

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

Petition No. 21 of 2023

Date of Order: 25.09.2023

Petition under Section 86 of the Electricity Act, 2003 read with Article 16 of the Power Purchase Agreement dated 30.12.2013 seeking directions to quash the Demand Notice dated 30.01.2023 issued by Punjab State Power Corporation Limited

In the Matter of: PN Clean Energy Ltd., Regd. office: 513/A, 5th Floor, Kohinoor city Mall, Kirol Marg, Off. L.B.S. Marg, Kurla (W), Mumbai-400070.

....Petitioner

Versus

1. Punjab State Power Corporation Limited, having its head office at the Mall Patiala-147001, Punjab
2. Punjab State Load Dispatch Centre, Ablowal Patiala, 147004.

.....Respondents

AND

Petition No. 22 of 2023

Petition under Section 86 of the Electricity Act, 2003 read with Article 16 of the Power Purchase Agreement dated 30.12.2013 seeking directions to quash the Demand Notice dated 30.01.2023 issued by Punjab State Power Corporation Limited.

In the Matter of : PN Renewable Energy Ltd., Regd. office at 513/A, 5th Floor, Kohinoor city Mall, Kirol Marg, Off. L.B.S. Marg, Kurla (W), Mumbai-400070

..Petitioner

Versus

1. Punjab State Power Corporation Limited, having its head office at the Mall Patiala-147001, Punjab
2. Punjab State Load Dispatch Centre, Ablowal Patiala, 147004.

.....Respondents

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

Petitioners: Sh. Tajinder Joshi, Advocate

PSPCL: Ms. Suparna Srivastva, Advocate

ORDER

1. The Petitioners have filed the present petitions disputing the demand notices dated 30.01.2023 issued by PSPCL with the plea that the same are based on an erroneous assumption that the Petitioners have supplied excess power from their Projects on account of alleged additional installed DC capacity. The petitions were admitted vide order dated 17.07.2023. The facts of both the petitions being identical, they are being disposed of through this common order.

2. Submissions of the Petitioners:

The submissions made by the Petitioners are summarized as under:

2.1 The Petitioners PN Clean Energy Ltd (PNCEL) and PN Renewable Energy Ltd (PNREL) have established Solar Photovoltaic (PV) power projects of 20 MW and 10 MW respectively for sale/supply of entire power to PSPCL under the PPAs dated 30.12.2013. The Petitioners have diligently supplied power from their Projects to PSPCL strictly in terms of the PPAs. However, based on an erroneous assumption that the Petitioners have supplied excess power from their Projects on account of alleged additional installed DC capacity, PSPCL illegally and arbitrarily issued the Demand Notices dated 30.01.2023 claiming to recover:

- (i) Rs. 21,05,789/- including interest for the alleged unauthorised 15575 kWh of energy supplied during the period from 13.03.2015 to 30.11.2022 by the 20 MW project of PNCEL;
- (ii) Rs.23,24,082/- including interest for the alleged unauthorised 268680 kWh of energy supplied during the period from 27.02.2015 to 13.11.2022 by the 10 MW project of PNREL.

2.2 That in terms of Articles 3.1 and 3.2 of the PPA the designated representative of the parties record joint readings of the meters (**JMR**) at the Interconnection Point on a monthly basis to prepare the monthly energy account depicting the energy delivered by the Petitioners' Projects to PSPCL. Accordingly, PSPCL regularly monitors and is duly aware of the injection of power from the Projects. In terms of the JMRs signed by the officials of PSPCL, it is clear that the Petitioners never injected power more than the Contracted Capacity from the Projects in any of the given months and the Available Capacity of the Projects had never exceeded in any given months. Moreover, during the period of alleged excess generation, PSPCL never raised any objection with regard to, generation and injection of power from the Projects being more than the Contracted Capacity. There is no enhancement in the capacity of the Projects beyond the capacity certified by PSPCL in the Synchronization Certificate dated 13.03.2015 and 27.02.2015 respectively and by PEDDA in the Commissioning Certificates dated 17.03.2015. Considering the month wise MW peak load of the projects for FY 2020-21, 2021-22 and 2022-23, in case of 20 MW project the maximum injection into the grid was 17.3 MW, 17.50 MW and 16.61 MW respectively and with regard to 10 MW project the maximum

injection into the grid was 8.73 MW, 9.00 MW and 8.84 MW. If the Petitioners would have had installed additional DC capacity and generation power then projects would have also generated/ injection power from such alleged DC capacity which would have been recorded in the JMRs prepared by PSPCL. PSPCL has not provided any evidence or supporting document to substantiate its claim of over generation/injection.

2.3 It is an admitted fact that:

- a) The Petitioners supplied power with the consent of PSPCL and only upto the Contracted Capacity from the Projects.
- b) The accounting of energy, i.e., the quantum of solar power generated by the petitioners is not disputed. It is also not in dispute that the beneficiary of such power is PSPCL.
- c) PSPCL after having consumed the power supplied by the petitioners has derived benefit from the same and recovered tariff in respect of such power from the end-consumers.
- d) PSPCL has made payment for such power supplied by the petitioners in terms of the tariff agreed in the PPA.
- e) PSPCL having enjoyed the benefit of reporting RPO compliance *inter-alia* based on the alleged excess energy received from the Projects, cannot now, at a much later stage, seek refund or deny payment for such energy.

2.4 The petitioners referring to judgement dated 24.01.2013 passed in appeal no. 170 of 2012 titled as "**Bangalore Electricity Supply Company Limited v. Reliance Infrastructure Ltd. & Ors**" and section 70 of the Indian Contract Act, 1872 has submitted that power was supplied as per its contractual obligation, PSPCL has consumed such power and paid the tariff

in terms of the PPA, hence PSPCL is not entitled to seek refund for the tariff already paid and the demand notices amount to unjust enrichment on the part of PSPCL.

2.5 The Petitioners, referring to the Article 3 and 16 of the PPAs have submitted that the demand notices dated 30.01.2023 are barred by limitation as during the period of alleged excess generation, PSPCL never raised any objection with regard to the generation/injection of power from the Projects being more than the Contracted Capacity.

2.6 Moreover, as per the Electricity Act and the PPA, any retrospective recovery of such tariff already paid will lead to alteration of tariff stipulated in the PPAs and adopted by the Commission in Order dated 14.11.2013. Further, the tariff agreed in the PPAs was discovered through a transparent competitive bidding process carried out by PEDA under Section 63 of the Electricity Act and adopted by the Commission and hence the same is sacrosanct and cannot be altered and shall remain constant for the entire duration of the PPA. The Petitioners have relied in this regard on the judgement passed by the Hon'ble Supreme Court in case of *Energy Watchdog v. CERC*: (2017) 14 SCC, the judgement passed by Hon'ble APTEL in Appeal No. 183 of 2019 titled *Renasant Power Ventures Pvt. Ltd. v. UPERC, Gujarat Urja Vikas Nigam Limited vs. Gujarat Electricity Regulatory Commission*, 2014 SCC On Line APTEL 168, Judgment dated 23.04.2015 passed in Appeal No. 297 of 2013 titled *GMR Gujarat Solar Power Private Limited vs. Gujarat Electricity Regulatory Commission & Anr*: and

Gujarat Urja Vikas Nigam Limited v. EMCO Limited, (2016) 11 SCC 182.

- 2.7 PSPCL's reliance on Clause 3.2 of the RFP to contend that only +5% tolerance is allowed on the capacity of the Project to be installed is misplaced. PSPCL cannot rely upon the provision of the RFP (which does not find mention on the PPA) to curtail the rights and entitlement of the petitioners under the PPAs, as held in the judgment passed by Hon'ble Tribunal dated 19.04.2017 in Appeal No. 161 of 2015 titled *Sasan Power Limited vs. CERC*, 2017 ELR (APTEL) 0108 wherein it was held that RFP cannot override the rights provided under the PPA.
- 2.8 That even assuming without admitting that, if PSPCL's allegation with respect to enhancement of Project capacity is to be accepted then the same would not amount to violation of the RFP or the PPA in terms of MNRE clarification dated 05.11.2019 and Hon'ble APTEL Judgment dated 16.11.2021, since it is the prerogative of the petitioners to finalize the optimal DC capacity for its Project in a manner that can deliver the Contracted Capacity from each Project.
- 2.9 That Demand Notices violate the vested rights and legitimate expectation of the petitioners. The Petitioners have a right to receive tariff of Rs. 8.70 and Rs. 8.65 respectively from the projects for every unit of power supplied under the PPAs for the entire period of 25 years. This is a vested right in favour of the petitioners, which cannot be taken away with retrospective effect. The Petitioners have relied in this regard on the judgment passed by the Hon'ble Supreme Court in case of *J.S. Yadav vs. State of U.P.*, (2011) 6SCC 570 and Judgment in case of *Delhi*

Electricity Regulatory Commission v. BSES Yamuna Power Ltd, (2007) 3 SCC 33.

- 2.10 That there is an express mandate on the Commission to promote generation from renewable energy and to gradually progress to satisfy energy demands by way of renewable energy sources under section 61(h), 86(1)(e) of the Electricity Act and clause 5.12.1, 5.12.2 and 5.12.3 of the National Electricity Policy, 2005. This position has also been affirmed by the Hon'ble Supreme Court in the case of *Gujarat Urja Vikas Nigam Ltd v. Solar Semi conductor Power Co. (India) Pvt. Ltd.* reported as (2017) 16 SCC 498. PSPCL, contrary to the express mandate of the Electricity Act and NEP, has issued the Demand Notices seeking post-facto refund of the tariff payment already made. If PSPCL is allowed to recover the amount claimed under the Demand Notices, it will severely affect the viability of the Project, since the petitioners have already incurred such cost towards generating and supplying power to PSPCL.
- 2.11 The Petitioners, referring to Clause 3.2 of the RFP and article 13.1.0 of the PPAs have submitted that the installed capacity of the project is not beyond the permissible tolerance i.e. +5%. The inspection/ assessment of the installed DC capacity of the projects have been carried out in an arbitrary/unilateral way. PSPCL's reports arbitrarily stated that the installed DC capacity is 21.01497 MW on 01.06.2021 and 21.00427 on 05.11.2022 for its 20 MW project and 10.25 MW for 10 MW project without disclosing the calculations i.e., breakup of capacity wise Solar PV modules found to be installed during the inspection. In fact, the Petitioner's 20 MW project comprise of modules in a

combination of 300 Wp, 315 Wp and 320 Wp, totaling 69963 Nos. of modules and 10 MW project comprise of 300 Wp, 315 Wp and 320 Wp, totaling 34930 Nos. of modules; however, the inspection reports do not reflect that each solar module was physically inspected during the first inspections. There is no enhancement in the installed capacity or power output of the Project beyond the permissible limit.

2.12 The Petitioners have prayed to :

- (a) *Quash the Demand Notices dated 30.01.2023 issued by PSPCL.*
- (b) *Direct PSPCL to refund the claimed amount already deducted along with interest at LPS rate computed on compounding basis to the petitioners in accordance with the PPA*
- (c) *Pass any such further order as the Commission may deem necessary in the interest of justice.*

3. Submissions of PSPCL:

The reply/submissions by PSPCL are summarized as under:

- 3.1 The Punjab Energy Development Agency (**PEDA**) issued a Request for Proposal (**RfP**) on 11.3.2013 inviting bids for development of 300 MW grid connected solar PV power projects in the State under the NRSE Policy Phase-I. The RfP recognized that there could be a situation of deviation as between the allotted capacity and the DC capacity of the generating station and as such, permitted a positive deviation to the extent of 5% of the allotted capacity from its DC capacity. Pursuant to the RfP, PEDA received proposals including from the Petitioners for development of solar PV power projects in the State. After evaluating the said proposals, PEDA accepted the

bid of the Petitioners for development of a solar PV power project of 20 MW at Village Lakhmirwala and 10 MW at Village Barre, in District Mansa, Punjab. Accordingly, the Petitioners entered into Implementation Agreements (**IAs**) with the PEDDA on 26.09.2013 and executed PPAs with PSPCL on 30.12.2013. The solar PV power projects of the Petitioners were to be established and operated as per the prescribed terms under the RfP/IAs which are a part of the PPAs. Therefore, Article 3.1.0 and 5.4.0 of the PPA are relevant for adjudication of the matter as the inspection/verification was indicative of the capacity installed at the Petitioners' projects and the violations, if any, of the agreed terms of the PPAs.

3.2 It is the Petitioners' misplaced and erroneous contention that the JMR alone establishes the compliance of PPA terms as regards the capacity installed. It is a matter of common knowledge that in a solar PV power plant, the installed DC capacity does not yield the same AC power output. Thus, even with the installed DC capacity beyond 21/10.5 MW, the projects can have the AC output still under 20/10 MW. The right to inspect the project has therefore been agreed under the PPAs to ensure that the projects are being operated in compliance of the provisions of the PPAs, including compliance in terms of the maximum permitted DC capacity which can only be seen through physical inspection of the panels and not through any meter readings.

3.3 That Article 5.2.0 of the PPAs required the Petitioners to operate & maintain the projects as per the legal/regulatory prescriptions and prudent utility practices so that there is no adverse effect on the grid. The requirement to operate the project as per the

permitted DC capacity was based on cogent considerations. The issue of installed DC capacity is also relevant in the context that under the PPAs, PSPCL is under an absolute obligation to accept all energy made available to it. However, the said obligation of PSPCL comes with the attached conditionality that only the permissible installed DC capacity would form the basis for injection by the generator. Therefore, the generating stations cannot be allowed to make available the energy which is beyond the maximum permissible installed capacity of the generating stations i.e. at most +5% of the allotted capacity, meaning thereby that the generating station must necessarily be installed as per the permissible DC capacity. Also, since the subject power projects have been established under a competitive bidding process of a given aggregate capacity by PEDDA, the capabilities of generation and delivery by a generating station established under it, are necessarily to be restricted in accordance with the allocated capacities to the selected bidders, aggregating to the total capacity under the RfP. Moreover, as per Section 32(2) of the Electricity Act, 2003, the State Load Despatch Centre is responsible for scheduling, despatch and accounting of electricity. Therefore, for the purpose of DC capacity of a generating station, the provisions of the contract are paramount and if any energy is supplied by the Petitioner in violation of the permissible installed DC capacity, PSPCL is not liable to make any additional payment for the same.

- 3.4 The Petitioners' plants were inspected on 1.6.2021 and 02.06.2021 to check the installed DC capacity and it was found that the installed DC capacity in respect of 20 MW and 10 MW

projects was 21.01497 MW and 10.52555 MW respectively i.e. in excess of the permissible tolerance in violation of clause 3.2 of the RfP and consequently a material breach of the PPA. Accordingly, on 23.6.2021, PSPCL issued the Default Notices under Article 13.3.0 of the PPA calling upon the Petitioners to cure the default by removing the excess installed DC capacity, failing which appropriate action was to be taken against the Petitioner including termination of the PPA. However, the Petitioners vide letters dated 22.08.2021 disputed the PSPCL's notice and submitted that its installed capacity is within the permissible limits. In the second inspection carried on 05.11.2022 and 14.11.2022 respectively, the installed DC capacity of the 20 MW project was found to be 21.00427 MW, which was again in excess of the permissible tolerance. However, the installed DC capacity of the 10 MW project was found to be 10.484965 MW, i.e within the permissible tolerance limit. Accordingly, on 9.11.2022, PSPCL issued another Notice to PNCEL, informing that it is in continued violation of the contractual obligations under the RfP, IA and the PPA. However, the Petitioner vide its letter dated 16.11.2022 again reiterated that its installed capacity has always remained within the permissible limit and submitted that there is some arithmetic/accounting error in calculating the total DC capacity. Since the response of the Petitioners were not satisfactory, PSPCL was constrained to issue the impugned demand notices dated 30.01.2023. Thereafter on, 22.03.2023 a meeting was also held between the Petitioners and PSPCL wherein PSPCL replied to the contentions raised by the Petitioners.

- 3.5 That in terms of clause 9.7.0 of the PPA, any correction in billing, whenever necessary, was required to be made applicable to the period between the date and time when the last corrected meter reading was recorded. Since the last correct meter reading of the projects was at the time of site visit by PSPCL on the CODs of the project i.e. 16.03.2015 and 27.02.2015 respectively, the aforesaid demand was raised based upon the amount of payments for tariff received by the Petitioners from PSPCL from COD till 30.11.2022 against the un-authorized energy injected by installing the excess DC capacity.
- 3.6 The contention of the Petitioners that the impugned demand notices are in violation of the provisions of the PPAs is misplaced. The RfP is an integral part of PPAs. The Petitioners have clearly contravened clause 3.2 of the RfP by installing excess DC capacity beyond the contractually permissible range. The Petitioners have remained in breach of its obligation under the PPAs from 13.3.2015 to 30.11.2022 and 27.02.2015 to 13.11.2022 respectively and has received excess tariff payments from PSPCL towards AC energy generated by it against the excess DC capacity installed. The PPA provisions clearly record that the Petitioner is entitled to receive the agreed tariff only (as per permissible installed DC capacity) and no additional payments are permitted to it. As such, the Petitioners are bound under the PPAs to retain only the said agreed tariff and return the excess tariff received from PSPCL. Besides, the Petitioners have committed a breach of its obligation under the PPA as contemplated under Section 73 of the Indian Contract Act, 1872, thereby entitling PSPCL to seek compensation in lieu of such

breach (being the excess tariff paid by PSPCL till 30.11.2022). That being so, PSPCL is entitled in law as also under the PPAs to seek refund of the excess tariff paid by it to the Petitioners during the relevant period. PSPCL also submits a detailed calculation sheet of the computation of demand raised by PSPCL based on the units of electricity generated by the Petitioner to contend that the demand of PSPCL is based upon the tariff paid by it to the Petitioner towards the excess differential AC output of the project vis-à-vis the AC output achieved through permissible DC capacity;

- 3.7 The contention of the Petitioner that the demand of PSPCL is barred by limitation is also misplaced. PSPCL relying upon the judgment dated 05.10.2021 passed by the Hon'ble Supreme Court in Civil Appeal No.7235/2009 has submitted that under the law of limitation, what is extinguished by the law of limitation is the remedy through a court of law and not a remedy available, if any, de hors through a court of law and thus the Demand Notices are not barred by limitation.
- 3.8 PSPCL has only sought a refund of agreed tariff paid to the Petitioner for units generated due to the excess DC capacity installed at the project so the refund does not change or revise the agreed tariffs under the PPAs. Exercising the right under contract to pay only such tariffs as agreed under the PPAs does not amount to a retrospective recovery of tariff leading to alteration of tariff. The judgment relied by the petitioner in Bangalore Electricity Supply Company case and Food Corporation of India case do not support the case of the petitioner as the same are distinguishable on facts and are not

applicable to the present case. Moreover, the energy supplied by the petitioner to PSPCL against the excess installed DC capacity could not have been known through the JMRs. The same was forced upon PSPCL and is outside the preview of Section 70 of the contract act as held by the Supreme Court in case of West Bengal Vs. B.K. Mondal & Sons, 1962 AIR SC 779.

3.9 The contention of the Petitioners that the demand notices seeks to revise the tariff under the PPAs is also misplaced. PSPCL has only requested a refund of payments made for the units generated/supplied beyond the permissible installed DC capacity. The reliance placed by the petitioner on the decision of Energy Watchdog, Gujarat Urja Vikas case and GMR Gujarat Solar Power that PPA is sacrosanct has no relevance in the present case and is liable to be rejected. The petitioner was not entitled to inject energy in excess of the agreed limit and action of the petitioner is not as per the IAs/PPAs entered between parties.

3.10 The contention of the petitioner that the demand notice is in violation of MNRE advisory/clarification dated 05.11.2019 and judgment dated 16.11.2021 passed by Hon'ble APTEL in Appeal No. 163 and 171 of 2020 titled as Nisagra Renewable Energy Vs. MERC is also not tenable. They pertain to the PPAs based on the AC capacity i.e. where the generators are obligated to meet a committed Capacity Utilization Factor (CUF) and are liable to penal charges for supply of the energy less than this range. However, in the present case the clause 2.1.1 and 2.1.3 of the PPAs require PSPCL to purchase all energy being made available to it at the interconnection point.

- 3.11 The submissions of the Petitioners that the impugned demand notices violate the vested rights and legitimate expectations of the petitioner are without any substance. The reliance by the Petitioners on the decision of the Hon'ble Supreme Court in case of J.S. Yadav Vs. State of Uttar Prades (2011) 6 SCC (570) is misplaced as the units supplied by installing excess DC capacity in violation of the contractual provisions cannot be said to be the energy lawfully supplied under the PPAs and PSPCL is not liable to pay the agreed tariff for the excess energy. The Petitioners cannot claim vested right and legitimate expectation beyond the contract enshrined in the PPA since it will violate the vested rights and legitimate expectation of PSPCL under the same PPA.
- 3.12 The submission of the Petitioners that the impugned notices are violative of the Electricity Act, Tariff Policy and the Electricity Policy is also misplaced. Although the Electricity Act has the clear mandate for promoting energy generation from renewable sources, however, the same cannot absolve any renewable power generator to generate electricity de-hors the contractual provisions. The petitioners are bound to adhere to the terms of the PPAs/IAs/RfP and in case of any deviation they are not entitled to take the protection of the Electricity Act.
- 3.13 The submission of the Petitioners that there is no default/violation of the PPA by the petitioner is also without any substance. The impugned demand notices have been issued in furtherance of site inspections conducted by its official wherein the installed DC capacity of the projects was found to be in excess of the permissible range. PSPCL has proceeded in

accordance the contractual provisions of RfP and the IAs/PPAs and has not curtailed any right and entitlement of the Petitioners. The reliance of judgment dated 19.04.2017 passed by the Hon'ble APTEL in appeal no. 161 of 2015, Sasan Power Ltd Vs. CERC sought by the petitioner is misplaced as the facts of the case in appeal are completely different from the present case and the selective reliance is liable to be rejected.

3.14 PSPCL has further submitted that the issues involved in the present petition have already been adjudicated upon and covered in the order dated 08.08.2022 passed by the Commission in Petition No. 02 of 2022 titled "Prayatna Developers Pvt. Ltd. Vs. PSPCL and Anr" wherein, the Commission has upheld the demand notices issued by PSPCL with regard to the obligations/ rights of the parties vis-a-vis the installed DC capacity of the projects, the MNRE Advisory dated 05.11.2019, issue of limitation and the issue regarding the revision/ alteration of the tariff stipulated in the PPAs. All the issues have already been adjudicated upon by the Commission in favour of PSPCL. PSPCL further submitted that although Hon'ble APTEL vide order dated 23.09.2022 has granted interim stay in the matter, however, keeping in view the judgment of the Hon'ble Supreme Court in case of Chamundi Mopeds Ltd. V. Church of South India Trust Assn., (1922) 3 SCC 1, the stay order does not wipe off the observations/judgment passed by the Commission.

4. Punjab State Load Dispatch Centre filed its reply submitting that the contents of the petition are related to quashing of the demand notices dated 30.01.2023 issued by PSPCL on account of excess energy

generated against the provision of the PPA. The PPA was executed between PSPCL and the petitioners and the payment of the bills against the energy injected by the petitioners is made by PSPCL. The issue in the petitions does not pertain to SLDC and therefore its name may be deleted from the array of the parties.

5. The Petitioners filed their rejoinders to the replies filed by PSPCL, reiterating their earlier submissions. It was further submitted that PSPCL has calculated the demand as per first checking and ignored the installed DC capacity found in the second checking. Difference in the findings also confirms that the inspections were inconclusive as capacities found were inconsistent and that there is an arithmetical error on the part of the PSPCL in both the inspections. Moreover, even if it is presumed that there is excess installed capacity, the account of the Petitioners could not be overhauled for a period earlier to the alleged checking. The inspection denotes the capacity installed at a particular time and on the said basis it cannot be presumed that the said capacity was installed since commissioning of the project. The date of the checking could be used only prospectively and not retrospectively. PSPCL did not carry out any checking for 6 years and now they cannot be allowed to take benefit of their inaction. There is no evidence with the PSPCL to allege that the petitioner has installed excess DC capacity since Commissioning of the project. So the demand raised by the PSPCL from the date of SCOD is totally wrong and illegal. PNCEL also submitted that there is an arithmetical error on the part of PSPCL in calculating the DC capacity of its plant and requested for verification of the installed DC capacity through any third party agency.

6. In the hearing held on 23.08.2023, while arguing his case, the Ld. Counsel of the Petitioners also submitted that PSPCL is referring to the selective reading of Article 9 of the PPAs by relying only on the Clause 9.7.0 and conveniently overlooking the Clause 9.6.0 which mandates half yearly checks, therefore PSPCL cannot be allowed to take benefit of their inaction as it did not carry out any checking for almost 6 years. After hearing the parties, the Order was reserved, vide order dated 28.08.2023 with directions that the parties may file written arguments within one week. However, none of the party chose to file their written arguments.

7. Observations and Decision of the Commission

The Commission has examined the submissions and arguments made by the parties. The Petitioners are disputing the demand notices issued by PSPCL for recovery of the payments made towards the excess energy supplied by use of solar modules installed purportedly in excess of the permitted DC capacity of the project. The Commission examines the issues raised as under:

7.1 The Commission observes that the issue of obligations/rights of the parties with respect to the installed DC capacity, procurement of power and payment of tariff in terms of the PPAs along with the relevance of Joint Meter Readings (JMRs) in determining the installed DC capacity of the projects stands already deliberated and decided vide Order dated 08.08.2022 in a similar Petition No. 02 of 2022 filed earlier by M/s Prayatna Developers Private Limited, as under:

a) Obligations/Rights of the parties with respect to the installed capacity of the Projects, procurement of power and payment of tariff:

After referring to the relevant provisions of the PPAs, IAs and RfP it was held as under:

“6.1(a) Provisions of the PPAs/IAs/RfP:

.....The Commission observes that, the PPAs entered into between the parties define the “Installed Capacity” of the projects as 50 MW which is the allocated capacity of the Project as per the Implementation Agreement (IA). And, the IAs, stated to be an integral part of the PPAs, specifies that the generating company is to act as per the terms & conditions of RfP and shall establish, operate and maintain the Projects as per provisions of RfP, IA & PPA. Further, the RfP specifies that +5% tolerance is allowed on the allotted capacity of the project, with an example illustrating that “25 MW capacity project can have 26.25 MW as DC capacity based on the rated capacity of PV modules at STC conditions”. Thus, it is evident that under the existing PPAs (read with IAs and RfP) the Petitioner’s 50 MW projects can have a maximum of 52.50 MW as the installed DC capacity. Accordingly, PSPCL’s obligation to purchase/ accept the energy at the tariffs stated in PPAs and the mandate for the petitioner to carry out the maintenance & overhauls (including repowering/replacement of Modules), is also subject to such limitation in the installed DC capacity of the Projects.”

Further, the Commission after referring to Hon’ble APTEL Judgment dated 19.04.2017, MNRE Advisory/Clarification dated 05.11.2019 and Hon’ble APTEL Judgment dated 16.11.2021 cited by the Petitioner and has observed as under:

“(b) Hon’ble APTEL Judgment dated 19.04.2017:

..... The Commission observes that the said judgment by Hon’ble APTEL pertains to a case, wherein the PPA gives express right to an

affected party to claim Change in Law in terms of the Article specified therein, overriding the provisions of RfP stating that the quoted tariff shall be inclusive one. But, that is not the case in the instant petition; the PPAs herein do not give any express right to the Petitioner to deviate from allowable DC capacity stated in the RfP. Thus, the above cited judgment is not relevant to the petitioner case.

(c) MNRE Advisory/Clarification dated 05.11.2019 and Hon'ble APTEL Judgment dated 16.11.2021:

..... The Commission observes, that the above stated MNRE advisory/clarification and Hon'ble APTEL judgement refers to the cases, wherein the contract is based on the deliverable energy/ AC capacity and there is no restriction on the DC capacity to be set up under the PPAs. Whereas, the contracts in the instant case are based on the installed DC capacity of the projects and also there is a restriction/tolerance limit on the installed DC capacity to be set up under the PPAs. Moreover, with the availability of solar power in the market at much competitive rates, procurement of additional power generated through capacities installed in excess than contracted for by the existing projects with higher tariffs is not prudent on the part of the distribution licensee. Thus, the above cited MNRE advisory/clarification and Hon'ble APTEL judgment cannot be considered relevant to the instant case.”

b) On the issue of relevance of JMRs in determining the installed DC capacity of the projects, it was held as under:

“6.2.....The Commission has already held that the contract between the parties is for the installed DC capacity (not AC capacity/output) and the power evacuation thereof.that the Joint Meter Readings (JMRs) recorded at the inter connection points depict the AC power output of the Projects and with the actual conversion of installed DC capacity to AC power being dependent on various factors (i.e the

prevalent weather, orientation of solar PV modules, O&M practices etc.), it cannot be considered as a true indicator of the installed DC capacity. The installed DC capacity of a solar PV power station, expressed as MWp, being the sum of the nominal DC rating (Wp) of all the individual solar PV modules installed in the plant, can be ascertained only through inspection of the Generating facility, the provision for which also exists in the PPAs...”

Accordingly, the Petitioner’ projects with similar provisions in the RfP, IAs and PPAs and having an allotted capacity of 20/10 MW can install a maximum of 21/10.5 MW as the installed DC capacity. Accordingly, in terms of the PPAs, the Petitioners’ right to supply and PSPCL’s obligation to accept the energy at the tariffs stipulated in respective PPAs is also subject to such limitation of the installed DC capacity. Further, with the actual conversion of installed DC capacity to AC power being dependent on various factors (i.e the prevalent weather, orientation of solar PV modules, O&M practices etc.), the monthly JMRs recorded by the parties cannot be considered as a true indicator of the installed DC capacity.

7.2 Physical checking of the installed DC Capacity of the Petitioners’ projects:

The Petitioners’ plea is that the impugned Demand Notices are based on the inspections carried out unilaterally by PSPCL on 01.06.2021 and 02.06.2021 and have arithmetic errors. It was pleaded that on rechecking by PSPCL on 05.11.2022 and 14.11.2022, though the installed DC capacity of PNREL was found to be 10.484965 MW against the permissible DC capacity

of 10.5 MW i.e. within the permissible tolerance allowed under Clause 3.2 of the RFP, the installed DC capacity of PNCEL was again recorded incorrectly as 21.00427 MW. It was also submitted that the inconsistent findings of two inspections indicates that they were inconclusive. PNCEL also requested for verification of its installed DC capacity through a third party agency.

On the other hand, it has been contended by PSPCL that the checking of DC solar capacity along with the counting of modules was done in the presence of the Petitioners' representatives. The ECR's dated 1.6.2021 and 02.06.2021 have been duly signed by the representative of the Petitioners. However, the representative present during the 2nd inspection refused to sign the reports.

The Commission has perused the inspections reports. The reports dated 01.06.2021 and 02.06.2021 contain the signatures of the Petitioner's representative. The Petitioner's plea that he was a junior level site engineer and coerced to sign under the influence of local police cannot be accepted. The reports also contain the details of wattage-wise modules along with the computed capacities. And, there appears to be no arithmetical error in PSPCL's calculations of the installed DC capacities based on the indicated modules. Thus, the Petitioners' plea of unilateralism, non-disclosure of the calculations and the arithmetical errors in the calculations cannot be sustained.

Further, as there is no dispute regarding the 2nd inspection report of the PNREL, the Commission proceeded to peruse the 2nd inspection report of PNCEL project and the data as submitted by the Petitioner vide rejoinder dated 10.07.2023. There appears to

be no arithmetical error in PSPCL's calculations of the installed DC capacity based on the indicated modules. There is, in fact, an error in the Petitioner's calculations, which on correction validates the very findings of PSPCL's report dated 05.11.2022. The module wise data and calculations of the installed capacity as submitted by the Petitioner along with the corrected figures shown in brackets vis-a-vis the contents of PSPCL's report are depicted below:

Data submitted by the Petitioner						PSPCL's ECR dated 05.11.2022		
Description	Tables (Nos)	Modules per table (Nos)	Total Modules (Nos)	Module Capacity (Wp)	Total Capacity (Wp)	Module Capacity (Wp)	Total Modules (Nos)	Total Capacity (Wp)
I	II	III	IV=II*III	V	VI=IV*V	VII	VIII	IX=VII*VIII
Tables having 40 Modules of 300Wp.	21	40	816 (840)	300	244800 (252000)	300	68082	20424600
Tables having 42 Modules of 300Wp.	1601	42	67242	300	20172600			
Tables having 40 Modules of 315Wp.	1	40	40	315	12600	315	418	131670
Tables having 42 Modules of 315Wp.	9	42	378	315	119070			
Tables having 40 Modules of 320Wp.	35	40	1400	320	448000	320	1400	448000
Total	1667		69876 (69900)		20997070 (21004270)		69900	21004270

In view of the above, the plea of the Petitioners that the inspections carried out by PSPCL are unilateral, without calculations and have arithmetic errors in computations of the installed DC capacity, cannot be sustained. The Commission also do not agree with the Petitioners' pleas that the inconsistent findings of two inspections indicates that they were inconclusive, as the result of an inspection is a function of number/capacity of the modules installed at site

which can always keep changing.

7.3 Demand raised by PSPCL:

7.3.1 The Petitioners' plea is that PSPCL has issued the impugned demand notices based on erroneous assumptions without furnishing any details/data regarding the basis for arriving at the calculations of the alleged excess generation by the Petitioners.

The Commission has observed in para 7.1 above that, as per the contractual provisions of the the PPAs read with the IAs and RfP, the impugned projects can install a maximum of 21/10.5 MW as the installed DC capacity and accordingly the Petitioners' right to supply and PSPCL's obligation to accept the energy at the tariffs stipulated in respective PPAs is also subject to such limitation of the installed DC capacity. Further, the Commission refers to the default notices and the demand notices issued by PSPCL, which states as under:

a) Default notices dated 23.06.2021:

*“iii. You are well aware that under clause 3.2 of the above said RfP, a +5% tolerance is allowed on the capacity of the project to be installed, based on the rated capacity of PV modules at STC conditions (1000 W/m², 25°C, AM 1.5). However, upon checking of your above said project by PSPCL on 01.06.2021/02.06.2021, the installed DC capacity has been found 21.0149/10.525 MW which is in excess of the permissible tolerance..... You are thus in violation of the express and mandatory contractual obligations under the RfP as also the IA and the PPA and the same amounts to an Event of Default by you in terms of clause 13.1.0 of the PPA. **Owing to such violation, PSPCL has been constrained to pay energy charges for un-authorized installed capacities** i.e. capacities installed in excess of permissible capacity in*

terms of the RfP, the IA and the PPA and the same are liable to be recoverable along with interest.

*In view of the above, notice is hereby being issued to you under clause 13.3.0 of the PPA to forthwith cure the above default by removing the excess installed DC capacity from your project. **You must also 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.***

b) Demand Notices dated: 30.01.2023:

“.....Owing to the above violation, PSPCL was constrained to issue to you a Notice dated 23.06.2021 under clause 13.3.0 of the PPA whereby you were requested to cure the default by removing the excess installed capacity from your project and explain why an amount proportionate to the energy supplied against excess installed capacity of your project be not recovered from you from the date of commercial operation (COD) of your project including interest, within 60 days from the receipt of the notice. In response thereto, you, vide your Reply dated 22.08.2021, stated that the actual generation never breached the PPA provisions and contended that the installed capacity has always remained within permissible limits.

It is further intimated that the reply submitted by you is not tenable

*Therefore the recovery of amount for supply of excess energy to PSPCL against un-authorized excess installed DC Capacity from COD of your projectshall be applicable and shall be carried out along-with interest. **The un-authorized energy supplied is 155757/268680 kWh and the corresponding recoverable amount is Rs. 13,55,080/23,24,082 and interest amount is Rs. 7,50,709/13,05,453 (upto 04.01.2023) (Calculation Sheet attached).***

.....”

As is evident, the default notices dated 23.06.2021, in addition to asking the Petitioners to cure the default by removing the excess installed DC capacity, also states that owing to such violation PSPCL has been constrained to pay energy charges for unauthorized installed capacities and why an amount proportionate to the energy supplied against excess installed capacity of the project should not be recovered from the date of COD of the projects including interest. Further, the demand notices dated 30.01.2023 issued by PSPCL mentions the quantum of unauthorized energy supplied by the Petitioners and corresponding recoverable payments thereof along with the calculation sheets for the same.

Thus, the Commission is of the view that the Petitioners' plea that the impugned demand notices are based on erroneous assumptions and without furnishing any details/data regarding the basis for arriving at the calculations of the alleged excess generation by the Petitioners' projects is not maintainable.

7.3.2 Issue of consideration of period of default:

The Petitioners plea is that the demand raised by PSPCL from the SCOD of the projects is totally wrong and illegal. It was pleaded that the inspection denotes the capacity installed at a particular time. Accordingly, even if it is presumed that there is excess installed capacity, it cannot be presumed that the said capacity was installed since commissioning of the project. The date of the checking could be used only prospectively and not retrospectively. PSPCL did not carry out any checking for 6

years and now they cannot be allowed to take benefit of their inaction.

On the other hand PSPCL contended that in terms of Article 9.7.0 of the PPAs any correction in billing, whenever necessary, is required to be made applicable from the date and time when the last corrected meter reading was recorded.

During the arguments, Ld. Counsel of the Petitioners submitted that PSPCL is referring to the selective reading of Article 9 of the PPAs by relying only on the Clause 9.7.0 by conveniently overlooking the Clause 9.6.0 which mandates half yearly checks, therefore PSPCL cannot be allowed to take benefit of their inaction as it did not carry out any checking for almost 6 years.

The Commission observes that it is a settled principle of law that all the provisions in an agreement have to be read harmoniously. It is presumed that each and every provision has been brought into the Agreement with some purpose. A particular provision cannot be read in isolation and has to be read in context of each other.

As such, the Commission is in agreement with the Petitioners that before invoking Clause 9.7.0 of the PPAs for determination of period of default PSPCL ought to have also ensured compliance of Clause 9.6.0 mandating half yearly checks. And, by not doing so, PSPCL cannot take advantage of its own wrong and seek to extend the period of default beyond the period of six months prior to the date of inspection.

The Commission is also of the view that a default can be considered to have been continued to exist only upto the date of intimation/request made by the generator for its re-checking, in

case, the same is found to have been cured on rechecking by PSPCL.

Accordingly, PSPCL is directed to rework the recoverable amount so due and refund the excess amount deducted from the Petitioners' bills along with the applicable late payment surcharge. The Commission also notes that the default in case of PNREL project already stands cured. The Petitioner to take remedial action in case of its PNCEL project and invite PSPCL for rechecking, who shall conduct the checking of same within a week thereafter and proceed accordingly in terms of the PPA and as per the observations and directions contained in this Order.

7.4 Other issues raised by the Petitioners:

The issues of Limitation, revision/alteration the tariff stipulated in the PPAs, vested right and legitimate expectation of the Petitioners, the Electricity Act/National Electricity Policy and unjust enrichment of PSPCL raised by the Petitioners stands already dealt in Petition No. 02 of 2022 as under:

a) Issue of Limitation:

The Commission after referring to the provisions under Articles 3 and 16 of the PPAs and the Limitation Act has held as under in the ibid Order:

"6.3.2..... Article 3 of the PPAs pertains to the "Billing Procedure and Payments" based on the monthly JMRs depicting the energy transactions between the parties and not the installed DC capacity of the Projects. And, under Article 16 (Disputes and Arbitration) of the PPAs, the period of 90 days is provided for the parties to resolve their disputes mutually, before availing the remedy available under the Electricity Act. As such,

the Commission does not agree with the Petitioner's plea that the impugned Demand Notices are in violation/barred under Articles 3 and 16 of the PPAs.

Further, regarding the issue of limitation raised by the petitioner, the Commission refers to the Hon'ble Supreme Court judgment dated 05.10.2021 in Civil Appeal No. 7235 of 2009 wherein it has been held that "Under the law of limitation, what is extinguished is the remedy and not the right. To be precise, what is extinguished by the law of limitation, is the remedy through a court of law and not a remedy available, if any, dehors through a court of law..." Thus, the Commission does not agree with the petitioners' plea that the impugned Demand Notices are barred by limitation."

b) Issue of revision/alteration of the tariff stipulated in the PPAs:

The issue that whether the Demand Notices issued by PSPCL seeks to revise/alter the tariff stipulated in the PPAs, was dealt in the ibid Order by the Commission as under:

"6.3.3.....The Commission has already observed that PSPCL's obligation to purchase/ accept energy made available at the interconnection point from said projects at the tariffs stated in the PPAs, is limited to the maximum installed DC capacity Thus, the Commission is of the view that exercising the right to pay only for as agreed under the PPAs and seeking refund of the payments made in excess, if any, cannot be termed as an attempt to revise/alter the tariff and the judgments relied upon by the Petitioner are therefore not relevant to the instant case."

c) Issue of vested right and legitimate expectation of the Petitioners:

On the issue whether the Demand Notices issued by PSPCL violates the Petitioners' vested right and legitimate expectation, the Commission after referring to the *Hon'ble Supreme Court judgment in J.S. Yadav vs. State of U.P (2011) 6SCC 570, Hon'ble Supreme Court Judgment in Delhi Electricity Regulatory Commission v. BSES Yamuna Power Ltd, (2007) 3 SCC 33 and Hon'ble APTEL Judgment dated 28.01.2021 passed in Appeal No. 271 of 2019 titled Haryana Power Purchase Centre vs. Haryana Electricity Regulatory Commission & Ors.*, cited by the petitioners, has held as under in the *ibid* Order:

"6.3.4..... The Commission has referred to the judgements cited by the Petitioner and observes that they refer to the rights/assurances and the legitimate expectations arising from a contract. As held by the Commission in the previous paras, the impugned Demand Notices issued by PSPCL cannot be termed as an attempt to revise/alter the tariff agreed/stated in the PPAs and as such cannot be said to be violating the vested right and legitimate expectation of the Petitioner. The petitioner cannot claim vested rights and legitimate expectations beyond the contract enshrined in the PPA since such allowance would violate the vested rights and legitimate expectations of the respondent PSPCL under the same PPA contract."

d) The Electricity Act and the National Electricity Policy:

The issue whether the Demand Notices issued by PSPCL are violative of the Electricity Act and the National Electricity Policy, was dealt as under:

"6.3.6.....The Commission refers to the relevant provisions of the

Electricity Act and the National Electricity policy. There is no doubt that non-conventional source of energy needs to be promoted. And, the Commission is mandated under the Act to provide suitable measures for connectivity with the grid and sale of electricity to any person, and also to specify RPOs for purchase of electricity from such sources. Further, the Act also specifies that a generating company may establish, operate and maintain a generating station without obtaining a licence under the Act if it complies with the technical standards relating to connectivity with the grid. However, the Commission is inclined to agree with PSPCL that, the Act does not absolve RE generators to operate de-hors the contractual provisions agreed thereto with the procurers.

Thus, the Commission is of the view that PSPCL's action to exercise its right to purchase power and pay only for as agreed under the PPAs and seeking refund of the payments made in excess, cannot be termed as violative of the Electricity Act/NEP."

e) Unjust enrichment on the part of PSPCL:

The issue whether the Demand Notices amount to unjust enrichment on the part of PSPCL was dealt as under in the *ibid* Order:

"6.3.7....The Commission has referred to the Judgements cited by the Petitioner and is inclined to agree with PSPCL that cases dealt therein were based on different facts, as evident from the following observations made therein:

(i) In the case of "Bangalore Electricity Supply Company Limited v. Reliance Infrastructure Ltd. & Ors., it has been observed as under:

"17 (d) Even before the expiry of the PPA i.e. on 29.9.2009, in principle approval for Wheeling and Banking of energy was already given by the Appellant on 17.9.2009 subject to entering into a tripartite agreement.

.....

(h) Thus, even though the RInfra had approached for entering into Wheeling & Banking Agreement, the Appellant more than six months prior to the expiry of the PPA between the Appellant and RInfra, the Appellant replied to consider the same on expiry of the PPA. Therefore, RInfra cannot now be blamed and penalized by not compensating them for the energy injected for its Wind Generator into the State Grid from the date of expiry of the PPA to the approval of Wheeling & Banking Agreement.”

(ii) In the Food Corporation of India v. Vikas Majdoor Kamdar Sahkari Mandli Ltd,(2007) 13 SCC 544, it has been observed as under:

“16. From various documents exhibited more particularly the letters dated 30.9.1994 to 14.10.1994 it is clear that the functionaries of the appellant-Corporation recommended higher payment rate for higher discharge. The letters written by the respondent society also clearly indicate that the demand was for higher charges in respect of the extra work. Though a stand has been taken that the signatories of the letters by the Corporation were not authorized, it is not disputed that on the basis of these letters extra work was undertaken. There is also material on record to show that extra expenditure had to be incurred for doing the extra work...”

As evident from the above, the above cases can be distinguished by the fact that; the said judgments do not deal with the breach of the terms and conditions of a legal contract in place as is the case in the instant petition, but with the situations similar to the implied contracts arising on account of the principle approval/consent of the receiver given in the matter. Further, the Commission is also in agreement with PSPCL’s contention that refunds of previous payments made in excess by the distribution

licensee are pass through in the future ARR's and thus cannot be considered to be causing unjust enrichment to PSPCL."

Accordingly, the petitions are disposed of in light of the above analysis, observations and directions of the Commission.

Sd/-
(Paramjeet Singh)
Member

Sd/-
(Viswajeet Khanna)
Chairperson

Chandigarh

Dated: **25.09.2023**

