

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SITE NO. 3, BLOCK B, SECTOR 18-A, MADHYA MARG, CHANDIGARH

Petition No. 25 & 26 of 2022
Date of Order: 15.11.2022

Petitions under Section 86 (1)(b), 86 (1)(c), 86(1)(e) , 86(1) (f), 86(1)(k) and 86(4) of the Electricity Act, 2003 read with Regulations 9(1), 69, 72 and 74 of Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005; seeking issuance of appropriate direction(s)/order(s) against the respondent for illegal deduction of lawful tariff payment due and payable to the Petitioners.

And

- In the matter of: 1. Petition No. 25 of 2022, SAEL Limited, Regd office at Faridkot Road, Guruharshahai, Dist. Ferozepur, Punjab.
2. Petition No. 26 of 2022, Universal Biomass Energy Pvt. Ltd, Regd office at Faridkot Road Guruharsahai, District Ferozepur, Punjab.

...Petitioners

Versus

1. Punjab State Power Corporation Limited, PSEB Head Office, The Mall, Patiala, Punjab-147001.
2. Punjab Energy Development Agency, Solar Passive Complex, Plot No. 1&2, Sector 33-D, Chandigarh -160020.

..Respondents

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

Petitioners: Sh. Aditya K Singh, Advocate

PSPCL: Ms. Suparna Srivastva, Advocate

PEDA: Sh. Munish Thakur, Advocate

Order

1. Vide this common order/judgment, Petition No. 25 of 2022 filed by M/s SAEL Limited and Petition No. 26 of 2022 filed by Universal Biomass Energy Pvt. Ltd. (UBEL) are being disposed of by this common order since similar facts and issues are involved. Both the Petitioners are generating companies and have PPAs with PSPCL for sale of all energy made available from their biomass power projects of 15 MW and 14.5 MW respectively. The Petitions have been filed with similar submissions and prayers.
2. The submissions of the Petitioners are summarized as under:
 - a) Petitioners SAEL and UBEL have entered into PPAs with PSPCL on 02.01.2018 and 02.06.2009, respectively. PPAs state that PSPCL will procure all energy generated by Petitioners at a tariff agreed therein. Petitioners commissioned their plants in terms of the PPAs and have been striving to supply energy to PSPCL in order to fulfil its obligations under the PPAs. It is pertinent to mention that the Petitioners have been strictly complying with their obligation to supply energy under the PPAs and accordingly raising invoices.
 - b) In the year 2020, the GoP and the Gol recognised that the country was threatened with the spread of Covid-19 epidemic, which had already been declared pandemic by the World Health Organisation (WHO). In view of the outbreak of Covid-19 pandemic, Gol declared a lockdown in India effective from 25.03.2020. The guidelines issued by Ministry of Home Affairs, Gol for enforcement of lockdown declared supply of electricity as an essential service. Consequently, during the lockdown

Petitioners had to face severe hardship to comply with their legal and contractual obligations to generate and supply electricity. However, on 28.03.2020 PSPCL issued direction to the Petitioners for shutting down their plants till the issuance of further instructions on the ground of occurrence of a Force Majeure event. In the notice, there was no description of the event which can qualify as a force majeure event and how such event had impacted PSPCL to such an extent that it has issued the curtailment notices to the Petitioners. PSPCL had mentioned that due to Covid, there was a load crash and due to this Force Majeure condition, it was forced to curtail the power purchase from the Petitioners. The said Curtailment Notices were objected to by Biomass Power Producers Association. On 07.04.2020, PSPCL issued a communication allowing injection of power into the PSPCL/PSTCL system with immediate effect.

- c) PSPCL has deducted the invoice amount corresponding to the power injected/supplied during the period of 30.03.2020 to 07.04.2020 i.e. Rs. 40.19 Lacs for 478.20 MWh in case of SAEL and Rs. 1.77 Crore for 2529 MWh in the case of Universal Biomass of period 29.03.2020 to 07.04.2020. Petitioners made various submissions before PSPCL to make payment of the withheld amount but PSPCL did not respond to the same nor did it act in terms of the PPAs.
- d) Further, PSPCL also deducted 5% from the invoices for the month of April, May and June 2020 without any justification. As per the provisions of Clause 3.3.0 of the PPAs, PSPCL is obligated to make full payment of monthly invoices raised by the generating companies. Petitioners made several submissions before PSPCL to make payment of the illegally deducted

amount but PSPCL refused to comply with its legal and contractual obligations.

- e) PSPCL on 21.03.2021 requested Petitioners to allow the deductions made from April 2020 to June 2020 monthly generation invoices on the ground that it was then passing through economic distress as its revenue from industrial and commercial sector had declined considerably due to pandemic and it was finding it difficult to honour its statutory liabilities. In response, Petitioners vide their letter dated 22.03.2021 informed PSPCL that it is ready to share 1.25% deduction of gross verified bill amount & assured that the balance amount shall not be claimed at a later stage and requested for refund of balance 75% deducted from the gross verified bills of April 2020 to June 2020.
- f) The Petitioners have day to day working expenses, O&M costs and other overhead costs. Such Arbitrary deductions in payments by PSPCL would lead to grave financial harm to the Petitioners. A single day's default in the payment to the lenders would cause the credit rating being downgraded to Default 'D' which may trigger higher interest cost and recalling of loan facilities. Petitioners require the payments to be made at the tariff agreed as per the PPAs to service its debts and other obligations.
- g) The Commission in a petition (21 of 2021) filed by similarly placed developers held issuance of the Curtailment Notice and tariff deduction as illegal. In furtherance to the aforesaid Order, Petitioners vide letters dated 04.10.2021 requested PSPCL to act in compliance of PSERC's dictum and make the payment

for the power injected and consumed during the curtailment period.

- h) The present matter is clear case of dominance abuse on the part of PSPCL, as Petitioners have no other option than to agree for deductions from the invoices of the said period. PSPCL being a State instrumentality is in dominant position and the same results in unfair and unreasonable bargains between parties and PSPCL.
- i) The Energy has been injected into the grid by the Petitioners during the impugned curtailment and as per the terms of the PPA, PSPCL is obligated to make payments for the electricity received and sold by it for commercial gains.
- j) The outbreak of Covid-19 and imposition of lockdown due to the same will not qualify as Force Majeure event under the PPAs. Also, economic hardship is not a valid ground for deduction of tariff payment. Clause 19 of the PPA states that to invoke a force majeure clause, a party must demonstrate the impact of force majeure on performance of its obligations and also demonstrate the steps undertaken to mitigate its consequences. PSPCL failed to demonstrate that imposition of lockdown has affected its obligation to supply power, as both PSPCL and Petitioners continued to be operational during that period.
- k) PSPCL has mistakenly relied on Article 11.1.0(ii) of PPA to issue curtailment notice; the said Article suggests that this clause can be invoked if there is load crash due to widespread rains, cyclones or typhoons. There was no occurrence of either of these. There has been no Force Majeure conditions under Article 11.1.0(v), which demonstrates that Covid-19 has led to “load crash” requiring curtailment of power from the Petitioners.

And, as per Article 11.1.0 (vii) of PPA, the instructions for disconnection can only be issued by SLDC and not by PSPCL.

l) Various judicial authorities in catena of judgments referred to provide relief for non-performance due to occurrence of the force majeure in absence of casual link between non-performance and Covid-19.

m) In view of the above, it is prayed to:

- (i) Declare the Curtailment Notice issued by PSPCL is illegal and consequently issue direction to PSPCL to make payment for consideration of the energy injected during the period by the Petitioners i.e. 30.03.2020 to 07.04.2020 by SAEL and 29.03.2020 to 07.04.2020 by Universal Biomass;
- (ii) Direct PSPCL to release payments of the 5% deductions made against the monthly energy invoices for April to June 2020 of the Petitioner;
- (iii) Direct PSPCL to make the payments alongwith late payment surcharge as per the terms of Clause 3.5.0 of the PPA from the respective due date of payment.
- (iv) Pass any such further/ other orders that the Commission may deem fit in the interest of equity and justice.

3. PSPCL in its reply to the Petitions on 02.08.2022, submitted that the same suffer from inordinate delay and liable to be dismissed at the threshold on the ground of delay alone. It is a settled legal position that 'delay defeats equity'. PSPCL, further stated as under:

- a) While PSPCL was obligated to purchase and accept all the energy delivered by the generating station of the petitioners at the inter-connection point and pay tariff for the same, such

obligation was subject to force majeure occurrences in which PSPCL could require the Petitioners to "temporarily curtail or interrupt deliveries of energy". Curtailment of power supply in prescribed eventualities was therefore an agreed term under the PPA which PSPCL was within its contractual rights to enforce together with the consequent deduction, if any, in energy bills corresponding to the energy curtailed.

- b) vide Order dated 22.3.2020, the GoP, Department of Health and Family Welfare, imposed restrictions to contain the spread of covid-19 in Punjab. In the wake of consequent declaration of lockdown in the State, there was a sudden decline in the electricity demand due to closure of industries, commercial establishment, offices, etc. which forced PSPCL to curtail its power purchase/generation. Considering that a force majeure situation in terms of clause 19.1.0 of the PPA had arisen, PSPCL was constrained to serve force majeure notice to the petitioners. Copies of the aforesaid force majeure notices were also served to the RE generators by SLDC to discontinue their supply of electricity during the continuance of the pandemic.
- c) On the happening of the specified events mentioned in the force majeure clause, the party suffering such events was excused of its obligations/liabilities. PSPCL was precluded from fulfilling its purchase obligations as also the consequent payment obligations under the PPA, particularly when curtailment Notice on account of force majeure occurrence had already been issued by it to the petitioners.
- d) Despite the above force majeure notice, the petitioners continued to inject power, even though it had a prior intimation of the intention of PSPCL not to accept the same in exercise of

the rights under force majeure provision of the PPA. The petitioners project being a biomass based project did not fall under the category of RE generators enjoying the "Must Run" status and as such, any injection of power after receipt of the force majeure notice was unilateral and not within the realm of mutuality under the terms of the PPA.

- e) PSPCL vide its letters dated 7.4.2020 allowed all RE generators including the present petitioner to inject power into the distribution/transmission system in the State with immediate effect. For the intervening period and as per the force majeure notices, the petitioners were not paid against the energy supplied/injected by them to PSPCL upto 24:00 Hrs. of 7.4.2020. The PPA dated 2.1.2018 provided for instances under Article 11.0.0 when PSPCL may require the Petitioners to temporarily curtail or interrupt delivery of energy.
- f) In the Order dated 24.09.2021 in petition 21 of 2021, the observations and findings of the Commission were given in the context of solar power generators which had been accorded a "Must Run" status in the State and as such, in the absence of a load crash as understood in its technical sense, the Commission found the curtailment to be unjustified and unilateral. However, in the present case, the project being operated by the Petitioners has not been accorded a "Must Run" status in the State. Thus PSPCL was well within its rights to temporarily curtail delivery of power from the Petitioner projects in the event of force majeure event being faced by it, as defined under Article 19.0.0. As such, the reliance of the Petitioners on the Commission's Order dated 24.09.2021,

dehors the fact that its generating stations are not a “must Run” stations, is misplaced.

- g) That during the relevant period, PSPCL had been passing through severe economic distress as its revenue from the industrial and commercial sector had declined considerably due to covid-19 pandemic and it was finding it difficult to honour even its statutory liabilities. In this dire situation, PSPCL was constrained to deduct 5% from the gross energy bills of the RE generators including from the energy bills of the petitioners for the months of April, to June, 2020. Vide email dated 21.3.2021, PSPCL further informed the petitioners that various central sectors power generating companies including the Transmission Utility had done their bit in having offered rebate to PSPCL to tide over the difficult phase. Further, Petitioners were informed that as discussed with different stakeholders, it has been observed that most of the RE generating companies were ready and willing to share the deduction as part of their social responsibility towards sustenance of the power sector; however, in various meetings with different stakeholders, it was represented that 5% deduction be reduced by to 1.25%.
- h) The prayer made by the Petitioners for release of the payment of deductions made against the monthly energy invoices for April 2020 to June 2020 is not maintainable in as much as the petitioners vide their letter dated 22.3.2021, accepted the above proposal of PSPCL for the months April, May and June, 2020 and further agreed not to raise any claim for late payment surcharge on the deducted amount. The refund of the said balance amount has since then been made to the Petitioners on 23.3.2021, which the Petitioners have duly accepted. The

Petitioners are therefore estopped from raising any claim in that behalf at a later stage.

- i) The petitioners could have declined to accord their consent to PSPCL. The petitioners are grossly wrong in pleading a case of dominance abuse, on part of PSPCL, such a plea raised by the petitioners is a clear mis-representation and an afterthought. Petitioners unequivocally accepted the deduction of 1.25% from the gross verified bill amount for the months April, May and June, 2020. Having so accepted, the Petitioner is estopped in law, apart from its own waiver, from raising any claims against the Respondent in that regard. In this regards, reference is also made to Judgements by the Hon'ble Supreme Court in Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401 and in Union of India v. N. Murugesan, (2022) 2 SCC 25. Apart from the express waiver on part of the Petitioners, by not approaching the Commission within a reasonable time, there has also been a tacit or passive acceptance of the actions of PSPCL, which it cannot be allowed to dispute at this point in time.
- j) The Commission in its Order dated 24.09.2021 in petition 21 of 2021 has also held that where the generators consented to a part deduction from their monthly invoices, such deductions were in the realm of contractual mutuality and were not a subject matter of adjudication by the Commission. Petitioners had also voluntarily consented for a part deduction from its invoices for the months of April, May and June, 2020 and as such, it is not open for it to approach the Commission and seek refund of the deductions so made.

4. The petitioners submitted their rejoinder on 08.08.2022 to PSPCL's reply as under:
- a) Bare reading of the Reply submitted by the Respondent suggests that the Respondent has devoted substantial time in its reply dealing with merits of the case rather than raising grounds for non-maintainability of the petition. By virtue of its reply, PSPCL has made all efforts to shirk away from its contractual responsibilities under the PPAs and the bounden duty under the governing legal framework to accept and pay for the solar power generated and supplied by the Petitioners.
 - b) PSPCL has raised the issue of delay in filing of petition; while not disputing the invoices and payments to be made. It is submitted that the Limitation Act prescribes three year time-period for suits related to contract. The petition has been filed against PSPCL's notice dated 28.03.2020 and unilateral deductions from the invoices for the month of April, May and June 2020 i.e. before three years from the occurrence of the cause of action. Therefore, the Petition is not barred by limitation.
 - c) PSPCL has raised the issue of maintainability of the petition on the ground that the Petitioners had waived its right to claim the deducted amount vide letters dated 22.03.2021. It is a matter of record that said letters were issued in response to the PSPCL's letter dated 21.03.2021 wherein it had communicated that they can get certain portion of their dues only post issuance of the said undertaking. The Petitioners were under severe financial duress and were not in a position to further negotiate with a big corporation like PSPCL. The Petitioners had no option except to accept the dictum of PSPCL. Consent of the petitioners was under duress and coercion. Whether the Petitioners had

accepted the proposal of PSPCL on their own accord or under influence is something that needs to be assessed and adjudicated by this Commission. It is settled that waiver is consensual in nature. The essential element of waiver is that there should be voluntary and intentional relinquishment of a right. However, there was no voluntary relinquishment, rather it was coerced by PSPCL in order to support its own illegal and unlawful act.

5. After hearing the parties on 10.08.2022, the Commission ordered as under:

“On the issue of curtailment notice issued by PSPCL, the Commission decides to admit the petition to examine the same. Further, Ld. Counsel for the petitioner argued that the petitioner consented for deductions made against the Monthly Energy Invoices under duress and coercion. However, Counsel for the PSPCL argued that the petitioner after giving consent for the deduction in the name of social responsibility is now retracting the same which is not permissible. The Commission has already given its judgment in such cases in petition No. 21 of 2021. The Commission has perused the petitioner’s letter dated 22.03.2021 placed at Annexure P-9 to the petition. The petitioner has expressed his acceptance and readiness to share 1.25% deduction of gross verified bill amount as a part of its social responsibility towards sustenance of the power sector and has undertaken that the balance amount shall not be claimed at later stage and no late payment surcharge shall be claimed on the deducted amount. This reveals that the consent was given by the petitioner out of his free will and without any duress or coercion. The Commission vide Order dated 24.09.2021 in petition No. 21

of 2021 while dealing with the same issue of payments of 5% deductions in case of solar developers has held as under:

“...The Commission however notes that some of the generators have consented to a part deduction from their monthly invoices. Such deduction(s) effected with mutual consent are a matter between the contracting parties and are not a subject matter of adjudication by the Commission. However, in cases where the deductions from the monthly invoices have been made without the consent of the generators, PSPCL is required to release the same, along with the late payment surcharge as may be applicable, as per the provisions of the PPA...”

Thus, the Commission is of the view that the prayer made by the petitioner under para No. 42 (b) of the petition is not maintainable.

Accordingly, the respondents are directed to submit the reply on merits on the issue of said curtailment notice within two weeks with a copy to the petitioner. The petitioner may file rejoinder, if any, within a week thereafter with a copy to the respondents.”

6. On 26.08.2022, PSPCL submitted that, since it has already filed its consolidated reply to the maintainability of the petition as well as its merits, no further reply is required to be filed by PSPCL in the captioned matter.
7. PEDA submitted its reply on 22.09.2022. PEDA's submissions made on the issue of the curtailment notice are as under:
 - a) From the factual matrix, it is clear that neither any relief has been claimed against PEDA nor is any role attributable to PEDA regarding the impugned action of PSPCL.

- b) The said controversy has already been adjudicated upon and settled by the Commission in Petition No. 21 of 2021 filed by Solar Power Developers Association. The controversy or the dispute was exactly the same as is being raised in the present petition with the only difference being that over there it was the Association of Solar Power Developers and over here it is a developer engaged in the generation of Biomass energy. Observations of the Commission therein would squarely cover the case of Biomass developers also for the reason that the PSPCL has given exactly the same reasons while issuing curtailment notice for the period dated 30.03.2020 to 07.04.2020.
- c) In various communication/memorandums issued by MNRE, no distinction has been made between different kinds of renewable energy projects. It is pertinent to mention that vide office memorandum dated 20.03.2020 relief was granted to all types of Renewable Energy Projects, whereby the Renewable Energy agencies were directed to consider suitable time extension in scheduled date of commissioning of RE projects due to disruption of supply chain on account of Corona Virus. Thereafter, MNRE vide communication dated 01.04.2020 issued clarification that the status of the RE generating stations as a must run projects shall remain unchanged during the period of lockdown. In continuation thereof, MNRE vide communication dated 04.04.2020 reiterated that the status of the RE generating stations remains must-run and no curtailment should be done except for grid safety.
- d) PSPCL be directed to honour its obligations under the PPA and as per the directions issued by this Commission in final Order dated 24.09.2021 and to pass any other Order in the instant matter as the Commission deems fit.

8. The Petitioners filed an additional Rejoinder on 29.09.2022. While reiterating its earlier submissions, it was further added that:
- a) World Health Organisation (WHO) declares any disease as pandemic when a disease's growth is exponential. Growth of any disease has no direct impact on the ability of the procurement of the electricity; however it may have direct impact on the ability of the generator to generate electricity. It is a matter of record that in-spite of such challenges, the Petitioners have complied with their obligation to supply electricity.
 - b) Conjoint reading of Clause 11 and Clause 19 of the PPAs suggest that PSPCL can refuse supply of the electricity if epidemic has any impact on its ability to procure the electricity. In the instant case, PSPCL has claimed a load crash in the system. PSPCL was under an obligation to substantiate this claim. It has merely relied on the word "load crash" to justify its claim.
 - c) It is cardinal principle of contract law that parties are bound by terms of the contract and even a judicial authority cannot absolve the parties from performance of their obligations arising from the contract. Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd vs Solar Semiconductor Power Company Private Ltd & Ors. (2017) 16 SCC 498 has held that the Respondent is bound by the terms and conditions of PPA. PSPCL was under an absolute obligation to procure electricity supply and to make payment in terms of the PPA. PSPCL was allowed to refuse supply only in those cases wherein its ability to procure has been impacted by occurrence of force majeure events. In the instant case, PSPCL has merely claimed occurrence of the load crash without demonstrating it.

- d) Even if a pandemic like Covid-19 falls within the ambit of a force majeure clause that, by itself, would not relieve a party from performance of contractual obligations. The force majeure event must have a direct impact on the non-performance and the party seeking to rely on the force majeure event is also under duty to mitigate and/or explore alternate means of performance. Various judicial authorities in a catena of judgments refused to provide relief for non-performance due to occurrence of the force majeure in absence of causal link between non-performance and Covid-19. The Hon'ble High Court of Delhi in its recent judgment of *Halliburton Offshore Services Inc. v. Vedanta Limited and Anr.* O.M.P (I) (COMM.) No. 88/2020 while dealing with similar issue held that: -

62. The question as to whether COVID-19 would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case. Every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a Force Majeure condition. The Court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic.

63... There has to be a 'real reason' and a 'real justification' which the Court would consider in order to invoke a Force Majeure clause.

- e) In terms of Clause 11, PSPCL is allowed to curtail delivery of energy if there is load crash in PSPCL/PSTCL system due to widespread rains, cyclones or typhoons. Bare reading suggests that this clause will have no applicability because there was no a widespread rain, cyclones or typhoons during the curtailment period. Even in terms of PSERC Grid Code, there was no load crash during curtailment period. PSERC Grid Code defines Load Crash as “*Sudden or rapid reduction of electrical load connected to a system that could be caused due to tripping of major transmission line(s), feeder(s), power transformer(s) or natural causes like rain etc.*” There was no sudden or rapid reduction of electrical load.
- f) Even if we assume but not concede that there was load crash. PSERC Grid Code provides guidance to deal with situation of the load crash and curtailment of the power generation/supply of biomass power plant is not a step provided by PSERC Grid Code. PSPCL was under an obligation to follow steps provided in Section 6.5 of PSERC Grid Code prior to issuance of the curtailment notice to Biomass Plants.
- g) The Monthly Reports of Power System Operation Corporation Limited for the months of March 2020 and April 2020 reflect that there was no load crash at all. It can be observed that the average energy consumption per day in the State was around Avg 62.342 MUs (During 24-Mar-20 to 31-Mar-20) and (During 1-Apr-20 to 7-Apr-20) it is around Avg 70.578 MUs/day. Further, it can be observed that there was no shortage in the demand as per the average requirement of power in the State of Punjab.
- h) PSPCL has submitted that the Commission in its Order dated 17.07.2020 has acknowledged the financial constraints that

Covid-19 might have on the PSPCL for it might adversely affect the sale of power to various categories of consumers and there would be reduction in receipt of power from new RE projects due to their late commissioning. PSPCL, however, ignored the remaining and operative part of the order whereby the Commission clearly states that there will be reduction in RPO target for FY 2020-21 provided that PSPCL honours the terms of the PPAs with RE generators and not refuse power from such projects during FY 2020-21.

- i) PSPCL has made an incorrect averment in its Reply that the curtailment notice/ force majeure notice was also served to the RE generators by the SLDC to discontinue their supply of electricity during the continuance of pandemic. It is submitted that no such notice was ever received by the Petitioner from SLDC.
 - j) Commission in its own Order dated 24.09.2021 in a petition filed by similarly placed developers held issuance of the Curtailment Notice as illegal and also held tariff deduction as illegal.
- 9.** In the hearing held on 12.10.2022, Ld. Counsels of the parties argued the matter, reiterating the submissions earlier made in the matter. The Ld. Counsel for PSPCL, while admitting that the term “Load Crash” was not technically appropriate to describe the event, reiterated that shutdown of establishments upon declaration of lockdown by the Government to prevent spread of Covid epidemic resulted in drastic reduction in its demand forcing PSPCL to curtail power from various sources. After hearing the parties, the Order was reserved.

10. Findings and decision of the Commission:

The Commission has examined the submissions and arguments thereon made by the parties. The Petition was admitted to examine the issue of curtailment notice issued by PSPCL. The Petitioners are pleading that the notice had been issued in complete ignorance of the terms of the PPAs, provisions of the Grid Code Regulations and MNRE instructions, moreover, similar notices issued to Solar power plants have been already set aside by the Commission vide Order dated 24.09.2021 in Petition No.21 of 2021. PEDDA also supported the Petitioners' case with the submission that all RE stations are to be treated equally. However, PSPCL contended that the issue of the Petitioners having biomass based plants cannot be compared with solar power plants which enjoy a 'must-run' status under the State Grid Code. It was further contended that the declaration of the lockdown by Central/State Governments due to Covid pandemic had resulted in decline in the electricity demand, which forced it to curtail its power purchase/generation under the force majeure situation in terms of clause 19.1.0 of the PPA. The Commission's findings and decision on the same is as under:

10.1 The Commission refers to the impugned notice dated 28.03.2020, which had been issued by PSPCL making a reference to the Govt. of Punjab, Department of Health & Family Welfare order No. 14/7/2020-4HB-IV/941 dt. 22.03.2020 and Ministry of Home Affairs, Govt. of India order No. 40- 3/ 2020-DM-1(A) dt. 24.03.2020, stating as under:

"1) As per above referred letters, Government of Punjab (GoP) and Government of India (GOI) has recognized that the country is threatened with spread of Covid-19 Epidemic, which has already been declared Pandemic by World Health Organization (WHO)

- 2) *In view of the of the outbreak of COVID-19 epidemic, GoP has declared lockdown in entire State of Punjab until 21:00 Hrs on 31-03-2020 and GOI has declared complete lockdown in India for a period of 21 days effective from 25-03-2020 i.e. upto 14th April, 2020.*
- 3) *This led to a load crash in PSPCL system. Due to this force majeure condition, PSPCL is forced to curtail its electric power purchase/generation.*
- 4) *You are hereby intimated that as per Force Majeure Clause no. 19.1.0 of subject cited PPA, PSPCL is prevented from performing its obligation of purchasing and accepting energy from your generating company facility on account of force majeure event of Epidemic (Covid-19) with immediate effect till this epidemic lasts. During this period, if any power is injected into PSPCL/PSTCL system then the same will be at your risk & cost.*
- 5) *This letter may be treated as notice in terms of Force Majeure Clause No. 19.0.0 read with Clause 11.0.0 of subject cited PPA.*
- 6) *The present notice is being sent by e-mail in view of the lockdown and the same may be treated as due service of notice.”*

The Commission observes that the impugned notice had been issued by PSPCL in terms of Force Majeure Clause No. 19.0.0 read with Clause 11.0.0 of the PPAs; citing both load crash in PSPCL’s system/force majeure condition purportedly under Clause 11 and force-majeure event of Epidemic (Covid-19) under Clause 19.

10.2 Further, the Commission examines the said clauses of the PPAs as under:

“11.0.0 Continuity of Service

11.1.0 The PSPCL/PSTCL’s Load Dispatch Centre (Board) may require the Generating Company to temporarily curtail or interrupt deliveries of energy only, when necessary in the following circumstances:-

.....

(ii) *Load crash in PSPCL's/PSTCL's (Board's) Grid System due to wide spread rains, cyclones or typhoons.*

.....

(v) *Under Force-Majeure Conditions of the PSPCL/PSTCL (Board).*

.....

(vii) *Instructions for the disconnection of the Generating Facility from the PSPCL's (Board's) system shall be notified by the PSTCL's (Board's) Load Dispatch Centre for the period/ duration indicated by it. However, the PSPCL (Board) shall take all reasonable steps to minimize the number & duration of such interruptions, curtailments or reductions.*

.....

19.1.0 Force Majeure

19.1.0 *If any party hereto shall be wholly or partially prevented from performing any of its obligations under this Agreement by reason of or on account of lightning, earthquake, fire, floods, invasion, insurrection, rebellion, mutiny, civil unrest, riot, epidemics, explosion, the order of any court, judge or civil authority, change in applicable law, war, any act of God or public enemy or any other similar cause or reason reasonably beyond its control and not attributable to any negligent or intentional act, error or omission. Then such party shall be excused of its obligations/liabilities under this Agreement and shall not be liable for any damage, sanction or loss resulting there from to the other party.*

19.2.0 *The party invoking this clause shall satisfy the other party of the existence of any Force Majeure event and give written notice within seven (7) days of the occurrence of such Force Majeure event to the other party and also take all reasonable and possible steps to*

eliminate, mitigate and overcome the effect and consequence of any such Force Majeure event.”

- a) Perusal of the contents of Clause 11 of the PPAs reveals that, it allows the Load Dispatch Centre to temporarily curtail or interrupt deliveries of energy, when necessary, in the event of exigencies as stated therein. Further, such instructions, if any, under this clause also needs to be notified by the SLDC. Though, the Petitioners are denying receipt of any such notice, PSPCL submitted that the copies of its aforesaid force majeure notices were also served to the RE generators by SLDC. The Commission is of the view that mere enclosure of PSPCL’s notice for action in a communication by SLDC to the Petitioners cannot be considered as issuance of instructions of its own volition by SLDC under the PPAs. Also, the Commission in Petition 21 of 2021, after analysis of the facts, had already held that the said event of reduction in demand cannot be technically termed a load crash. As such, the Commission agrees with the Petitioners that PSPCL’s action of invoking Clause 11 in the impugned notices is not as per the terms of the PPAs.
- b) However, clause 19 of PPAs, in specifying the events, includes ‘epidemics’ and/or ‘the order(s) of any civil authority’ and states that if any party is wholly or partially prevented from performing any of its obligations under the Agreement on account of such force majeure event(s), then such party shall be excused of its obligations/liabilities under the Agreement. There doesn’t seem to be any dispute or doubt on the issue of Covid-19 being an epidemic and on the declaration of a lockdown by the Government to control the same. The

Petitioners have also admitted the same in their submissions. The Commission also notes that the impugned notices to the Petitioners citing force majeure event were issued on 28.03.2020 i.e. within seven (7) days of imposition of restrictions as mandated under sub-clause 19.2.0 of the PPAs.

- c) Further, in order to examine the plea that to absolve either of the parties from performing its obligations under the PPA, it needs to be established that the party has been wholly or partially prevented from performing its obligations on account of such event(s), the Commission refers to the data submitted by the Petitioners. The statistics indicate that, the daily consumption in the State was reduced from about 106 MUs on 21.03.2020 to an average of about 62 MUs during 24th - 31st March and to about 70 Mus during 1st - 7th April, 2020. Though, the said reduction in demand cannot be technically termed a load crash as already decided by the Commission in Petition 21 of 2021, the data submitted by the Petitioners indicates that there was indeed a drastic reduction in the demand of PSPCL on account of shutdown of various establishments upon declaration of the lockdown by the Government to prevent spread of Covid epidemic, requiring back-down/curtailment of generation/power procurement by PSPCL.

Thus, the Commission is of view that, though PSPCL erred in invoking Clause 11 of the PPAs in the impugned notices, its action of invoking Clause 19 in the same notices detailing its inability to perform its obligations of purchasing and accepting energy from the Petitioners biomass power plants on account of force majeure event of Epidemic (Covid-19)

under Force Majeure Clause No. 19 of the PPAs (at Sr. No. 4 of the notice) cannot be overlooked.

10.3 The Commission's Order in Petition No.21 of 2021:

The Petitioners have pleaded that similar notices issued to Solar power plants have been already set aside by the Commission vide Order dated 24.09.2021 in Petition No.21 of 2021. The Commission refers to the said Order, wherein, it was observed that notwithstanding that it was a force majeure event, the terms and conditions of PPAs need to be read in conjunction with the provisions of the State Grid Code Regulations (SGC). In view of the 'must-run' status accorded therein to the solar power stations under Regulation 5.4 of the SGC, the Commission had held PSPCL's action of curtailment of solar power to be unjustified.

a) Accordingly, in order to ascertain status of the Petitioners' biomass based plants, the Commission also refers to the relevant provisions of the SGC, which states as under:

"5.4.1 System operator (SLDC) shall make all efforts to evacuate the available solar and wind power and treat as a must-run station. However, System operator may instruct the solar /wind generator to back down generation on consideration of grid security or safety of any equipment or personnel is endangered and Solar/ wind generator shall comply with the same.

.....
11.4.1.....

(xiv) Since variation of generation in run-of-river power stations shall lead to spillage, these shall be treated as must run stations. All renewable energy power plants, except for biomass power plants and non-fossil fuel based cogeneration plants whose tariff is determined

by the PSERC shall be treated as 'MUST RUN' power plants and shall not be subjected to 'merit order despatch' principles."

It is evident from the above stated provisions that the biomass power plants do not enjoy the same status of must-run as accorded to the solar power plants in the State Grid Code Regulations.

b) The Commission also refers to the MNRE Office Memorandums (OMs) cited by PEDDA with the submission that all RE stations are to be treated equally:

(i) In OM dated 20.03.2020, MNRE has only dealt with the issue of extension in Scheduled Commissioning date considering disruption of the supply chains due to spread of coronavirus in China or any other country as Force Majeure event and do not refer to the scheduling of power.

(ii) Vide OM dated 01.04.2020, MNRE has clarified as under:

"3(a) Must-Run Status to RE Projects:

Renewable Energy (RE) Generating Stations have been granted 'must-run' status and this status of 'must-run' remains unchanged during the period of lockdown."

In continuation to the above, MNRE vide OM dated 04.04.2020, stated as under:

"2. Since, some of the DISCOMs are still resorting to RE curtailment without any valid reason i.e. grid safety; it is once again reiterated that Renewable Energy (RE) remains 'MUST-RUN' and any curtailment but for grid safety reason would amount to deemed generation."

As is evident, the above MNRE OMs dated 01.04.2020 and 04.04.2020, issued by its Grid Solar Power Division, only reiterate the continuation of the must-run status to the RE Stations who have been granted 'must-run' status. Subsequently, the Electricity (Promotion of Generation of Electricity from Must-Run Power Plant) Rules, 2021 notified on 22nd October, 2021 also specify only wind, solar, wind-solar hybrid or hydro power plants (in case of excess water leading to spillage) as must-run power plants. As such, the said MNRE memoranda cannot be said to have been intended to grant the must-run Status to all RE stations. Moreover, office memoranda/letters of MNRE cannot override the provisions of the duly notified Grid Code Regulations, which have the status of subordinate legislation. The Regulations specifically have omitted biomass power plants and non-fossil fuel based cogeneration plants from the 'must-run' category.

Thus, the Petitioners' plea that similar notices issued to Solar power plants have been already set aside by the Commission vide Order dated 24.09.2021 in Petition No.21 of 2021, does not support their case.

In light of above observations, the petitions are dismissed.

Sd/-

(Paramjeet Singh)
Member

Sd/-

(Viswajeet Khanna)
Chairperson

Chandigarh

Dated: **15.11.2022**