

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

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

Petition No. 51 of 2022

Date of Order: 11.07.2023

Petition under Section 86(1)(b), 86(1)(e), 86(1)(f), 86(1)(k) and 86 (4) of the Electricity Act, 2003 read with Regulation 9 (1) and Regulation 69, Regulation 72, Regulation 74 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 seeking issuance of appropriate directions/order(s) against the respondent for raising illegal/unlawful demand of Rs. 3,10,70,444/- (including share and penal interest) on account of share in the CDM benefit for the period to the execution of long term PPA and forcibly deducting the same from due tariff bills of the petitioner and further claiming Rs. 12,45,911/- on account of late payment for the period 13.11.2021 to 27.06.2022.

AND

In the Matter of: Chandigarh Distillers and Bottlers Ltd, Registered office and works Banur Tehsil Mohali, District S.A.S Nagar, Head Office SOC 140-141, Sector 34-A, Chandigarh.

.....Petitioner

Versus

1. Punjab State Power Corporation Limited, PSEB Head Office the Mall, Patiala Punjab- 147001.
2. Punjab Energy Development Agency, Plot No. 01 and 02, Sector 33-D, Chandigarh.

.....Respondents

Commission: Sh. Viswajeet Khanna, Chairperson

Sh. Paramjeet Singh, Member

Petitioner: Sh. Munish Thakur, Advocate

PSPCL: Ms. Suparna Srivastva, Advocate

PEDA: Sh. Aditya Grover, Advocate

ORDER

1. Chandigarh Distillers and Bottlers Limited (CDBL) has filed the present petition seeking issuance of appropriate directions/order(s) against PSPCL for raising a demand of Rs. 3,10,70,444 (including share and penal interest) on account of share in the CDM benefits for the period of FY 2007-08 to 2012-13 i.e. prior to the execution of long term PPA and forcibly deducting the same from due tariff bills and further claiming Rs. 12,45,911 on account of late payment for the period 13.11.2021 to 27.06.2022. The submissions of CDBL are summarized as under:

1.1 CDBL, a Public Ltd Company situated in village Banur, Punjab has set up Co-Generation Plants of 3.1 MW in the year 2005 and 8.25 MW in the year 2007. The present dispute pertains to the 8.25 MW Co-generation plant selling surplus power upto 5.25 MW to PSPCL. The plant uses Biomass and Biogas and is covered under the NRSE Policy of the Govt. of Punjab.

1.2 CDBL had signed an IA with PEDA on 29.01.2007 under NRSE Policy 2006 and the project was commissioned on 18.08.2007. However, the long term PPA was not signed with PSPCL. Therefore, from 06.09.2007 to 31.03.2013, surplus power was sold to PSPCL by way of Short Term Power Purchase

Agreements (PPAs) of 3 months to 1 year at the tariff of Rs. 3.49/kWh to Rs. 4.04/kWh, as under:

S. No.	PPA		Rate Per Unit	Short term PPAs
	From	To		
1	06.09.2007	31.03.2008	3.49	6 months
2	04.04.2008	31.03.2009	3.69	1 year
3	02.04.2009	30.09.2009	3.80	6 months
4	01.10.2009	31.03.2010		6 months
5	02.04.2010	30.09.2010	3.92	6 months
6	01.10.2010	31.12.2010		3 months
7	01.01.2011	31.03.2011		3 months
8	04.11.2011	31.03.2012	4.04	5 months
9	12.04.2012	30.06.2012		3 months
10	01.07.2012	30.09.2012		3 months
11	01.10.2012	31.12.2012		3 months
12	01.01.2013	31.03.2013		3 months

1.3 It could be seen from the various orders passed by the Commission that the tariff to similarly placed projects having Long Term PPA as fixed by the Commission was in the range of 4.87 to 4.94/kWh. Thus, CDBL was getting lower tariffs compared to other generators which had preferential tariffs available under long term PPAs.

1.4 CDBL, who was finding the project unviable, applied for and, was granted approval for availing CDM benefit by the competent authority vide project ID 516-07. It is only on account of availing CDM benefits that CDBL was able to sustain the project which otherwise would have been shelved. It is pertinent to mention that at this time, from 2008 to 2013, there was no support from PSPCL by way of any preferential tariff and a bare perusal of all these short term PPAs would show that nothing was agreed between the parties as to the sharing of CDM benefit.

1.5 The petitioner has availed CDM benefits as under:

Financial Year	CDM Benefit
2007-08	Nil
2008-09	Nil
2009-10	96,94,454
2010-11	1,95,60,549
2011-12	Nil
2012-13	54,47,066
Total	3,47,02,069

1.6 In the year 2012, CDBL approached the Commission for directing PSPCL to execute a long term PPA with CDBL and to fix an appropriate remunerative tariff for sale of surplus renewable energy to PSPCL, through petition no. 64 of 2012, which was allowed by the Commission on 28.02.2013 with the following observations:-

“viii) Accordingly the tariff payable for the CDBL’s project is depicted in the following table:-

Tariff for the year 2012-2013				
Levellised fixed cost	Variable Cost (FY2012-13)	Applicable Tariff Rate	Benefit of Acc. Depreciation, if availed	Net Applicable Tariff Rate Adjusting for Accelerated Depreciation Benefit (3-4)
1	2	3	4	5
1.53	3.42	4.95	0.08	4.87

ix) The above tariff shall be payable to the petitioner prospectively with effect from the date of issue of this Order but shall be paid after signing of the PPA for supply of Power on long term basis with PSPCL.

x) Further sharing of CDM benefits will be as per the RE Regulations 2012.”

1.7 Thus, the Petitioner was for the first time granted preferential tariff under the long term PPA. Accordingly, the PPA was executed between CDBL and PSPCL on 22.03.2013

incorporating the above directions by the Commission. A bare perusal of above said Order shows that it is from the signing of the PPA dated 22.03.2013 and that the sharing of CDM benefits has been made applicable as per RE regulations 2012. The said direction is prospective in nature and not retrospective meaning thereby that had the petitioner taken any CDM benefit subsequent to signing of the PPA, the same would have to be shared with PSPCL.

1.8 Thereafter, having been granted preferential tariff, CDBL never applied for or availed CDM benefit, pursuant to the PPA dated 22.03.2013. The position that CDBL had earlier availed CDM benefit for the period 2007-2008 to 2012-2013 was very much in the knowledge of PSPCL.

1.9 CDBL continued to supply surplus power to PSPCL under the long term PPA since 01.04.2013 and the arrangement worked smoothly. However, it was shocked to receive communication dated 14.09.2021 from PSPCL stating that it has found an entry of Rs. 1,95,60,549 titled sale of CERs in Schedule 9 of balance sheet ending 31.03.2011, which shows availing of CDM benefit by CDBL. PSPCL stated that it would have to deposit PSPCL's share in the availed CDM benefits ignoring the fact that these were availed prior to the execution of long term PPA dated 22.03.2013. PSPCL's demand is wrong and without jurisdiction because the CDM benefit has been availed in the period 2007-08 to 2012-13 and there was no condition in the short term PPAs regarding the sharing of CDM Benefits.

1.10 CDBL, vide letter dated 23.10.2021, submitted its response to PSPCL's communication along with a certificate by the CA

detailing the CDM benefits availed year wise from 2007-08 till 2018-19, stating specifically that after signing of long term PPA dated 22.03.2013, CDBL never claimed or availed any CDM benefit.

1.11 PSPCL without adverting to the factual and legal position in this regard, vide communication dated 28.12.2021, asked CDBL to immediately deposit the share of PSPCL in the CDM Benefit as per clause 2.1.1(vii) of the PPA. The total amount was stated to be Rs.3,10,70,444 which included Rs. 1,05,30,588 as PSPCL's share in the CDM benefit and Rs.2,05,39,856 as penal interest for late payment @ SBI short term PLR + 4.5% on day to day basis. Further, without waiting for the reply of CDBL on the recovery notice, PSPCL stopped making the payment of monthly due bills and started adjusting the same against its self-determined share in CDM Benefits.

1.12 CDBL submitted a detailed reply, vide letter dated 06.05.2022, objecting to the wrong demand raised by PSPCL. It was submitted that there is no clause in any of the short term PPAs regarding sharing of the CDM benefit with PSPCL. And, after the coming in force of long term PPA dated 22.03.2013, CDBL has not availed any CDM benefit. It was requested that recovery be stopped and due payments of CDBL on account of monthly power supplied be released at the earliest.

1.13 CDBL vide letter dated 27.05.2022 also brought to the notice of PSPCL that in terms of Clause 16.4.0 of PPA, payment of any bill should not be withheld for any reason whatsoever and parties shall continue to perform their contractual obligations. The right course for the PSPCL should have been to send the

dispute for arbitration and not to act unilaterally as a judge in its own cause.

1.14 PSPCL vide letter dated 30.05.2022 refuted all the objections raised by the CDBL stating wrongly that the duration of long term PPA executed on 22.03.2012 would start from 18.08.2007 i.e. the CoD of the project.

1.15 CDBL vide its letter dated 29.06.2022 pointed out that as per the definition of "Duration of Agreement" given in the PPA, the starting date of the PPA is from the date of execution of the PPA and the date of commissioning has only been used to determine the total term of the PPA. Thus, clarifying that date of commissioning is only used to determine the useful life of the project, whereas the respective rights and obligations of the parties under the PPA are to be determined from the date of execution of the PPA i.e. 22.03.2013.

1.16 PSPCL once again disregarded all the objections of CDBL vide letter dated 05.07.2022 reiterating that it considers date of scheduled commercial operation as the starting date for calculating the CDM benefit. Further, PSPCL vide the latest communication dated 05.08.2022 informed and admitted that it has now recovered the whole amount of Rs. 3,10,70,444 from monthly tariff bills on account of their perceived share in the CDM Benefit. Furthermore, it stated that it has imposed late payment surcharge of Rs. 12,45,911 from the period 13.11.2021 to 27.06.2022.

1.17 The whole approach and action of PSPCL is absolutely illegal, arbitrary, wrong, without jurisdiction and violative of the well settled norms as well as the terms of the PPA because CDBL is

not required under any contract or law to pay any share in the availed CDM benefit for the period prior to the execution of long term PPA. No power vests with PSPCL under any provision or law to stop the tariff bills and make such adjustment unilaterally and recover the alleged amount by imposing hefty penalties, that too after an inordinate delay of many years.

1.18 In the PPA dated 22.03.2013, from the definition of 'Duration of agreement' it is clear that like any contract in law, the terms and conditions would take effect from the date of execution of the agreement i.e. 22.03.2013 and cannot be made retrospective by any stretch of the imagination. PSPCL has in this regard relied on clause 12.0.0 Term of the agreement which is totally contrary to the rules of interpretation.

1.19 It is submitted that, firstly, as a rule of interpretation, whenever there is a dispute regarding the definition of any clause, it is the definition clause which has an overriding effect and is deemed to convey the correct and actual meaning. So, if there is said to be any dispute, the definition of 'Duration of agreement' stating that date of execution of the PPA as the starting date of agreement would override the Clause 12.0.0 which talks of term of the Agreement from the date of commission. Moreover Clause 12.0.0 is to be read with the definition clause "Useful Life" which only acts as base to determine the useful life of a project i.e. 20 years from the Commercial date of operation, there is no further use of the commercial date of operation.

1.20 Even if it is assumed for the sake of arguments that PSPCL had any share in CDM Benefits, even then the claim is time barred and could not have been enforced in any court of law had

PSPCL gone for adjudication of its claim through legal means. It is submitted that the CDM benefit was last claimed in the year 2012-2013 and the long term PPA was signed on 22.03.2013. As per the law of limitation, a claim for recovery under civil law procedure has to be raised within a period of 3 years from the date of cause of action. Thus, the claim raised by PSPCL is time barred and could not have been allowed by any Court.

1.21 PSPCL has calculated its share of CDM benefit to be Rs. 1,05,30,558. It has further imposed a penalty to the tune of Rs. 2,05,39,856 by relying upon clause 2.1.1 (vi) which is totally wrong, illegal and arbitrary. There was never any delay on the part of the CDBL in informing the PSPCL about the CDM benefits claimed in the period from 2007-08 to 2012-13 as all the financial documents were shared with PSPCL at the time of signing the PPA dated 22.03.2013. Thus, PSPCL was well aware of the actual position about the CDM benefits having been availed by the CDBL. Clause 2.1.1 (vi) states that if something is concealed regarding benefits of subsidy/grant/accelerated depreciation etc. then PSPCL would revise the tariff and recover the excess amount paid through tariff with penal interest as per SBI short term PLR plus 4.25% worked out on day to day basis. In the present case, there is no concealment by the CDBL.

1.22 PSPCL is required to adhere to and strictly comply with the terms of the PPA and any divergence from, or non-compliance by PSPCL of the clear and unambiguous terms of the PPA constitutes a breach on the part of PSPCL. Also, the present matter is a clear case of dominance abuse on the part of

Respondent PSPCL as the Petitioner is having no other option because PSPCL neither considers this as a dispute to be referred to the arbitration nor makes payment of due tariff bills and has unilaterally deducted the amounts. Respondent being a state instrumentality is in a dominant position and the same results in unfair and unreasonable bargains between parties with the Respondent Possessing wholly disproportionate and unequal bargaining power.

1.23 In view of the submissions made hereinabove, it is prayed that the Commission may be pleased to:

- a) Declare that the respondent PSPCL is not entitled to any share in CDM benefit availed by the petitioner for the period 2007-2008 to 2012-2013 because the terms and conditions of the long term PPA dated 22.03.2013 would come in force from the date of execution of the PPA and not from the date of commissioning of the project;*
- b) Set aside the order for recovery passed by the respondent PSPCL claiming an outstanding amount of Rs. 3,10,70,444/- on account of PSPCL's share in CDM Benefit for the period of 2007-2008 to 2012-2013, comprising of actual share of Rs. 1,05,30,588/- and penal interest of Rs. 2,05,39,856/- and also to set aside the imposition of late payment surcharge of Rs. 12,45,911/- for the period of 13.11.2021 to 27.06.2022;*
- c) Declare that there has been no concealment by the petitioner of any details relating to grant of subsidy/benefit etc. for the duration of the agreement and thus imposing of penal interest @ SBI PLR plus 4.25% working out on day to day basis by the respondent PSPCL is totally wrong, illegal, against the provisions of the PPA and based on wrong methodology;*

- d) *Direct the respondent PSPCL to immediately release amount of Rs. 3,10,70,444/-deducted from the due tariff bills of the petitioner which have been wrongly deducted and illegally adjusted on account of share in CDM benefit along with late payment surcharge of Rs. 1.25% per month from the respective Due Date (viz. 60 days from the invoice date as per the terms of the PPA) till the actual date of payment.;*
- d) *Direct the respondent PSPCL not to withhold the payment of future tariff bills that would be raised by the petitioner in due course by adjusting the same against the alleged outstanding claim of late payment surcharge of Rs. 12,45,911/- for the period of 13.11.2021 to 27.06.2022;*
- (e) *Pass any other order or direction as this Hon'ble Commission may deem fit in the facts and circumstance of the case."*

2. In the hearing held on 16.11.2022, after hearing the Ld. Counsels for the Petitioner and PSPCL, the petition was admitted with directions to issue notice to the respondents to file their reply to the petition within two weeks with the copy to the petitioner, who may file a rejoinder to the replies filed by the respondents within one week thereafter.

3. PSPCL filed its reply on 26.12.2022, submitting as under:

3.1 The Petitioner had initially signed a long-term PPA dated 14.2.2005 for sale of 2.5 MW to PSPCL @ Rs.3.01/kWh (with base year 2001-02 plus 3% escalation upto 2005-06 and no escalation thereafter). Under the said PPA, the Petitioner also undertook to continue to supply the minimum agreed energy per annum to PSPCL even after any expansion/upgradation of the co-generation facility. The said PPA was valid for a period of 20 years from the date of commencement of supply of power.

3.2 Thereafter, after setting up of its 8.25 MW cogeneration unit, the Petitioner signed an IA with PEDDA on 29.1.2007 under the NRSE Policy, 2006 but did not sign any long-term PPA with PSPCL as required under the IA. Power from the Petitioner's project was accordingly purchased by PSPCL on short-term PPAs entered into from time to time at the rates notified under the NRSE Policy, 2006 during the years 2007-08 to 2012-13.

3.3 Subsequently, vide Order dated 27.08.2012 passed in Petition No.34 of 2012 filed by the Petitioner, the Commission allowed the Petitioner to sell power under open access outside or within the State of Punjab from its 8.25 MW co-generation plant. In the said Order, the following submissions of PSPCL were duly recorded by the Commission:

"i)

ii) *PSPCL had requested the petitioner on numerous occasions to sign a long term power purchase agreement for sale of balance power in terms of MoU and IA signed by the petitioner with PEDDA.....but the Petitioner has failed to do for reasons not assignable to the PSPL.*

iii) *The petitioner company requested PSPCL to sell power at average pooled rate but PSPCL had refused because as per clause 4.1 (i) of IA dated 29.01.2007, the petitioner company is required to sell power to PSEB (now PSPCL) at the tariff fixed by the Commission as per NRSE Policy 2006.*

.....

vi) *As per Order dated 19.12.2007 of the Commission in Petition No.11 of 2007 filed by the petitioner, the petitioner was required to approach erstwhile PSEB (now PSPCL) for signing long term PPA. In the*

generic Order dated 13.12.2007 passed by the Commission, clause (f) provides:

“In order to protect the interests of the PSEB and consumers in general, PEDDA and State Govt. may take suitable steps to ensure that the developers/plant owners continue to supply power at prescribed rates during the entire period of contract”

But the petitioner signed a short term PPA dated 06.09.2007 valid upto 31.3.2008 with the erstwhile PSEB.”

It is clear from the aforesaid that despite request from PSPCL, the Petitioner did not come forward to sign the long-term PPA for sale of power from its 8.25 MW co-generation plant. The Petitioner has chosen to wrongly contend to the contrary and has raised a misplaced plea that PSPCL failed to extend any support to the Petitioner by way of preferential tariff and it was only upon availing the CDM benefits that its project became financially viable. Such a plea of the Petitioner is contrary to the stated position on record.

- 3.4 Under the Order dated 28.2.2013 passed in Petition 64 of 2012, the Commission, while approving the tariff of Rs. 4.95/kWh for procurement of power upto 5.25 MW from the Petitioner project of 8.25 MW payable with effect from the date of issue of the Order further directed that the sharing of CDM benefits will be as per the RE Regulations 2012. Accordingly, the Petitioner and PSPCL executed the PPA dated 22.3.2013 for sale/purchase of 5 MW surplus power generated from the said 8.25 MW co-generation facility of the Petitioner.
- 3.5 In the PPA, under clause 12.0.0 (Term of agreement) it has been specified that the Agreement shall remain in force for a

period of 20 years from the date of commencement of generation by the plant (commissioned on 18.8.2007) i.e. up to 17.08.2027. As such, all the rights, obligations and liabilities agreed under the PPA were to come into effect from 18.8.2007 and not from the date of signing of the PPA (i.e. on 22.3.2013).

3.6 Thus, in terms of the above, while the tariff as approved by the Commission was made applicable from the date of the Order dated 28.2.2013, the liability of the Petitioner to share the CDM benefits availed by it with PSPCL was expressly made applicable from the date of commissioning of the co-generation facility i.e. from 18.8.2007, meaning thereby that the Petitioner was liable to pay to PSPCL its share in the CDM benefits availed by it even prior to the date of the Order and from the date of commissioning of its cogeneration facility. Further;

- (i) CDM benefits availed by the Petitioner were liable to be shared with PSPCL in accordance with the applicable Regulations framed by the Central Electricity Regulatory Commission (CERC) as adopted by the Commission and in the manner as provided under the PPA;
- (ii) The share of PSPCL in such CDM benefits availed by the Petitioner was required to be paid by the Petitioner within 20 days of receipt of such CDM benefits failing which the prescribed interest charges were to become applicable;
- (iii) The Petitioner was required to submit its Annual Financial Reports and copies of the Income Tax Returns for the last 10 years from the year of commissioning i.e. FY 2007-2008 as a proof towards availment/non-availment of CDM benefits by it; and

(iv) In case it was found at a later stage that the Petitioner had failed to pay to PSPCL its share of the CDM benefits availed by it, PSPCL was within its rights to recover the same through the monthly tariff bills along with penal interest as per SBI short term PLR +4.25% worked out on day-to-day basis.

3.7 The deduction in tariff bills and levy of interest/penalty on the Petitioner has been made in accordance with the above provisions of the PPA on account of the Petitioner failing to share the availed CDM benefits and as such, the same cannot be faulted with. There is no “*dominance abuse*” by PSPCL as has been alleged by the Petitioner when all its actions have been strictly in accordance with the agreed terms under the PPA.

3.8 Under clause 2.1.1 (vii) of the PPA, the Petitioner was required to submit its Annual Financial Reports and copies of the Income Tax Returns for the last 10 years from the year of commissioning i.e. FY 2007-08 as a proof towards availment/non-availment of CDM benefits. The Petitioner submitted the following financial documents to PSPCL:

- (i) Income Tax Returns for FY 2006-07 to FY 2007-08 on 25.11.2020, FY 2008-09 to FY 2013-14 on 08.10.2020 & FY 2014-15 to FY 2018-19 on 02.03.2020 ;
- (ii) Annual Financial reports for FY 2007-08 to FY 2010-11 on 25.11.2020, FY 2011-12 to FY 2015-16 on 08.10.2020 & FY 2016-17 to FY 2018-19 on 26.02.2020.

3.9 Upon scrutiny of the above documents, it was found that there had been an entry of Rs.1, 95, 60,549/- titled as “Sale of CERs” in Schedule 9 of Balance Sheet ending 31.3.2011 which demonstrated that the Petitioner had availed CDM benefits. It has chosen to wrongly contend before the Commission that the availing of CDM benefits was in the knowledge of PSPCL. It is submitted that the required documents were submitted by the Petitioner only in 25.10.2021, no question of there being any delay in claiming its share of CDM benefits by PSPCL could at all arise. The Petitioner is therefore wrong in contending that the said claims were time-barred.

3.10 The deduction in tariff bills and levy of interest/penalty on the Petitioner has been made in accordance with the above provisions of the PPA on account of the Petitioner failing to share the CDM benefits with the Petitioner. There is no dominance abuse by PSPCL. As per clause 2.1.1(vii), in case it is later to be found that the Petitioner has failed to pay to PSPCL its share of the CDM benefits availed by it from the date of commissioning of its cogeneration facility, PSPCL is within its right to recover the same through the monthly tariff bills along-with penal interest. Accordingly, PSPCL has deducted an amount of Rs.3,23,16,355/-(Rs. 3,10,70,444/- + Rs. 12,45,911/-) from the tariff bills of the Petitioner on account of failure on its part to pay to PSPCL, the CDM benefit availed by it in the years 2009-2012 in terms of clause 2.1.1(vii) of the PPA.

3.11 PPA has a provision for settlement of all disputes arising between the parties under the Agreement through arbitration. However, in view of the Judgment of the Hon'ble Supreme Court

in the matter of Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd. [(2008) 4 SCC 755] holding, inter alia, that whenever there was a dispute between a licensee and the generating companies only the State Commission or the Central Commission had the powers to adjudicate upon the same, the above provision in the PPA became otiose and could no longer be given effect to. As such, reliance by the Petitioner on the above provision is completely misplaced.

3.12 Further, Clause 16.4.0 relied upon by the Petitioner to plead its case for continuity in payment was applicable during the period any dispute between the parties was pending adjudication in arbitration, which was not the case here.

3.13 PSPCL recovered its rightful share in CDM benefits through adjustment in tariff bills and demanded payment of penal interest from the Petitioner. Thus, the present Petition is devoid of any merit and is therefore liable to be dismissed.

4. The petitioner filed its rejoinder dated 09.01.2023 to the reply filed by PSPCL as under:

4.1 PSPCL has submitted that the petitioner had signed a long term PPA dated 14.02.2005 for sale of 2.5 MW to PSPCL. It is pertinent to mention here that the petitioner has 2 separate and independent co-generation plants. Whilst the first plant was of 3.9 MW capacity and was set-up in the year 2005, the second plant is of 8.25 MW capacity and was set-up in the year 2007. Both the plants are distinct and separate for all intents and purposes including billing. It is correct that there is a long term PPA for 3.9 MW plant set-up in the year 2005 but there is no

dispute pertaining to the same, so the reference to 3.9 MW plant is inconsequential.

4.2 It needs to be clarified that the present dispute pertains to the second plant of 8.25 MW capacity set-up in the year 2007 and admittedly the long term PPA has not been executed between the parties for the 8.25 MW plant set-up in the year 2007 till 22.03.2013, when it was finally executed in compliance of the order dated 28.02.2013 passed by the Commission in Petition no. 64 of 2012 filed by the petitioner

4.3 PSPCL's contention that the petitioner did not come forward to execute the long term PPA is totally incorrect and without any substance. It would be appropriate to add here that the reproduction of the order cited are the submissions made by PSPCL and are not the findings of the commission on the point. In fact understanding could not be developed between the parties on the long term PPA due to the reluctance of the PSPCL in fixing a preferential tariff as per rules. And, that the petitioner had to file petition no. 64 of 2012 before the Commission to fix the remunerative tariff and to direct the PSPCL to enter into a long term PPA which was ultimately accepted vide order dated 28.02.2013. It was only as a consequence thereof that the existing long term PPA dated 22.03.2013 was executed between the parties and a preferential tariff was awarded to the petitioner.

4.4 It has been wrongly construed by the PSPCL that as per the definition of "Duration of agreement" and "Term of the Agreement" given in PPA the rights and liabilities of the parties would start from the date of commencement of generation by

the plant i.e. 2007. Both the definitions are very clear and when read together show that the reference to the date of commencement of generation by the plant is only to determine the useful life of the project or the termination date of the agreement. The interpretation sought to be given by PSPCL would be contrary to the basic principles of contract law. There can be no retrospective operation of this PPA in law when it is clear that rights and liabilities start only from the date of execution of the PPA.

4.5 PSPCL has given an absurd interpretation to the Order dated 28.02.2013 passed by the Commission. PSPCL has stated that though its liability to give preferential tariff would start from the date of Order i.e. 28.02.2013, however the liabilities of the petitioner would start from the date of commencement of generation i.e. 2007.

4.6 PSPCL's submission that the petitioner is liable to give PSPCL's share of CDM benefit in terms of CERC RE Regulations 2012 and PSERC Tariff Regulation 2014. Both these Regulations are prospective and came into affect much later while the period concerned in the present case pertains to 2007 to 2012. Moreover even the said regulations have to be read in conjunction with the PPA and it is implicit in the said regulations that there must be existence of long term PPA between the distribution licensee and the developer for the sharing of CDM benefit.

4.7 The very nature of Clean Development Mechanism (CDM benefit) is based on the contribution made by each party to the environment by adhering to the clean development

mechanism. In the present case there has been no contribution of the PSPCL yet it wants share in CDM Benefit which would be nothing but unjust enrichment without contributing to the cause.

4.8 PSPCL's submission that there was delay on part of the petitioner in submitting the documents is incorrect. The claim of the petitioner is not only that the penalty for delay imposed by PSPCL is illegal because the delay, if any, lies with PSPCL itself but the petitioner has also prayed that the claim for share in CDM benefit made by PSPCL is bad in law because the same pertains to period prior to signing of the PPA. Further, the project was running since 2007 and was operational for 5 years when the PPA was signed and that at the time of signing of the PPA all the financial documents including balance sheet etc are provided and scrutinized by PSPCL to check the financial health and viability of the company. Thus, the argument of PSPCL that documents were not provided is unbelievable.

5. PEDA submitted its reply on 26.04.2023, stating as under:

5.1 Although, the issue with regard to the CDM benefits doesn't have any concern whatsoever in any manner with PEDA, however, being the nodal agency for the Promotion of New and Renewable Energy in the State of Punjab, PEDA is submitting reply on the fundamental issue itself.

5.2 The demand raised by PSPCL with effect from 2007-08 to 2012-13, as sought to be set-aside by CDBL, for the period prior to entering into the long term PPA dated 22.03.2013 and CERC RE regulations coming into force with effect from

01.04.2012, is totally unreasonable and un-warranted and as such deserves to be set-aside.

5.3 None of the short term PPAs entered between PSPCL and CDBL, signed prior to entering into the long term PPA on 22.03.2013, carried any such stipulation with regard to sharing of CDM benefits between the parties. The PPA dated 22.03.2013, entered between the parties on the directives issued by the Commission in terms of Order dated 28.02.2013 passed in Petition No. 64 of 2012 filed by CDBL, carries the stipulation with regard to sharing of CDM benefits for the first time.

5.4 PSPCL while misconstruing the provisions of the PPA and Order dated 28.02.2013, in its favour, has wrongly sought the impugned demand with a retrospective effect, which is impermissible in the eyes of law and as such deserves to be set-aside.

6. The petition was taken up for hearing on 24.05.2023. After hearing the Ld. Counsel for both the parties, Order was reserved with direction that the parties may file written submissions, if any, within two weeks. In response, PEDAs and PSPCL have filed written submissions:

6.1 PEDAs vide written submissions filed on 07.06.2023 reiterated its earlier argument that the demand raised by PSPCL with effect from 2007-08 to 2012-13, for the period prior to entering into the long term PPA dated 22.03.2013 and CERC RE Regulations coming into force with effect from 01.04.2012, is totally unreasonable and deserves to be set-aside.

6.2 PSPCL filed written submissions on 30.05.2023. While reiterating its earlier arguments it was further submitted that:

- a) The Petitioner has contended that the date of commissioning had been used in the PPA clause “12.0.0 TERM OF THE AGREEMENT”, only to calculate the useful life of the project. However, in the definition clause of the PPA, “Useful Life” has already been defined to mean 20 years from the date of the project SCOD. That being so, the Petitioner’s said contention does not hold any ground and as such is liable to be rejected.
- b) Reference in the PPA dated 22.3.2013 to the CERC Regulations with regard to sharing of CDM benefits were only to the extent of applying the mechanism for such sharing and not beyond. The obligation to share CDM benefits was a contractual obligation and was not to be discharged as a statutory obligation under the CERC Regulations as has wrongly been contended by the Petitioner. The agreed terms of the PPA read with the Order dated 28.2.2013 passed by the Commission made it clear that the liability of the Petitioner to share CDM benefits with PSPCL ensued from the date of COD of its cogeneration facility. There was no “retrospective” applicable of the CERC Regulations in this contractual scheme.
- c) In terms of clause 2.1.1 of the PPA dated 22.3.2013, while the tariff, as determined by the Commission, has been made applicable from the date of the Order i.e. 28.2.2013, sharing of CDM benefits has, with open eyes, been agreed to by the Petitioner to be made applicable from the date of the

commissioning of the plant. Having undertaken its obligations with open eyes, it is not open for it to contend that the interpretation given by PSPCL to the PPA provisions suffers from the vice of arbitrariness. In the matter of Adani Power (Mundra) Ltd. Vs. Gujarat Electricity Regulatory Commission & Ors. [*Civil Appeal No. 11133 of 2011– paras 16, 19*], the Hon'ble Supreme Court has held that the contract is required to be read as a whole and the provisions of the contract cannot be read in isolation.

7. Findings and Decision of the Commission

The Commission has carefully gone through the petition, reply by PSPCL, rejoinder by the Petitioner CDBL, reply by PEDDA and the arguments/written submissions thereon by the parties. The genesis of dispute lies in PSPCL's claim/demand of a share in the CDM benefits availed by the Petitioner for the period prior to the execution of the long term PPA dated 22.3.2013 between the parties and consequent deductions of the same along with penalty/interest from the petitioners' monthly energy bills. The Petitioners' plea is that no obligation can be cast on it for the period prior to the execution of said PPA. Whereas, PSPCL's contention is that the demand and consequent deductions have been made in accordance with the provisions of the said PPA, with the submission that, in terms of clause 2.1.1, though the tariff determined by the Commission is payable to the Petitioner after signing of the PPA, the Petitioner is required to share the CDM benefits availed by it since commissioning of the plant i.e. 18.08.2007. Thus, the issue before the Commission is mainly to adjudicate about the applicability of PPA provisions regarding sharing of the CDM benefits availed by the Petitioner with

PSPCL, in particular, for the period prior to execution of the said PPA between parties.

7.1 In order to examine the same, the Commission refers to relevant provisions of the applicable CERC Regulations 2012, the Commission's Order dated 28.02.2013 in Petition No. 64 of 2012 determining the tariff for the petitioners' project and the relevant clauses in the PPA as under:

- a) **CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012, adopted by the Commission:**

"1. Short title and commencement

1)

2) These regulations shall come into force on 1.4.2012,

.....

21. Sharing of CDM Benefits

(1) The proceeds of carbon credit from approved CDM project shall be shared between generating company and concerned beneficiaries in the following manner, namely-

a) 100% of the gross proceeds on account of CDM benefit to be retained by the project developer in the first year after the date of commercial operation of the generating station;

b) In the second year, the share of the beneficiaries shall be 10% which shall be progressively increased by 10% every year till it reaches 50%, where after the proceeds shall be shared in equal proportion, by the generating company and the beneficiaries."

- b) The Commission's Order dated 28.02.2013 in Petition No. 64 of 2012:

"6. Findings and Decision of the Commission:

.....

vi) *The Commission determines the tariff for the renewable energy projects in accordance with its Regulations. For the purpose, the Commission in its Order dated 19.07.2012 adopted the Central Electricity Regulatory Commission (Terms and Conditions for tariff determination from Renewable Energy Sources) Regulations, 2012 with State specific modifications in respect of non-fossil fuel based co-generation projects (RE Regulations, 2012). The Commission has already determined the generic tariff for various RE technologies for the year 2012-13 in its Order dated 19.07.2012 in accordance with the aforementioned RE Regulations.....*

vii) *For working out the levellised fixed cost of the petitioner's project for the year of applicability of tariff i.e. FY 2012-13, the Commission intends to determine the capital cost of petitioner's co-generation project commissioned in FY 2007-08 for that year by applying the capital cost indexation mechanism as specified in the RE Regulations, 2012, on the normative capital cost of Rs. 420 lac per MW for non-fossil fuel based co-generation projects for the year 2012-13 and then depreciate it to the applicable year of tariff i.e. FY 2012-13. Accordingly, the normative capital cost for the petitioner's project for the year 2007-08 comes to Rs. 356.735 lac per MW which, after depreciation at the standard book depreciation rate of 5.28% per annum upto FY 2012-13, works out to Rs. 271.99 lac per MW for the year 2012-13. With this capital cost and using normative parameters for FY 2012-13, the levellised fixed cost works out to Rs.1.53 per kWh. The variable cost for FY 2012-13 for the petitioner's project would be the same as allowed to other such projects to be commissioned in the State in the year 2012-13 as per Commission's Order dated 19.07.2012 i.e. Rs. 3.42 per kWh.*

viii) Accordingly, the tariff payable for the petitioner's project is depicted in the following table:

Tariff for the year 2012-2013				(Rs./kWh)
Levelling fixed cost	Variable Cost (FY 2012-13)	Applicable Tariff Rate	Benefit of Acc. Dep., if availed	Net Applicable Tariff Rate Adjusting for Acc. Dep. Benefit
1	2	3	4	5
1.53	3.42	4.95	0.08	4.87

ix) The above tariff shall be payable to the petitioner prospectively with effect from the date of issue of this Order but shall be paid after signing of the PPA for supply of power on long term basis with PSPCL. Both the parties are directed to sign the PPA afresh for supply of power on long term basis expeditiously. ...

x) Further, in accordance with Regulation 22 of the RE Regulations, 2012, any incentive or subsidy offered by the Central or State Governments if availed by the generating company for the renewable energy power plant(s), is to be deducted while determining tariff. Further, sharing of CDM benefits will be as per the RE Regulations 2012.

xi) With regard to the submission of PSPCL in respect of petitioner's obligation under the earlier PPA dated 14.02.2005, Commission's Order dated 27.08.2012 in petition no. 34 of 2012 filed by the petitioner may be referred to wherein it has been held that ".....the petitioner shall be bound to fulfil all its contractual obligations under the long term PPA dated 14.02.2005.....".

c) PPA dated 22.3.2013 executed between the parties:

"1.0.0 DEFINITIONS

.....

"Duration of Agreement" means starting from the date of the execution of this agreement till 20 years from the date of commissioning of the

project i.e. upto 17.08.2027 since the project was commissioned on 18.08.2007 which could be extended by another 10 years through mutual agreement.”

.....
“RE Regulations” mean the Central Electricity Regulatory Commission (Terms and Conditions for tariff determination from Renewable Energy Sources) Regulations, 2012 as amended/revised from time to time and as adopted by Punjab State Electricity Commission for the State of Punjab.

.....
“Useful Life” in relation to a biomass fuel based unit of generating station including evacuation system shall mean 20 years from the Date of commercial operation (COD) of such generating facility.”

.....
2.0.0 Energy Purchase and Sale

2.1.0 Sale of energy by Generating Company

2.1.1 The PSPCL shall purchase and accept all energy made available at the interconnection point from the Co-Generation facility, pursuant to the terms and conditions of this Agreement at the following rates approved by the Commission in its generic levelised generation tariff for Renewable energy power projects (other than Solar) order dated 28.2.2013, which is set out below:

The applicable tariff rate for Non-Fossil Fuel based co-Generation project is Rs.4.95/- per KWH (Rs.1.53/- per Kwh for Levelised fixed tariff +Rs.3.43/- per Kwh for variable Cost) as applicable to this project from the date of order.

vii) As per CERC Regulations, CDM benefits availed if any by RE Projects shall be shared between the parties. In the first year, 100% of CDM benefit will be retained by the Company whereas in

the 2nd year 90% will be retained by the Company and 10% will be passed on to PSPCL. Thereafter, the share of PSPCL will increase progressively by 10% every year till it reaches 50%, whereafter the proceeds shall be shared in equal proportion by the Generating Company and PSPCL. The share of PSPCL will be submitted to PSPCL in the form of DD payable at Patiala within 20 days of its receipt failing which interest charges will be applicable. The Company will submit copies of the Annual Financial Reports and copies of the Income Tax Returns for 10 years from the Year of Commissioning as a token of proof within six months from the close of financial year and in any case not later than the end of next financial year. In case it is found at any later stage by PSPCL that the Company has availed the benefits, PSPCL shall recover the excess amount paid through tariff with penal interest as per SBI short term PLR + 4.25% worked out on day to day basis.

.....

12.0.0 Term of the Agreement

12.1.0 Except where terminated by default, this agreement shall remain in force for a period of 20 (Twenty) years from the date of commencement of generation by the plant (Plant was commissioned on 18.08.2007) i.e. upto 17.08.2027 which would be extended by another 10 (Ten) years through mutual agreement..”

7.2 From the perusal of above provisions, it is evident that:

- a) The CERC (Terms and Conditions for tariff determination from Renewable Energy Sources) Regulations, 2012, came into force on 1.4.2012. The Commission adopted the same with some State specific modifications vide Order dated 19.07.2012. The tariff for the Petitioners’ impugned project

was determined under the said Regulations, with the stipulation that sharing of CDM benefits will also be as per the said RE Regulations 2012.

- b) There is no dispute between the parties that the tariff determined by the Commission was applicable prospectively from the date of issue of the Order dated 28.02.2013 and payable to the petitioner after the signing of the PPA for supply of power on long term basis with PSPCL. However, while the Petitioners' stand is that the stipulation about sharing of CDM benefits as per RE Regulations 2012 has also prospective effect, PSPCL is contending otherwise.
- c) It is not comprehensible that when the tariff, as determined in the said Order, is being allowed to the petitioner prospectively how can the stipulation about the sharing of CDM benefits in the same Order be given effect from the retrospective date unless specifically indicated therein. Retrospective CDM benefits have not been taken into account by the Commission while determining tariff in the Order dated 28.02.2013 in Petition No.64 of 2012 nor does retrospective sharing of CDM benefits form a part of the PPA. This interpretation by PSPCL is egregious and unsustainable.
- d) Further, 'Duration of Agreement', has been defined in the PPA to mean "starting from the date of the execution of the agreement till 20 years from the date of commissioning of the project i.e. up to 17.08.2027 (since the project was commissioned on 18.08.2007)". Implying that the terms & conditions of the Agreement shall commence on the date of signing of the PPA dated 22.3.2013 and shall remain in

force up to 17.08.2027 i.e till the useful life of 20 years of the project. The reference to the COD of the project is only to determine the total time period for which the PPA remains in force and the date on which it concludes while the terms and conditions of the PPA are to be applied prospectively from the date of the execution of the PPA agreement.

- e) Also, the 'Term of the Agreement' has been specified in the PPA as "except where terminated by default, the agreement shall remain in force for a period of 20 (Twenty) years from the date of commencement of generation by the plant i.e. upto 17.08.2027". As is evident, it only specifies the validity of the agreement to be upto 17.08.2027, as also indicated in the definition of 'Duration of Agreement'.
- f) Thus, PSPCL's contention, that in terms of clause 2.1.1 of the PPA, though the tariff determined by the Commission is payable to the Petitioner from the date of said Order i.e. 28.2.2013, the Petitioner is required to share the CDM benefits availed by it since commissioning of the plant i.e. 18.08.2007, is not a correct interpretation of the PPA provisions.
- g) Moreover, under the Clean Development Mechanism (CDM) a RE generator can earn Certified Emission Reductions (CERs), each equivalent to 1 Ton of carbon dioxide (CO₂), based on its actual generation from RE sources and contributing towards the CDM. As such, since the impugned CDM benefits have accrued to the Petitioner for generating electricity from RE sources for the period prior to signing of the PPA dated 22.3.2013 with PSPCL; the Commission

agrees with the Petitioner that the PSPCL's demand to claim a share in the said benefits without contributing to the same i.e. till the procurement of its generation at the tariff determined/ approved by the Commission, is not sustainable.

In light of the above analysis and observations of the Commission, the Petitioner's prayers are allowed and PSPCL's demand for a share in the CDM benefits availed by the Petitioner, for the period prior to the execution of said PPA dated 22.3.2013 between them, and consequent deductions of the same along with penal interest and/or late payment surcharge from the due monthly energy bills of the Petitioner is set aside. PSPCL is directed to refund/make payments against all the deductions made from said monthly energy bills of the Petitioner, on account of CDM benefits plus interest wrongly claimed by PSPCL, along with applicable late payment surcharge, as per the provisions of the PPA.

The petition is disposed of accordingly.

Sd/-

(Paramjeet Singh)
Member

Sd/-

(Viswajeet Khanna)
Chairperson

Chandigarh

Dated: 11.07.2023