Project in the State at the Net Tariff of Rs. 5.57 (Rupees Five and Fifty Seven paisa only)/KWh after discount on generic tariff of Rs. 7.04/KWH (as notified by PSERC in its RE Tariff Order for Solar PV Power projects for FY 2015-16), offered by you in your financial bid for developing a Grid Connected Solar PV Power Project in the State of Punjab."*

3.4 Accordingly, PEDA executed the IA dated 30.11.2015 with the Petitioner and PSPCL signed the PPA dated 13.01.2016. And, the Commission approved the said power procurement vide Order dated 10.06.2016 in Petition No. 31 of 2016 filed by PSPCL for approval of procurement of 500 MW Solar PV Power including 50MW to be developed by the Petitioner.

3.5 On 03.03.2017, the Petitioner filed Petition 15 of 2017 citing disputes with PEDA and PSPCL under the IA read with the PPA due to the delay in commissioning. The Commission vide its order dated 10.10.2017 referred the issues except the tariff to arbitration and appointed Hon'ble Mr. Justice S.S Saron (Retd.) as Sole Arbitrator, with the observation that the tariff, if required to be re-determined in terms of Article 3(C) of the Implementation Agreement, to be treated as an integral part of the PPA as per sub-clause (d) at page 2 of the PPA, shall be determined by the Commission after considering the relief granted by the Arbitrator. The said order has not been challenged and has attained finality.

3.6 In terms of the bidding documents, the Petitioner was required to commission the project within 12 months from the date of signing of the PPA. Therefore, in terms of the PPA signed on 13.01.2016, the commissioning of the project was required to be achieved on or before 12.01.2017. It was only in these circumstances, that the stated tariff for Rs. 5.57 was to be made applicable to the Petitioner. However, the Petitioner achieved commercial operation only on 08.05.2017 of 25MW and on 10.06.2017 of 15MW.

3.7 The Ld. Arbitrator passed an Arbitral Award on 07.12.2020. PSPCL has filed an appeal (Arbitration Case 103/2023) under Section 34 of the Arbitration & Conciliation Act, 1996 challenging the said Arbitral Award, which is pending before the Hon'ble District and Sessions Judge at Chandigarh. Without prejudice to the rights and contention of PSPCL in the said Arbitration Case, the implications of the arbitral award are as under:

a) PEDA has been restrained from encashing/ invoking the balance amount of the Performance Bank Guarantee (PBG);
b) PSPCL is not entitled to levy liquidated damages on the Petitioner for the delay in the commissioning of the project;
c) The Commission is required to re-determine the tariff since the project was commissioned in the next financial year i.e. in the FY 2017-18.

3.8 In terms of Articles 3 (C) and 10.5 (ix) of the IA, the Commission is mandated to re-work the tariff applicable to the project. Since, the PPA provides that the terms of the IA are an integral part of the

PPA, the tariff as determined under the provisions of the IA would be the applicable tariff for the term of the PPA.

3.9 PSPCL submits the following for consideration of the Commission for re-determination of the applicable tariff:

a) The tariff should be determined by the Commission at the Generic rate for Solar PV Projects commissioned during the FY 2017-18 minus the discount offered by the Petitioner. In terms of the Generic Tariff Order dated 23.11.2016 passed by the Commission in Suo-Moto Petition No. 55 of 2016, per kWh tariff determined was Rs. 5.68/5.08 for the Solar PV Projects commissioned upto 31.03.2018. As, the Petitioner was selected on the basis of an offered discount of Rs 1.47/kWh. Therefore, the applicable tariff for the commissioned 40MW cannot exceed Rs. 4.21/3.61 i.e., the generic tariff of Rs. 5.68/5.08 (without/with AD) minus the discount of Rs 1.47.

b) Further, it is open for the Commission to consider the prevalent market rates in the FY 2017-18, which ranged from approx. Rs. 3.66 to Rs. 4.41. Reliance in this regard is placed on the following orders passed by State Commissions determining the Tariff of Solar PV Projects commissioned in FY 2017-18:

(i) Order dated 12.04.2017 passed by the Karnataka Electricity Regulatory Commission, which reads as under:

*"4. **Tariff for grid connected Solar PV for FY18***

*i. On the basis of the approved parameters, in modification of its earlier Order dated 30th July, 2015, the Commission hereby determines the tariff of **Rs.4.36 per unit** for all new grid connected MW scale solar PV Plants entering into Power*

Purchase Agreement (PPA) on or after 1st April, 2017 but before 1st April, 2018.

ii. This tariff determined shall also be applicable to those grid connected megawatt scale Solar PV Plants for which PPAs were entered into before 1st April, 2017 but are not commissioned within the specified commercial operation date (COD) and achieve COD during the period from 1st April, 2017 to 31st March, 2018."

(ii) Order No. 2 of 2017 dated 28.03.2017 i.e., the Comprehensive Tariff Order on Solar Power passed by Tamil Nadu Electricity Commission, which reads as under:

"8. Solar Power Tariff

8.1. Solar power tariff is computed with reference to the determinants listed above. The tariff works out to ***Rs. 4.50 per unit*** *for Solar PV projects and Rs.10.19 per unit for Solar Thermal projects without Accelerated Depreciation (AD) benefit. The AD benefit component of the tariff is Rs.0.09 per unit for Solar PV and Rs.0.21 per unit for Solar Thermal. ..."*

c) Order dated 09.10.2017 passed by the Rajasthan Electricity Regulatory Commission in Suo Moto Petition determining the generic levellised tariff for FY 2017-18, which reads as under:

"Applicable Tariff for solar Power Plants

68. Considering the parameters discussed above, the generic tariff for Solar PV plants is being determined as ***3.93/kWh*** *as per calculation sheet placed at Annexure-III. This tariff is levellised tariff for 25 years and applicable for plants commissioned without availing AD benefit. The tariff would be* *lower by 0.27/kWh, i.e., 3.66/kWh, if AD benefit is availed. This tariff would be applicable for solar PV plants where PPA is signed on or before 31.03.2018 and which get commissioned on or before 31.03.2019."*

d) This Commission, in the case of a similarly placed Generator *Photon Suryadaya* in Petition No. 14 of 2017 vide Order dated 11.02.2019, has exercised its powers in terms of the IA & PPA and re-determined the tariff. In the said case, after examining the prevalent Tariff rate for the year of Commissioning of the Solar PV Project, the Commission deemed it fit to re-determine the applicable tariff from Rs. 5.27/kWh to Rs. 3.75/kWh. The relevant extracts from the Order, inter-alia, reads as under –

"The petitioner's project was slated to be commissioned in FY 2016-17 whereas the same would now be commissioned in FY 2019-20 at the earliest. During the interregnum of 3 years, the tariffs for solar PV power projects have witnessed a significant decline. The Commission adopted the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 after due process, according to which annual generic tariff for solar PV power projects is not to be determined. Therefore, the Commission intends to rely upon the latest generic tariffs determined by other SERCs for the remaining 67.71% expenditure yet to be incurred by the petitioner. KERC and MERC have determined the tariffs of Rs. 3.05 per kWh (for projects upto 5 MW capacity) and Rs. 3.02 per kWh respectively for solar PV power projects for FY 2018-19. The average of these tariffs works out to Rs. 3.035 per kWh. …. As such, the Commission finds

it just and fair to allow the aforementioned average tariff of Rs. 3.035 per kWh for the remaining 67.71% expenditure. Based upon the discussion above, the weighted average tariff for the petitioner's solar PV power project works out to Rs.3.75 (5.27x0.3229+3.035x0.6771) per kWh.

Accordingly, the Commission allows the tariff of Rs. 3.75 per kWh which shall be payable by PSPCL for purchase of electricity from the petitioner's project for the entire term of the PPA."

3.10 Insofar as the remaining 10 MW is concerned, PSPCL submits that Article 10.1.1 and 10.1.2 of the PPA stands automatically terminated to the extent of non-commissioning within 17 months. Accordingly, the PPA capacity stands reduced to 40 MW. The Petitioner is only entitled to a tariff to be determined by the Commission for the 25MW + 15 MW capacity commissioned by the Petitioner and no further extension/tariff is payable in respect of the 10MW that has not been commissioned till date.

4. Submissions of PEDA

PEDA filed its reply on 08.08.2023, submitting that it is an admitted case of the Petitioner that copy of the award was received on 16.08.2022. The Petitioner has miserably delayed the project and now even in terms of the relief given by the Sole Arbitrator, the Petitioner did not Commission the remaining 10 MW capacity. The Petitioner is now maliciously seeking relief with regard to the tariff for 40 MW commissioned capacity and extension in period of commissioning of remaining 10 MW capacity as well as tariff therefor. The relief claimed by the Petitioner is liable to be dismissed with costs.

5. Rejoinder filed by the Applicant/Petitioner

The Petitioner filed its rejoinder dated 30.08.2023 to the reply filed by PSPCL. While, reiterating its earlier submissions, it was further submitted as under:

5.1 In Petition No. 31 of 2016 filed by PSCPL seeking approval for procurement of Solar PV Power, the Commission, vide order dated 10.06.2016 had approved the tariff of Rs. 5.57 per kWh. Through the said order, the Commission had categorically held that the applicability of the approved tariff beyond 31.03.2017 will not be allowed, barring force majeure/change in law events.

5.2 It is, thus, evident that in case the commissioning date goes beyond 31.03.2017 due to a force majeure, the approved tariff would continue to apply. Concededly, in the present case it has been categorically held by the Ld. Arbitrator that delay has occurred due to a force majeure event, as had been delineated in the award itself. Thus, the present case would get squarely covered by the order dated 10.06.2016 passed by the Commission in Petition No. 31 of 2016 and consequently, the approved tariff of Rs. 5.57 per kWh forming part of the PPA would remain intact not only for the commissioned 40 MW (25 MW + 15 MW) but also for the remaining non-commissioned 10 MW.

5.3 The reliance placed by PSPCL on the orders passed by other Commissions is misconceived. Reliance placed on this Commission's Order dated 11.02.2019 passed in Petition No. 14 of 2017 is also misplaced as the said project to be commissioned in the FY 2016-17 had not been commissioned even on the date of the passing of the order and was projected to be commissioned in FY 2019-20. Further, in that case that the Petitioner's project was observed to have additional advantages of declining prices of Solar PV modules and also the economies of scale which is not the situation in the present case.

5.4 Further, PSPCL has sought to make erroneous projections, while stating that the applicable tariff for commissioned 40 MW cannot exceed Rs. 4.21 per kWh. PSPCL for that purpose has taken the Generic Tariff of Financial Year 2017-18 (wrongly mentioned as Financial Year 2016-17) and has subtracted Rs. 1.47 per kWh from the same, the latter amount being the discount that had been offered by the Applicant/Petitioner while making bid on the Generic Tariff of Financial Year 2015-16. It is beyond comprehension that a discount that had been offered on the Generic Tariff of Rs. 7.04 per kWh would ipso facto be applicable to the Generic Tariff of Rs. 5.68 per kWh. Without prejudice, if PSPCL wants to place reliance upon the Generic Tariff of Financial Year 2017-18, the same in that event is to be made applicable without any discount. Further, PSPCL’s calculations for tariff of Rs. 3.61 per kWh could not be considered applicable to the present case as the Petitioner’s bid has been submitted on the generic tariff without availing the benefit of accelerated depreciation.

5.5 Also, the plea of PSPCL that the PPA capacity would stand reduced to 40 MW is not sustainable keeping in view the award passed by the Ld. Arbitrator.

6. The IA was taken up for hearing on 06.09.2023, whereon final arguments on the petition were also heard. After hearing the parties, the Order was reserved vide Order dated 12.09.2023 with directions that the parties may also file written arguments within two weeks with a copy to each other. The Petitioner and PSPCL submitted their written submissions on 26.09.2023, in line of their earlier submissions.

7. **Observation and Decision of the Commission.**

The Commission has examined the submissions and counter submissions made by the parties. The instant application is for passing of appropriate orders in Petition No. 15 of 2017 filed by the applicant/petitioner for adjudication of its disputes with the PEDA and PSPCL arising out of the issue of delay in period of commissioning of its 50 MW solar PV project. The observation and decision of the Commission on the prayers made by the applicant/petitioner is as under:

7.1 **Prayer to hold that the tariff in respect of the already commissioned 40 MW (25MW+15MW) would remain as per the Power Purchase Agreement (PPA) and to direct the PEDA and PSPCL to amend relevant clauses of the IA and PPA in order to give meaningful effect to Award dated 07.12.2020 and order(s) of the Commission as well:**

The applicant/petitioner’s plea is that the tariff ought to remain the same i.e. Rs. 5.57/kWh as stated in the PPA in view of the Commission’s Order dated 10.06.2016, since the delay in commissioning has occurred on account of Force Majeure events as held in the Arbitral Award dated 07.12.2020.

On the other hand, PSPCL’s contention is that the project was required to be commissioned within 12 months from the date of signing of the

PPA dated 13.01.2016 (i.e., on or before 12.01.2017) and it was only in these circumstances that the stated tariff of Rs. 5.57/KWh was to be made applicable to the Petitioner's project. It was also contended that as the commissioning of project, which was required to be achieved in FY 2016-17, got extended beyond 31st March 2017 i.e. to the next financial year, therefore the said tariff ceased to exist in terms of the PPA read with Article 3(C) and 10.5 (ix) of the IA and is required to be re-determined by the Commission.

a) The Commission refers to the PPA dated 13.01.2016 signed between the Petitioner and PSPCL where the 'Recital' and relevant Article, of the PPA read as under:

"WHEREAS

……….

b) The Company has signed Implementation Agreement with PEDA on 30th November 2015 for setting up the allocated project.

………..

d) Implementation Agreement signed by M/s Photon Sunbeam Pvt. Ltd. …….. with PEDA shall be treated as an integral part of the Power Purchase Agreement. All the clauses and Regulatory Norms applicable to the Implementation Agreement shall be unequivocally applicable to the Power Purchase Agreement in letter and spirit.

…………..

2.1.1 The PSPCL shall purchase and accept all energy made available at the Interconnection Point from the Generating Company's facility, pursuant to the terms and conditions of this Agreement which is set out below:

(i) Rs. 5.57 per unit for Solar Photo Voltaic Power Project of 50 MW capacity as per competitive bidding done by PEDA.

………

10.1.0 The Generating Company shall commission the Generating Facility (which shall be Scheduled Date of Commercial Operation) and synchronize with the PSPC/PSTCL's Grid within 12 months from the Effective Date i.e date of signing of this PPA which is 13th January 2016. Therefore, the scheduled date of commissioning for this project is 12th January, 2017.

………

19.0.0 FORCE MAJEURE

…………..

19.4.0 This clause as provided in this PPA will be operative after the project achieves COD. For force majeure events occurring during the commissioning period of the project, provisions of IA will be applicable."

As is evident, the PPA, while specifying the tariff of Rs. 5.57/kWh as per competitive bidding done by PEDA, also specifies that the scheduled date of commissioning for this project as 12th January, 2017. The PPA also specifies that the Implementation Agreement (IA) signed by the Petitioner with PEDA shall be treated as an integral part of the PPA and that for force majeure events occurring during the commissioning period of the project, provisions of IA will be applicable.

Accordingly, the Commission further refers to the relevant Articles of the IA dated 30.11.2015 executed by the Petitioner, which read as under:

*"**Article 3: Tariff for Sale of Power to PSPCL***

A. The Company shall sell all energy generated at the Project at a tariff of Rs. 5.57 per kWh which is the net availed tariff as per the bid submitted by the Company. ……. The Company will undertake that it shall not avail any grant/ subsidy from GOI / GOP for the project and if availed, it will be passed on to the PSPCL.

B. CDM benefits availed if any by the Company shall be shared between PSPCL and the Company as per CERC RE Regulations 2012.

C. However, if the project COD crosses beyond 31st March 2017 then this tariff shall cease to exist and the developer will be bound to get the tariff re-determined from the PSERC.

…………..

Article 7.0: Consequences of Delay in Commissioning by the Company

A. Encashment of Performance Security:

The Solar PV Project shall be commissioned within 12 (Twelve) months from the date of signing of PPA. After 12 months period, extension can be given for 30 days in the First go on payment of a fee of Rs.20000/MW/day and thereafter for another period of maximum 60 days on a payment of a fee of Rs.40,000/MW/day. Thereafter, right is retained with PEDA for forfeiture of 100% Performance guarantee….

B. Liquidated Damages:

………… The maximum time period allowed for commissioning of the full Project Capacity with encashment of Performance Bank Guarantees and payment of Liquidated Damages shall be limited to 17 months from the date of signing of PPA. ………..

…………………..

Article 10: Force Majeure

…

10.5 Obligations of the parties in case of Force Majeure Events

……….

*ix)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 be as determined by PSERC.***"**

As is evident, the PPA read with the IA considers the issues of 'extension in commissioning' and 'applicability of the tariff' distinctly. While extension in the period of commissioning is permissible to a certain extent on payment of fee/encashment of Performance Bank Guarantee and payment of Liquidated Damages, applicability of the stated tariff is allowed only for the COD achieved within the existing tariff control period with the provision that if the project COD crosses beyond 31st March 2017 then the stated tariff shall cease to exist and the developer will be bound to get the tariff re-determined from the Commission. Even under the 'Force Majeure Clause', it has been categorically provided under Article 10.5 (ix) of the IA that in case commissioning of the project is delayed due to the force majeure conditions stated thereunder, the only relief available is that the due dates for encashment of performance security and imposition of liquidated damages shall be extended accordingly, however in case such delay affects the COD of the project getting extended to the next financial year then the tariff payable shall be as determined by the Commission.

Thus, it is conclusively established that the contractual provisions, as agreed to by the parties in the PPA read with IA, while allowing for extension in the period of commissioning, do not allow the continuation of tariff beyond the relevant tariff control period and mandate re-determination of tariff if the project CoD crosses beyond 31st March 2017, even if the delay is on account of force majeure event(s).

b) The Commission also refers to the relevant CERC RE Regulations and the Commission's RE Tariff Order as under:

(i) Regulation 8(2) of the CERC RE Regulations, 2012, reads as under:

"8(2) Notwithstanding anything contained in these regulations,

a) the generic tariff determined for Solar PV projects based on the capital cost and other norms applicable for any year of the control period shall also apply for such projects during the next year;

…..

Provided that (i) the Power Purchase Agreements in respect of the Solar PV projects …… are signed on or before last day of the year for which generic tariff is determined and (ii) the entire capacity covered by the Power Purchase Agreements is commissioned on or before 31st March of the next year …"

(ii) The Commission's Order dated 24.07.2015 in Suo-Moto Petition No. 43 of 2015, reads as under:

"1. The Commission in its Order dated 19.07.2012 in Petition No. 35 of 2012 (Suo-Motu) for adoption of Central Electricity Regulatory Commission (Terms & Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 (CERC RE Regulations, 2012) .., after due process, adopted the said Regulations with State specific modifications in respect of Non-fossil fuel based Co-generation Projects……

8. Accordingly, the generic tariffs for the various RE Projects/ Technologies to be commissioned during the year 2015-16 will be as indicated in the Table below:

Generic Tariff for RE technologies for FY 2015-16

Particulars	*Applicable Tariff Rate (Rs/KWh)*	*Benefit of AD, if availed (Rs/KWh)*	*Net applicable tariff Rate upon adjusting AD Benefit (Rs/KWh)*
Solar Power Projects			
Solar PV	*7.04*	*0.69*	*6.35*

9. It is clarified that as per Regulation 8(2) of the RE Regulations, 2012, the generic tariff shall be applicable for solar PV projects upto 31.03.2017 ………. provided the Power Purchase Agreements (PPAs) are signed on or before 31.03.2016 and the entire capacity covered by the PPAs is commissioned on or before 31.03.2017……

11. Further, Para 6.4 (2) of the Tariff Policy notified by Ministry of Power, Govt. of India on 06.01.2006 provides that procurement of electricity from renewable sources of energy for future requirements shall be done, as far as possible, through competitive bidding under Section 63 of The Electricity Act, 2003. ………. The Commission further decides that till such time tariff based competitive bidding is resorted to, bidding may be carried out on the basis of discount to be offered by the prospective bidders on the generic tariffs determined by the

Commission in this Order, which would be the maximum/ceiling tariff for the purpose."

As is evident, the applicable CERC Regulations specify that the generic tariff determined for Solar PV projects based on the capital cost and other norms applicable for any year of the control period shall also apply for such projects during the next year, provided the PPAs are signed on or before last day of the year for which generic tariff is determined and the entire capacity covered by the Power Purchase Agreements is commissioned on or before 31st March of the next year. Accordingly, the ceiling tariff of Rs. 7.04/KWh (without Accelerated Depreciation) determined for Solar PV projects in Tariff Orders for Generic Tariff for RE technologies for FY 2015-16 was made applicable only for the PPAs signed on or before 31.03.2016 and commissioned on or before 31.03.2017, with directions that the bidding may be carried out on the basis of discount to be offered by the prospective bidders on the same.

Thus, the ceiling generic RE Tariff of Rs. 7.04/kWh determined by the Commission in its generic Tariff Order of FY 2015-16, based on which the stated net availed tariff of Rs. 5.57/kWh for the project was worked out after considering the discount offered in the bid, was applicable for the projects commissioned on or before 31.03.2017.

c) The Commission also refers to its Orders dated 10.06.2016 in Petition No. 31 of 2016 filed by PSPCL for approval of power procurement arrangements from 500 MW solar PV power projects (including 50MW by the Petitioner at the net availed tariff of Rs. 5.57

per Kwh without Accelerated Depreciation as per the discount offered in its bid), relied upon by the applicant/petitioner. The Order reads as under:

"12. … The bidders were required to submit their bids on the basis of discount to be offered on the generic tariff determined by CERC for solar PV power projects for FY 2015-16. The same tariff for such projects was approved/determined by the Commission in Order dated 24.07.2015 in petition no. 43 of 2015 (Suo-Motu)…

16. ….the Commission approves the procurement of power from the solar PV projects by PSPCL at the tariff determined in the competitive bidding process conducted by PEDA on the basis of discount offered by the bidders on the generic tariff for such projects for FY 2015-16 …..

The tariffs approved above would be applicable upto 31.03.2017 provided the PPAs have been signed on or before 31.03.2016 and the entire capacity covered in each PPA is commissioned on or before 31.03.2017, in line with Regulation 8 of the said Regulations. It is further clarified that barring force majeure / change in law etc., the applicability of the said approved tariff beyond the aforementioned date i.e. 31.03.2017 will not be allowed even if punitive clauses in the PPA are made applicable."

As is evident, the Commission's approval to the said arrangement was allowed on the basis of discount offered by the bidders on the generic tariff for such projects for FY 2015-16 with the stipulation that the stated tariff would be applicable provided the PPAs have been signed on or before 31.03.2016 and the entire capacity covered in each PPA is commissioned on or before 31.03.2017, in line with Regulation 8 of the CERC Regulations, the Commission's

Generic RE Tariff Order and the provisions of the PPA read with the IA executed/signed by the applicant/Petitioner.

As regards the words contained thereafter that, "It is further clarified that barring force majeure / change in law etc., the applicability of the said approved tariff beyond the aforementioned date i.e. 31.03.2017 will not be allowed even if punitive clauses in the PPA are made applicable" as cited by the applicant/petitioner is concerned, the Commission observes that the applicant/petitioner's plea that it has been categorically held by the Ld. Arbitrator that delay has occurred due to force majeure event is not absolutely correct. In fact, its plea has been allowed in part with the observation that, "there have been lapses on the part of the claimant as well, therefore, its claim for the refund of Bank Guarantee to the tune of Rs.3.00 crore encashed by PEDA is declined" as evident from the following extract of the award:

> *"175.Accordingly, the award is pronounced and the reference made for arbitration is answered on clauses of the prayer in the petition except the tariff, and the prayers of the claimant in regard to the occurrence of force majeure events are accepted. …...*
>
> *<u>However, as discussed there have been lapses on the part of the claimant as well, therefore, its claim for the refund of Bank Guarantee to the tune of Rs.3.00 crores encashed by PEDA (respondent No.2), is declined.</u>*
>
> ***(****<u>Emphasis supplied</u>****)***

Further, the Commission's Order dated 10.10.2017 in Petition No. 15 of 2017 while referring the case to arbitration has observed as under:

"Accordingly Hon'ble Mr. Justice S.S Saron (Retd.) is appointed as Sole Arbitrator to decide upon all the clause of the prayer in the petition except <u>the tariff, which, if required to be re-determined in terms of Article 3 (c) of the Implementation Agreement to be treated as an integral part of the PPA as per sub-clause (d) at page 2 of the PPA, shall be determined by the Commission after considering the relief granted by the Arbitrator</u>."

(<u>Emphasis supplied</u>)

As is evident, while referring the Petitioner's case to arbitration, the Commission has observed that, if required to be re-determined in terms of Article 3 (C) of the IA to be treated as an integral part of the PPA, shall be determined by the Commission after considering the relief granted by the Arbitrator. And as already discussed in the preceding para, Article 3(C) of the IA specifies as under:

"3(C) However, if the project COD crosses beyond 31st March 2017 then this tariff shall cease to exist and the developer will be bound to get the tariff re-determined from the PSERC"

Thus, the Commission is of the view that the tariff of Rs. 5.57/kWh stated in the PPA/IA, based on the ceiling generic RE Tariff of Rs.7.04/kWh determined by the Commission in its generic Tariff Order of FY 2015-16 and the discount offered in the bid, was for the project capacity envisaged to be commissioned latest by 31.03.2017 i.e within FY 2016-17, however, the COD of the project got extended beyond 31st March 2017 i.e., to the next tariff control period. Further, the contractual provisions, as agreed to by the parties in the PPA read with IA, while allowing for extension in the period of commissioning, do not allow the continuation of tariff

beyond the relevant tariff control period and mandate re-determination of tariff if the project CoD crosses beyond 31st March 2017, even if the delay is on account of force majeure event(s), conclusively establishing that the time period was the essence of the impugned contract as far as tariff is concerned.

7.1.1 Tariff for 40 MW (25MW+15MW) Capacity commissioned in FY 2017-18:

The Commission notes that the impugned project was allocated to the applicant/Petitioner on the basis of an offered discount of Rs.1.47/kWh on the then prevailing solar PV generic ceiling tariff of Rs.7.04/kWh (without availing accelerated depreciation) determined by the Commission in its Generic RE Tariff Order of FY 2015-16 and applicable for the projects to be commissioned upto 31.03.2017. However, the commissioning of the same got extended to the next tariff control period. For the next tariff control period i.e. solar PV projects getting commissioned upto 31.03.2018, as is the case of the applicant/Petitioner, the Commission in Petition No. 55 of 2016 (Suo-Motu), had determined the levellised generic ceiling Tariff of Rs. 5.68/kWh (without availing accelerated depreciation) in the Generic RE Tariff Order for FY 2016-17, with the same stipulation that that till such time tariff based competitive bidding is resorted to, bidding may be carried out on the basis of discount to be offered by the prospective bidders on the same.

The Commission notes that with the development of technology, increased efficiency and the competition, the prices of solar equipment have experienced a sharp downward trend. By the time the project was implemented, the cost of the project had also dropped considerably, the gains of which need to be passed on to the consumers. The tariffs ought to be reflective of the reduced costs and the applicant/petitioner cannot be provided with the windfall and unearned gains while not implementing the project within the prescribed schedule.

The Commission also observes that, as evidenced from Annexure at Page 198 of the petition, the applicant/petitioner had scheduled placing of orders for equipment by EPC contractor in July to Oct., 2016 i.e. in second half of FY 2016-17.

As observed above, the time period is of the essence in the impugned PPA/Contract as far as tariff is concerned. Tariff is entirely linked to the time schedule of the commissioning of the Project. Accordingly, the Commission is inclined to agree with PSPCL that the tariff for the impugned project can be re-worked by considering the generic ceiling tariff of Rs 5.68/kWh (without availing accelerated depreciation), determined by the Commission in the Generic RE tariff Order of FY 2016-17 applicable for the relevant tariff control period for the year of actual commissioning and appropriate accounting for the discount of Rs. 1.47/kWh offered by the Petitioner in its bid. However, the applicant/Petitioner has also professed a pertinent point that a discount that had been offered on the higher Generic Tariff of Rs. 7.04 per kWh cannot be made applicable ipso facto to the Generic Tariff of Rs. 5.68 per kWh. However, the claim of the applicant/petitioner that the original tariff and discount be preserved and allowed to them inspite of the delayed commissioning is also not justified or fair. Nor is their claim fair that in case the generic tariff for the commissioning year is allowed, then it may be so allowed without any discount. The whole basis of allotting the project to them was based on the concept of discount agreed on the generic tariff of the relevant year.

Therefore, the Commission having given due consideration to the issue, deems it just and proper to consider the discount offered by the applicant/petitioner in percentage terms on the generic ceiling tariff determined by the Commission for the applicable tariff control period. The discount of Rs. 1.47/kWh offered on the generic ceiling tariff of Rs. 7.04/kWh of the previous control period comes to be 20.88%. When applied to the generic ceiling Tariff of Rs. 5.68/kWh applicable to the control period in which the Petitioner's 40 MW project was actually commissioned, it works out to be Rs.1.186/kWh and thus the applicable tariff for 40MW solar PV project commissioned in FY 2017-18 works out to be Rs. 4.494/kWh. The said tariff is also broadly commensurate to the then prevalent market tariffs cited by PSPL i.e. Rs. 4.36/kWh and Rs. 4.50/kWh determined by the Karnataka and Tamil Nadu State Commissions respectively.

As regards the tariffs of Rs. 3.93/kWh and Rs. 3.75/kWh (determined respectively by the Rajasthan State Commission and the Commission in Petition No. 14 of 2017) suggested for consideration by PSPCL, the Commission is in agreement with the applicant/Petitioner that the same are not equitable to the impugned case, particularly so, as the said tariffs pertain to the later tariff control period of FY 2018-19 and FY 2019-20 respectively when the prices of the solar equipment and the cost of setting up projects had dropped even further.

In view of the above analysis, the Commission re-determines the net tariff for the applicant/petitioner's 40MW Solar PV projects commissioned in FY 2017-18 to be Rs. 4.494/kWh (in place of Rs. 5.57/kWh with the commissioning envisaged in FY 2016-17), with other terms and conditions of tariff remaining the same.

7.1.2 **Prayer to direct the PEDA and PSPCL to amend relevant clauses of the IA and PPA in order to give meaningful effect to Award dated 07.12.2020:**

The Commission has noted in the preceding paras that under the 'Force Majeure Clause' of the PPA read with IA, it has been categorically provided under Article 10.5 (ix) of the IA that in case commissioning of the project is delayed due to the accepted force majeure conditions, the due dates for encashment of performance security and imposition of liquidated damages shall be extended accordingly.

Accordingly, the Commission is of the view that, after the Arbitral award allowing for extension in the commissioning of the project attains finality after the judicial appeals process as informed by PSPCL is concluded, the provision already exists in the PPA read with Article 10.5(ix) of the IA that in case the commissioning of the project is delayed due to force majeure

conditions 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. As such no new directions are required for the same.

7.2 Prayer to provide extension of nine months to the Petitioner to commission the remaining 10 MW project from the date of relevant amendments made to IA and PPA by the Respondents and to direct that the tariff for the remaining 10 MW to remain the same till the extended period, keeping in view the order dated 10.06.2016 passed by the Commission and the fact that the Award and the extension of time is under Force Majeure:

The applicant/Petitioner's plea is that Ld. Arbitrator vide its award dated 07.12.2020, copy of which was made available to the Petitioner on 16.08.2022, has accepted the prayer of the claimant with respect to the occurrence of force majeure events and has directed the PEDA to re-fix the time schedule for the completion of the its partially commissioned project at village Teona Pujarian with 220 KV Grid sub-station at Talwandi Sabo, after the tariff payable to the Petitioner is determined by the Commission.

Whereas, PSPCL has submitted that the said Award is still under appeal in Arbitration Case 103/2023 filed before the District and Sessions Judge Chandigarh under Section 34 of the Arbitration & Conciliation Act, 1996. PSPCL further contended that in terms of the Article 10.1.1 and 10.1.2 of the PPA the remaining 10 MW capacity stands automatically terminated to the extent of non-commissioning within 17 months (i.e. after June 2017), accordingly the PPA capacity stands reduced to 40 MW and no further extension/tariff is payable in respect of the 10MW that has not been commissioned till date. And, the PEDA's contention is that despite the Arbitrator relief to the Petitioner for extending the period of commissioning qua 10 MW capacity, the Petitioner could not act upon in terms of the relief rendered and till date has not commissioned 10 MW remaining capacity.

Whereas, the applicant/petitioner vide its rejoinder has submitted that the plea of the respondents is not sustainable in view the award passed by the Ld. Arbitrator.

a) The Commission refers to the relevant extract of the Arbitral Award, which reads as under:

> "175….T*he prayers of the claimant for restraining PEDA (respondent No.2) from Invoking and/or encashing the remaining Performance Bank Guarantee (PBG) dated 18.11.2015 (Annexure P-5 colly.); for restraining PSPCL and PEDA (respondents No.1 and 2) from cancelling and/or terminating the LOA dated 19.10.2015 (Annexure P-1), the IA dated 30.11.2015 (Annexure P-9) and PPA dated 13.01.2016 (Annexure P-11) and for not levying the extension in respect of commissioning of the project, are accepted.*
>
> *176. The PEDA (respondent No.2), after the tariff payable by the claimant has been determined by the Punjab State Electricity Regulatory Commission, shall re-fix the time schedule for the completion of the second partially commissioned project on 10.06.2017 at Village Teona Pujarian with 220 KV Grid Sub Station at Talwandi Sabo."*

The Commission notes that the Award while restraining PSPCL and PEDA from cancelling and/or terminating the LOA/ IA /PPA has issued specific directions that the PEDA, after the tariff payable by the claimant has been determined by the PSERC, shall re-fix the time schedule for the completion of the second partially commissioned at Village Teona Pujarian with 220 KV Grid Sub Station at Talwandi Sabo.

Accordingly, without prejudice to the outcome of Arbitration case filed by PSPCL, PEDA is mandated to re-fix the time schedule for the completion of remaining 10 MW project, pursuant to re-fixation of the tariff for same by the Commission.

b) As far as the issue of tariff for capacity yet to be commissioned is concerned, the Commission has already observed in the preceding paras, that the tariff of Rs. 5.57/kWh stated in the PPA/IA was for the project capacity envisaged to be commissioned latest by 31.03.2017 i.e. FY 2016-17, however, the COD of the project got extended beyond 31st March 2017 i.e., to the next tariff control period. Therefore, the PPA read with IA mandates re-determination of the tariff for the impugned project.

However, the Commission observes that the tariff control period in which the remaining capacity of 10MW is likely to be commissioned is still not known. Also, the Commission is no more determining the annual generic ceiling tariffs in view of the emerging circumstances wherein, with the maturing of RE Technologies resulting in higher CUF at lower costs and innovative financial engineering in project costing, the tariffs being discovered through competitive bidding are substantially lower than the generic ceiling Tariffs so determined on normative parameters initially designed for the preferential tariff regime.

The Commission is now allowing the power procurement arrangements of PSPCL based on the tariffs discovered through competitive bidding process only. Further, based on the weighted average of recent solar tariffs discovered through competitive bidding, the Commission also approves the proposed Feed-in-Tariff for the oncoming year for the purpose of gross metering arrangements under the PSERC (Grid Interactive Rooftop Solar Photo Voltaic Systems) Regulations, 2021, in the Annual Tariff Orders of the distribution utility. The approved Feed-in-tariff for FY 2023-24 is Rs.2.65/kWh. The Commission is of the view that the Feed-in-tariff as approved for the financial year in which the remaining capacity of the project is actually commissioned can be allowed to the applicant/Petitioner.

Accordingly, the instant IA and the petition are disposed of in light of the above analysis, observations and directions of the Commission.

Sd/-	**Sd/-**
(Paramjeet Singh)	(Viswajeet Khanna)
Member	Chairperson

Chandigarh
Dated: **31.10.2023**