

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

**Petition No. 21 of 2016 &  
I.A. No. 14 of 2016  
Date of Order:19.03.2018**

In the matter of: Petition under section 86(1)(f) of the Electricity Act, 2003 read with rule 10, 69, 71 and 73 of the PSERC (Conduct of Business) Regulations, 2005 and Clause 85 of CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012 (adopted by the Commission vide its Order dated 19.07.2012 in Suo-motu Petition No. 35 of 2012) read with clause 19.1.0 of the Power Purchase Agreement dated 31.03.2015, article 10 of the Implementation Agreement dated 24.03.2015 and section 94 of the Electricity Act, 2003, for seeking project specific extension of period of commissioning of the project upto 20.02.2016 with applicable tariff of Rs.6.88 per kWh.

AND

In the matter of: Solaire Power Private Limited, Office No. # 203, Pentagon P-3, 2<sup>nd</sup> Floor, Magarpatta City, Hadapsar, Pune 411013, India, through its authorized signatory Shri P.N.Sood.

.....Petitioner

Versus

1. Punjab State Power Corporation Limited through its Managing Director, The Mall, Patiala.
2. Punjab Energy Development Agency through its Director, Solar Passive Complex, Plot No.1 & 2, Sector 33-D, Chandigarh.

.....Respondents

**Present:**

**Ms. Kusumjit Sidhu, Chairperson  
Sh. S.S. Sarna, Member  
Ms. Anjuli Chandra, Member**

## **ORDER**

Solaire Power Private Limited (SPPL), Pune, filed the present petition seeking project specific extension of period of commissioning of the project upto 20.02.2016 with applicable tariff of Rs.6.88 per kWh along with an application for restraining Punjab Energy Development Agency (PEDA) from invoking the Performance Bank Guarantee (PBG) and further restraining PEDA from getting the cheque dated 17.03.2016 of Rs 1,88,68,965 encashed which has been handed over to it under protest as a security deposit to avoid the invocation of bank guarantee. It has been further sought to direct PEDA to return the above said cheque to the petitioner. The petition and IA were admitted vide order dated 22.03.2016. In the meantime, PEDA was restrained from invocation/encashment of PBG till the next date of hearing and was further directed to maintain status quo of the cheque dated 17.03.2016 of Rs. 1,88,68,965/- . The stay order restraining PEDA from invocation/ encashment of PBG was further extended by the Commission vide orders dated 04.05.2016, 31.05.2016, 19.08.2016, 05.09.2016, 20.10.2016.

2. PEDA filed IA no.19 of 2016 dated 30.03.2016 for vacation of stay granted by the Commission against invocation/ encashment of PBG. SPPL filed reply dated 04.04.2016 to the IA no. 19 of 2016. The Commission vide order dated 12.04.2016 decided not to vacate Order dated 22.03.2016 passed by the Commission in petition no.21 of 2016 and IA no. 14 of 2016. IA no 19 of 2016 in petition no. 21 of 2016 was disposed of accordingly.

3. PEDA submitted its reply to the petition vide letter No.531-33 dated 02.05.2016. PSPCL submitted its reply to the petition vide memo no.5483 dated 28.04.2016.

4. The petitioner was directed to file rejoinder by 16.05.2016, however, the petitioner filed rejoinders dated 23.05.2016 to the reply filed by PSPCL and PEDA on 25.05.2016. During hearing on 04.08.2016, PSPCL was directed to file the documentary evidence stating the date on which the power evacuation system including 66kV bay, metering, breakers etc. was cleared for commissioning by the P&M testing team and the date on which the same was commissioned. The petitioner was directed to submit documentary evidence stating the date of completion and commissioning of the plant, 66kV line, testing and sealing of metering equipment and commissioning of step up transformer. During hearing on 01.09.2016, the petitioner filed affidavit regarding completion and commissioning of the project. PSPCL filed the reply/ information vide letter no.5741 dated 22.08.2016. The petitioner filed reply dated 19.09.2016 to PSPCL's submissions dated 22.08.2016

5. The counsel for the petitioner sought adjournment in the matter on 14.11.2016 and the Commission, acceding to the prayer, fixed the next date for arguments as 13.12.2016. Thereafter, PEDA requested for an adjournment and the next date for hearing final arguments was fixed as 24.01.2017

6. Further, PEDA filed IA No. 6 of 2017 dated 15.03.2017 seeking adjudication of the issue with respect to undue influence of the counsel representing the petitioner. In the hearing on 25.04.2017, the petitioner was directed to file written submissions in the said IA with a copy to PEDA. The matter was fixed for arguments in the

main petition on 19.05.2017 vide order dated 11.05.2017. However, PEDA filed another IA No. 22 of 2017 on 19.05.2017 seeking rectification/ modification of the order dated 11.05.2017 submitting that an order in IA No. 06 of 2017 be passed first before proceeding further in the matter.

7. The Commission disposed of the IA No. 06 of 2017 vide order dated 22.05.2017 in terms of the order dated 18.05.2017 passed in IA No. 7 of 2017 in petition no. 22 of 2016. Therefore, the IA no. 22 of 2017 became infructuous and redundant as per the order dated 23.05.2017 of the Commission. The main petition was fixed for arguments on 02.06.2017 and the same was adjourned to 07.06.2017 on the request of counsel for PSPCL.

8. The arguments were heard in the petition and the order was reserved on 07.06.2017 directing the parties to file written submissions by 14.06.2017. The petitioner and PEDA filed their respective written arguments/submissions on 21.06.2017 and 23.06.2017. PSPCL vide memo no. 6264 dated 14.06.2017 submitted that replies already filed by PSPCL are comprehensive in nature and treated as its written submissions.

9. The Commission vide Order dated 08.08.2017 held that it will be appropriate to hear all the parties afresh so that final arguments can be addressed in the light of the written submissions and the petition can be disposed of after hearing the parties. The next date for final arguments was fixed as 29.08.2017. The counsel of PSPCL sought adjournment and next date of hearing was fixed as 13.12.2017, which was further adjourned to 17.01.2018 on the request of the parties.

10. The parties were heard on 17.01.2018 and the order was reserved vide Order dated 25.01.2018.

11. The Petitioner submitted in the petition, in brief, as under:

- i) The petitioner was allotted 24 MW solar PV power project (project) by Punjab Energy Development Agency (PEDA) vide Letter of Award (LoA) dated 25.02.2015. The Implementation Agreement (IA) and Power Purchase Agreement (PPA) for setting up of the said project were signed with PEDA and PSPCL on 24.03.2015 and 31.03.2015 respectively. As per article 6.2 (iv) of the IA, the petitioner submitted the performance bank guarantee amounting to Rs. 9.6 crore at the rate of Rs. 40 lakh per MW to PEDA. As per the PPA, the project was required to be commissioned within 10 months from the date of signing of the PPA i.e. the scheduled date of commercial operation (SCOD) was 30.01.2016.
- ii) The petitioner seeks extension of Commercial Operation Date (COD) for the project upto 20.02.2016 with applicable tariff of Rs. 6.88 per kWh after providing a discount on generic tariff of Rs. 7.72 per kWh as adopted and notified by the Commission in its RE Tariff Order for solar PV power projects for FY 2014-15 and a further direction that no coercive action be taken by the respondents with regard to the PBG. The said generic tariff was applicable for both rooftop and ground mounted solar power projects. The said order further directed that the generic tariff shall be applicable to such solar power projects for which the PPAs were signed in FY 2014-15. The delay in achieving COD was

solely attributable to the force majeure events which were beyond the control of the petitioner.

- iii) The time allowed by PEDA for implementation of these projects without any damages and penalties was 10 months as against 13 months for the projects allotted under phase-I and 12 months for the project allotted under phase-III. The Developers took up this challenging timeline based on the exceptional support provided by PEDA and Govt. of Punjab during the execution of phase-I projects.
- iv) As per clause 35.0.0 of the PPA, the PPA was effective and binding on the parties upon approval by the Commission. This was objected by the developers and a letter was submitted to PSPCL and PEDA in this regard. It was conveyed that this will delay the financial closure & disbursement of loan and shall affect timely commissioning of the projects. The developers were informed that the PPA is expected to be approved by the Commission within 7 days from the signing of the PPA. However, the Commission approved the procurement of power from the solar developers and tariff vide its Order dated 11.05.2015 in petition no. 21 of 2015 filed by PSPCL. Upto 11.05.2015 the Petitioner could not start any work because the PPA was yet to be approved by the Commission and the same was practically ineffective and non-bankable. In fact, PSPCL was required to get the draft PPA approved before it is executed by the parties. But the PSPCL filed petition after the PPAs were executed. So out of total 10 months implementation period, the petitioner could not do any work for more than one month and 11 days. This delay of 1.5 months

- approximately is beyond the reasonable control of the developers and cannot in anyway be attributed to them.
- v) The recital of the PPA clearly stipulates that all the clauses and regulatory norms applicable to the IA shall be unequivocally applicable to the PPA in its true letter and spirit. The IA is to be read as part and parcel of the PPA.
  - vi) The delay in commissioning of the project was due to the fault of PSPCL though the project was completed before 31.01.2016. The project was commissioned on 18.02.2016 (wrongly mentioned by the petitioner as 20.02.2016).
  - vii) The project developers vide letter dated 06.01.2016 collectively informed PEDDA about the force majeure events faced by them. PEDDA in complete ignorance of the letters and the joint representation issued a letter dated 18.01.2016 informing that there will be no extension in the SCOD and clause 3.23 of the RfP shall prevail for any delay beyond SCOD. In response to the letter dated 18.01.2016, the petitioner vide letter dated 21.01.2016 to PEDDA specifically stated that it received very little time for execution of the project as the approval of the PPA took lot of time and some more issues were raised.
  - viii) The employees of the offices of Deputy Commissioner, SDMs, East & West, Tehsil and Sub-Tehsil went on strike from 21.05.2015 to 30.05.2015, 27.06.2015 to 30.06.2015 and 07.10.2015 to 14.10.2015, which adversely effected the execution of land lease deeds. A period of 22 days was lost. The event (strike) falls under force majeure event.
  - ix) There was unrest in the State of Punjab on account of desecration of holy Sri Guru Granth Sahib at various places

and section 144 was imposed in almost whole of the State from 14.10.2015 to 22.10.2015. The occurrence of this event is an event of force majeure since the same was beyond the control of the petitioner. The said event led to a delay of 9 days in commissioning of the project.

- x) Jat agitation in the State of Haryana started in the middle of February and turned violent around 20.02.2016, which ended around 24.02.2016. Due to the said agitation, the entry and exit points of the State were put under curfew, which restrained the petitioner from receiving the materials for structure and balance of system to reach the site of the project to enable its construction. The said event led to a delay of 10 days in commissioning of the project.
- xi) The petitioner vide letter dated 01.02.2016 specifically informed PEDA that it has completed 24 MW solar PV power project at village Usman Khera, Tehsil Abohar, District Fazilka and the transmission line as per PSPCL standards on 29.01.2016. Due to non-availability of ABT meters at 66 KV Kallar Khera, grid sub-station, the petitioner was not able to synchronize the project. PSPCL was not ready with its infrastructure to take electricity.
- xii) Addl. SE/Protection, Moga vide letter dated 08.02.2016 informed Addl. SE/Distribution, Abohar, that the testing results were satisfactory and recommended for synchronization of the project with PSPCL System. The petitioner vide letter dated 10.02.2016 informed Chief Engineer/Distribution (West), PSPCL, Bathinda that the project was ready for synchronization and requested to depute a team for installation of the meters. The petitioner

also informed PEDA vide letter dated 10.02.2016 that the project was ready but the grid sub-station was not ready. PSPCL was not issuing synchronization letter.

- xiii) The meters were received at 66 kV Kallar Khera, grid sub-station on 13.02.2016 and thereafter PSPCL gave synchronization permission on 16.02.2016. The plant was synchronized and commissioned on 18.02.2016. The delay occurred was due to sole fault of the PSPCL as 66 kV Kallar Khera, grid sub-station was not ready for taking electricity.
- xiv) PEDA issued letter dated 24.02.2016 asking to intimate the capacity commissioned during the month of February, 2016. Further, PEDA sought to impose penalty for non-commissioning/shortfall in commissioning of allocated capacity as per clause 3.23 of the RfP. The letters dated 18.01.2016 and 24.02.2016 denying the extension of SCOD and the direction by the respondents to calculate the LD was wrongful and arbitrary.
- xv) The petitioner vide reply dated 25.02.2016 to the letter dated 24.02.2016 of PEDA specifically stated that the petitioner has already informed the PEDA that the project was ready since end of January, 2016 but due to non readiness of grid sub-station, the project could not be synchronized.
- xvi) PEDA acted arbitrarily in not granting the extension of COD. No loss was caused to the respondents because PSPCL would get the electricity for complete 25 years at the rates which were already approved.
- xvii) 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 performance bank guarantees.

- xviii) The petitioner and PEDA are strictly governed by the terms of the IA/PPA, and a party cannot act in a manner de-hors the same. There was no explanation by PEDA as to why it denied the extension of COD. A contract cannot provide that one party will be the arbiter to decide whether it committed breach or the other party committed breach. The question can only be decided by only an adjudicatory legal forum, that is by the Commission.
- xix) The respondents were acting contrary to the terms of the PPA and IA. The action of PEDA was contrary to its statutory obligations and terms of its license. The respondent's actions were contrary to public interest.
- xx) PEDA vide letter dated 15.03.2016 requested Yes Bank Ltd. to invoke the PBG given by the petitioner. The petitioner visited PEDA on 17.03.2016 and in order to avoid the invocation of the PBG, handed over a cheque of Rs. 1,88,68,965/-, under protest towards security/deposit in lieu of invocation of PBG. PEDA has no right to invoke the PBG since the delay was solely attributable to the force majeure events.

- xxi) The petitioner is also claiming interim relief, for restraining PEDA from invoking the PBG(s) and getting the cheque of Rs. 1,88,68,965/- encashed and also a direction from the Commission that the respondents shall not take any coercive action whatsoever till the final adjudication.
- xxii) It is prayed to the Commission to:
- a) set aside and/or quash the letters dated 18.01.2016 and 24.02.2016 of PEDA;
  - b) hold and declare that the COD of the project of the petitioner stands extended till 20.02.2016 in accordance with clause 10 of the PPA read with article 7.0 of the IA on account of force majeure events and events which are beyond the control of the petitioner;
  - c) hold and declare that the petitioner is entitled to tariff of Rs. 6.88 per kWh in terms of the PPA during the extended COD period;
  - d) direct PEDA not to invoke the PBG, and to not take any coercive actions whatsoever against the petitioner; and
  - e) restrain PEDA from getting the cheque of Rs. 1,88,68,965/- encashed, given by the petitioner to PEDA on 17.03.2016, as deposit security to avoid invocation of its PBG and further direct PEDA to return the above said cheque to the petitioner, in the interest of justice.

12. PEDA filed an application (IA No. 19 of 2016) under section 94 and other relevant sections/provisions of the Act read with Regulations 65, 69, 70, 71 and other relevant Regulations of PSERC (Conduct of Business) Regulations 2005, seeking vacation of the interim Order dated 22.03.2016, whereby the Commission

restrained PEDA from invocation of PBG and directed to maintain status quo of the cheque dated 17.03.2016 handed over by the petitioner to PEDA to avoid invocation of the Bank Guarantee. The application (IA No. 19 of 2016) was disposed of by the Commission vide Order dated 12.04.2016.

13. PSPCL's submissions in its reply dated 28.04.2016, in brief, are as hereunder:

- i) The plant of the petitioner stands synchronized as per permission given by PSPCL letter no. 265/68/IPC-455 dated 16.02.2016. The prayer of the petitioner for extension in date of commissioning of project is baseless.
- ii) PSPCL is a performa respondent and has no major role to play at this stage. All the grounds taken by the petitioner on account of force majeure events do not fall under the clause 19.1.0 of the PPA and are vague, technically incorrect & legally defective. The said clause deals with the natural calamities or events like unrest, epidemics, any court order, change in law or any act of God. The grounds taken in the petition inter alia, deal with the approvals, an incident happened in Faridkot, some agitation in another state and self created alibi of non-availability of staff of Sub-Registrar at Distt. Fazilka. None of the grounds find any hold and are liable to be dismissed entitling the petition to be dismissed with exemplary costs to be imposed on the petitioner.
- iii) PSPCL would have to purchase the expensive RECs to comply with the RPO specified by the Commission and if the petitioner delays the commissioning of the project, it would affect the public at large. PSPCL may be allowed to carry forward the RPO by saddling the petitioner with heavy cost to

- be paid to PSPCL. As per clause 10.1.0 of the PPA the generating company was under an obligation to commission and synchronize the project with PSPCL grid within 10 months from the effected date i.e. date of signing of PPA which was 31.03.2015. Therefore as per the PPA, the scheduled date of commissioning for the project was 30.01.2016. The tariff should be reduced so that due to petitioner's own fault, the department and the public at large should not suffer.
- iv) The approval for purchase of power and tariff by the Commission is not only a practice but also legally binding on both the parties. Although the approval of the Commission was issued after signing of the PPA but there was no bar that the petitioner cannot initiate other processes and formalities for the commissioning of the project. PSPCL did not give any assurance to the petitioner that approval of the PPA would be obtained in 5-7 days. In case the petitioner was having problem with clause 35.0.0 of the PPA, the same should have been challenged or the petitioner should have objected to it or should not have bid.
  - v) It is wrong that there was strike by the staff of the sub-registrar as mentioned by the petitioner. The incident of desecration of holy Sri Guru Granth Sahib took place in Distt. Faridkot which is more than 93 km from the project. Therefore, there was no effect of the situation prevailing in Distt. Faridkot in Distt. Mansa.
  - vi) Jat agitation initiated in Distt. Rohtak, Haryana which is 334

km away from the project. The agitation did not have any effect in State of Punjab.

- vii) The petitioner nowhere mentioned on which date it applied for approval of transmission line to PSPCL, the plea taken by the petitioner is not only vague but is also non-believable and thus, is liable to be dismissed. PSPCL make all endeavor to assist the generating companies in all the formalities with regard to the synchronization or grid feasibility on urgent basis as the delay in providing the same would cause loss to PSPCL itself as the delay in commissioning the project would cause purchasing the expensive RECs for the compliance of RPO. The application as alleged by the petitioner was made to PEDA whereas the feasibility and synchronization was the matter of PSPCL.
- viii) The petitioner sent a letter dated 10.02.2016 for synchronization. The permission for synchronization was granted to the petitioner on 16.02.2016 i.e. even within less than a week. The PPA was entered into on 31.03.2015, however the petitioner took a long time to apply for synchronization of the project.
- ix) It is the sole responsibility of the petitioner to fulfill the terms and conditions as entered into by it while signing the PPA. No doubt the issue pertaining to force majeure events was to be adjudicated by the Commission but the same was to be proved by the petitioner itself and it cannot take the plea in air.
- x) The bank guarantee and the cheque submitted by the petitioner was against the non-compliance of the terms of the IA and PPA. IA/PPA are the self-attested documents of the

petitioner wherein it agreed that if it would not be in a position to commission the project on time, PSPCL and PEDA would be at liberty to encash the PBG and the cheque kept with them.

- xi) It is requested to the Commission that the petition be dismissed with exemplary costs on the petitioner as it tried to take the Commission on ride without disclosing it the clear facts in the interest of justice.

14. PEDA in its reply dated 02.05.2016 submitted, in brief, as under:

- i) The petition is bad both in terms of de-jure and de-facto and is based on conjectures and surmises, hence not maintainable in the eyes of law.
- ii) The petitioner has not demonstrated the true factual matrix of the matter and in order to evade its bounden obligation, as stipulated therein the RfP, LoA and IA, of achieving the COD within time, has tried to setup a false and frivolous case. The petition is not maintainable as there exists an arbitration clause in the document entered between the parties.
- iii) The petitioner wrongly invoked the jurisdiction of the Commission under section 86(1)(f) of the Act, which empowers the Commission to adjudicate upon disputes between the generating company and the distribution licensee. The petitioner could not achieve COD in terms of RfP, LoA and IA entered between the petitioner and PEDA.
- iv) IA is the main contractual document, which provides that the petitioner was to set up the project and to achieve full capacity COD by 30.01.2016, however, the petitioner has

failed to achieve full capacity COD of the project. The petitioner while misleading the Commission wrongly sought interim Order dated 22.03.2016 passed by the Commission, as to restrain PEDA from encashing the unconditional Bank Guarantee deposited by the petitioner, which is against the settled canons of law laid down by the Hon'ble Supreme Court of India in catena of judgments. The petitioner failed to fulfil its obligation of setting up the complete project upto 30.01.2016, in line with the provisions of RfP, LoA and IA, therefore, the petitioner is liable to be levied with penalty and PEDA becomes entitled to encash the PBG deposited by the petitioner in line with the contractual terms agreed between the parties, on account of the same.

- v) PEDA floated RfP inviting various solar power private developers for setting up of an aggregate of 250MW capacity of solar projects under Phase-II in the State of Punjab. As per the terms & conditions of the RfP, the successful bidder was to furnish the PBG of Rs. 40 lakh per MW to PEDA. Consequently, the petitioner was a successful bidder for allocation of 24 MW solar project by PEDA. In line with the terms & conditions of the RfP, the petitioner deposited two PBGs amounting to Rs. 9.6 crore with PEDA. As per the terms & conditions of the RfP/IA, the developer was under a bounden obligation to commission the plant on or before 30.01.2016, failing which it was provided in the contractual documents that the PBGs submitted by the developer shall be encashed/invoked to tune of 30% of the PBG for delay upto one month for the un-commissioned project capacity, on account of penalty. It was further stipulated that further delay

- of more than one month shall attract the encashment of remaining 70% of the PBG on account of penalty.
- vi) The petitioner could not commission the project within the stipulated date i.e. 30.01.2016 and commissioned the project on 19.02.2016. PEDA while giving various prior intimations as to the timely commissioning of the project, initiated the invocation/encashment of the bank guarantee by making a request to the issuing bank of the PBG in order to recover the penalty amount levied on account of delay. While duly acknowledging its liability to pay the penalty levied upon the petitioner on account of the delay in commissioning of the project, the petitioner requested the PEDA for accepting the amount of penalty leviable upon the petitioner on the aforesaid account, by way of cheque bearing No. 783253 dated 17.03.2016 of Rs. 1,88,68,965/- and further requested to withdraw the letter of invocation issued by PEDA to the issuing bank of the bank guarantee. From the perusal of the letter dated 17.3.2016, it would be revealed that the petitioner itself requested PEDA for accepting a cheque for the penalty amount thereby requesting that their PBG should not be invoked. While handing over the aforesaid cheque to PEDA, the petitioner assured PEDA as to the encashment/honouring of the cheque. In good faith and believing in the petitioner, PEDA withdrew its request made to the issuing bank of the PBG i.e. Yes Bank by letter dated 17.03.2016.
- vii) As per the assurance given by the petitioner, PEDA presented the cheque dated 17.03.2016 with its banker i.e. Union Bank of India, Sector 32, Chandigarh, however, the aforesaid cheque was returned unpaid and dishonoured by

Union Bank of India vide its return memo dated 19.03.2016 with remarks “funds insufficient”. PEDA as per the assurance of the petitioner, once again presented the said cheque with its banker. The said cheque was again dishonoured on account of stop payment by the petitioner. The petitioner is under a bounded obligation to deposit the amount of Rs.1,88,68,965/- on account of the penalty levied upon the petitioner due to the delay caused in the complete commissioning of the project.

- viii) The petitioner failed to fulfil its bounden obligation of making the payment of Rs.1,88,68,965/- and issued the said cheque intentionally to PEDA with the knowledge that there are no sufficient funds in the bank account of the petitioner and the cheque issued shall not be honoured at all, which goes to show that the petitioner with a clear and wilful intention to cheat PEDA issued the said cheque. The petitioner committed an offence under section 138 of the Negotiable Instrument Act, 1881 as amended upto date by having issued the said cheque which was ultimately dishonoured on its presentation to the bank and also the offence under section 420 of Indian Penal Code for having cheated PEDA under deceitful means and pretension. PEDA reserves its right to initiate appropriate legal proceedings against the petitioner as and when advised for.
- ix) The petitioner while misleading the Commission by filing the petition before the Commission having false, frivolous and misleading assertions sought interim order dated 22.03.2016, whereby the Commission has restrained the PEDA from invocation/encashing the PBG submitted by the petitioner till

next date of hearing of the petition i.e. on 03.05.2016 and also PEDA was directed to maintain status quo of cheque dated 17.03.2016 to avoid invocation of the PBG, till the next date of hearing i.e. 03.05.2016.

- x) The petition deserves to be dismissed at the very outset as there exists an arbitration clause in the contractual document(s) and as per the settled canons of law, in case there exists an arbitration clause in the contractual documents entered between the party, the matter cannot be adjudicated upon by arbitration in case any dispute arises.
- xi) The petitioner submitted the PBG to PEDA. As per the agreed terms & conditions it is liable to pay the penalty for delay in commissioning of the complete capacity of the project. PEDA is entitled to encash the PBG submitted by the petitioner.
- xii) PEDA is a Society under the aegis of Govt. of Punjab and in no eventuality the petitioner i.e. a private developer can be allowed to play fraud upon PEDA in the garb of the interim order dated 22.03.2016, wrongly sought by the petitioner while misleading the Commission.
- xiii) As per the settled canons of law laid down by Hon'ble Supreme Court of India as well as Hon'ble Punjab and Haryana High Court in catena of judgments have held that even in case of breach of contract the encashment of the bank guarantee can be restrained. Therefore, the interim order dated 22.03.2016 wrongly sought by the petitioner, deserves to be vacated and PEDA is entitled to seek/charge the amount of penalty on account of delay in commissioning of the complete capacity of the project.

- xiv) Further the plain/false assertions of the petitioner as to purported occurrence of force majeure events are concerned, the same are belied from the fact that in the same phase of allocated projects, 7 Solar power projects with total 62 MW capacity have been successfully commissioned by similarly placed developers in the State of Punjab.
- xv) The Commission in its Orders dated 25.04.2016 in petition no. 27 of 2016 in the matter of Talwandi Sabo Power Ltd. Vs. PSPCL has held as under:

*"The Commission does not find favour with TSPL's contentions that the correspondence and record of site visits by PSPCL officers constitute the notices in terms of Article 6.1.1 of the PPA. Also, only tentative dates of synchronization/commissioning were mentioned in these documents. No firm date of synchronization of the Third Unit was mentioned. The Commission is of the view that the notices fulfilling the requirements in terms of Article 6.1.1 of the PPA are mandatory and were required to be issued by TSPL. The same are not forthcoming in the submissions of TSPL. The office of Chief Engineer/ Thermal Designs specifically requested TSPL for supplying copies of these notices issued under Article 6.1.1 of the PPA but TSPL failed to do so. The Commission finds that TSPL has not met with the requirements Article 6.1.1 of the PPA. Hon'ble APTEL in its recent judgment dated 07.04.2016 in Appeal No. 56 of 2013 and Appeal No. 84 of 2013 filed by TSPL against impugned Orders dated 24.12.2012 and 27.09.2012 passed by the Commission in Petitions No. 46 of 2012 and 11 of 2012, has set aside the said orders. The Commission interprets that the underlying principle behind the said findings is that provisions of the PPA should be strictly followed in letter and spirit. Accordingly, the*

*Commission holds that TSPL will comply with the requirements of Article 6.1.1 and Article 6.2.2 of the PPA meticulously for synchronization and commissioning of the Third Unit. In view of the above, the prayer(s) in the petition to direct PSPCL to witness/monitor the commissioning tests of the Third Unit (Unit No.1), quash PSPCL's letters dated 29.03.2016 and 30.03.2016 and direct PSPCL to pay capacity charges for the period the Third Unit is prevented from being commissioned due to default on the part of PSPCL, cannot be granted."*

The force majeure article provided under the IA stipulates that the affected party shall give written notice to the other parties describing the particular of the force majeure event as soon as reasonably practicable after its occurrence but not later than 5 days after the date on which such party knew of the commencement of the force majeure event or of its effect on such party. Similarly, the PPA also provides issuance of notice as to the occurrence of force majeure event within a period of 7 days.

The petitioner failed to give notice to PEDDA in line with the force majeure clauses of the IA. Therefore, in light of the ibid Order passed by the Commission, no reliance can be placed upon the false and purported assertions made therein by the petitioner in the petition as to delay in commissioning of the project due to the purported occurrence of the force majeure events.

- xvi) The implementation of the project within 10 months from the date of signing of PPA without penalty as against 13 months allocated under phase-I and 12 months under phase-III are concerned, the same are denied being twisted in nature. As the petitioner at the time of participating in the bidding

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

- xvii) As per LoA para 3 (g), the petitioner was to achieve the financial closure within 120 days from the date of signing of PPA i.e. by 31.07.2015. However, as per the documents submitted by the petitioner the financial closure was achieved and State Bank of India issued in-principle approval vide letter dated 26.05.2015 and the same was submitted to PEDA by the petitioner vide its letter dated 06.08.2015. The in-principle approval of State Bank of India nowhere indicates that the petitioner has faced any difficulty and neither the petitioner while submitting these documents has stated any difficulty with regard to financial closure.
- xviii) The IA in light of the clauses of the PPA does not lose its sanctity and happens to be a primary contractual document entered between the developer and PEDA as the same happens to be the very basis of allocation, setting up and running of the project under the provisions of PPA.
- xix) The force majeure clause provided in the IA, stipulates that the effected party shall give written notice to the other parties describing the particular of the force majeure event as soon

as the reasonably practicable after its occurrence but not later than 5 days after the date on which such party knew of the commencement of the force majeure event or of its effect on such party. Similarly, the PPA also provides issuance of notice as to the occurrence of force majeure event within a period of 7 days. However, the petitioner failed to issue any such notice invoking the aforesaid clause as to the occurrence of force majeure event(s) if any, in line with the terms and conditions of the IA.

- xx) The disclaimer clause of the RfP states as under:-

*“1. This Request for Proposal RfP No. PEDAV/ET/15-16/SP/1103 document is not an agreement or offer by the PEDA to the prospective Bidders or any other party. The purpose of this RfP is to provide the information to the interested parties and to assist them in formulation of Bid. This RfP is based on material and information available in public domain.*

*2. While this RfP, has been prepared in good faith, neither the PEDA, or their employees or advisors make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omissions herein, or the accuracy, completeness or reliability of information, and shall incur no liability under any law, statue, rules or regulations as to the accuracy, reliability or completeness of this RfP, even if any loss or damage is caused by any act or omissions on their part.”*

The RfP clearly states that the IA and PPA attached with it were indicative in nature and were as available at the time of issue of RfP and could be changed at any time. The respondents were to get the necessary approvals of the

competent authorities till a final and binding agreement was signed between the parties.

The petitioner failed to produce on record any letter written under article 10.4 of the IA and/or clause 19.2.0 of the PPA for the occurrence of force majeure event due to delay in signing of PPA or due to conditional PPA.

- xxi) The petitioner nowhere intimated the happening of the strikes to PEDA even in response to the emails dated 23.05.2015, 03.06.2015, 18.06.2015 and letter dated 16.07.2015.
- xxii) The petitioner failed to demonstrate any such occurrence of the purported events by way of cogent evidence in support thereof. The purported force majeure events referred by the petitioner were after thought, as the petitioner just in order to run away from its bounden obligation to setup the project in a time bound manner as provided there under the IA and in order to escape from the consequential penal action stipulated there under the RfP and IA, tried to setup false and frivolous pleas as to the occurrence to the force majeure events.
- xxiii) The desecration of the Holy Sri Guru Granth Sahib took place in village Bargari in Faridkot, and the project falls in Distt. Fazilka. Hence, the purported plea of the petitioner is also belied.
- xxiv) Jat agitation took place in the state of Haryana which is far away from the project site and has no relevance/affect on the setting up of the project in a time bound manner.
- xxv) It is wrong that PEDDA abused its dominant position in as much as issuance of letter dated 24.02.2016. The petitioner failed to commission its project within the stipulated time

frame i.e. on or before 30.01.2016. Therefore, PEDA rightly issued the said letter for levy of penalty as per agreed contractual terms. PEDA is entitled to levy penalty upon the petitioner in case of delay in commissioning of the project beyond the stipulated dated i.e. 30.01.2016. PEDA was not aware of the occurrence of any of the force majeure events as purported by the petitioner.

- xxvi) The claim of the petitioner that the project was ready since the end of January, 2016, is wrong.. The project was visited by District Manager, PEDA on 14.02.2016 and it was reported that the implementation work of the project was still pending.
- xxvii) It is wrong that PEDA has issued letters dated 18.01.2016 and letter dated 24.02.2016 for imposition of LD. PEDA rightfully issued letters dated 18.01.2016 and 24.02.2016 well within its rights under the RfP. The petitioner was fully aware and agreed to the RfP clauses with regard to penalties applicable for delays in commissioning of the project. PEDA in line with the agreed terms and conditions of the contractual documents has rightly decided to impose penalty upon the petitioner for the delayed period, which the petitioner is liable to pay. The petitioner is not at all entitled for any relief as prayed for.
- xxviii) The penalty and LD are two different terminologies having different nature. In case of penalty, no evidence as to the actual loss suffered is required as the imposition of the same has been provided under the contract agreed to by both the parties i.e. the petitioner and PEDA. Further, PEDA has an interest in development of NRSE projects in the state of

Punjab and any delay in the commissioning of the same results in adding liability of RECs on the state licensee. Therefore, there is loss to the State and resultantly loading on the consumers of the state.

- xxix) The petitioner could not commission the project well within the stipulated date i.e. 30.01.2016 and commissioned the project on 19.02.2016. Hence, PEDA while giving various prior intimations as to the timely commissioning of the project, initiated the invocation/encashment of the PBG by making a request to the issuing bank of the PBG in order to recover the penalty amount levied on account of delay. While duly acknowledging its liability to pay the penalty levied upon the petitioner on account of the delay in commissioning of the project, the petitioner requested PEDA for accepting the amount of penalty leivable upon the petitioner on the aforesaid account, by way of cheque no. 783253 dated 17.03.2016 amounting to Rs.1,88,68,965/- and requested to withdraw the letter of invocation issued by PEDA to the issuing bank of the PBG. The perusal of the letter dated 17.03.2016 reveals that the petitioner itself requested PEDA for accepting a cheque for the penalty amount thereby requesting that their PBG should not be invoked. While handing over the aforesaid cheque to PEDA, the petitioner assured PEDA as to the encashment/ honouring of the cheque. In good faith and believing the petitioner, PEDA withdrew its request made to the issuing bank of the PBG i.e. Yes Bank, by letter dated 17.03.2016. As per the assurance given by the petitioner, PEDA presented the cheque with its banker i.e. Union Bank of India, Sector 32, Chandigarh.

However, the said cheque was returned unpaid and dishonoured by the Union Bank of India vide its return memo dated 19.03.2016 with remarks “funds insufficient”.

PEDA as per the assurance of the petitioner, once again presented the said cheque. The aforesaid cheque was again dishonoured on account of stop payment by the petitioner. The petitioner is under a bounden obligation to deposit the amount of Rs. 1,88,68,965/- on account of the penalty due to the delay in the commissioning of the project. In view of dishonour of the cheque, the petitioner is liable under law to make payment to PEDA against the said cheque.

- xxx) It is requested to dismiss the petition with exemplary costs and PEDA be allowed to invoke the PBG(s) deposited by the petitioner on account of levy of penalty due to delay in the commissioning of the Project. The petitioner be directed to deposit the amount of the penalty for delay in commissioning of the project in line with the contractual documents entered between the parties in the interest of justice, equity and fair play.

15. The petitioner in its rejoinder dated 23.05.2016 to the reply of PSPCL dated 28.04.2016, while reiterating its earlier submissions, further submitted in brief as hereunder:

- i) PSPCL is not a performa respondent in the petition. The delay in commissioning of the project occurred due to the fault of PSPCL which was beyond the control of the petitioner.

- ii) PSPCL cannot deny the contents of the IA by merely saying that it was not executed by it though as per recital of the PPA the IA is integral part of the PPA. For the pre-commissioned period the force majeure clauses mentioned in the IA were to be seen and as such the reasons for which delay occurred in commissioning of the project are either force majeure or defaults on the part of PSPCL. PSPCL did not read the clause 19.1.0 of the PPA in true spirit. The reliance is placed on the judgment dated 07.04.2016 of Hon'ble APTEL in the case of Uttar Haryana Bijli Vitaran Nigam Limited Vs. CERC and Other in Appeal No. 97 of 2014 and 151 of 2013 and connected matters on the interpretation of force majeure clause.
- iii) It is wrong that the petition was filed with an intention to delay the commissioning of the project and for seeking any illegal and unrealistic order from the Commission.
- iv) The petitioner cannot be penalized for the fault of the respondents. There was no explanation by PSPCL as to how its own default can give it a right to invoke PBG of the petitioner.
- v) There is no doubt that the PPA was to be approved by the Commission before its execution. It was never informed by PSPCL or PEDA that the PPA was yet to be approved. The petitioner & other solar developers objected to the same at the time of its signing as PSPCL should have got the PPA approved from the PSERC before its date of execution. The petitioner would have challenged the clause 35 of the PPA in case the PSPCL told that approval would take long time. PSPCL failed to get the draft PPA approved from the

Commission before the PPAs were executed by the parties and thereafter put a clause in the PPAs that these would be effective from the date these were approved by the Commission and in this way caused a delay of 41 days.

- vi) In whole of the Punjab, section 144 of the Cr.PC was imposed and in view of this no work could be done. It is wrong that as the project is 93 km from Distt. Faridkot so there was no effect on the project.
  - vii) It is wrong that the Jat agitation was not so violent or loud that it had any effect in State of Punjab. Due to the said agitation the materials to be supplied to the petitioner got stuck at the borders of the state.
  - viii) There is no issue of reducing tariff as there is no fault on the part of the petitioner in delay of the commissioning of the project and the delay was occurred due to faults of PSPCL.
16. The rejoinder dated 23.05.2016, filed by the petitioner to the reply of PEDA, in brief, is as hereunder:

- i) It is wrong that the petition is bad both in terms of de-jure and de-facto and is based on conjectures and surmises, hence not maintainable in the eyes of law. It is also wrong that the petitioner did not demonstrate the true factual matrix of the matter and in order to evade its bounden obligation, as stipulated therein the Rfp, LoA and IA, of achieving the COD well within time, has tried to setup a false and frivolous case.
- ii) It is wrong that the petition is not maintainable as there exists an arbitration clause in the contractual document entered between the parties. This issue already stands decided by Hon'ble Supreme Court of India vide its judgment dated

13.03.2008 in Appeal (Civil) 1940 of 2008 in Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Limited.

- iii) It is settled principle of law that any dispute between a generator and a distribution licensee has to be adjudicated under section 86(1)(f) of the Act by the respective State Commission and the Commission has inherent powers to pass an appropriate order to provide justice to the affected person.
- iv) It is wrong that the IA entered into between PEDA and the petitioner is the main contractual document. As per recital of the PPA, the IA is an integral part of the PPA. The petitioner completed the project on 29.01.2016 but due to non-readiness of GSS and non-availability of meters at GSS side and the faults on the part of PSPCL the plant could not be synchronized.
- v) It is wrong that the petitioner got the interim Order dated 22.03.2016 while misleading the Commission. PEDA moved an application (IA No. 19 of 2016) for vacating the said interim Order. The Commission vide Order dated 12.04.2016 declined to vacate the stay.
- vi) As per RfP and IA, the developer was required to commission the plant on or before 30.01.2016 failing which the PBG submitted by the developer shall be encashed as mentioned in the IA/RfP. As per IA and PPA the total period allowed for commissioning the project was 10 months. But as per clause 35 of the PPA (which was not earlier the part of the RfP) it was only effective after it is approved by the Commission. The PPA was approved by the Commission vide its order dated 11.05.2015 and as such upto 11.05.2015

the PPA could not be acted upon and the petitioner virtually got 8½ months only instead of 10 months. Requests were made to PEDA for extension of time of COD but PEDA acting against the mandate of the provisions of NRSE Policy, 2012 has invoked the PBG. PEDA being a nodal agency never informed the petitioner before signing of the PPA that it would be effective only after it was approved by the Commission. PEDA did not disclose material facts regarding acceptance of PPA by the Commission.

- vii) Even before invoking the PBG no prior notice was given by PEDA to the petitioner. The project was commissioned on 18.02.2016 (wrongly mentioned by the petitioner as 19.02.2016) but the plant was ready before 31.01.2016 and the petitioner sent many letters to the respondents and informed that the work at GSS was not completed and delay in commissioning occurred due to non completion of GSS. The project was commissioned on 18.02.2016. If PEDA wanted to invoke the PBG, then it could be on pro-rata basis for 18 days. But PEDA intentionally invoked the PBG for the whole amount of Rs. 2.88 crore. For 19 days the amount comes to Rs. 1,88,68,965/- . The perusal of the letter dated 15.03.2016 sent by PEDA to Yes Bank Ltd. for invoking the PBG would further show the malafide intention of PEDA. In para 2 of the said letter it was wrongly and illegally mentioned that till 15.03.2016 the project was not commissioned.
- viii) The petitioner visited PEDA on 17.03.2016 and informed the reasons for alleged delay in commissioning of the project and also informed that it is approaching the Commission by way

of filing a petition for extension of COD when the petitioner got information that PEDA invoked the PBG for Rs. 2.88 crore (30% of total PBG). As a security the petitioner gave a cheque of Rs. 1,88,68,965/- to PEDA. The petitioner vide letter dated 17.03.2016 specifically mentioned that it issued a cheque of Rs. 1,88,68,965/- as deposit to PEDA.

- ix) After taking the cheque as a deposit, PEDA withdrew the letter sent to Yes Bank. It was never settled between the petitioner and PEDA that the cheque would be sent for encashment. PEDA without the knowledge of the petitioner presented the cheque in the bank for encashment. The petitioner got information about the presentation of the cheque from Yes Bank by mail on 21.03.2016. The petitioner was asked to fund the account by 11.30 am so that the cheque is cleared. The petitioner never gave cheque to PEDA for presenting it for encashment but just to avoid dishonor of the cheque as this is not seen as a positive sign in the cash squeezed solar industry, the petitioner decided to get the cheque encashed and deposited the necessary funds by 1.32 p.m. But the bank returned the cheque at 12.33 p.m.
- x) PEDA presented the cheque without the consent of the petitioner but once the cheque was presented the petitioner did not want that cheque to be dishonored. So the petitioner sent a mail on 21.03.2016 to the bank for transferring the amount by RTGS. But bank officials informed that the RTGS is not possible and asked the petitioner to request PEDA to present the cheque again. Accordingly the petitioner requested PEDA to again present the cheque in the bank. The Commission vide Order dated 22.03.2016 stayed the

invocation of PBG and status quo regarding cheque was also granted. So when PEDA again presented the cheque in the bank the petitioner stopped the payment of the same as the Commission has granted status quo regarding cheque.

- xii) It is wrong that the petitioner committed any offence under section 138 of the Negotiable Instrument Act, 1881. The cheque was valid for three months and the PBG was valid upto 15 months. PEDA instead of filing reply to the petition filed an application for vacation of stay, which is not understandable. PEDA is interested in money and not in decision of the case.
- xiii) Article 10.5 (ix) of the IA states 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 PBG 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 the PSERC.
- xiv) The petitioner invested about Rs. 170 crore in this project in the State of Punjab and besides the petitioner is also investing about Rs. 200 crore in another project in the State of Punjab in the solar projects. The petitioner is not running away and the matter is pending before the Commission.
- xv) It is settled principle of law that the stay can be granted by the Hon'ble Court in encashment of the Bank Guarantee. In the present case the article 7 of the IA is qualified by article 10 of the IA and as such PEDA has not absolute right to

- invoke the bank guarantee. PEDa is misleading the Commission by making false averments.
- xv) The facts of the petition no. 27 of 2016 in the matter of Talwandi Sabo Power Ltd. Vs. PSPCL are different than the facts of the present case. The Commission has inherent power to pass an appropriate order and extend the period of commissioning of the project as the delay occurred was due to sole fault of the respondents. The petition was filed for condonation of delay in commissioning of the project under section 86(1)(f) of the Act read with Regulation 10, 69 , 71 and 73 of the PSERC (Conduct of Business) Regulations, 2005 and Regulation 85 of CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012.
- xvi) The time allowed by the respondents for implementation of these projects without any damages and penalties was 10 months as against 13 months for the projects allotted under phase-I and 12 months for the project allotted under phase-III. This is the shortest time allowed by any authority for implementing large scale grid connected solar projects in India.
- xvii) State Bank of India issued in-principle approval vide letter dated 26.05.2015 i.e. after the PPA was approved on 11.05.2015. Due to delay in approving the PPA the petitioner could not start other works of the project earlier.
- xviii) By mentioning Disclaimer clause in RfP, PEDa cannot shirk away from its responsibilities as mentioned in NRSE Policy, 2012. The Disclaimer does not give power to add a new clause 35.0.0 in the PPA making the PPA ineffective. In case

the PPA was approved at the time of signing the PPA, the petitioner would have got 41 days more i.e. complete 10 months. The petitioner raised this issue before PEDDA in the joint representation dated 06.01.2016 but PEDDA failed to give any relief.

- xix) In whole of the Punjab section 144 of the Code of Criminal Procedure was imposed and in view of this no work could be done. Jat agitation was initiated in Distt. Rohtak, Haryana and the project is around more than 334 km away. It is wrong that the agitation was not so violent or loud that it has any effect in State of Punjab. The protests started in mid-February and turned violent by 20.02.2016. The protesters blocked highways and railway lines. Jat agitation came to end on 24.02.2016. The entry and exit points of the State were put on curfew, thereby restraining the petitioner from receiving the materials for structure and balance of system equipments to reach the site of the power plant thus unabling the construction of the said power plant. The materials got stuck at the borders of the state.
- xx) As per section 72 of The Indian Contract Act, 1872 irrespective of a clause in a contract / PPA for quantifying the liquidated damages, an aggrieved party can only claim actual damages sustained by it as a result of any default by the other party in fulfilling its obligations under the contract. The LD / Penalty amount is only an upper limit 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.

17. PEDA filed an appeal no. 167 of 2016 before Hon'ble APTEL against the Order dated 12.04.2016 in IA no. 19 of 2016 passed by the Commission. Hon'ble APTEL vide order dated 03.08.2016 held as under:

*"We are informed that the State Commission is to hear the main matter tomorrow i.e. on 04.08.2016. On 04.07.2016, we had given liberty to the appellant to inform the State Commission that notice has been issued by this Tribunal in this appeal as well as in the stay application. Since the main matter is going to be heard by the State Commission tomorrow, we must make it clear that the State Commission is free to dispose it of tomorrow. It is possible that if the main matter is disposed of by the State Commission, the present appeal may become infructuous. However, we make it clear that we have not expressed any opinion on the merits of the matter. Learned counsel for the parties are directed to show a copy of this order to the State Commission."*

18. PSPCL's final written submissions dated 22.08.2016 are summarized in brief as hereunder:

- i) The plant stands synchronized as on 18.02.2016 vide permission given by PSPCL letter No. 265/68/IPC-455 dated 16.02.2016.
- ii) The timeline for setting up the project is clear in the IA and PPA and it was to be complied with in true letter and spirit by the petitioner. Any delay caused by the petitioner creates a burden on PSPCL as it is forced to purchase RECs to comply with RPO of the given year thereby burdening the public at large as the money spent for the same is public money and PSPCL is directly accountable to the public and residents of the state.

- iii) There was no bar on the petitioner to proceed with other ancillary works related to the project. Nor was there any bar in getting pre-feasibility so as to get an idea if the project as planned can be commissioned as per the requirements even if the PPA is not approved by the Commission.
- iv) As per clause 5.5.0 & 8.2.0 of the PPA, the firm was to give 30 days prior notice of synchronization to PSPCL. This is the buffer period which is used by PSPCL to deal with any and all technical issues, when minor issues like non-readiness of bay, meters etc, can be sorted out but unfortunately no such notice was given. The firm cannot expect to complete everything at the 11<sup>th</sup> hour and expect PSPCL to provide connectivity for injection of power into the grid at the very last moment as proper planning and engineering efforts are required to make arrangements for injection of power.
- v) As per clause 9.0.0 of the PPA, main and check meters to be installed at plant side (on the basis of which billing is to be done) are to be purchased, arranged by Generating Company and calibration and testing thereof is also the responsibility of the Generating Company. Accordingly, the generating company has made an application to concerned field office who had sent the meter to PSPCL Lab at Patiala for calibration and testing of these meters on 29.01.2016. After calibration and testing, ME Lab Patiala returned the meters to concerned Sub Division on 05.02.2016. Testing by MMTS wing of PSPCL at plant side was done on 11.02.2016 after installation of these meters. The meters (called standby meters) for GSS were received on 12.02.2016 and tested by MMTS on 14.02.2016 as admitted by the firm in its affidavit.

As such, the delay claimed by firm with respect to late visit by MMTS team for testing of meters was not based on facts and is an alibi. Thus, the generating company has made an excuse of this point only to get extension in SCOD.

- vi) As per clause 6.3.0 of the PPA, the developer has to arrange himself all clearances including CEI, so the developer was to arrange the same timely, and as such no one else is responsible for the delay in the same.
- vii) The petitioner approached SE/IPC office for permission of synchronization of their plant on 15.02.2016 and permission was allowed on 16.02.2016. The installation of grid side meters (called stand by meters) does not affect the plant side erection / installation and various clearances like CEI clearance, protection clearance, MMTS clearance etc. As per terms and conditions of PPA, all the clearances are to be arranged by the Generating Company.
- viii) PSPCL is only responsible for bay at PSPCL sub-station which includes metering equipment & meters (standby meters) which does not affect the installation of plant and relevant clearances of plant side.
- ix) The protection clearance was obtained by the petitioner on 08.02.2016 as such the claim that the petitioner was ready on 29.01.2016 is baseless. As per intimation vide memo No. 1029 dated 07.05.2015, the petitioner was to submit all the clearances through the office of SE/Distribution at least 30 days prior to the scheduled synchronization of the plant.
- x) The petitioner instead of accepting its fault is trying to escape its responsibility by playing a blame game to divert attention from their incapability and inability to complete the project on

time. The petitioner did not approach the Commission with clean hands and have tried to pass off their responsibility on to the PSPCL and have tried to cover up their incapability by raising non existing issues of force majeure event, for which no evidence was provided and no specific notice given. The petitioner did not submit the data for synchronisation which is to be given 30 days in advance as required under PPA and thereby delaying the synchronization process itself.

19. The petitioner filed an affidavit dated 01.09.2016 in compliance of the Order dated 19.08.2016 passed by the Commission and submitted that it sent plant side meters along with fees for testing on 22.01.2016. The said meters were received after testing and calibration on 05.02.2016. The transmission line was completed on 29.01.2016 and the required fee for inspection by Chief Electrical Inspector (CEI) was deposited on the same day. CEI approval letter was received on 02.02.2016. The petitioner further submitted that there was a delay on the part of PSPCL in procuring the meters to be installed on grid sub-station side due to which the MMTS team did not come for testing and installation of plant side meters. The petitioner vide letter dated 12.01.2016 requested CE/OP(West), DS,PSPCL, Bathinda to arrange ABT meters. The petitioner did not receive the GSS side meters on 29.01.2016. The petitioner vide letter dated 01.02.2016 updated the status of the following to PED:

- a) Tested ABT meters have not arrived at GSS. It is expected to take minimum 2 more days i.e. 03.02.2016 or 04.02.2016.
- b) Testing of GSS equipment has not been completed which means charging cannot be done.

c) CEI approval for plant, PSPCL Testing group visit of the plant was awaited and ABT meters were not yet installed.

The application for inspection by PSPCL team was submitted on 27.01.2016. Fee estimation letter from PSPCL was received on 02.02.2016 and the same was deposited on 03.02.2016. Testing was started on 03.02.2016 and completed on 08.02.2016. Final clearance was issued by PSPCL on 08.02.2016. The delay was primarily due to non availability of GSS side meters, which led to delay in MMTS team visiting the site for meter installation and sealing of both plant and GSS side meters. Thereafter, XEN, Abohar issued a letter to SE, Sri Mukatsar Sahib for synchronization of the plant on 15.02.2016. The petitioner visited the office of SE/IPC with all the clearances on 15.02.2016 for issue of permission for synchronization and the same was granted on 16.02.2016.

20. PSPCL filed reply dated 08.09.2016 to the affidavit of the petitioner wherein it reiterated its earlier submissions.

21. The petitioner filed reply dated 19.09.2016 to the written submissions dated 22.08.2016 of PSPCL wherein it reiterated its earlier submissions.

22. PEDA filed IA No. 06 of 2017 on 16.03.2017 seeking adjudication of the issue with respect to undue influence of the counsel representing the petitioner in the petition before the Commission who was representing the Commission before other court(s)/forum(s)/tribunal(s), which gravely prejudiced the rights of PEDA.

The counsel for the petitioner filed reply dated 18.04.2017 to the said IA supported by copies of judgments titled and reported as

R. Balakrishna Pillai Vs. State of Kerala, (2000) 7 Supreme Court Cases 129, Reference No.1 of 2003 decided on November 10, 2008, reported in (2009) 1 Supreme Court Cases 337, Abrahama Kuruvila Vs. S.C.T. Institute of Medical Sciences & Technology and others reported in (2005) 9 Supreme Court Cases 49, Keshab Roy Vs. The State of West Bengal, reported in (1973) 3 Supreme Court Cases 216, Hyderabad Vanaspatti Ltd. Vs. A.P. State Electricity Board and others, reported in (1998) 4 Supreme Court Cases 470 and a judgment of the Punjab & Haryana High Court reported in the Times of India on 10.02.2017.

Detailed arguments were heard on the merits of issue involved in all the above cited judgments on 09.05.2017. Vide Order dated 11.05.2017, Order in the IA was reserved.

PEDA filed another IA No. 22 of 2017 seeking rectification / modification in the Order dated 11.05.2017 passed by the Commission. PEDA prayed to the Commission to decide IA No. 06 of 2017 prior to further proceedings in the petition, in the interest of justice, equity and fair play.

The IA No. 06 of 2017 was disposed of by the Commission vide Order dated 22.05.2017 in terms of the Order dated 18.05.2017 passed in IA No.07 of 2017 filed by PEDA in petition no. 22 of 2016 in the matter of Solaire Urja Private Limited Vs. PSPCL & PEDA as the facts and the relief claimed in IA No.06 of 2017 were similar to the facts of IA No.07 of 2017. The IA No. 22 of 2017 filed by PEDA became infructuous in terms of the Commission's Order dated 22.05.2017 in IA No. 06 of 2017.

23. PSPCL vide its letter dated 14.06.2017 submitted that the replies already filed by it are comprehensive and be treated as written submissions as well.

24. The petitioner filed written arguments dated 21.06.2017 wherein while reiterating its earlier submissions, it further submitted as hereunder:

- i) PEDA during arguments relied upon letter dated 26.05.2015 of State Bank of India whereby in-principle approval was given by State Bank of India. The in-principle approval was given by the State Bank of India in reference to SBICAPS letter dated 11.05.2015. In the minutes of board meeting dated 12.05.2015 it is mentioned that the company received an offer letter from SBI Capital market. This exercise could be done earlier in case the PPA was approved earlier.
- ii) The petitioner completed the project on 29.01.2016 but due to the fault on the part of PSPCL the project could not be synchronized. Addl. SE, Protection Division, Moga issued a letter dated 08.02.2016 to Addl. SE, Distribution Division, Abohar and mentioned therein that the testing results are satisfactory and recommended for synchronization of the plant of the petitioner with the PSPCL System. The petitioner again sent letter dated 10.02.2016 to CE/DS (West), PSPCL, Bathinda and informed that the plant is fully ready for synchronization and request was made to depute a team for installing the meters. The petitioner also sent a letter dated 10.02.2016 to PEDA and submitted that the plant is ready but the GSS was not ready and due to this reason delay is occurring in synchronization of the plant. It was also

submitted that PSPCL was not issuing synchronization permission. The meters were received at GSS on 13.02.2016 and thereafter PSPCL gave synchronization permission on 16.02.2016 and the plant was then synchronized and commissioned on 18.02.2016. So the delay from 29.01.2016 to 18.02.2016 was solely due to the fault of PSPCL and for the same the petitioner cannot be penalized.

- iii) The petitioner vide letter dated 22.01.2016 requested SE/Distribution, Sri Muktsar Sahib and Sr. Xen/Distribution, Abohar for granting synchronization permission. In the said letter it was specifically mentioned that it built the project and transmission line and is in the process of commissioning and synchronization of the same and for this purpose need synchronization certificate on 30.01.2016. So once the petitioner informed PSPCL about its intention to synchronize the plant then it was the duty of the respondent to complete the GSS. But as meters were not available at GSS, no permission was given by PSPCL, though the plant was ready on 29.01.2016.
- iv) The plant side meters along with fees and application were submitted on 22.01.2016 for testing to PSPCL, Patiala. However, the said meters were received after testing and calibration on 05.02.2016. So delay is solely on the part of PSPCL.
- v) The transmission line was completed on 29.01.2016 and the petitioner paid required fee for CEI inspection on 29.01.2016. PSPCL requested CEI on 30.01.2016 for inspection and permission for energization of transmission line. CEI approval letter was received on 02.02.2016.

- vi) There was delay on the part of PSPCL in procuring the meters to be installed on GSS side because of which the MMTS Team didn't come for testing and installation of even plant side meters. The petitioner vide letter dated 12.01.2016 requested Chief Engineer OP (West), DS, PSPCL Bathinda to arrange for ABT compliant Main and Check Energy Meters. However, the petitioner did not receive the GSS side meters on 29.01.2016 though the petitioner built the plant by 29.01.2016.
- vii) The protection clearance was obtained on 08.02.2016. The plant was ready by 27.01.2016 and accordingly, application for inspection by PSPCL team was submitted on 27.01.2016. Necessary fee estimation letter was received on 02.02.2016. Fee was deposited on 03.02.2016. Testing was started on 03.02.2016 and was completed on 08.02.2016. Accordingly, the final Clearance was given on 08.02.2016
- viii) The GSS side meters were finally received on 12.02.2016 which lead to delay in the MMTS team visiting the site on 14.02.2016 for meter installation and sealing of both plant and GSS side meters. Thereafter, XEN Abohar issued the letter to SE Muktsar for synchronization of the plant on 15.02.2016. The SE/IPC granted synchronisation approval on 16.02.2016 and plant was synchronized on 18.02.2016.
- ix) During arguments before the Commission, PSPCL admitted that the GSS meters were received on 12.02.2016 and the GSS was not ready. So once GSS was not ready then the delay in synchronization is solely due to fault of PSPCL and for the same the petitioner cannot be penalized.

- x) There was a fault of the respondents and force majeure events which caused delay in commissioning of the project and as such the petitioner is entitled to get the extension of COD as prayed for.
- xi) As per PPA, the IA is an integral part of the PPA. For the pre-commissioned period, the force majeure clauses mentioned in the IA has to be seen and as such the reasons for which delay occurred in commissioning of the project are either force majeure or defaults on the part of the respondents. Reference was made to the recent judgment dated 07.04.2016 of Hon'ble APTEL in Uttar Haryana Bijli Vitaran Nigam Limited Vs. CERC and others in Appeal No. 97 of 2014 and 151 of 2013 and connected matters on the interpretation of force majeure clause. Relevant extract of the aforementioned judgment is reproduced herein below:

*“...279. Thus, the term 'Force Majeure' is a term of wider import and the widest meaning that can be given to 'Force Majeure' is that where reference is made to 'Force Majeure', the intention is to save the performing Party from the consequences of anything over which he has no control.*

.....  
*284. A reading of Articles 12.3, 12.4 and Article 12.7(a) establishes that an event constitutes a Force Majeure Event,. if (a) It wholly or partly prevents or unavoidably delays the performance of obligations under the PPA or hinders or delays the performance of obligations of the PPA. (b) Such event is not within the reasonable control of the Affected Party, directly or indirectly. (c) Such events and circumstances could not have been avoided by the Affected Party, even if it had taken reasonable care or complied with Prudent Utility Practices. (d) The events*

*that materially impact the cost of fuel are expressly covered, so long as they are a consequence of an event of Force Majeure....”*

- xii) The force majeure definition in article 10.1 of the IA provides for the following:

*“10.1 Force Majeure Event*

*In this Agreement, Force Majeure means an event occurrence in India of any or all of non-political events described in clause 10.2 and political events described in clause 10.3 respectively hereinafter which prevents the party claiming Force Majeure. (The affected party) from performing its obligations under this agreement and which act or event.*

- i. *Is beyond the reasonable control of and not arising out of the fault of the affected party.*
  - ii. *The affected party has been unable to prevent by the exercise of due diligence and reasonable efforts, skill and care, including through expenditure of reasonable sum of money and*
  - iii. *Has a materially adverse effect on the project.”*
- xiii) As per article 10.5(ix) of the IA, once delay has happened on account of force majeure, the commercial operation date of the project shall get extended. In the Order dated 11.05.2015 passed in petition no. 21 of 2015, the Commission while approving the tariff applicable to the petitioner's project, inter alia, held as follows:

*“... ... The tariffs approved above would be applicable upto 31.03.2016 provided the PPAs have been signed on or before 31.03.2015 and the entire capacity covered in each PPA is commissioned on or before 31.03.2016, 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. 31.03.2016 will not be allowed by the Commission even if punitive clauses in the PPA are made applicable.”*

- xiv) According to the tariff order, the commissioning of the project would be on or before 31.03.2016. Barring force majeure / change in law etc., the applicability of the approved tariff beyond 31.03.2016 will not be allowed by the Commission. Therefore, if there are events of force majeure / change in law etc. the approved tariff in such circumstances will be allowed even beyond 31.03.2016. In the present case, the project was commissioned on 18.02.2016. There is nothing on record to show that the petitioner was in any manner responsible for the delay in commissioning of the project. Neither PEDA nor PSPCL produced any documents or evidence to counter the submissions made by the petitioner. In this context, reference is made to the judgment of the Commission passed in petition no. 17 of 2015 in case of Atma Powers Pvt. Ltd. wherein the commissioning date beyond 31.03.2015 was permitted for purposes of retaining the approved tariff. Further, reference and reliance was also placed on the judgment of Hon’ble APTEL in appeal no. 170 of 2014 in the case of GUVNL v. GERC and others, wherein it has been held as follows:

*“10.11 We have gone through the Conduct of Business Regulations, 2004 and the provisions provided under Section 86 of the Electricity Act, 2003 and find that the learned State Commission has rightly passed the impugned order under its inherent powers. We are unable to accept the contention of the Appellant that the State*

*Commission cannot exercise inherent power for the purpose of extending the control period. We may clarify that the control period of the tariff order is fixed by the State Commission itself and, hence, the State Commission has inherent powers to extend the control period of the tariff order. There is no restriction or fetter on the powers of the State Commission in the Electricity Act, 2003 or under the Conduct of Business Regulations, 2004 to pass such order as the State Commission may deem fit and appropriate in the interest of justice and discharge its functions under the Electricity Act, 2003. The Conduct of Business Regulations, 2004 provide inherent powers to the State Commission to pass any order it deem fit and proper to meet the ends of justice or to prevent abuse of the process of the court. The State Commission has liberty to exercise its inherent powers if the exercise of inherent power is not in any way in conflict with what has been expressly provided in the Civil Procedure Code or against the intentions of the legislature which means that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.*

*10.12 Regulation 85 of the Conduct of Business Regulations, 2004 dealing with Extension or abridgement of time prescribed fairly provide that subject to the provisions of the Acts, the time prescribed by these Regulations or by order of the Commission for doing any act may be extended (whether it has already expired or not) or abridged for sufficient reason by order of the Commission.*

*10.13 The facts of the matter make it abundantly clear that the impugned petition seeking extension of control period was filed by the Respondent No.2 in a good faith without any malafide and not afterthought and the real difficulties faced by the Respondent No.2 in commissioning of the project were clearly stated in the impugned petition. The State Commission, in the*

*impugned order, has rightly by exercising the inherent power, extended the control period of 24 days for the solar power project of the Respondent No.2. We have carefully gone through the law laid down by this Appellate Tribunal in the matter of AP Transco vs. Sai Renewables and in Green Infra vs. Jaipur Vidyut Vitran Limited cited by the Appellant but the same are not applicable in the instant matter because in the reported matters, there was a specific regulation prohibiting reopening of the tariff in the project that had been entered under an erstwhile regulations but, in the present case, there is no such prohibition against reopening of the tariff.*

*10.14 We observe that the Respondent No.2/petitioner was striving to procure land and commission its' project in the Control Period provided by the Tariff Order, 2010 despite all hurdles faced by it and for this reason the Respondent No.2 did not raise the issue of extension of control period before the State Commission before 13.1.2012. However, the Respondent No.2 was prevented from commissioning of the said project during the control period solely on account of the aforesaid reasons which are not attributable and beyond the control of the Respondent No.2 and for the same Respondent No.2 cannot be penalized for the delay by way of payment of lower tariff. We, further, find that the Respondent No.2 had committed its investments and ordered most of the equipments for its project well before the issuance of discussion paper in November, 2011. The Appellant had already recovered substantial part of the amount from the power supply bills from the Respondent No.2 towards liquidated damages prescribed in Article 2.3 of the Supplemental PPA. Further, the Respondent No.2, on the basis of the tariff order No. 2 of 2010 had already spent the capital cost for its project and made substantial investments/expenditures in the project during the control period of the Tariff Order, 2010. Apart from it, the Respondent No.2 had placed orders for capital*

*equipments, etc. in May, 2011 and had, in fact, committed expenditure to the extent of approximately 78% of total project cost during the midst of the control period of Tariff Order, 2010 and well before the end of the control period. The Respondent No.2 also did not get the benefit of capital cost relevant for the next control period.*

.....

*10.17 This Appellate Tribunal, in its judgment, dated 2.1.2013, in Appeal Nos. 96 & 130 of 2012, held that the State Commission has been vested with inherent powers to meet the end of justice and to prevent abuse of the Code and such powers can be exercised by the State Commission to extend the control period of a tariff order when any project developer, like the Respondent No.2 herein, faces problem, due to reasons beyond its control, in completing its project in the said control period in the interest of justice after examining each case on its merits.”*

- xv) The petitioner relied upon the powers available with the Commission under Regulation 69, 71 and 73 of the PSERC (Conduct of Business) Regulations, 2005. Regulation 73 gives wide powers to the Commission. In any event, the Commission in the tariff order retained the ability to extend the control period for applicability of the approved tariff on account of force majeure / change in law etc.
- xvi) PEDA/PSPCL were both aware and were informed about the force majeure events by the petitioner from time to time.
- xvii) The respondents cannot impose a penalty under a contract unless the same is in the nature of compensation, which it is required to justify in accordance with the principles in the Indian Contracts Act. In this context, reference was made to the recent judgment of Hon'ble Supreme Court of India in the

case of Kailash Nath reported in (2015)4SCC136, where in it was held as follows:

*"43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:- 1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation. 2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act. 38 Page 39 3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section. 4. The Section applies whether a person is a plaintiff or a defendant in a suit. 5. The sum spoken of may already be paid or be payable in future. 6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded. 7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where,*

*however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application. 39 Page 40 44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that the DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages – namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.”*

- xviii) The SCOD of the project be extended to 18.02.2016 with applicable tariff of Rs. 6.88 per kWh in terms of the PPA during the extended COD period and the letters of PEDa for invocation of the PBG be set aside and necessary directions be issued to PEDa to return the PBG of the petitioner, in the interest of justice.

25. PEDa filed its written submissions dated 23.06.2017. While reiterating its earlier submissions, PEDa submitted as under:

- i) PEDa choose to argue the main matter without prejudice to its rights to challenge the Order dated 18.05.2017 passed by the Commission while adjudicating the application filed by PEDa with respect to the undue influence of the counsel for the petitioner on the Commission i.e. I.A No. 06 of 2017. PEDa reserved its right to challenge the ibid order dated 18.05.2017 passed by the Commission, if need so arises.
- ii) The Act doesn't empower the Commission to assume jurisdiction over the disputes arisen, if any, between State Government / its agency and the project developer. Hence, the instant dispute purportedly raised by the petitioner

against PEDA does not qualify under the provisions of section 86(1)(f) of the Act and thus the petitioner wrongly invoked the jurisdiction of the Commission, while filing the petition.

- iii) The plea of the petitioner with respect to the bankability of the PPA on account of the approval by the Commission already stands adjudicated upon by the Commission in number of decisions in the similar matters such as petition nos. 06, 07 and 10 of 2016. Therefore, no reliance can be placed upon the false and purported pleas raised by the petitioner.
- iv) The IA, in light of the clauses of the PPA, does not lose its sanctity and happens to be a primary contractual document entered between the developer & PEDA, as the same happens to be the very basis of allocation, setting up and running of the project under the provisions of PPA.
- v) Any delay in the commissioning of the project results in adding liability of RECs on PSPCL and therefore, there is a loss to the state and resultantly loading on the consumers of the State.

### **Commission's Observations, Findings and Decision**

26. The Commission has carefully gone through the petition and the application for interim stay, replies thereto by PEDA & PSPCL, and rejoinders to the replies by the petitioner, other submissions and written arguments filed by the parties. In the petition and the application for stay, the petitioner sought the following reliefs:

- a) set aside and/or quash the letters dated 18.01.2016 and 24.02.2016 of PEDA;

- b) hold and declare that the COD of the project of the petitioner stands extended till 20.02.2016 in accordance with clause 10 of the PPA read with article 7.0 of the IA on account of force majeure events and events which are beyond the control of the petitioner;
  - c) hold and declare that the petitioner is entitled to tariff of Rs. 6.88 per kWh in terms of the PPA during the extended COD period;
  - d) direct PEDA not to invoke the PBG, and to not take any coercive actions whatsoever against the petitioner; and
  - e) restrain PEDA from getting the cheque of Rs. 1,88,68,965/- encashed, given by the petitioner to PEDA on 17.03.2016, as deposit security to avoid invocation of its PBG and further direct PEDA to return the above said cheque to the petitioner, in the interest of justice.
27. Considering the submissions of the parties as brought out in the foregoing paras, the findings and decision of the Commission on various issues raised in the petition are as follows:

Jurisdiction of the Commission to adjudicate upon disputes between PEDA and the petitioner

- i) PEDA submitted that the petitioner wrongly invoked the jurisdiction of the Commission under section 86(1)(f) of the Act, which empowers the Commission to adjudicate upon disputes between the generating company and the distribution licensee. The Act does not empower the Commission to assume jurisdiction over the disputes between PEDA and the project developer. The petition is not maintainable as there exists an arbitration clause in the contractual document (IA) signed between the parties.

In this regard, the Commission notes that in para 14 of its Order dated 11.05.2015 in petition no. 21 of 2015 while granting approval for purchase of power from the petitioner's project by PSPCL and other developers including tariff, the Commission expressed its view as under:

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

In the recital on page-2 of the PPA under clause (d), it is clearly mentioned that IA signed by the petitioner with PEDA shall be treated as an integral part of the PPA and all the clauses and regulatory norms applicable to the IA shall be unequivocally applicable to the PPA in letter and spirit. In view of the above, the Commission holds that the submissions made in this regard are devoid of merit and no cognizance of the same is required to be taken. PEDA further submitted that the petition is not maintainable as there exists an arbitration clause in the contractual documents. The Commission notes that the said issue has already been decided by the Commission in its Order dated 12.04.2016 in IA no. 19 of 2016 in petition no. 21 of 2016 (this petition) & IA no. 14 of 2016 wherein it was held that the same was devoid of any merit. The Commission holds the same view.

The submission of the petitioner that the time period of 10 months for completion of the projects from the date of signing the PPA is less, is not understandable as this was a part of the RfP and the petitioner and many others bid for the

**projects of their own free will. Furthermore, PEDA has submitted that 7 similarly placed projects were commissioned in time.**

**Approval of PPA by the Commission on 11.05.2015**

- ii) The PPA was signed by the petitioner with PSPCL on 31.03.2015. The petitioner submitted that PSPCL added clause 35.0.0 in the PPA which was not part of the draft PPA annexed with the RfP. The petitioner and other solar developers at the time of signing the PPA objected to the same stating that the PPA including the said clause should have been got approved from the Commission by PSPCL before its date of execution. The petitioner further submitted that PSPCL assured that the approval from the Commission shall be obtained in 5 to 7 days. However, the PPA was approved by the Commission on 11.05.2015. The insertion of clause 35.0.0 in the PPA practically rendered it ineffective and non-bankable until approved by the Commission. The petitioner submitted that the project activities could not progress due to the same. PSPCL submitted that as per clause 10.1.0 of the PPA, the generating company was under an obligation to synchronize the project with the PSPCL grid and commission it within 10 months from the date of signing the PPA i.e. by 30.01.2016 as also mentioned in the bidding documents. Approval of PPA by the Commission is legally required. The petitioner should have exercised due diligence at the time of bidding and before signing the PPA. PSPCL submitted that it did not assure the petitioner that the PPA would be approved by the

Commission in 5 to 7 days. The petitioner should have objected and challenged the addition of clause 35.0.0 in the PPA or not signed the same. PEDDA submitted that the plea of the petitioner with respect to the PPA being non-bankable is wrong, as the financial closure was achieved and State Bank of India issued in-principle approval vide letter dated 26.05.2015 and the same was submitted to PEDDA by the petitioner vide its letter dated 06.08.2015. The in-principle approval of State Bank of India nowhere indicates that the petitioner has faced any difficulty and neither the petitioner while submitting these documents has stated any difficulty with regard to financial closure. PEDDA further submitted that the disclaimer clause in the RfP clearly states that the IA and PPA annexed with the RfP were indicative in nature and could be changed later. The petitioner failed to produce on record any letter written under article 10.4 of the IA and/or clause 19.2.0 of the PPA with regard to the occurrence of force majeure event due to delay in signing the PPA or that the PPA was conditional.

**The Commission notes that in-principle approval for the petitioner's project was given by State Bank of India vide letter dated 26.05.2015. Accordingly, the financial closure of the project was achieved on 26.05.2015. The financial closure document was submitted by the petitioner to PEDDA vide letter dated 06.08.2015 despite having achieved the same on 26.05.2015 as submitted by PEDDA. The petitioner has failed to show on record the activities which it could not initiate/execute during the period 31.03.2015 to 11.05.2015 for**

execution of the project. This clearly shows that the preliminary / preparatory works for execution of the project were not hampered for want of approval / acceptance of the PPA by the Commission on 11.05.2015, as alleged by the petitioner. The Commission further notes that clause 10.1.0 and clause 35.0.0 are concurrent and co-exist in the PPA. Article 7 of the IA signed by the petitioner with PEDDA on 24.03.2015 stipulated the commissioning period of the project as 10 months from the date of signing the PPA. Further, as per para (d) on page-2 of the PPA, IA shall be treated as an integral part of the PPA. The Commission has carefully considered the matter. The Commission is of the opinion that in the absence of documentary evidence to prove any loss / delay suffered by the petitioner due to the time elapsed between the submission of petition by PSPCL on 30.03.2015 and acceptance of the PPA by the Commission on 11.05.2015, no benefit on this account is admissible to the petitioner.

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

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

and exit points of the State were put under curfew which restrained the petitioner from receiving the materials at the project site.

PSPCL in its reply submitted that the alleged force majeure events as brought out above do not fall under the relevant clause 19.1.0 of the PPA. The said clause deals with the natural calamities or events like unrest, epidemics, any court order, change in law or an act of God. The grounds taken in the petition inter alia, deal with the approvals, an incident happened in Faridkot, agitation in another state and self-created alibi of non-availability of staff of the office of the concerned sub-registrar for registration of land lease. The grounds taken by the petitioner do not hold good and are liable to be dismissed. PEDA submitted that the petitioner failed to issue notice to it in line with the conditions of the IA as to the occurrence of the said force majeure events. The purported force majeure events referred to by the petitioner is an afterthought. The petitioner in order to run away from its bounden obligation to set up the project in a time bound manner and to escape from the consequential penal action stipulated in the RfP and IA, has tried to set up false and frivolous pleas as to the occurrence of the said force majeure events. The incident of desecration of Holy Sri Guru Granth Sahib took place in village Bargari, district Faridkot whereas the project site falls in district Fazilka. Further, the Jat agitation took place in the State of Haryana which is far away from the project site of the petitioner and did not affect the setting up of the project.

**The Commission notes that the claim of the petitioner with regard to alleged force majeure events i.e. unrest in the State of Punjab due to desecration of holy Sri Guru Granth Sahib, Jat agitation in the State of Haryana and strike by the staff of the office of sub-registrar has been strongly opposed by both PEDA and PSPCL. The Commission feels that the petitioner has failed to show what material difference these events made to the implementation of the project. Neither did the petitioner bring these issues up before PEDA / PSPCL at the relevant time nor submitted any documentary evidence to justify their claim that these events affected / delayed the execution of the project in terms of article 10 of the IA and clause 19.0.0 of the PPA. The claim for relief on these grounds is therefore rejected.**

**Providing tested ABT meters at GSS and various clearances by PSPCL**

- iv) The petitioner submitted that vide letter dated 22.01.2016, it requested PSPCL for granting synchronization permission as it intended to commission and synchronize the project by 30.01.2016. The plant side meters along with fees and application were submitted on 22.01.2016 for testing to PSPCL, Patiala. The said meters were received after testing and calibration on 05.02.2016. The petitioner further submitted that it completed the project on 29.01.2016 and Addl. SE, Protection Division, Moga issued protection clearance for plant and line and recommended for synchronization to Addl. SE, Abohar vide letter dated 08.02.2016. The petitioner vide letter dated 10.02.2016 to

CE/DS (West), PSPCL, Bathinda informed that the plant is fully ready for synchronization and requested to depute a team for installing the meters. The petitioner submitted that the meters to be installed at GSS were received on 13.02.2016 and thereafter PSPCL gave synchronization permission on 16.02.2016. The plant was synchronized and commissioned on 18.02.2016. The petitioner contended that the delay from 29.01.2016 to 18.02.2016 was solely due to the fault of PSPCL.

PSPCL submitted that as per clause 5.5.0 & 8.2.0 of the PPA, the petitioner was required to give 30 days prior notice of synchronization to it. This is the buffer period which is used by PSPCL to deal with all technical issues, when minor issues like non readiness of bay, meters etc, can be sorted out. PSPCL submitted that no such notice was given. As per clause 9.0.0 of the PPA, main and check meters to be installed at plant side for the billing purpose are to be purchased, arranged by the Generating Company and calibration & testing thereof is also the responsibility of the Generating Company. Accordingly, the generating company made an application to concerned field office, which sent the meter to PSPCL Lab at Patiala for calibration and testing of these meters on 29.01.2016. After calibration and testing, ME Lab Patiala returned the meters to concerned Sub Division on 05.02.2016. Testing by MMTS wing of PSPCL at plant side was done on 11.02.2016 after installation of these meters. The meters to be used as standby meters for GSS were received on 12.02.2016 and tested by MMTS on

14.02.2016. As such, the delay claimed by firm with respect to late visit by MMTS team for testing of meters was not based on facts and is an alibi. Thus, the generating company has made an excuse of this point only to get extension in SCOD. As per clause 6.3.0 of the PPA, the developer has to arrange for all clearances including CEI. The petitioner approached SE/IPC, PSPCL for permission of synchronization of their plant on 15.02.2016 and permission was allowed on 16.02.2016. The installation of grid side meters (called stand by meters) does not affect the plant side erection / installation and various clearances like CEI clearance, protection clearance, MMTS clearance etc. As per terms and conditions of PPA, all the clearances are to be arranged by the Generating Company. PSPCL is only responsible for bay at PSPCL sub-station which includes metering equipment & meters (standby meters) which does not affect the installation of plant and relevant clearances of plant side. The protection clearance was obtained by the petitioner on 08.02.2016 and accordingly the claim of the petitioner that it was ready on 29.01.2016, is baseless. As per intimation vide letter dated 07.05.2015, the petitioner was to submit all the clearances through the office of SE/Distribution at least 30 days prior to the scheduled synchronization of the plant.

**The Commission notes that the SCOD of the project was 30.01.2016 as per PPA. The petitioner requested PSPCL for synchronization permission on 22.01.2016 as it intended to**

commission and synchronize the project on 30.01.2016. As per the terms of the PPA, the petitioner was required to give 30 days prior notice of synchronization to PSPCL. The Commission notes that PSPCL informed the petitioner vide letter dated 07.05.2015 to submit all the clearances 30 days prior to the scheduled synchronization of the project. The Commission further notes that the petitioner's project was completed on 02.02.2016 on approval by CEI for plant and transmission line. The protection team of PSPCL granted clearance on 08.02.2016 for synchronization. The petitioner again applied for synchronization permission on 15.02.2016 after getting all the clearances, which was granted by PSPCL on 16.02.2016. The petitioner was required to comply with the terms of clause 5.5.0 & 8.2.0 of the PPA by 31.12.2015, if it intended to commission and synchronize the project on 30.01.2016. However, the synchronization permission was applied by the petitioner initially on 22.01.2016 and thereafter on 15.02.2016 after getting all the clearances. The project was commissioned and synchronized on 18.02.2016 i.e. within less than 30 days period after applying for the synchronization permission to PSPCL on 22.01.2016.

Keeping the above in view, the Commission holds that petitioner's project is not entitled for extension in commercial operation date upto 18.02.2016 as prayed by the petitioner. The stay granted by the Commission for forfeiture and encashment of PBGs is hereby vacated. Accordingly, PEDA is directed to take action as per the delay attributable to the petitioner in respect of delayed commissioning on 18.02.2016

**in terms of IA/PPA. The PBGs for the remaining amount be released to the petitioner within seven working days from the date of this Order, failing which PEDA will be liable to pay penal interest on the remaining amount to the petitioner at the rate of 1.25% per month payable on pro-rata basis for each day's delay beyond seven working days. There is no case for levy of liquidated damages by PSPCL. It is further held that there shall be no change in the tariff of the project as provided in the PPA, which is payable to the petitioner by PSPCL for purchase of electricity from the project.**

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

-Sd/-

(Anjuli Chandra)  
Member

Chandigarh  
Dated: 19.03.2018

-Sd/-

(S.S. Sarna)  
Member

-Sd/-

(Kusumjit Sidhu)  
Chairperson