PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

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

Petition No.57 of 2021
Alongwith IA 20 of 2021
Date of Order: 08.09.2022

Petition under section 86 (1) (f) and other relevant provisions of the Electricity Act, 2003 read with the provisions of the Power Purchase Agreements dated 01.01.2014 challenging the legality, validity and propriety of letters/memos dated 25.08.2021 & 15.09.2021 issued by PSPCL to terminate the Power Purchase Agreements dated 01.01.2014

AND

In the matter of:

1. Bhanuenergy Infrastructure Power Limited Regd. Office 906-907, Indraprasth Corporate, Opp. Venus Atlantis, 100ft. Road, Prahladnagar, Ahmedabad-380015, Gujarat.
2. Bhanuenergy Industrial Development Limited Regd. Office 906-907, Indraprasth Corporate, Opp. Venus Atlantis, 100ft. Road, Prahladnagar, Ahmedabad-380015, Gujarat.

Petitioners.

Versus

1. Punjab State Power Corporation Ltd. the Mall, PSEB Head office, Patiala, Punjab-147001.
2. Punjab Energy Development Agency Plot No. 1-2, Sector 33-D Chandigarh-160020

Respondents.

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

Petitioner: Sh. Sitesh Mukherjee, Advocate

PSPCL: Ms. Suparana Srivastva, Advocate

PEDA: Sh. Aditya Grover, Advocate

ORDER

1. The petitioners Bhanuenergy Infrastructure Power Limited (BIPL) and Bhanuenergy Industrial Development Limited (BIDL) have filed the present petition with the prayer to:

a) Set aside the letters/memos dated 28.05.2021 and 15.09.2021 issued by PSPCL to BIPL and BIDL;

b) Hold and declare that the alleged termination undertaken by PSPCL under its letter dated 15.09.2021 is invalid in law and as a consequence, the PPAs of BIPL and BIDL continue to exist;

c) Pass such other or further order(s) as the Commission may deem just in the facts of the present case.

The petitioners also filed IA (No. 20 of 2021) seeking an ex-parte & ad-interim stay or injunction on termination notices issued by PSPCL till the disposal of the present petition.

2. The Commission vide Order dated 24.09.2021, while directing the respondents to file reply to the I.A as well as the petition stayed the operation of letters issued by PSPCL terminating the PPA's dated 01.01.2014 till the next date of hearing. The stay was further extended vide the Commission's subsequent interim Orders, pending adjudication of the matter.

3. Petitioner's submissions

Submissions made in the petition are summarised as under:

3.1 The Petitioners are generators within the meaning of Section 2 (28) of the Act and are supplying power to PSPCL from their two Solar PV Power Projects of 15 MW capacity each. The PPAs dated 01.01.2014 were entered with PSPCL and amendments in the same were also made to incorporate; name change, location of

project site and the tariff & date of commissioning. The plants were commissioned on 29.03.2016.

3.2 That, PSPCL issued letters dated 28.05.2021 under Clause 13 of the PPAs to the Petitioners, alleging default vis-à-vis the installed capacity of projects with the directions to cure the default by removing excess installed capacity. An explanation was also sought as to why recovery of amount should not be done by it on account of alleged excess energy supplied from the excess capacity installed.

3.3 In response to PSPCL's said letters, the Petitioners replied vide letters dated 05.07.2021, interalia submitting data to PSPCL which demonstrated that the installed capacity at both the projects was within the tolerance level prescribed under the RFP. Further, PSPCL was invited to conduct a joint inspection so as to confirm that both the projects were complying with Clause 3.2(ii) of the RFP. The relevant extracts of the letters dated 05.07.2021 are reproduced herein below for ready reference –

(i) BIPL's response dated 05.07.2021 –

"3. *In this regard, it is stated that the Company's Installed DC capacity based on the rated capacity of the PV modules is 15.742 MW which is below the permissible capacity of 15.75 MW and therefore, the Company's power plant is adhering to the tolerance norms prescribed for the plant. The module specification installed at the plant as set out in table below, clearly demonstrates that the Company is in compliance with the tolerance norms vis-à-vis the Installed DC capacity and there is no breach on any count as being contended by PSPCL:*

BIPL			
INVERTER	**Watt**	**No of Modules**	**DC Capacity (MW)**
1A	260	7248	1.884
	255	288	0.073
1B	260	7536	1.959
	255	48	0.012
2A	260	7390	1.921
	255	146	0.037
2B	260	7248	1.884
	255	288	0.073
3A	260	336	0.087
	255	7392	1.885
3B	260	991	0.258
	255	6689	1.706
4A	260	1196	0.311
	255	6580	1.678
4B	260	7477	1.944
	255	107	0.027
TOTAL		**60960**	**15.742**

(ii) BIDL's response dated 05.07.2021 –

"3. *In this regard, it is stated that the Company's Installed DC capacity based on the rated capacity of the PV modules is 15.745 MW which is below the permissible capacity of 15.75 MW and therefore, the Company's power plant is adhering to the tolerance norms prescribed for the plant. The module specification installed at the plant as set out in table below, clearly demonstrates that the Company is in compliance with the tolerance norms vis-à-vis the Installed DC capacity and there is no breach on any count as being contended by PSPCL:*

BIDL			
INVERTER	**Watt**	**No of Modules**	**DC Capacity (MW)**
1A	260	0	0.000
	255	7728	1.971
1B	260	0	0.000
	255	7728	1.971
2A	260		0.000
	255	7776	1.983
2B	260	792	0.206
	255	6864	1.750
3A	260	48	0.012
	255	7632	1.946
3B	260	6480	1.685
	255	1104	0.282
4A	260	5808	1.510
	255	1824	0.465
4B	260	6036	1.569
	255	1548	0.395
TOTAL		**61368**	**15.745**

As is discernible from the above, there was no violation of Clause 3.2(ii) of the RFP as alleged by PSPCL. However, since the Petitioners did not hear back from PSPCL, the Petitioners again wrote to PSPCL on 27.07.2021 reiterating the contents of their previous letters dated 05.07.2021.

3.4 On 15.09.2021, without responding to and in utter disregard of the replies submitted by the Petitioners, PSPCL intimated that it has terminated the PPAs dated 01.01.2014 with immediate effect. That the Petitioners in response to PSPCL's said letters received on 21.09.2021, have responded stating that such termination is wholly illegal, unauthorized, and contrary to the terms of the PPA and law.

And that, PSPCL has failed to follow the due procedure prescribed under the PPA and law. Moreover, there is no such breach of material conditions as alleged by PSPCL nor can any recovery be initiated by PSPCL. Further, being aggrieved by the actions of PSPCL, the present petition has been filed by the Petitioners challenging the legality, validity and propriety of the letters dated 28.05.2021 & 15.09.2021 issued by PSPCL to terminate the PPAs.

3.5 That, there is no violation of the RFP, PPA or IA as concluded by PSPCL under its letters dated 15.09.2021. PSPCL has decided on its own that the Petitioners have violated so called '*express and mandatory contractual obligations*' under the Clause 3.2(ii) of the RFP and the IA amounting to a default under Clause 13.1.0 of the PPA. It is relevant to highlight that there is no such violation of Clause 3.2(ii) of the RFP as alleged & decided by PSPCL. As is discernible from the said Clause, RFP provides that +5% tolerance is allowed on the capacity of the project. Hence, the Petitioners are permitted to install up to 15.75 MW DC capacity at each project.

3.6 It is PSPCL's case that when its officers had checked the Petitioner projects on 05.04.2021, it was found that the installed capacity was 15.9084 (BIPL) and 15.8462 MW (BIDL) i.e., beyond the permissible tolerance of +5% prescribed under the RFP. Pertinently, PSPCL conducted a unilateral assessment and no opportunity was afforded to the Petitioners nor any documentary evidence/ data was submitted.

3.7 The petitioners have submitted that in the intervening period i.e., between 28.05.2021 and 15.09.2021, PSPCL never responded to the Petitioners letters nor issued any communication. The data submitted by the Petitioners in their letters dated 05.07.2021 was

not disputed by PSPCL nor did PSPCL attempt to undertake joint inspection despite being invited and reminded of the same. PSPCL made a vague averment that as was evident from the letter dated 05.07.2021, the Petitioners failed to cure the default or furnish cogent reasons for '*failing to perform material obligations*'. Accordingly, PSPCL decided to terminate the PPA.

3.8 The relevant extracts of one of the letters dated 15.09.2021 is reproduced herein below for ready reference as both the letters are similar in this regard –

"*v. In view of the above, in terms of clause no. 13.3.0 of the PPA, a default notice of 60 calendar days' was issued by this office on dated 28.05.2021 with a request to forthwith cure the above default by removing the excess installed DC capacity from your project. It was also asked that you must explain as to why an amount proportionate to the energy supplied against excess installed capacity of your project should not be recovered from you from the date of commercial operation (COD) of your project including interest. Further, in case you fail to cure the defaults as mentioned above, within 60 (sixty) calendar days after receipt of this Notice and/or fail to furnish the explanation called as above, appropriate action shall be taken against you under the terms & conditions of the RfP, IA and PPA, including termination of the PPA.*

vi. It has been noted from your letter dated 05.07.2021 that the company neither cured the default till date even after lapse of 60 days from the date of service of default notice nor furnished any cogent reasons for failing to perform material obligations. Therefore, PSPCL has decided to

terminate the PPA dated 01.01.2014 signed between M/s Bhanuenergy Infrastructure and Power Ltd. (formally M/s Moserbear Infrastructure and Power Limited) and the Punjab State Power Corporation Limited (PSPCL) in terms of clause no. 13.3.0 of the above said PPA."

While PSPCL loosely stated that the Petitioners have violated so called '*express and mandatory contractual obligations*' amounting to a default under Clause 13.1.0 of the PPAs, the same is not true. PSPCL has failed to substantiate its allegations that the Petitioners have failed to discharge their material contractual obligations under Clause 13 of the PPA.

3.9 That under letters dated 15.09.2021, without following due procedure prescribed under the PPA, PSPCL has decided that the PPA stood terminated with effect from the date of delivery of its notice. In fact, PSPCL has gone a step further and has adjudicated its own entitlement to recover excess payments allegedly made by it to the Petitioners from the COD along with interest.

3.10 That PSPCL's above conduct is grossly arbitrary. Particularly, PSPCL's actions are contrary to the express mandate of Sections 63 and 86 of the Act which *inter alia* confer jurisdiction upon this Commission to approve PPAs and adjudicate upon disputes arising between licensees and generating companies including, disputes pertaining to termination. It is relevant to point out that even in terms of the explicit provisions of the PPA, any dispute or difference arising between the parties including, termination, was to be mutually discussed and amicably resolved within 90 days. In the event that the parties are unable to resolve the dispute, the same was to be dealt with as per the provisions of the Act.

All differences or disputes between the parties had to be attempted to be resolved through mutual discussion and amicable resolution. Contrary to the above in the present case, PSPCL did not even respond to the Petitioner letters and has sought to terminate the PPA in a wholly arbitrary and illegal manner.

3.11 That under Section 86(1)(e) of the Act, the Commission is obligated to promote generation of electricity from renewable energy sources. Further, in the case of *Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission* reported as(2015)12 SCC 611 it has been held by the Hon'ble Supreme Court that promotion of renewable sources of energy is subservient to the mandate of the Constitution. In view of the above, the generation of electricity from the Petitioners Project should be safeguarded by the Commission.

4. PEDA in its reply to the Petition has submitted that the Petitioners have filed the petition against termination order issued by PSPCL, thus PEDA has no role to play.

5. PSPCL's Reply

PSPCL filed the reply to the Petition and IA, contending that the present Petition is devoid of any merit and is therefore liable to be dismissed. The same is summarized as under:

5.1 PEDA issued a request for proposal (RfP) in March, 2013 for development of new grid connected solar PV power projects (300 MW capacity under Phase-1) on 'Built, Own and Operate' basis. The RfP provided as under:

> *"3.2 (ii). +5% tolerance is allowed on the capacity of the project. e.g. 1 MW capacity project can have 1.05 MW as DC capacity based on the rated capacity of PV modules at STC conditions (1000 W/m 2.25°C, AM 1.5). No negative tolerance is acceptable."*

5.2 Pursuant to the aforesaid RfP, PEDA received proposals from certain bidders including from the present petitioners. After evaluation of the proposals received, PEDA accepted the bid of the Petitioners for development of 15 MW solar power projects each and issued Letters of Award dated 22.7.2013 to the petitioners requiring them to execute the IAs as per the RfP. Accordingly, the petitioners entered into IAs dated 30.11.2013 where under they were granted the permission to establish, operate and maintain their respective solar PV projects and sell power generated at the projects to PSPCL *"as per tariff arrived after competitive bidding process under New Grid Connected Solar Photovoltaic Power Project of Phase-1"*. The IAs provided as under:

> ***"4.4 .....***
>
> *The Company shall establish, operate and maintain the Solar PV Power Project and interconnection facilities for evacuation of power from the project as per provisions of RfP & PPA.*
>
> *……*
>
> ***6.2 Obligations of Company:***
>
> *i. "The Company shall act as per the terms and conditions of the RfP."*

Suffice it to say, the solar power projects of the Petitioners were to be established as per prescribed terms under the RfP/IAs.

5.3 In furtherance of the above IAs, the Petitioners executed PPAs dated 1.1.2014 with PSPCL. The PPAs recorded in Recital 'd' as under:

> *"d) Implementation Agreement signed by Mis.....with PEDA shall be treated as an integral part of the Power Purchase Agreement. All the clauses and Regulatory Norms applicable to the Implementation*

Agreement shall be unequivocally applicable to the Power Purchase Agreement in letter and spirit."

It followed from the above that the installation of DC capacity as permitted under the RfP also became an agreed term under the PPAs for purchase of power by PSPCL from the Petitioner projects.

5.4 Under clause 2.0.0 of the PPAs, PSPCL was obligated to purchase and accept all energy made available at the inter-connection point at the agreed tariff. This obligation to purchase *"all the energy made available by the generating company"* was necessarily with respect to the 15 MW allocated capacity together with the 5% positive deviation in its DC capacity as permitted under the RfP and not beyond. The liability of PSPCL to pay tariff was to be discharged accordingly.

5.5 Under clause13.0.0, the PPAs provided for Events of Default and Termination as under:

"13.0.0 EVENTS OF DEFAULT ANDT ERMINATION

13.1.0 The occurrence of any or combination of the following events at any time during the term of this Agreement shall constitute an Event of Default by the Generating Company:

……..

c) Failure or refusal by the Generating Company to perform its material obligations under this Agreement"

Thus, failure on part of the Petitioners to install the projects as per the permissible DC capacity is to be construed as an event of default on part of the Petitioners under the above clause. Upon occurrence of such event of default, clause13.3.0 provided as under:

"13.3.0 Except for failure to make any payment due within ninety (90) calendar days after receipt of Monthly Invoice (in which Clause 3.9.0 will apply), if an Event of Default by either party extends for a *period of sixty (60) calendar days after receipt of any written notice of such Event of Default from the non-defaulting party, then the non defaulting party may, at its option, terminate this agreement by delivering written notice of such termination to the party in default.*

(i) If the default pertains to the PSPCL……

(ii) If the default pertains to the Generating Company the PSPCL may at its option:

a) Require the Generating Company to cure the default and resume supply to the PSPCL within sixty (60) days of receipt of notice from the PSPCL.

.....

c) Terminate the Agreement."

Thus, when an event of default occurred, PSPCL was within its right to terminate the PPAs (by sending written notices of such termination to the Petitioners) in case said event of default continued for a period beyond 60 calendar days or PSPCL could send a notice to the petitioners to cure such an event of default within 60 calendar days, failing which PSPCL was within its right to terminate the PPAs.

5.6 That pursuant to the signing of the PPAs and start of sale/ purchase of power generated from the power projects set up by the selected bidders, the projects including that of the present Petitioners were inspected on 5.4.2021 by a team to check the installed DC capacity (based on the no. of solar panel/modules installed at the projects). The said inspection was carried out in the presence of one Mr. Rajat

Kumar, Assistant Manager of the Petitioner projects and it was found that the installed DC capacity of the Petitioner projects was 15.9084 MW and 15.8462 MW respectively which was beyond the contractually permissible limits. An Inspection Report was accordingly prepared by the said team; however, when the above said Mr. Rajat Kumar, Assistant Manager was asked to sign the said Inspection Report, he refused to sign the same and even refused to receive a copy thereof. As such, the team of PSPCL was left with no option but to affix the Inspection Report at the gate of the projects. It may be mentioned here that had there been any discrepancy in evaluation of installed DC capacity, the Petitioners, would have raised objections on the Inspection Report by recording their remarks and/or would have even contested the same by writing a letter. However, no such protest or remarks/comments were raised/ recorded by the said officers, thereby making it clear that the Inspection Report was considered to be correct and admitted by the Petitioners.

5.7 Accordingly, vide letters/notices dated 28.5.2021, PSPCL called upon the Petitioners to cure the default of excess installed DC capacity in terms of clause13.3.0 of the PPAs by removing the excess installed DC capacity, failing which the PPAs were liable to be terminated.

5.8 In response to the above notices, the Petitioners vide their letters dated 5.7.2021, requested PSPCL to withdraw the notices dated 28.5.2021 on the ground that they had not committed any breach of the provisions of the RfP/IAs/PPAs. Despite being aware of the Inspection Report which had been recorded in front of the officers of the petitioner companies and which had been affixed at the gate of the project way back on 5.4.2021, the petitioners, for

reasons best known to them, had chosen to remain silent on the same and it was only upon issuing of the default notices on 28.5.2021 that the petitioners raised an objection to the Inspection Report and that too on 5.7.2021 i.e. after 3 months from the date of inspection. Further, the only objection raised by the Petitioners in their above said response had been that, based on the rated capacity of solar PV modules currently installed at the project sites, the installed DC was within the permissible tolerance norms. It is pertinent to mention here as per clause no. 3.2 of the RfP, DC capacity of solar PV projects is based on the rated capacity of PV modules at STC conditions (i.e. 1000 W/m2,25°C, AM 1.5) and the solar PV panels/modules are designed at these STC conditions. During the site inspection on 5.4.2021, the team of PSPCL had calculated the installed DC by adding the name plate ratings of solar PV modules installed at the project sites which clearly exceeded the permissible limits. However, the above said letter of the Petitioners and the details of the PV panels stated to be installed at the project sites gave rise to a reasonable apprehension that some of the PV panels might have been removed by the Petitioners during the intervening period between 5.4.2021 and 5.7.2021 so as to falsely demonstrate the current installed DC capacity to be within the permissible range.

5.9 Further, vide letter dated 15.9.2021, PSPCL informed the petitioners that the violation with respect to the permissible tolerance had been informed to the petitioners only after checking the projects by the team of PSPCL on 5.4.2021. Thus, PSPCL terminated the PPAs of the Petitioners in accordance with the terms of the RfP/IAs/PPAs for excess installed DC Capacity of tolerance permitted on the project capacity. The Petitioners disputed the said

termination vide their letters dated 22.9.2021 and thereafter approached the Commission by filing the present Petition.

5.10 Regarding the so-called 'data' furnished by the Petitioners in their letters dated 05.07.2021. PSPCL submitted that the only 'supporting data' furnished by the Petitioners in the said letters has been a table of the number of modules stated to have been installed by the Petitioners at the project sites and their corresponding DC capacity. In this regard, the Petitioners have failed to give any explanation as to what prevented them to furnish the same at the time of inspection being carried out on 05.04.2021 in the presence of its officials or even before issuance of the default notice. This deliberate delay gave rise to a reasonable apprehension that in the intervening period, the Petitioners removed certain PV modules so as to falsely claim a DC capacity within the permissible range and were now requesting for a joint inspection. Since, the so-called data furnished by the Petitioners, had been submitted after issuance of the default notice, that too not as an attempt by the Petitioners to cure the default but rather as an extremely belated objection to the Inspection Report of PSPCL, such data was therefore completely inconsequential and irrelevant.

5.11 The Petitioners have contended that under letter dated15.9.2021, PSPCL has terminated the PPAs without following due procedure prescribed under the PPAs. The Petitioners further submitted that any dispute or difference arising between the parties including, termination, was to be mutually discussed and amicably resolved within 90 days as per the PPAs. However, PSPCL did not even respond to the letters of the Petitioners and terminated the PPAs in an arbitrary and illegal manner without affording any opportunity to the Petitioners. Under clause 13.0.0, the PPAs provided for events

of default and termination where under failure on part of the Petitioners to perform their material obligations is considered as an Event of Default. Thus, the installation of DC capacity beyond permissible capacity is to be construed as an event of default on part of the Petitioners. Upon occurrence of such event of default, clause13.3.0 provided that PSPCL was within its right to terminate the PPA (by sending written notice of such termination to the Petitioners) in case said event of default continued for a period beyond 60 calendar days. Alternatively, PSPCL could also send a notice to the Petitioners to cure such an event of default within 60 calendar days, failing which PSPCL was within its right to terminate the PPAs. In the present case, PSPCL in strict accordance with the above said procedure, upon finding deviation in the installed DC capacity in the Petitioners' projects on 5.4.2021, first issued default notices dated 28.5.2021 akin to notice stipulated under clause 13.3.0(ii)(b), requesting the Petitioners to cure the default within 60 days. By way of the said default notices, the Petitioners were clearly informed that in case of failure to cure the defaults pointed out by PSPCL, appropriate action including termination of PPAs would be initiated against them. Rather than curing the default, the Petitioners vide their letters dated 5.7.2021, sought to dispute the Inspection Report of PSPCL after a delay of full 3 months with data related to the installed PV modules and their rated capacity, which was clearly available with the Petitioners even on the day of the inspection. It was only when the Petitioners completely failed to cure the default that PSPCL proceeded to terminate the PPAs. As such, it is completely wrong on part of the Petitioners to contend that the prescribed procedure in the PPAs has not been followed.

5.12 Regarding the completely fallacious submission of the Petitioners that the present controversy is a mere 'dispute' as defined under clause 1.0.0 of the PPAs which is required to be amicably resolved by the parties within 90 days failing which the provisions of the Electricity Act 2003 shall apply, PSPCL submitted that the same is only an attempt on part of the Petitioners to ostensibly contend that the present controversy is not a 'material breach of obligation' on their part, duly covered under the provisions of clause 13.0.0 of the PPAs having a well defined procedure prescribed there under. The stipulations contained in the bidding documents or the RfP in the present case are not only critical in interpreting the terms of the PPA but are also mandatory pre-conditions on which the very PPA is based upon. As such, any violation of the terms of the RfP or the IA, which are integral parts of the PPA, is necessarily to be considered as a breach of a material obligation resulting in the consequent penalties and liabilities attached with it. Under no circumstance can a gross and clear violation of a fundamental stipulation of the RfP relating to the installed DC capacity of a project be regarded as a mere 'dispute' under clause 1.0.0 of the PPAs as has been wrongly contended by the Petitioners.

5.13 In respect to the contention of the Petitioners that since the subject PPAs have been duly approved by the Commission, PSPCL could not have terminated the same, PSPCL submitted that the Petitioners have completely failed to appreciate the scope of the approval granted by the Commission to the PPAs and the express contractual rights available to either parties under the said PPAs. It is a matter of common knowledge that the Commission grants approval of power procurement by PSPCL under the PSERC

Regulations, where under the Commission, on the basis of demand/ energy forecast and availability projections made by PSPCL in accordance with provisions of the said Regulations approves only that power purchase which is necessary to meet the demand or renewable purchase obligation and which is most economical so as to protect the interest of the consumers. However, a contractual right with PSPCL under the PPA (such as the right to terminate) can be exercised by PSPCL as per the agreed terms therein and for which the contracting parties are not required to obtain any approval from the Commission.

5.14 The Petitioners have also contended that the action of PSPCL is contrary to the mandate under Section 86(1)(e) of the Electricity Act 2003 of promotion of energy generation from renewable sources. No doubt the Electricity Act 2003 has a clear mandate of promoting energy generation from renewable sources; however, the same cannot absolve any renewable power generator to generate such electricity de-hors the contractual provisions and the RfP document. The Petitioners, being generating companies under the Electricity Act 2003 and also as signatories of the PPAs and the IAs executed on the basis of the RfP, are also duty bound to adhere to the terms thereof and in case of any deviation from or breach of the same, the Petitioners cannot be allowed to hide behind the mandate under the Electricity Act 2003 to promote energy generation from renewable sources.

6. The Petitioners rejoinder

The Petitioners filed their rejoinder on 26.10.2021 to the reply of PSPCL denying the contentions raised by PSPCL. The same is summarized as under:

6.1 PSPCL's belated explanation in respect of the inspection dated 05.04.2021 is an afterthought and its veracity is questionable. In PSPCL letters dated 28.05.2021 & 15.09.2021, there is not a single reference with respect to the existence of the inspection Report dated 05.04.2021 or with respect to PSPCL's allegations of non-signing or refusal to receive the Inspection Report by the Petitioners. More importantly, nothing precluded PSPCL from, enclosing the so-called Inspection Report dated 05.04.2021 with its letters dated 28.05.2021 or 15.09.2021.

6.2 Further, PSPCL allowed a time of 60 days (i.e., till 27.07.2021) to cure the alleged defaults and response with explanation. Within the time allowed by PSPCL itself, the Petitioners responded by way of its letters dated 05.07.2021 where it refuted PSPCL's allegations and set out data which demonstrated that the installed DC capacity was within permissible limits. PSPCL has painted a picture in its reply as if the Petitioners response was delayed by 3 months i.e., from 05.04.2021 (date of alleged inspection) to 05.07.2021. Such submissions are not true and are designed to mislead the Commission. The Petitioners responded within the time allowed by PSPCL itself. On the strength of its misleading submission, PSPCL has also contended that such delay should lead to an apprehension that in the intervening period (i.e., between 05.04.2021 to 05.07.2021), solar PV modules may have been removed to bring the installed DC capacity within permissible limits

6.3 PSPCL's Inspection Reports dated 05.04.2021 are arbitrary and bereft of any material particulars relevant to installed DC capacity:

a) The Petitioners submitted that the Inspection Reports dated 05.04.2021, are contrary to both technical and arithmetical

logic. Pertinently, in abruptly arriving at a conclusion that the installed DC capacities are 15.9084 MW and 15.8462 MW for BIPL & BIDL respectively, the so-called Inspection Reports fail to disclose the number of modules and the name plate rated capacities of such modules. The projects comprise of modules in a combination of 255 W_P and 260 W_P totalling to 60,960 modules for BIPL and 61,368 modules for BIDL i.e., a total of 1,22,328 modules. Hence, to arrive at the total installed DC capacity of each project, the name plate rated capacity of each of the 1,22,328 modules should have been physically inspected and verified by PSPCL's officers which it is now claiming to have been completed in a matter of few hours. The inspection Reports disclose that the only procedure followed by PSPCL was to merely open the MCB and check certain meters pursuant to which, PSPCL straightaway arrived at the highly arbitrary calculation of 15.9084 MW and 15.8462 MW for BIPL & BIDL respectively. Such figures are arbitrary and impossible because no combination of 255 W_P and 260 W_P capacity modules can result in a sum totalling to 15.9084 MW or 15.8462 MW.

b) Even otherwise, the said Inspection Reports dated 05.04.2021 were not brought to the notice of BIPL & BIDL as per the terms of the PPAs. Instead, PSPCL claims to have only affixed the same on the gate of the projects. Pertinently, for reasons best known to PSPCL, the so-called Inspection Reports dated 05.04.2021 were not even sent by post. It is noteworthy that such procedure is not even envisaged in extreme cases such as unauthorized use or even theft of electricity. Hence, not only the contents of the so-called Inspection Reports dated

05.04.2021 are questionable on account of being contrary to all technical and arithmetical logic but the same were not even brought to the Petitioners notice till 22.10.2021. Such procedural infirmities and impossibilities render PSPCL's entire exercise invalid.

6.4 Termination is contrary to the explicit & categorical provisions of the PPAs, IA and RFP:

a) The petitioners have submitted that it is PSPCL's case that that compliance of the RFP terms is a material obligation and a right to terminate in terms of Article 13.3.0 gets triggered if an event of default occurs in terms of Article 13.1.0(c) i.e., failure or refusal to perform material obligations. As is discernible, the unequivocal intent of the Clause 3.2 of the RFP is that 5% positive tolerance in installed DC capacity is permissible. In due compliance of the same, the assessment of the installed DC capacity was carried out at the time of COD itself by none other than PEDA i.e., signatory to the IAs. Notably, the COD certificates explicitly and categorically mention that the installed DC capacity of the projects is 15.75 MW each. It is indisputably evident that Clause 3.2 of the RFP stood complied with. As is discernible, at the time of COD, the installed DC capacity was assessed as required by Clause 3.2 of the RFP and PEDA certified the same to be 15.75 MW i.e., within the permissible tolerance limit of 5% over 15 MW (i.e., 15.75 MW).

b) That there is overwhelming evidence which demonstrates & proves that the Petitioners projects had never breached the tolerance norms pertaining to the permissible installed DC capacity. Pertinently, under the so-called Default Notices dated 28.05.2021, PSPCL itself sought data pertaining to inverter wise

number of modules/module capacity/total capacity. The data submitted by BIPL and BIDL in their letters dated 05.07.2021 was not disputed by PSPCL, nor did PSPCL attempt to undertake joint inspection despite being invited and reminded of the same. As desired by PSPCL and, within the period of 60 days allowed by PSPCL itself, the Petitioners have responded by submitting the inverter wise module capacity data of the installed DC capacity at BIPL's project totaling 15.742 MW and the installed DC capacity at BIDL's project totaling 15.745 MW.

c) As against the above, it is PSPCL's allegation that the installed DC capacity was found to be 15.9084 MW and 15.8462 MW for BIPL and BIDL respectively. In this regard, it is of utmost relevance to point out that the said figures claimed by PSPCL are impossible to be derived by deploying any number of modules having combination of 255 W_P and 260 W_P.

6.5 PSPCL has submitted that whatever has transpired between the parties is not a 'dispute' but is a material breach of obligation of the PPAs which is governed by Clause 13 of the PPAs. The Petitioners have submitted that there is no such artificial distinction under the PPAs between a 'mere dispute' and a 'breach of a material obligation' as suggested by PSPCL. In fact, in explicit and categorical terms, the PPAs provide that any dispute or difference whatsoever arising between the parties, including termination (as mentioned specifically), has to be mutually discussed and amicably resolved within 90 days. In the event that the parties are unable to resolve the dispute, the same has to be dealt with as per the provisions of the Act. The Petitioners submitted that, plainly stated, a dispute arises when a claim is asserted by one party and denied by the other on whatever grounds. In the present case, a

dispute arose between the parties because, pursuant to a unilateral inspection allegedly carried out on 05.04.2021, PSPCL by way of letters dated 28.05.2021& 15.09.2021 claimed that the Petitioners had installed excess DC capacity. The same was denied by the Petitioners under its letters dated 05.07.2021, 27.07.2021 and 22.09.2021. Such disputes can only be adjudicated by the Commission under Section 86(1)(f) of the Act, as held in a catena of Judgements.

6.6 Having persuaded the Commission to reduce its RPO targets, PSPCL is illegally seeking to wriggle out of executed contracts:

With a view to justify its actions, PSPCL has also pressed into service a contention that renewable energy cannot be promoted at the cost of consumer interest. In this regard, it is imperative to note that if PSPCL's illegal termination is indeed allowed to perpetuate, the same would result in a graver & adverse impact which prejudices consumer interest. On the one hand, PSPCL has persuaded the Commission to reduce RPO on the grounds that despite its best efforts, it is unable to fulfil RPO targets because renewable energy is not available, on the other hand, PSPCL is illegally seeking to terminate concluded PPAs under which solar power is being supplied to it. Such conflicting stances adopted by a governmental instrumentality, such as PSPCL ,are wholly arbitrary and misleading.

6.7 That on 22.09.2021, appreciating the facts and circumstances of the present case, operation of letters/memos dated 15.09.2021 issued by PSPCL terminating the PPAs was stayed by the Commission till the next date of hearing i.e., till 27.10.2021.On the very same day i.e., 22.09.2021, the directions of the Commission were brought to PSPCL's notice by way of the Petitioner letters.

However, in complete disregard of the same, the projects were disconnected on 24.09.2021. After the order dated 24.09.2021 of the Commission was issued and served on PSPCL, the connection and evacuation was restored. Such actions were undertaken by PSPCL despite the fact that the projects are must-run and, the termination was stayed by the Commission on 22.09.2021 itself. In this regard, the Petitioners also reserve their rights to raise a claim for deemed generation charges during the period which the projects were illegally disconnected.

6.8 PSPCL's actions are an abuse of its dominant position. Being a government undertaking, even under contracts, PSPCL cannot act arbitrarily. Under Section 60 of the Act, the Commission is empowered to issue such directions to PSPCL, so as to ensure that PSPCL does not abuse its dominant position. Reliance is also placed upon the judgment of the Hon'ble Supreme Court in the case of *City Industrial Development Corpn. v. Platinum Entertainment* reported as (2015)1 SCC 558, holding that:

> *"37. It is well settled that whenever the Government dealt with the public establishment in entering into a contract or issuance of licence, the Government could not act arbitrarily on its sweet will but must act in accordance with law and the action of the Government should not give the smack of arbitrariness."*

6.9 Even if it is assumed that PSPCL's allegations are true:

a) Taken on its face value, PSPCL's best case is that while petitioner's projects had excess installed DC capacity as on 05.04.2021 the same was brought within permissible limits by 05.07.2021 by removing some of the PV modules. The relevant extracts of PSPCL's submissions are reproduced herein below for ready reference –

"16.3…This deliberate delay of 3 months, that too only after issuance of default notices, gave rise to a reasonable apprehension that in the intervening period, the Petitioners removed certain PV modules so as to falsely claim a DC capacity within the permissible range and were now requesting for a joint inspection."

In effect, PSPCL has conceded and admitted the point that as on 05.07.2021, the alleged default of installing excess DC capacity (if any) was cured as the installed DC capacity was brought under the permissible limits. In view thereof, its action of termination under letter dated 15.09.2021 has been rendered illegal ab-initio and invalid in law.

b) That under its alleged Default Notices dated 28.05.2021, PSPCL itself stated that as per Clause 13.3.0 of the PPAs, a period of 60 days was allowed to cure the default. In response to the above, before the expiry of 60 days period itself, the Petitioners responded by stating that the installed DC capacity was never breached beyond permissible limits. Squarely in line with PSPCL's own suggestion and to show its bona fide, the Petitioners also invited PSPCL for a joint inspection. Hence, as admitted by PSPCL in its reply, the alleged default of installing excess DC capacity (if any in the first place) stood cured by 05.07.2021 itself. Hence, the termination notices dated 15.09.2021 have been rendered illegal ab-initio and invalid in law as per PSPCL's own admission.

c) Applying the settled principles of law, it is clear that since PSPCL has categorically admitted that as on 05.07.2021, the default due to excess installed DC capacity (if any) was cured, its unilateral action of termination under letter/memo dated 15.09.2021 has been rendered illegal ab-initio and invalid in law

as being contrary to the PPAs. In view of such categorical admission, nothing survives in PSPCL's defence. Accordingly, as held by the Hon'ble Supreme Court in a catena of judgments, the Commission is empowered to lay the instant dispute to rest by allowing the present petition and quashing the termination under letters/memos dated 15.09.2021 read with letters/memos dated 28.05.2021.

7. PSPCL filed its sur-rejoinder on 26.11.2021. While reiterating its earlier submissions, it was further stated that:

7.1 In the present case PSPCL, in strict accordance with the applicable procedure, upon finding deviation in the installed DC capacity in the Petitioners' projects on 5.4.2021, first issued default notices dated 28.5.2021 akin to notice stipulated under clause 13.3.0(ii)(b) despite having a clear option to forthwith terminate the PPAs under clause 13.3.0(ii)(c), requesting the Petitioners to cure the default within 60 days by which the Petitioners were clearly informed that in case of failure to cure the defaults pointed out, appropriate action including termination of PPAs would be initiated against them. When no action for curing the said default was taken by the Petitioners, except disputing the findings of the inspection, the PPAs were terminated vide the impugned letters;

7.2 No doubt the Electricity Act 2003 has a clear mandate of promoting energy generation from renewable sources; however, the same cannot absolve any renewable power generator to generate such electricity de-hors the contractual provisions and the RfP document.

7.3 The Inspection Report dated 5.4.2021:

a) The Petitioners, while disputing the Inspection Report dated 5.4.2021, have submitted that under the default notices and the

termination notices, there is no reference of the Inspection Report or to the fact that there was refusal on part of the officials present on the plant site to receive/ countersign the inspection report. As such, the Petitions have entirely disputed the existence of any such Inspection Report and have alleged that the same is merely an afterthought after filing of the present Petition. PSPCL submits that in default notices dated 28.5.2021 and PPA termination notices dated 15.9.2021, it has clearly been mentioned/recorded that *"the installed DC capacity of your solar plant was checked by PSPCL team on 5.4.2021 and has been found as 15.9084 MW & 15.8462 MW respectively for BIPL & BIDL projects which is more than the allowable tolerance by 1.056% and 0.6413% respectively".* Also, in response to the Termination Notice dated 15.9.2021, the Petitioners by way of letters dated 22.9.2021, while objecting to the termination of PPAs have clearly stated as under:

> *"6. PSPCL's action of assessment of the capacity and allegations as mentioned in its letter dated 28.05.2021 is unilateral and same has been done in complete disregard of the express provisions of the RFP/IA/PPA. Further, no steps were undertaken by PSPCL to resolve the matter and PSPCL's entire conduct of neither communicating to our emails/letters nor considering joint inspection of the project's installed DC is completely contrary to the regulatory framework governing the parties."*

It is clear from the above that although the Petitioners objected to the assessment of the installed DC capacity by PSPCL, there was no objection as the very existence of such data, which was naturally collected by PSPCL during the Inspections and has never been refuted by the Petitioners until the filing of the Rejoinder. Therefore, having been in the know of the inspection conducted by

the Respondent, having being informed about the same in the default notices dated 28.5.2021 and having acknowledged the data therein in their letters dated 22.9.2021, the Petitioners are now disputing the existence of any such inspection which is not only an afterthought on part of the Petitioners but is completely misleading.

b) The Petitioners have also submitted that in case of refusal to accept the Inspection Report, a copy of the same could have been sent to them under registered post. PSPCL has submitted that reliance by the Petitioners on the Supply Code is completely misplaced in as much as the present case in no manner whatsoever can be equated to a case of unauthorized use or theft of electricity which is a penal act while the present case is a case of breach of material obligations of the PPAs by the Petitioners, action for which is liable to be taken in terms of the PPAs. In any case, since it is amply clear that the contents of the Inspection Report were clearly known to the Petitioner as is evident from contents of their letters dated 22.9.2021, the issue of not sending the same via post is completely irrelevant at this stage inasmuch as it cannot be contended by the Petitioner that they were completely unaware of the contents of the Inspection Report.

c) It is the case of the Petitioners that in order to arrive at the total installed DC capacity of each project, the nameplate rated capacity of each of 122328 modules could not have been inspected by PSPCL within a matter of few hours. As such in effect, the Petitioners have given an impression that no inspection was ever carried out and the Inspection Report is in effect fabricated. PSPCL has submitted that while arriving at the installed DC capacity, the team of PSPCL has physically checked the ratings of

each module plate as per the nameplate data/readings which is a technical and arithmetical method to calculate the installed DC capacity as per RfP. It is further submitted that four teams of PSPCL, have checked the solar projects of the Petitioners which has taken a period of almost 11 hours to count the total modules. The teams remained at the project site for almost 11 hours from 9:53 a.m. to 8.58 p.m. Therefore, it is completely wrong on part of the Petitioners to contend that the modules installed were not physically inspected by the team of PSPCL.

7.4 Termination of PPA is contrary to the explicit and categorical provisions of the PPAs, IAs and the RfP:

The RfP having clearly provided a restriction on the DC capacity of the projects, cannot be read in a manner so as to allow the Petitioners to clearly breach the same on the sole basis that the capacity of the projects have been checked at the time of commissioning. Since the RfP has formed the fundamental basis for executing the IAs and the PPAs, any breach thereof is necessarily to be construed as a material breach of obligations under the PPAs by the Petitioner.

7.5 The Petitioners never breached the tolerance norms with respect to permissible installed DC capacity:

The Petitioners have also submitted that since the solar modules deployed at their projects are of 260W_p and 255W_p, the DC capacity alleged by PSPCL of 15.9084 and 15.8462 is impossible to arrive at. PSPCL has submitted that the installed DC capacity upto 6 decimal point was found to be 15.908400 MW and 15.846240 MW respectively for the projects of the Petitioners. For example, for Petitioner No.1, the installed DC capacity of 15.908400 MW may be arrived through a combination of 46455

modules of 260W_p plus 15020 modules of 255W_p. Similarly for Petitioner No.2, the installed capacity of 15.846240 MW may be arrived by a combination of 13215 modules of 260W_p plus 48668 modules of 255W_p. Further, the above are not the only combinations but rather one of many other combinations that can be made by replacing 52 modules of 255W_p with 51 modules of 260W_p module or vice-a-versa. As such, the contention of the Petitioners that the DC capacity alleged by PSPCL is arithmetically impossible to arrive at is misleading.

7.6 The Petitioners have also contended that the actions of PSPCL, which are stated to be in exercise of their contractual rights under the PPAs, denude the jurisdiction of the Commission. In this regard, Petitioners have raised an ingenious ground that an alleged violation of PPAs creates a *"dispute"* and since procurement of the subject power has been approved by the Commission, PSPCL cannot terminate the PPAs without approaching the Commission. PSPCL submitted that no doubt the Commission has approved the subject power procurement under the relevant regulations, the same cannot be of any hindrance in the exercise of clear contractual rights vested in PSPCL. Further, even if it is presumed that there has in fact been a 'dispute' between the parties, the same can only be said to arise upon PSPCL exercising its contractual right to terminate the PPAs for failure on part of the Petitioners to cure the defaults notified to them. Upon occurrence of such a dispute, the Petitioners have approached the Commissions invoking its powers under Section 86(1)(f). As such, under no circumstance the jurisdiction of the Commission can be said to have been denuded, as has been wrongly contended by the Petitioners. It has never been the

submission of PSPCL that the present controversy is not a 'dispute' as defined under the PPAs, rather the submission has been that since PSPCL has only validly exercised its contractual rights under the PPAs, there has been no occasion for PSPCL to approach the Commission for adjudication of any dispute.

7.7 The Petitioners submitted that while on one hand in Petition No.36/2021, PSPCL has persuaded the Commission to reduce its RPO targets on the ground that it is unable to fulfil the same owing to lack of available renewable energy; on the other hand, it is seeking to terminate concluded PPAs with the Petitioners under which the solar power is being supplied to it. PSPCL has submitted that the submissions of the Petitioners are based upon a complete misunderstanding of the Petition No.36/2021 and the Order dated 13.10.2021 passed by the Commission. The short-term renewable power is available at much cheaper rates than the tariff rates of the Petitioners. In the year 2020-21, the average rate for purchase of short-term renewable power was in the range of Rs. 4.35/- per unit, while the tariff payable to the Petitioners is Rs. 6.88/- per unit. The unauthorized supply of energy would definitely burden the consumers of the State of Punjab. Thus, it is completely wrong on part of the Petitioners to contend that termination of the PPAs would be prejudicial to consumer interest. Secondly, while passing the Order dated 13.10.2021 in Petition No.36/2021, the Commission has categorically held as under:

> *"However, in order to ensure maximum RPO compliance, PSPCL shall endaveour to evacuate all the RE Power made available from its various contracted sources keeping in view their must run status. The curtailment/back down of the same would be permissible only in the event(s) and in the manner*

as specified in the respective Agreements read with the provisions of the State Grid Code Regulations."

Thus, the Commission being conscious of the various contractual rights under the PPA that may be exercised by either parties in specific cases, has permitted PSPCL to take action in accordance with the respective PPAs and applicable Regulations. The actions of PSPCL thus being totally compliant with the Order dated 13.10.2021 the misplaced interpretation of the import of the said Order is liable to be ignored by the Commission.

7.8 The Petitioners have also contended that despite issuance of Order dated 22.9.2021 by the Commission staying the termination notice, PSPCL has proceeded to disconnect the projects of the Petitioner on 24.9.2021 which is also reflective of lack of regard towards the Commission. The Order of the Commission staying the termination notices was issued and served upon PSPCL on the very same date i.e. 24.9.2021. However, it is an admitted position that as soon as the said Order was received by PSPCL on 24.9.2021, the connections of the Petitioners were immediately restored which were disconnected for a brief period only on 24.9.2021. As such, there has been no violation of any direction by PSPCL. PSPCL submits that it had validly terminated the PPAs of the Petitioners, and it was well within its right to disconnect their project till the interim Order passed by the Commission was received.

7.9 The Petitioners have also submitted that as on 5.7.2021, i.e. when the Petitioners issued a response letter to PSPCL demonstrating their compliant DC capacity which has not been disputed by PSPCL, it has been an admitted position that the DC capacity of Petitioners project was within the permissible limits. Thus, the

termination notices are illegal. In this regard PSPCL submitted that, the letters dated 5.7.2021 issued by the Petitioners were in response to the default letters issued by PSPCL. As such, the Petitioners were required to demonstrate how they had cured the default pointed out by PSPCL. On the contrary, the Petitioners disputed the defaults pointed out to them and stated that currently their DC capacity was within permissible range. As such, it was probable that the Petitioners could have removed some solar modules to reflect such data. Since the Petitioners failed to cure the defaults, PSPCL rightly terminated the PPAs.

7.10 The Petitioners have also submitted that the actions of PSPCL demonstrate arbitrary exercise of power and abuse of dominant position inasmuch as it has acted arbitrarily. In rejoinder to the same, it is submitted that these are merely empty and baseless allegations with no substantiating merit.

8. The Petitioners vide their reply to PSPCL's sur-rejoinder, while reiterating its earlier submissions has further submitted as under:

8.1 That while PSPCL has attempted to justify termination by placing reliance on Recital 'd' and Clauses 13.1.0(c) & 13.3.0(ii) of the PPAs read with Articles 4.4, 6.2(i) and 8.2(v) of the IAs which relate back to compliance with the terms of the RFP including Clause 3.2 (ii) of the RFP, the Petitioners have in no manner violated the said provisions or committed a material breach. As is discernible, the unequivocal intent of the Clause 3.2(ii) of the RFP is that 5% positive tolerance in installed DC capacity vis-à-vis allotted project capacity is permissible.

a) The indisputable fact which has emerged is that even after availing an opportunity of filing sur-rejoinder, PSPCL has

miserably failed to prove that the Petitioner solar PV plants ever breached the +5% tolerance limit.

b) While PSPCL claims that each of the 1,22,328 modules were physically counted by its team over 11 hours, PSPCL has been unable to demonstrate as to how many numbers of 255 W_p and 260 W_p modules were actually found to be installed during its so-called assessment. Instead, PSPCL is attempting to argue its entire case based on examples & mere conjectures. As alleged by PSPCL, if a physical assessment was actually carried out by counting each module, there is no reason why Inspection Reports dated 05.04.2021, which have come to the fore only on 22.10.2021, only mention that the MCB was opened instead of setting out the exact inverter-wise break-up of the number of 255W_p and 260W_p modules. Therefore, the very nature of the inspection carried out by PSPCL on 05.04.2021 is questionable.

c) That while the term material breach has been loosely employed by PSPCL without explaining as to how the ingredients constituting a material breach have been satisfied, it is relevant to refer to the Hon'ble Supreme Court's judgment in the case of *Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.*, (2018)3 SCC 133. By way of the said judgment, the Hon'ble Supreme Court held that a fundamental breach is said to have occurred if the same pervades the entire contract and once committed, the contract as a whole stood abrogated.

8.2 Inspection Reports:

It is PSPCL's case that the contents of the Inspection Reports dated 05.04.2021 were known to the Petitioners as PSPCL's letters/memos dated 28.05.2021 and 15.09.2021 clearly mentioned that installed DC capacity was checked by PSPCL

team on 05.04.2021. PSPCL also alleged that in response to its letters dated 15.09.2021, by way of their letters dated 22.09.2021, the Petitioners only objected to the assessment of installed DC capacity but not the existence of data which was naturally collected. In this regard the Petitioners submitted that:

a) That the Inspection Reports dated 05.04.2021 fail to set out any such 'data' which PSPCL now claims to have been 'naturally collected'. Till date, PSPCL has never mentioned nor placed on record the so-called data. Essentially, PSPCL has vaguely and ambiguously submitted that there is some data and the same has been admitted by the petitioners. Hence, there is no need to explain/mention the same under the Inspection Reports dated 05.04.2021 or even place the same on record before the Commission. Thus, PSPCL's entire submission is that the Commission should merely take PSPCL's word for it and there is no need to place any evidence on record.

b) That PSPCL has either failed to comprehend the grievance and dispute which has been raised by the Petitioners with respect to the Inspection Reports dated 05.04.2021 or is attempting to mislead the Commission. As set out in their letters dated 22.09.2021, the petitioners merely expressed their grievance with the highly arbitrary assessment procedure followed by PSPCL on 05.04.2021. It was expressly stated that the action of assessment & allegations as mentioned in PSPCL's own letter dated 28.05.2021 was unilateral and done in disregard of the provisions under the PPAs, IAs and RFP. When the petitioners has explicitly and unambiguously disputed PSPCL's allegations, there is no reason as to how the same can be construed as an admission of any sort.

c) It is an undisputed fact that the so-called Inspection Reports dated 05.04.2021 were neither annexed to PSPCL's letters dated 28.05.2021 &15.09.2021 nor sent by registered post/courier. Accordingly, there was no opportunity or occasion for the petitioners to dispute the contents or accuracy of the same and the same cannot be presumed to be an admission. This is because, a party can neither deny nor admit an allegation which it is not privy to. Only at the stage of filing its belated reply in the present petition on 22.10.2021, the so-called Inspection Reports dated 05.04.2021 were brought to the fore by PSPCL for the first time accompanied with allegations such as the petitioners refusal to receive, etc. Since such allegations were made for the first time, the petitioners immediately filed a rejoinder dated 26.10.2021 and disputed PSPCL's allegations with respect to the so-called Inspection Reports dated 05.04.2021. In view of the above, it is reiterated that at the respective relevant stage, the petitioners have disputed each and every allegation levied by PSPCL and there is no admission on their part whatsoever. In any case, a party cannot admit to something which it is not privy to.

d) Under its sur-rejoinder, PSPCL has alleged that the petitioners reliance on the provisions of the Punjab Supply Code is misplaced as the case at hand does not pertain to unauthorized use or theft which entails penal consequences. It is the petitioners case that even in extreme cases such as theft or unauthorized use of electricity, which attract penal consequences, PSPCL is not enjoined with an unbridled right to take an action without even sending a copy of the inspection report by registered post. The limited purpose of this contention is to highlight the degree of

arbitrariness in the course of action which PSPCL has chosen to follow in the present case.

8.3 The Clause 5.4.0 of the PPAs merely sets out that PSPCL has a right to inspect. However, the manner of inspection and consequences post such inspection are not governed by Clause 5.4.0 of the PPAs. The consequences are governed by Clause 16 of the PPAs read with the definition of the term 'Dispute'. The relevant extracts of the PPAs are reproduced below for ready reference –

> "*1.0.0 DEFINITIONS*
>
> *...*
>
> *"Dispute" means any dispute or difference whatsoever arising between the parties, out of or relating to the construction, meaning, scope, operation or effect of this Agreement, or the validity, breach or termination thereof.*
>
> *...*
>
> *16.0.0 DISPUTES AND ARBITRATION*
>
> *16.1.0. All difference or disputes between the parties arising out of or in connection with this agreement shall be mutually discussed and amicably resolved within 90 days.*
>
> *16.2.0 In the event that the parties are unable to resolve any dispute or claim relating to or arising under this agreement as stated above which are falling under the provision of Electricity Act, 2003 shall be dealt as per provisions of Electricity Act, 2003."*

As is discernible from the above quoted and highlighted extracts, once a dispute arose between the parties pursuant to PSPCL's letters/memos and the petitioners response, even if the dispute pertained to termination, the appropriate course of action was to attempt amicable resolution and then to approach the Commission.

While PSPCL has evidently flouted this procedure, the petitioners have acted in compliance of the PPAs. In this regard, it is relevant to highlight that upon receiving PSPCL's letter dated 28.05.2021, calling upon the petitioners to *inter alia* furnish inverter wise number of modules/ module capacity/ total capacity etc., which would be subject to further check by PSPCL, the petitioners immediately responded by way of their letters dated 05.07.2021 along with the desired information and agreed for a joint inspection. However, PSPCL proceeded to act in a highly arbitrary manner contrary to the provisions of the PPAs. Hence, the petitioners had no choice but to approach the Commission invoking jurisdiction under the Act.

8.4 Under its sur-rejoinder, PSPCL has submitted that it has undertaken a technical and arithmetical exercise of checking the nameplate rated capacity of each of the 1,22,328 modules installed by The petitioners over a period of almost 11 hours. It is pertinent to highlight that PSPCL's claims of conducting a technical and arithmetical exercise are a complete afterthought and an attempt at justifying its arbitrary actions in hindsight. Such procedure of checking the nameplate rated capacity of each of the modules installed is not forthcoming even from its so-called Inspection Reports dated 05.04.2021. Not to mention that the veracity of the said inspection reports and the nature of PSPCL's so-called inspection itself are questionable in the first place. Even assuming for the sake of argument i.e., assuming but not admitting that PSPCL's officers have physically inspected each of the 1,22,328 modules as claimed by it now, the same is an admission and a concession which works in the petitioners own favour. Right from the beginning i.e., its letter dated 05.07.2021, the petitioners have

consistently maintained that in total, it has installed only 1,22,328 modules. The break-up of these is as follows:

Project: BIPL	
Number of 260 W_P modules	39422
Total Watts	10249720
Number of 255 W_P modules	21538
Total Watts	5492190
Combined total Watts	15741910 (**i.e., 15.742 MW**)
Total modules	60,960
Project: BIDL	
Number of 260 W_P modules	19164
Total Watts	4982640
Number of 255 W_P modules	42204
Total Watts	10762020
Combined total Watts	15744660 (**i.e., 15.745 MW**)
Total modules	61,368

Considering that PSPCL has failed to substantiate its allegations despite exhausting all opportunities, the Commission is implored to consider directing the parties to undertake a joint inspection so as to conclusively determine and prove the veracity of the petitioner's above data.

8.5 As against the above, till date PSPCL has failed to disclose as to how many modules of 255 W_p and 260 W_p capacity were found to be installed at the petitioners solar PV plants during the so-called assessment dated 05.04.2021. In view of the above, it is most humbly submitted that even if PSPCL's submissions that it has physically inspected each of the 1,22,328 modules during a 11 hour inspection is taken on face value (i.e., assuming but not admitting that without taking a single break during the 11 hour period and considering that there are 660 minutes in 11 hours, PSPCL's officers physically inspected 185 solar modules per minute). This argument of PSPCL that more than 3 modules were counted and details recorded per second is ex-facie erroneous and impossible. The same are admissions which work in the Petitioners favour. Such

submissions of PSPCL under its sur-rejoinder buttress and strengthen the petitioners case that it has only installed 1,22,328 modules in total (i.e., for the both the plants put together) whereby, the installed DC capacity of BIPL and BIDL is 15.75 MW each. The inspection reports do not, in any manner, reflect that each solar module was physically inspected and there is no mention of the number of modules. Assuming, as per PSPCL's revised response that they inspected the plants from 9:53 am to 8:58 pm (even beyond sunset) for 11 hours through four teams, means that the each team counted each module at the rate of little over 1 second, which is erroneous and impossible because the nameplate rated capacity on each module is mentioned in such a manner wherein, practically it is impossible to inspect one module per second.

8.6 Under the sur-rejoinder, PSPCL has submitted that for fulfilment of RPO, renewable energy is available for procurement at much cheaper rates. Be that as it may, PSPCL's submissions that renewable energy is available in short-term market at much cheaper rates reveals its ulterior motive behind the entire so-called assessment. PSPCL cannot be allowed to illegally wriggle out of concluded contracts on one premise or the other.

8.7 Upon being mentioned, the Commission granted stay on the operation of PSPCL's impugned letters/memos dated 28.05.2021 and 15.09.2021 on 22.09.2021 itself during the course of hearing. Such directions of the Commission were also brought to PSPCL's notice on 22.09.2021 itself. As such, PSPCL was bound to respect the directions of the Commission's orders and follow the same. Since the petitioners projects were illegally disconnected, it

reiterates the reservation of its rights to raise a claim for deemed generation charges at the appropriate stage.

9. In the hearing held on 27.04.2022, the counsel of the Petitioners argued the matter and reiterated in detail the submissions made in various affidavits. The counsel of PSPCL submitted that the counsel for the petitioner has referred to the inspection report dated 05.04.2021 in his arguments and it was thus required that the officers who conducted the inspection and made their report be consulted and requested for time to argue the matter. The Commission allowed the same.

10. PSPCL filed an additional affidavit on 19.05.2022 submitting that:

10.1 Based on the comments obtained from the team that carried out the physical inspection of the projects, PSPCL submitted that the modules at the Petitioner projects have been installed in a series of modules varying in their numbers. The solar modules installed at the project site were checked by a team of 12 members which were divided into 6 teams of 2 members each. The number of panels in each row were counted and added to arrive at the total no. of installed panels and their rated capacity.

10.2 That Mr. Rajat Kumar of the petitioners and his colleagues at the site informed the members of the teams that all panels were of same capacity in each row of panels. As such, the capacity of panels on the sides of the row was noted by the members. The arithmetic sum of total no. of panels in the rows collected by the teams was calculated. Thus the total capacity installed in the projects was calculated which was recorded in the Inspection Report.

10.3 With regard to the contention of petitioners that the inspection report prepared by PSPCL was that which is used for a consumer and not for generating companies, PSPCL submitted that the petitioners being solar power generators draw power from PSPCL during the night and thus are also consumers of PSPCL. As such, while undertaking an inspection of the projects of the Petitioner, the format used for preparation of Inspection Report is that of an Enforcement Checking Report used for consumers. After inspection of equipment had been completed, PSPCL had noted the record of the meter checks and MCB seals as also the installed capacity calculated in the manner stated above.

11. In response to PSPCL's Affidavit, the Petitioners also filed an additional affidavit dated 04.07.2022 submitting as under:

11.1 Under the sur-rejoinder dated 26.11.2021, PSPCL had submitted before the Commission that during the inspection dated 05.04.2021, four (4) teams of its officers inspected the petitioners Solar PV projects. In stark contradiction, under the additional affidavit dated 19.05.2022, PSPCL has now submitted that six (6) teams of its officers inspected the petitioners Solar PV projects on 05.04.2021. Additionally, while under the sur-rejoinder dated 26.11.2021, PSPCL submitted that nameplate rated capacity of each module was checked, PSPCL has now submitted that only the nameplate rated capacity of panels on the sides of each row was noted by it.

11.2 In view of the above inherent self-contradictions in PSPCL's own statements. The Petitioners reiterated that the very nature and veracity of the so-called inspection carried out by PSPCL on 05.04.2021 is questionable. Even in the additional affidavit PSPCL has not indicated the break-up of the capacity i.e., number of

panels of different capacity of solar panels, as recorded in the inspection. In this context, it is also reiterated that despite having exhausted multiple opportunities of filing pleadings up to the stage of sur-rejoinder and additional affidavit now, PSPCL has been unable to corroborate its allegations of there being excess installed capacity at the petitioners Solar PV projects with details of the exact number of 255 W_P and 260 W_P modules as counted by it during the so-called inspection on 05.04.2021.

11.3 That the fundamental fallacy in PSPCL's new explanation with respect to the procedure adopted by it during the so-called inspection on 05.04.2021 is that, each row does not comprise of modules having identical rating. Instead, each row comprises of both 255 W_P and 260 W_P solar PV modules. Therefore, apart from being self-contradictory (i.e., because under the sur-rejoinder dated 26.11.2021, PSPCL alleged that it counted each module and checked its nameplate rating), PSPCL's submissions are factually incorrect as well.

11.4 PSPCL has provided yet another desperate submission to justify its inspection reports, that instead of carrying out an independent inspection (i.e., where the nameplate rated capacity of each Solar PV module had to be physically inspected by its own officers), PSPCL went by the words of the petitioner representatives at the site that each row comprised of Solar PV modules having identical capacity and, therefore, only the nameplate rated capacity of the Solar PV module on the sides of the row was noted by the members of the inspection team. It is submitted that no such confirmation was provided by the petitioners representatives that each row comprised of Solar PV modules having identical capacity. All such submissions being attempted by PSPCL are

misleading and incorrect and with the sole intent to present a narration to justify the botched-up inspection process/report.

11.5 While such belated explanation offered by PSPCL is clearly an afterthought, even assuming but not admitting that PSPCL's new explanation under the affidavit dated 19.05.2022 is true, the indisputable fact which emerges out of PSPCL's own admission & concession is that during the so-called inspection on 05.04.2021, PSPCL's officers did not check the nameplate rated capacity and count each of the Solar PV modules before arriving at a conclusion that the installed DC capacity was in excess. Therefore, the entire initial premise set-up by PSPCL in its defence i.e., that its team had "physically checked the ratings of each module plate as per the nameplate data/readings which is a technical and arithmetical method to calculate the installed DC capacity as per RfP" stands wiped out.

11.6 Once it is established that either the veracity of the so-called inspection on 05.04.2021 is questionable or that it suffers from a fundamental flaw the very foundation of PSPCL's actions culminating into the issuance of the so-called default notices on 28.05.2021 and termination notices on 15.09.2021 stands wiped out. In this regard, it is a settled principle of law that, in case a foundation is removed, the superstructure fails. In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of ***Coal India Ltd. v. Ananta Saha*** reported as **(2011)5 SCC 142**. Relevant extracts of the aforesaid judgment are reproduced below for ready reference –

> "*32. It is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a fact situation, the legal maxim sublatofundamentocadit*

opus is applicable, meaning thereby, in case a foundation is removed, the superstructure falls."

11.7 In fact, PSPCL's candid admission that it had followed the 'Enforcement Checking Report' format, which is followed for inspecting consumer premises, betrays PSPCL's own case and highlights the lackadaisical and arbitrary approach followed by it in arriving at an erroneous conclusion that the petitioners had allegedly installed excess DC capacity of modules. On the basis of such ill-founded & arbitrary conclusions, PSPCL went ahead and terminated the PPAs in an attempt to wriggle out of its long-term i.e., 25-year contractual obligations of buying electricity from the petitioners. In this regard, it is of utmost relevance to highlight the Hon'ble Supreme Court's recent judgment in the case of *Southern Power Distribution Power Co. Ltd. of A.P. (APSPDCL) v. Hinduja National Power Corpn. Ltd.,* reported as 2022 SCC On Line SC 133 where, the Hon'ble Supreme Court came down heavily upon the Distribution Licensees of the State of Andhra Pradesh ("AP DISCOMs") for arbitrarily and illegally attempting to wriggle out of their contractual obligations. In fact, the Hon'ble Supreme Court imposed a cost of Rs. 5 Lakhs on the AP DISCOMs for acting contrary to public interest despite being State instrumentalities –

"100. Undisputedly, the appellants - DISCOMS are instrumentalities of the State and as such, a State within the meaning of Article 12 of the Constitution of India. Every action of a State is required to be guided by the touch-stone of non-arbitrariness, reasonableness and rationality. Every action of a State is equally required to be guided by public interest. Every holder of a public office is a trustee, whose highest duty

is to the people of the country. The Public Authority is therefore required to exercise the powers only for the public good. "

In view of the arbitrary approach adopted by PSPCL, which is also a State instrumentality, the above judgment of the Hon'ble Supreme Court is squarely applicable to the facts & circumstances of the present case as well. Therefore, even PSPCL's conduct in the present case deserves to be deprecated and its letters/memos dated 28.05.2021 and 15.09.2021 deserve to be set-aside.

12. In the hearing held on 20.07.2022, the Ld. Counsel for the parties addressed the arguments at length, wherein Ld. Counsel for PSPCL also reiterated the stand taken in the latest affidavit of PSPCL. After hearing the parties, the Commission reserved the Order.

13. Observations & Decision of the Commission

The Commission has examined the submissions and arguments made by the parties. The Petitioners are seeking to set aside the default notices and the termination notices issued by PSPCL vide letters dated 28.05.2021 and 15.09.2021 respectively, purportedly due to the DC capacity installed in excess of the contractually permissible limit. The Commission observes that, on the issue of permissible installed capacity of the projects, both the parties are in agreement regarding the applicability of the RFP clause stating that +5% tolerance is allowed on the allocated capacity of the projects and that accordingly each of the Petitioner's projects with 15 MW allocated capacity is permitted to install up to 15.75 MW DC capacity. The issue requiring adjudication in the instant petition is the Petitioners plea that the inspection/assessment of the installed

DC capacity of its projects have been carried out in an arbitrary/ unilateral way and that PSPCL has proceeded to issue the impugned default/termination notices contrary to the terms of the PPA. The observations & decision of the Commission on the same is as under:

13.1 Issues raised w.r.t. the Inspection Reports dated 05.04.2021

a) The Petitioners are pleading that the said inspection reports are questionable as they fail to set out any data which PSPCL claims to have collected. PSPCL's reports, arbitrarily state that the installed DC capacities are 15.9084 MW for BIPL and 15.8462 MW for BIDL without disclosing the calculations i.e breakup of capacity wise modules found to be installed during the inspection. In fact the Petitioner projects comprise of modules in a combination of 255 W_P and 260 W_P, totaling 60,960 modules for BIPL and 61,368 modules for BIDL i.e., a total of 1,22,328 modules; no combination of these modules can result in a sum totaling to 15.9084 MW or 15.8462 MW. The reports only disclose that the procedure followed by PSPCL was to merely open the MCB and check certain meters. That the reports have been prepared on the format used for a consumer and not for generating companies.

Each row of the panels comprises of both 255 W_P and 260 W_P capacity modules. However, the inspection reports do not reflect that each solar module was physically inspected and till date PSPCL has failed to disclose as to how many modules of 255 W_p and 260 W_p capacity were found to be installed at the petitioners solar PV plants during the so-called assessment dated 05.04.2021.

PSPCL, initially in its reply to the petition, had claimed that the projects were inspected by a team to check the installed DC

capacity, based on the number of solar panel/modules installed at the projects. On being pointed out by the Petitioner that, since the rated capacity on each module is distinctive and seperate, it was practically impossible to inspect each of the 122328 modules by a team within a time of about 11 hours. It would imply that more than 3 modules were inspected and details recorded in each second. PSPCL, vide sur-rejoinder dated 26.11.2021, submitted that four teams of PSPCL have physically checked the ratings of each module as per the nameplate, which is a technical and arithmetical method to calculate the installed DC capacity as per the RfP, taking a time of almost 11 hours.

On being challenged by the Petitioners' argument, that even this would mean inspection of each module at the rate of little over 1 second, the Ld. Counsel of PSPCL sought time to consult the officers who conducted the inspection. Thereafter, vide additional affidavit dated 19.05.2022, PSPCL submitted that the solar modules installed at the project site were checked by a team of 12 members which were divided into 6 teams of 2 members each, and only the capacity of the panels on the end of each row was noted to calculate the total installed capacity of the entire row.

The indisputable fact which emerges out of PSPCL's own admission is that during the so-called inspection, PSPCL's officers did not check the nameplate rated capacity of each of the Solar PV modules before arriving at a conclusion that the installed DC capacity was in excess.

The Commission observes that the Petitioners plea that the inspection reports have been prepared by PSPCL on the Performa used for its consumers and not for generating

companies is not a valid ground for challenging the inspection reports, as no format has been specified in the PPAs for inspection of the Generating Stations. Also, PSPCL, by giving examples, was able to demonstrate that the impugned capacity can be worked out with different combinations of 255 W_P and 260 W_P capacity modules. However, it could not disclose the actual numbers of modules vis-a-vis rated capacities found during the impugned inspection. The Commission notes that the installed DC capacity of a solar PV power station, expressed as MWp, is the sum of the nominal DC rating (Wp) of the individual solar PV modules installed in the plant. It is imperative that rating of each module is ascertained to arrive at an accurate assessment of its installed DC capacity. However, in the instant case, as revealed by PSPCL's final submission, assessment has been carried out by noting the rating of one module in the corner of each row and projecting the total of entire row by assuming all the modules in the row to be of same rating. The Commission, thus, is of the view that the impugned inspection reports do not represent an accurate assessment of the installed DC capacity of the Petitioner projects.

The Commission also observes that the impugned inspection reports as per PSPCL's own admissions in its later affidavit, has been faulty. The last affidavit has established the earlier affidavits to be incorrect, having erred on the facts of the number of teams deployed and has changed PSPCL's stated position on the manner of conducting the inspection and has

generally proved the earlier assertions to be misleading and thereby raising questions as to the veracity of PSPCL's responses.

b) The Petitioners have further pleaded that the said inspection reports were not brought to the notice as per terms of the PPAs. It was only at the stage of filing its reply in the present petition on 22.10.2021 that the so-called Inspection Reports dated 05.04.2021 were brought to the fore by PSPCL for the first time accompanied with allegations such as the Petitioners refusal to receive the reports, etc. PSPCL's contention that the inspection was carried out in the presence of the Asst. Manager of the Petitioners projects, who refused to receive a copy of the reports and as such it had no option but to affix the same at the gate of the projects, is an afterthought. It was submitted that there is no reference with respect to the existence of these reports or with respect to the Petitioners refusal to receive them in PSPCL letters. More importantly, nothing precluded PSPCL from sending the so-called Inspection Reports either through registered post and/or with its letters dated 28.05.2021 or 15.09.2021, as stated in the PPAs.

The Commission observes that, as contended by PSPCL, a reference of inspections dated 05.04.2021 has indeed been made in its letters/notices dated 28.05.2021 and 15.09.2021. However, there is no reference to indicate the Petitioners refusal to receive the reports or appending them with the said letters/notices.

The Commission also refers to the relevant provision of the PPAs, which specifies as under:

"25.0.0 NOTICES

25.1.0 Any written notice provided hereunder shall be delivered personally or sent by registered post acknowledgment due or by Courier for receipted delivery with postage or courier charges prepaid to the other party…."

As is evident, in the event of refusal by the Petitioners representative to receive the reports personally in terms of the PPAs, PSPCL was mandated to send the reports through registered post or Courier. However, there is nothing on the record to show that the Inspection Reports were delivered to the Petitioners as per the process of delivery of 'Notices' specified in the PPA, either separately or along with the default notices, for presenting their comments/objections, if any, to the findings of the Inspections.

Keeping the sequence of events and the facts on record in mind, the Commission is of the considered view that PSPCL's impugned Inspection Reports do not stand test of scrutiny and are arbitrary, improper and without due process and are thus liable to be set aside. Accordingly, the default notices and consequent termination notices, issued on the basis of the above stated Inspection Reports, are also liable to be quashed.

13.2 Whether the impugned termination notices issued by PSPCL are also contrary to the terms of the PPA:

The Petitioners are pleading that PSPCL had issued letters/notices dated 28.05.2021 alleging default w.r.t installed capacity of the Petitioner projects, asking them to cure the default within 60 days and had itself sought data pertaining to inverter wise number of modules/module capacity/total capacity. As desired by PSPCL and within the period of 60 days allowed by PSPCL, the Petitioners vide letters dated 05.07.2021 responded by submitting the inverter wise

module capacity data illustrating the installed DC capacity at BIPL's project as 15.742 MW and at BIDL's project as 15.745 MW. The data submitted by the petitioners was not disputed by PSPCL nor did it undertake the joint inspection, despite being invited to conduct it and being reminded of the same. Without considering the responses of the Petitioners, PSPCL terminated the PPAs vide letters dated 15.09.2021 alleging that the Petitioners have failed to cure the default. It was further submitted that the procedure adopted by PSPCL to terminate the PPAs is contrary to Clause 13.3.0 of the PPAs; wherein the Petitioners are allowed to cure the default within 60 days from the date of notice. In the present case, even assuming for the sake of argument but not admitting, it is PSPCL's own assumption that by 05.07.2021 i.e., within 60 days from its notice dated 28.05.2021; solar PV modules may have been removed by the Petitioners to bring the installed DC capacity within reasonable limits. It is the settled principle of law that admission by a party in its own pleadings is the best evidence. Hence, the issue (if any at all) was resolved and termination could not have been proceeded with, being contrary to the PPAs. Also, as per Article 16, under the heading 'Disputes and Arbitration', the appropriate course of action was to attempt amicable resolution and then to approach the Commission.

Whereas, PSPCL has contended that the Article 16 of the PPAs refers to the general disputes, however the issues of 'Events of Default and Termination' are specifically covered under Article 13. Thus, upon finding deviation in the installed DC capacity in the Petitioners' projects, it first issued default notices dated 28.5.2021 akin to notice stipulated under clause 13.3.0, requesting the petitioners to cure the default within 60 days. By way of the said default notices, the Petitioners were clearly informed that in case

of failure to cure the defaults pointed out by PSPCL, appropriate action including termination of PPAs would be initiated against them. Rather than curing the default, the Petitioners vide their letters dated 5.7.2021, sought to dispute the inspection reports of PSPCL with data related to the installed PV modules and their rated capacity, which was clearly available with the Petitioners even on the day of the inspection, giving rise to a reasonable apprehension that some of the PV panels might have been removed by the Petitioners during the intervening period between 5.4.2021 and 5.7.2021 so as to falsely demonstrate the current installed DC capacity to be within the permissible range. The petitioners were required to demonstrate how they had cured the default pointed out by PSPCL. On the contrary, the Petitioners disputed the defaults pointed out to them by stating that currently their DC capacity was within permissible range. PSPCL also submitted that, since the so-called data furnished by the Petitioners had been submitted, not as an attempt to cure the default but as a belated objection to the inspection reports of PSPCL, such data was therefore completely inconsequential and irrelevant. Thus, PSPCL terminated the PPAs of the Petitioners in accordance with the terms of the RfP/IAs/PPAs for installing DC Capacity in excess of the tolerance permitted on the project capacity.

The Commission refers to the relevant provisions of the PPA, which specifies as under:

"13.0.0 Events of Default and Termination

13.3.0 Except for failure to make any payment due within ninety (90) calendar days after receipt of Monthly Invoice (in which Clause 3.9.0 shall apply), if an Event of Default by either party extends for a period of sixty (60) calendar days after receipt of any written notice of such

Event of Default from the non-defaulting party, then the non defaulting party may, at its option, terminate this agreement by delivering written notice of such termination to the party in default.

……..

(ii) If the default pertains to the Generating Company the PSPCL may at its option:

a) Require the Generating Company to cure the default and resume supply to the PSPCL within sixty (60) days of receipt of notice from the PSPCL.

b) If the Generating Company is unable to cure the default and resume supply within the stipulated time frame……..

c) Terminate the Agreement"

The Commission observes that the procedure to deal with the "Event of Default" by either party is contained in Article 13 of the PPA. However, as is evident, it allows termination of the PPA only in case the Generating Company is unable to cure the default within sixty (60) days of receipt of notice from the PSPCL. Accordingly, once the Petitioners furnished the details of project's inverter-wise DC installed capacity to PSPCL within the stated period of sixty (60) days illustrating the same to be within the permissible contractual limit and also inviting PSPCL for inspection of the same, it was not legally permissible for PSPCL to proceed with termination of the PPAs without ascertaining the continuation of the alleged default by the Petitioners.

13.3 **Arbitrariness on part of PSPCL:**

The Petitioners have submitted that**,** the actions of PSPCL demonstrate arbitrary exercise of power and abuse of dominant position. Since the procurement of the subject power has been

approved by the Commission, PSPCL cannot terminate the PPAs without approaching the Commission. Also the action of PSPCL is contrary to the mandate under Section 86(1)(e) of the Electricity Act 2003 for promotion of energy generation from renewable sources. PSPCL went ahead and terminated the PPAs in an attempt to wriggle out of its long-term i.e., 25-year contractual obligations of buying electricity from the Petitioners on the basis of ill-founded and arbitrary conclusions. In this regard, it is of utmost relevance to highlight that being a government undertaking, even under contracts, it cannot act arbitrarily as held in the following judgments of the Hon'ble Supreme Court:

a) In the matter of City Industrial Development Corpn. v. Platinum Entertainment reported as (2015)1 SCC 558, wherein it has been held as under:

> "*37. It is well settled that whenever the Government dealt with the public establishment in entering into a contract or issuance of licence, the Government could not act arbitrarily on its sweet will but must act in accordance with law and the action of the Government should not give the smack of arbitrariness."*

b) In the matter of Southern Power Distribution Power Co. Ltd. of A.P. (APSPDCL) v. Hinduja National Power Corpn. Ltd., reported as 2022 SCC On Line SC 133, wherein, it has been held as under:

> *"100. Undisputedly, the appellants - DISCOMS are instrumentalities of the State and as such, a State within the meaning of Article 12 of the Constitution of India. Every action of a State is required to be guided by the touch-stone of non-arbitrariness, reasonableness and rationality. Every action of a State is equally required to be guided by public interest. Every holder of a public office is a trustee, whose highest duty is to the people of the country. The Public Authority is therefore required to exercise the powers only for the public good. "*

However, PSPCL has contended that the Commission, on the

basis of demand forecast and availability projections made by PSPCL in accordance with provisions of the Regulations, approves only that power purchase or renewable purchase obligation which is necessary to meet the demand and which is most economical so as to protect the interest of the consumers. Other contractual obligations/rights under the PPAs are regulated as per the mutually agreed terms therein. PSPCL also submitted that while the Electricity Act 2003 has a clear mandate of promoting energy generation from renewable sources; however, the Petitioners, being signatories to the PPAs are also duty bound to adhere to the terms thereof.

The Commission agrees with the contention of PSPCL that the approval granted for Power Procurement Arrangement is for the quantum and price, other obligations and rights stated in the Agreements are regulated as per the provisions mutually agreed to by the parties.

However, after going through the details of the case, its record, the various affidavits filed by both the parties and submissions, both written and oral, by the Ld. Counsel for both parties, the Commission is constrained to observe that PSPCL's conduct in this case indeed indicates arbitrariness. Such conduct is not acceptable from a public utility which has the status of the instrumentality of a State as enshrined in Article 12 of the Constitution of India. The Hon'ble Supreme Court of India has also mandated that the conduct of public establishments must be in accordance with law and should not smack of arbitrariness.

The entire case of the Respondent PSPCL in issuing the default notices and then following up by issuing termination

notices was based on a vague inspection report, whose details too kept on changing with each affidavit filed by PSPCL before the Commission. Taking such an extreme position as termination of PPAs of renewable energy projects involving substantial investments, based on a vague report without undertaking due diligence or verification, was certainly avoidable. PSPCL should have been more diligent and, as requested by the Petitioners, another joint inspection could have been carried out. Treating the Petitioners response as failure to cure the default without re-ascertaining the same, particularly so when the assessed capacity based on its own inspection/ assumptions was found to be only fractionally higher than the authorized one as per RFP was not justified. Treating its own vague inspection report as just cause for termination of PPAs is not sustainable and hence the Commission has decided to revoke and set aside both the default and termination notices.

13.4 The Petitioners have also submitted that on 22.09.2021, operation of PSPCL's letters/memos dated 15.09.2021 terminating the PPAs was stayed by the Commission till the next hearing i.e., till 27.10.2021. On the very same day i.e., 22.09.2021, the directions of the Commission were brought to PSPCL's notice by way of the Petitioners letters. However, in disregard of the same, its projects were disconnected by PSPCL on 24.09.2021. It was only after the Order dated 24.09.2021 of the Commission was issued and served on PSPCL, was the connection and evacuation restored. Such actions were undertaken by PSPCL despite the fact that the projects are must-run and, the termination was stayed by the Commission on 22.09.2021 itself.

However, PSPCL has submitted that the Order of the Commission staying the termination notices was issued and served upon PSPCL on 24.9.2021. It is an admitted position that as soon as the said Order was received by PSPCL on 24.9.2021, the connections of the Petitioners were immediately restored which were disconnected for a brief period only on 24.9.2021.

The Commission has taken a serious view of PSPCL's action in proceeding with disconnecting the Petitioner projects in spite of the full knowledge about the grant of stay in the matter as the Commission's Order was pronounced during the hearing held on 22.09.2021 in the court itself which was communicated to PSPCL and was in its knowledge.

The Commission notes that PSPCLs whole process in the instant case has been arbitrary and unilateral. The same has also been reflected in its changing stands in various affidavits filed by it, which the Commission has noted with concern. Without even a token effort to verify the authenticity of its officials inspection reports which, prima facie, lacked any kind of detail, PSPCL took the step of issuing a default notice. Even when the default notice was replied to by the Petitioners with details of the capacity of installed modules, with an offer for a joint inspection to ascertain the true facts, respondent PSPCL ignored the Petitioners reply and proceeded with the termination notices. In fact, in a questionable interpretation, PSPCL treated the Petitioners reply as their refusal to remove an unproven default and proceeded with the extreme step of issuing the termination notices. In light of these observations and viewing with concern the sequence of events as detailed in the Order above, the Commission, after due

consideration, decides to quash both the default and termination notices issued by PSPCL.

The prayers of the petitioners are thus allowed and the petition and IA are disposed of in terms of the above Order.

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

Chandigarh
Dated: 08.09.2022