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

Petition No. 02 of 2022
Alongwith IA No. 03 of 2022
Date of Order: 08.08.2022

Petition under Section 86 of the Electricity Act, 2003 read with Article 16 of the Power Purchase Agreements dated 12.01.2016 seeking directions to quash the Demand Notices dated 03.12.2021 issued by Punjab State Power Corporation Limited.

AND

In the matter of: Prayatna Developers Private Limited, Adani Corporate House 4th Floor- South Wing, Shantigram Near Vaishno Devi Circle, S.G. Highways, Khodiyar, Ahmedabad, Gujarat, India.

Petitioner.

Versus

1. Punjab State Power Corporation Limited, The Mall Patiala.
2. Punjab State Load Dispatch Centre, Ablowal Patiala.

Respondents

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

Petitioner: Sh. Amit Kapoor, Advocate
Sh. Akshat Jain, Advocate

PSPCL: Ms. Suparna Shrivastava
Sh. Paramjit Singh, CE/ARR&TR
Sh. Mukesh Kumar, ASE/TR-5
Sh. Balinder Pal Singh, AE/TR-5

PSLDC: Sh. Vivek Goel, ASE/EA&S, SLDC Ablowal
Sh. Rajan Sharma, AEE/Energy Accounting, SLDC, Ablowal

ORDER

Prayatna Developers Private Limited (PDPL), a generating company, has filed the present petition for quashing the demand notices dated 03.12.2021 issued by PSPCL and to declare that repowering of capacity and replacement of defective/damaged Solar PV Panels during the operation of the Projects is a permissible activity under the PPAs, Tariff Orders and CERC RE Tariff Regulations 2012 and falls within the ambit of Operation and Maintenance of the Solar Power Plants. PDPL also filed IA No. 03 of 2022 praying to stay the operation of demand notices issued by PSPCL.

Submissions of PDPL

2.0 PDPL has submitted that it has established Solar Photovoltaic (PV) Power Projects in the State of Punjab with individual installed capacity of 50 MW at Village Sardargarh (Sardargarh Project) and 50 MW at Village Chughekalan (Chughekalan Project) at Bathinda inthe State of Punjab. PDPL has entered into two separate Power Purchase Agreements (PPAs) dated 12.01.2016 with Punjab State Power Corporation Limited (PSPCL) for sale/supply of entire solar power generated from the Projects. The Sardargarh Project was commissioned in 2016 and Chughekalan Project was commissioned in 2016-2017 and since then both the Projects have been supplying the entire Contracted Capacity of solar energy generated from the Projects to PSPCL in terms of the PPAs.

2.1 That PSPCL has illegally and arbitrarily issued two separate Demand Notices on 03.12.2021 claiming to recover Rs. 17,58,21,836/- and Rs. 9,19,03,434/- along with interest (from the pending and future Energy Bills payable to PDPL) based on an erroneous assumption that PDPL has supplied excess energy of 30314110 units and 15445955 units respectively to PSPCL from its 50 MW Sardargarh Project and 50 MW Chughekalan Project during the period from 18.05.2018 to

30.09.2021.PSPCL has not furnished any details/data regarding the basis for arriving at the calculation of the alleged excess generation by PDPL.

2.2 That during the period 18.05.2018 to 30.09.2021, PDPL has diligently supplied power to PSPCL from the Projects strictly in terms of the PPAs. PSPCL regularly monitors and is duly aware of the injection of power from the Projects. A Joint Meter Reading (JMR) is signed by the representatives of PDPL and PSPCL each month recording the meter reading at the Interconnection Point depicting the total power generated/injected from the Projects in a month. In terms of the JMR signed by the officials of PSPCL for the period 18.05.2018 to 30.09.2021, PDPL never injected power more than the Contracted Capacity of 50 MW from the Projects in any of the given months and the Available Capacity of the Projects has never been more that 50 MW in any given months.

2.3 That during the period of alleged excess generation, PSPCL never raised any objection with regard to generation and injection of power from the Projects more than the Contracted Capacity of 50 MW. In fact, since commissioning, Chughekalan Project has recorded peak injection of 43.5 MW only and Sardargarh Project has recorded peak injection of 43.4 MW only, which is less than the Contracted Capacity of 50 MW. Therefore, there is no enhancement in the capacity of the Projects beyond the capacity certified by PSPCL in the Synchronization Certificates dated 24.01.2017 and by PEDA in the Commissioning Certificates dated 04.07.2017. The demand notices dated 03.12.2021are barred by limitation and are violative of article2.1.1, 2.1.3, 2.2.1,3, 3.2.0 and 16.0.0of the PPA as well as the Electricity Act, 2003 since the retrospective recovery of the tariff already paid will lead to alteration of tariff stipulated in the PPAs and adopted by the Commission vide order dated 10.06.2016.

2.4 That there is no provision in the PPAs, which allows PSPCL to unilaterally deduct payment of invoices due, on the pretext to recover the tariff payment already made for the past period. It cannot be the case that PDPL having installed additional DC capacity (over and above the Contracted Capacity) at the Project sites has injected power only upto 50 MW. If PDPL would have had additional DC capacity installed and generating power then PDPL would have also generated/injected power from such alleged additional DC capacity which would have been recorded in the JMR prepared by PSPCL. PSPCL's Demand Notices contradict the JMRs signed by the officials of PSPCL itself. PSPCL verified the invoices raised by PDPL and made payment against the same without raising any dispute or protest. The payments made against such invoices have attained finality. Further, in terms of the Limitation Act 1963, PSPCL's right to challenge the Tariff Invoices for the period prior to December 2018 is barred by limitation. Moreover, even in the event of any dispute with respect to the Tariff Invoices raised by PDPL or power supplied by PDPL under the PPAs it is mandatory for PSPCL to approach the Commission for adjudication of such dispute. Unilateral deduction of tariff by PSPCL is not permitted under the PPAs and the Electricity Act, 2003. That in terms of article 16 of the PPA any disputes between the parties if not resolved amicably within 90 days has to be adjudicated by the Commission. PSPCL has not raised any such dispute before the Commission and as such, the Demand Notices issued by PSPCL are unlawful. As per Article 2.1.1 of the PPA, PSPCL is obligated to pay the tariff of Rs. 5.95/unit under Chughekalan PPA and Rs. 5.80/unit under Sardargarh PPA for the Scheduled Energy/ Energy injected by PDPL, as certified in the JMR by the officials of PSPCL.

2.5 PDPL has supplied power as per its contractual obligation and PSPCL has consumed such power and paid the tariff in terms of the PPAs. Hence, PSPCL is not permitted to seek refund for the tariff already paid. In terms of section 70 of the Contract Act, 1872 which provides that when a party to a contract does anything for another person, or delivers anything to him, not intending to do it gratuitously and such other person has obtained benefit, the former is entitled to compensation. PDPL has relied in this regard on judgment in case of *Food Corporation of India v. Vikas Majdoor Kamdar Sahkari Mandli Ltd*, (2007) 13 SCC 544 and the judgment dated 24.01.2013 passed by the Hon'ble APTEL in Appeal No. 170 of 2012 titled as "*Bangalore Electricity Supply Company Limited v. Reliance Infrastructure Ltd. & Ors*" wherein it has been held that where, the Licensee has enjoyed the benefit of the energy that has gone into the system and has recovered tariff in respect of the same, the claim of the generator qua the charges for the power supplied cannot be said to be illegal.

2.6 That the Demand Notices amount to unjust enrichment on the part of PSPCL as the tariff paid by PSPCL during 18.05.2018 to 30.09.2021 is factored in the power purchase cost of PSPCL, which is incorporated in the retail tariff levied and recovered by PSPCL/Discoms in terms of the Commission's Tariff Orders issued from time to time. Hence, PSPCL after having recovered the cost of such power supplied by PDPL ought not to be permitted to seek refund.

2.7 That the Demand Notices seek to revise the Tariff Agreed under the PPA's and is violative of the Electricity Act 2003. PDPL has established the Projects pursuant to competitive bidding carried out by PEDA under Section 63 of the Electricity Act. The tariff for sale of power from PDPL's

Projects is a competitively discovered tariff determined under Section 63 of the Electricity Act and adopted by the Commission by Order dated 10.06.2016. The tariff agreed in the PPAs dated 12.01.2016is a Statutory Contract, discovered through transparent competitive bidding process, which cannot be altered by PSPCL, or this Commission. PDPL has relied in this regard on the judgments passed by the Hon'ble Supreme Court in case of *Energy Watchdog v. CERC*: (2017) 14 SCC 80 & Gujarat Urja Vikas Nigam Limited v. EMCO Limited, (2016) 11 SCC 182 and Hon'ble APTEL judgments; dated 27.09.2019 passed in Appeal No. 183 of 2019 in case of *Renascent Power Ventures Pvt. Ltd. v. UPERC, Gujarat Urja Vikas Nigam Limited vs. Gujarat Electricity Regulatory Commission*, 2014 SCC On Line APTEL 168, *GMR Gujarat Solar Power Private Limited vs. Gujarat Electricity Regulatory Commission & Anr*.

2.8 That the Demand Notices are in Violation of MNRE Advisory/Clarification dated 05.11.2019 and APTEL Judgment Dated 16.11.2021. MNRE issued an Advisory/Clarification on 05.11.2019, clarifying that: -

(a) Designing and installation of solar capacity on the DC side should be left to the discretion of the generator/developer.

(b) As long as the solar PV power plant is in accordance with the contracted (AC) capacity and meets the range of energy supply based on Capacity Utilisation Factor requirements, the design and installation of solar capacity on the DC side should be left to the generator/developer.

(c) Even if installed (DC) capacity of a solar PV power plant is in excess of the value of the contracted (AC) capacity (MW), it is not violation of PPA, as long as the:-

(i) AC capacity of the solar PV power plant set up by the developer

corresponds with the contracted AC capacity; and

(ii) Power (MW) generated/supplied from the solar PV power plant is not in excess of the contracted AC capacity.

(d) As per law, setting up of generation capacity is an unlicensed activity. Therefore, any person is entitled to set up any capacity which he desires to set up and sell power to any entity which may want to buy it.

The aforesaid direction of MNRE was communicated to PSPCL on 07.08.2021 and 30.09.2021. A letter from the Ministry of the Union of India has been held to be a statutory document having force of law in *Energy Watchdog v. Central Electricity Regulatory Commission,* (2017) 14 SCC 80. The Hon'ble APTEL vide Judgment dated 16.11.2021 passed in Appeal Nos. 163 & 171 of 2020 titled *Nisagra Renewable Energy Private Limited v. MERC & Anr* held that it is the prerogative of the developer to finalize the optimal DC capacity for its project in a manner that can deliver the contracted capacity. There is no restriction on the solar generator with respect to the DC capacity to be set up. DC overloading is accepted as an industry practice for Solar Projects. Even 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 PPAs in terms of MNRE clarification dated 05.11.2019 and Hon'ble APTEL Judgment dated 16.11.2021, since it is the prerogative of PDPL to finalize the optimal DC capacity for its Project in a manner that can deliver the Contracted Capacity of 50 MW from each Project.

2.9 That the Demand Notices violate vested right and legitimate expectation of PDPL. PDPL has a right to receive tariff of Rs. 5.95 for every unit of power supplied under the Chughekalan PPA and tariff of Rs. 5.80 for every unit of power supplied under Sardargarh PPA for the entire period of 25 years.

This is a vested right in favour of PDPL which cannot be taken away with retrospective effect. PDPL has 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. PDPL's decision to invest in the State of Punjab was directly linked to the competitively discovered tariff, which was to remain constant for a period of 25 years. Therefore, there was a legitimate expectation that the tariff determined through competitive bidding, adopted by the Commission and incorporated in the PPAs signed between the parties would be honored. PDPL relied in this regard on the judgment passed by the Hon'ble Supreme Court in case of *Delhi Electricity Regulatory Commission v. BSES Yamuna Power Ltd*, (2007) 3 SCC 33, wherein it was held that a change in the rate of depreciation from an assured rate of 6.69% to 3.75% infringes the doctrine of legitimate expectation since policy directives issued by the Government of Delhi inviting bids from the private sector were based on certain assurances which had been altered. PDPL has further, relied in this regard on the judgment dated 28.01.2021 passed by the Hon'ble APTEL passed in Appeal No. 271 of 2019 titled *Haryana Power Purchase Centre vs. Haryana Electricity Regulatory Commission & Ors.*

2.10 That replacement of under-performing and damaged solar PV panels did not enhance the project capacity or power output from the project. Moreover, replacement of under-performing and damaged Solar PV Panels is the prerogative of PDPL and within the ambit of O & M of the Solar Plants. In terms of the PPA's dated 12.01.2016, PDPL shall carry out regular maintenance and overhauls of the Project as per recommended schedules and procedures of the equipment supplier and PDPL shall install and whenever required, augment the equipment at its own cost

during the tenure of this Agreement. PSPCL has not provided any evidence to establish that power output from the projects had increased beyond 50 MW during the period 18.05.2018 to 30.09.2021 on account of replacement of such under-performing and defective solar PV modules. In view of the above contractual and regulatory framework. It is submitted that :-

(a) There is no restriction under the PPAs, Implementation Agreements, CERC RE Tariff Regulations 2012 and Tariff Order dated 31.03.2015 for replacement of under-performing/defective Solar PV Panels during the operating period of the Project/PPA.

(b) Definition of the Project under the PPAs does not include the total number of Solar PV Panels to be installed by PDPL. Hence, installation of PV Panels upto the Contracted Capacity of 50 MW is the discretion of PDPL.

(c) The O&M expenses provided under the tariff payable to PDPL include the cost of spares, overheads and repairs & maintenance of the Solar Project. Thus, it is implied that repair/replacement of the equipment/machinery of the Solar Projects is already envisaged under the PPAs, RE Tariff Regulations and Tariff Order as a permissible exercise to be undertaken by the Project developer.

(d) The Hon'ble APTEL vide its Judgment dated 11.11.2019 passed in Appeal No. 118 & 151 of 2016 titled *Welspun Renewables Energy Private Limited v. TNERC* ("Welspun Judgment") held that spares are an essential component for the efficient and continued operations of a solar generation plant and the need for such spares cannot be dispensed with.

(e) As per the Module technology and warranted terms, since installation, of solar modules of the Projects had degraded more than the warranted 4.8% degradation of its original capacity therefore, such damaged/defective solar PV Panels installed in the Projects at the time of commissioning were replaced with new PV Panels with the view to compensate such capacity loss due to accelerated degradation of such defective modules of the Projects. The, repowering of the degraded capacity and replacement of defective/damaged modules in both the Projects carried out by PDPL falls within the ambit of operation and maintenance activity of the Projects.

2.11 That PSPCL was aware of the repowering of capacity and panel replacement carried out by PDPL since 14.01.2019 when PDPL wrote to PSPCL informing about the same and on 02.06.2021 when PSPCL carried out physical inspection of the Project sites. However, PSPCL continued availing the power supplied by PDPL (which was never more than the Contracted Capacity) from 14.01.2019 to 30.09.2021 and has belatedly raised the Demand Notices after almost 3 years as an afterthought to unjustly enrich itself and to the prejudice of PDPL's right under the PPAs. Conduct of PSPCL amounts to waiver and acquiescence and PDPL has relied in this regardupon Hon'ble Supreme Court judgment in *Kanchan Udyog Limited v. United Spirits Limited*, (2017) 8 SCC 237.

2.12 That there is no default/violation of the PPA or RFP by PDPL. PSPCL's allegation with respect to Event of Default under Article 13.3.0 of the PPAs is misplaced and unfounded. PSPCL has not provided any evidence to establish that the installed capacity of the Projects or power output from the Projects had increased beyond 50 MW during the period 18.05.2018 to 30.09.2021 on account of repowering or replacement of such under-

performing and defective solar PV modules. Further, there is no restriction under the PPAs with respect to installation of DC/installed capacity. The only restriction under the PPAs is that PSPCL is obligated to pay tariff only upto the Contracted Capacity of 50 MW under each PPA. Hence, even if PSPCL's argument is to be accepted, PDPL is not in violation of any of the provision of the PPAs since it is an admitted position that PDPL has never supplied power more than 50 MW to PSPCL till date. On the contrary, it is PDPL's material obligation under the PPAs to keep the capacity of both the Projects at 50 MW during the entire tenure of the PPAs i.e., 25 years. If PDPL would have not replaced the defective panels it would have resulted in generation loss amounting to default and violation of PDPL's obligation to supply the contracted capacity of 50 MW under each PPA.

2.13 That PSPCL's reliance on Clause 3.2 of the RFP that only +5% tolerance is allowed on the capacity of the Project to be installed is misplaced. There is no enhancement in the installed capacity or power output of the Projects beyond the permissible limit. Moreover, there is no such restriction in the PPAs with respect to enhancement of the Project capacity upto a certain limit. Therefore, PSPCL cannot rely upon the provision of the RFP to curtail the rights and entitlement of PDPL under the PPAs. PDPL has relied in this regard on the judgment dated 19.04.2017 passed by the Hon'ble APTEL in Appeal No. 161 of 2015 titled as Sasan Power Limited vs. CERC, 2017 ELR (APTEL) 0508 wherein it has been held that despite the provision of the RFP which states that the quoted tariff shall be all-inclusive, the PPA gives express right to an affected party to claim compensation for an event which qualifies as a Change in Law event and that the RFP cannot override the rights provided under the PPA.

2.14 That under the Electricity Act and National Electricity Policy, there is an express mandate on the Commission to promote generation from renewable energy and have cited Sections 61(h) and 86(1)(e) of the Act and Clauses 5.12.1 to 5.12.3 of the NEP in this regard.

3. The petition was admitted vide Order dated 04.02.2022 and Notice was issued to PSPCL and PSLDC. PSLDC filed its reply vide memo No. 179 dated 02.03.2022 submitting that the issue in the petition pertains to quashing of the demand notices issued by PSPCL therefore, the petition needs to be defended by PSPCL. PSPCL filed its reply vide memo No. 5774 dated 18.04.2022, and filed IA No. 16 of 2022 seeking rectification of errors in its reply. In view of no objection expressed by the petitioner as well as the Respondent No. 02 regarding the same,the IA filed by PSPCL was allowed and the amended reply was taken on record vide Order dated 19.05.2022.

Submissions of PSPCL

4. PSPCL has submitted in reply to the petition that Punjab State Energy Development Agency (PEDA) issued a Request for Proposal (RfP) in June, 2015 inviting bids for development of 500 MW grid connected solar PV power projects in the State of Punjab under the NRSE Policy Phase-III. The RfP under clause 3.2 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. However, it disallowed any negative tolerance/deviation. It was clearly stated in clause 4.4 of the draft Implementation Agreement annexed with the RfP, that the selected bidder would establish, operate and maintain the solar PV power project and interconnection facilities for evacuation of power from the project as

per the provisions of the RfP and the PPA. The Petitioner executed two Power Purchase Agreements dated 12.1.2016 with PSPCL. The PPAs recorded in Recital that Implementation Agreement shall be treated as an integral part of the Power Purchase Agreement and all the clauses and Regulatory Norms applicable to the Implementation Agreement shall be unequivocally applicable to the Power Purchase Agreement in letter and spirit. Thus, the installation of DC capacity as permitted under the RfP also became an integral term under the PPAs governing the purchase of power by PSPCL and based on which PSPCL was to pay the agreed tariff to the Petitioner. The entire energy generated from the Petitioner's projects *"of 50 MW capacity"* (together with 5% positive deviation in DC capacity) was to be purchased by PSPCL at the discovered tariffs, which tariffs were to remain constant throughout the terms of the PPAs. The clause recorded a categoric negative covenant that no additional payment on any account was to be made to the Petitioner.

4.1 That under clause 13.0.0, the PPAs provided for Events of Default and Termination. Failure on part of the Petitioner to perform its 'material obligations', which included its obligation to install the projects as per the permissible DC capacity was to be construed as an Event of Default on part of the Petitioner. Upon occurrence of such Event of Default, clause 13.3.0 of the PPA provided that PSPCL is within its right to terminate the PPAs.

4.2 That the following terms agreed under the PPAs assume importance for adjudication of the issues agitated before the Commission:

(i) Under clause 5.4.0, PSPCL had the right to designate from time to time, officers/officials who were to be responsible for inspecting the Generation

Facility of both projects for the purpose of verifying the Petitioner's compliance with the PPAs.

(ii) Under clause 3.1.0, the designated representative of both parties were to record joint meter readings (JMRs) of the meters at the Interconnection Point based on which Monthly Energy Accounts were to be prepared by PSPCL for the purpose of tariff payments to the Petitioner.

The inspection/verification was indicative of the capacity in fact installed in the Petitioner's project and the violations, if any, of the agreed terms of the PPAs. It is the Petitioner's misplaced contention that it was the joint meter readings alone, which established the compliance of PPA terms as regards capacity installed at the projects.

4.3 That in a solar PV power plant, the DC capacity is the summation of name plate ratings of all solar panels whereas the AC capacity is the summation of wattage from all inverters. The Petitioner is well aware that applying the DC/AC ratio as per the established industry practice,installation of 50MW (or 52.5 MW) DC capacity at a solar PV project may not yield 50 MW of AC power output but is likely to yield an output of AC power in the range of 40-42 MW. As per the Petitioner's own stated case also the AC output at the plants with an installed DC capacity of 52.5 MW has never exceeded 44 MW. Also, if the Petitioner's projects exceed their installed DC capacity beyond 50 MW, the AC power output of the same may still be under 50MW by applying the DC/AC ratio. Therefore, the joint meter readings showing the AC power output of the projects can never demonstrate the installed DC capacity of the said projects. The right to inspect the project premises of the Petitioner 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. Further, 50 MW is the *"installed capacity"* of the Petitioner's projects whose corresponding AC output can never be 50 MW; the Petitioner's contention that it has never supplied power more than 50 MW is therefore misleading and is liable to be rejected.

4.4 That with regard to the operation and maintenance of the Generation Facilities, the requirement under clause 5.2.0 of the PPA was to operate and maintain the projects as per the legal and regulatory prescriptions and Prudent Utility Practices so that there was no adverse effect on the grid (owing to a non-compliant operation). Under clause 5.6.0, the Petitioner could carry out *"regular maintenance and overhauls* "of the Generation Facilities *"as per recommended schedules and procedures of the equipment suppliers"*. There was thus no agreement under the PPAs as regards repowering of capacity and replacement of solar PV panels except as per the recommended schedules and procedures of the equipment suppliers. The tariff being paid to the Petitioner had been based upon the annual generic tariff notified by the CERC in its Order dated 03.03.2015 passed in Suo-Moto Petition No.SM/005/2015 wherein, while determining the benchmark capital cost norms for solar PV power projects applicable during FY 2015-16, the CERC after duly considering the efficiency degradation of solar PV modules over the period, had provided for a reasonable compensation for degradation due to ageing in the form of additional capital cost of Rs.9.69 lakh/MW. Based on this capital cost, the CERC proceeded to determine the annual generic tariff for FY 2015-16. Therefore, it is clear that theannual generic tariff as determined by the CERC is inclusive of compensation in tariff, by considering higher capital

cost, in lieu of degradation of modules. Thus, any excess recovery of tariff on the pretext of repowering due to degradation of PV modules is clearly over and above the annual generic tariff and thus cannot be permitted.

4.5 That requirement to operate the projects as per the permitted DC capacity was based on cogent considerations.The issue of installed DC capacity is relevant in the context that under the PPAs executed with the solar power generators, PSPCL is under an absolute obligation to accept all energy made available to it. It follows that the obligation of PSPCL to accept *"all energy made available"* comes with the attached condition that only the permissible installed DC capacity (under the RfPs read with the IAs and PPAs) would form the basis for injection by the generators. As such, the generating stations cannot be allowed to make available 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 stations must necessarily be installed as per the permissible DC capacity. Further,

(i) under Regulation 3.20 of the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2019 (the "PSERC MYT Regulations, 2019"), 'Declared Capacity' is defined as the capability to deliver ex-bus electricity in MW declared by a generating plant in relation to any period of the day or whole of the day, duly taking into account the availability of fuel or water, and subject to further qualification in the relevant Regulation. Since the power projects have been established under a competitive bidding process of a given aggregate capacity by PEDA, 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 RfPs;

(ii) under Section 32(2) of the Electricity Act, 2003, the following provision has been made:

"32. ……

(2) The State Load Despatch Centre shall –

(a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State; ….."

Scheduling, despatch and accounting of electricity by the State Load Despatch Centre is thus to be done in accordance with the applicable contracts. As such, for the purpose of DC capacity of a generating station, the provisions of the contract are paramount.

4.6 That pursuant to the signing of the PPAs and start of sale/purchase of power generated from the projects of the Petitioner, the parties conducted a joint site inspection of the projects on 17.5.2018 wherein, it was verified that both plants had been installed with 52.5 MW DC capacity each (i.e. +5% of the installed capacity of 50 MW) as certified in the commissioning certificates. As per record, neither plants had ever crossed the peak output of >44 MW on any given day during the financial year which ended on 31.3.2018. When the Petitioner's plants were inspected on 2.6.2021 to check the installed DC capacity, it was found that the installed DC capacity of the projects were 58.228 MW (at Sardargarh project) and 55.256 MW (at Chugekalan project) which was in excess of the permissible tolerance by 11.46% and 5.51%

respectively and which was a clear violation of clause 3.2 of the RfP and consequently a material breach of the PPAs. Accordingly, on 23.6.2021, PSPCL issued Default Notices to the Petitioner under Article 13.3.0 of the PPAs stating as under:

"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 W1m2,25°C, AM 1.5). However, upon checking of your above said project by PSPCL on 02.06.2021, the installed DC capacity has been found .....MW which is in excess of the permissible tolerance by .....You are thus in violation of the express and mandatory contractual obligations under the RfP as also the lA 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 lA and the PPA and the same are liable to be recoverable alongwith interest.

ln 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. Further, a detailed report of the final installed DC capacity may also be intimated to PSPCL (clearly mentioning inverter wise no. of modules/module capacity/total capacity), which shall be subject to further check by PSPCL 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.

.....”

4.7 That in response to the Default Notices, the Petitioner, vide its letters dated 7.8.2021 informed that there was no restriction under the PPAs for repowering or replacement on account of efficiency degradation or under-performing/defective solar PV panels. The repowering of PV panels was within the ambit of CERC Tariff Order for FY 2015-16 and was not in violation of any provision under the RfP or IAs or PPAs and during the operation of the projects, it was found that some of the solar PV modules used in the projects were defective/degraded and were performing significantly below their warranted performance levels. To prevent further deterioration of generation from the projects and to comply with the obligation under the PPAs to supply the contracted capacity to PSPCL, the defective or under-performing modules were replaced with new modules, as per Prudent Utility Practices.The Petitioner requested PSPCL to withdraw the Default Notices dated 23.6.2021 on the ground that it had not committed any breach of the provisions of the RfP/IAs/PPAs.

4.8 That in response to the letter dated 7.8.2021, PSPCL, vide its letters dated 22.9.2021, informed the Petitioner as under:

(i) that by installing extra/excess DC capacity beyond permissible limits, the Petitioner had failed to perform its material obligation under the PPAs which constituted an Event of Default as per clause 13.1.0;

(ii) that the act of repowering or replacement on account of solar PV panels so as to increase the installed DC capacity of the project was not envisaged under the RfP, PPAs or the IAs;

(iii) that the CERC in its Order dated 31.03.2015 passed in Suo-Moto Petition No.SM/005/2015 while determining benchmark capital cost norm for solar PV projectsfor FY 2015-16, had considered the efficiency degradation of solar PV modules over the period and provided reasonable compensation for degradation due to ageing in the form of additional capital cost of Rs.9.69 lakh/MW which formed part of the generic tariff for FY 2015-16 and as such, any further recovery of amounts by the Petitioner was contrary to the agreed tariff;

(iv) thatthe AC power output of solar PV plant depended upon various factors like location of the plant, weather parameters, orientation of solar PV modules, O & M practices etc. and as such, the output could or could not be equal to installed DC capacity of the plant. Hence, a lower AC output of the projectscould not be construed to mean that the installed DC capacity was within permissible limits; and

(v) that the Petitioner's reliance on MNRE's Advisory/Clarification dated 5.11.2019 was misplaced inasmuch as the said Advisory related only to projects under such PPAs in which the energy supply was based on Capacity Utilization Factor (CUF) where the procurerwas not obligated to purchase energy beyond the range of CUF and in case of under-injection the generator could be penalized, which was not the case of the Petitioner.

As such, PSPCL informed that if the excess installed DC capacity was not removed from the projects by the Petitioner within 10 days, PSPCL would be within its right to terminate the PPAs. However, in response to the letters dated 22.09.2021 of PSPCL, the Petitioner, vide its letter dated

30.9.2021, denied the defaults. Since the response of the Petitioner under its aforesaid letters was not satisfactory, PSPCL was constrained to issue the impugned Demand Notices on 03.12.2021.

4.9 That in terms of Clause 9.7.0 of the PPAs, 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 corrected meter reading of the projects was at the time of joint site visit by PSPCL and PEDA on 17.5.2018, the aforesaid demand has been based upon the amount of tariff received by the Petitioner from PSPCL from 18.5.2018 till 30.9.2021 against the un-authorized and excess installed DC capacity. Moreover, it is clearly seen from the comparison of the units generated by the projects of the Petitioner in the months of October to February in the current year and the preceding years that right after removal of the excess DC capacity installed by the Petitioner i.e. after 30.9.2021, the AC output of the Petitioner's projects has significantly reduced when compared to the AC output during the same period in the previous years. This demonstrates that the higher AC output in the earlier periods is only on account of the excess DC capacity installed at the projects against which PSPCL has wrongly been made to make additional tariff payments, which payments are liable to be refunded by the Petitioner to PSPCL.

4.10 The Petitioner's reliance on Article 3.1 and 3.2 of the PPAs to justify the correctness of the tariff payments made to it by PSPCL without any objection is misplaced. Under the said provisions, tariff payments to the Petitioner are required to be made in accordance with the joint meter readings and Monthly Energy Accounts of the energy output of the projects. However, as stated above, these readings can only demonstrate

the AC power output of the projects and not the installed DC capacity. Therefore, while tariff payments were being made to the Petitioner based on the joint meter readings, PSPCL could not have known the actual installed DC capacity of the projects without a site inspection and as such, tariff payment based on the said joint meter readings were being duly made. It was only upon the inspection of the project sites that it was found that the installed DC capacity of the projects was in excess of the permissible range under and that the AC power output of these projects was being achieved through these excess solar panels. Since under Article 2.1.1, PSPCL is obligated to purchase all energy made available to it by the Petitioner at the Interconnection Point at the agreed tariff, this energy is necessarily to be compliant of the provisions of the RfP and the IAs which clearly mandate maintaining the installed DC capacity of the projects between the range of 50 MW to 52.5 MW and not beyond. Therefore, any AC energy output achieved by the Petitioner by use of solar panels in excess of the abovesaid DC capacity is not liable to be purchased by PSPCL and tariff payments made against such excess energy sold is liable to be refunded. Thus, the contention of the Petitioner that merely because PSPCL has never raised any objection towards the bills raised by the Petitioner based on such joint meter readings, it is precluded from raising an objection today, is completely misplaced. Till the site inspection was carried out by PSPCL on 2.6.2021, there was no occasion for PSPCL to ascertain that the Petitioner was generating electricity through installation of excess solar panels. And, the contention of the Petitioner that the demand is barred by limitation in terms of Article 16 of the PPAs is also misplaced in as much as Article 16 merely provides that disputes between the parties should ideally be discussed and

amicably resolved within 90 days.In the present case, the demand is based upon an Event of Default being committed by the Petitioner i.e. breach of mandatory conditions under clause 3.2 of the RfP which forms an integral part of the PPAs and has therefore been agitated by PSPCL under the provisions of Article 13 of the PPAs.

4.11 That the contention of the Petitioner that the agreed tariff under the PPA has been approved by the Commission and cannot be altered or revised is misplaced as PSPCL has neither sought to change the agreed tariff under the PPA for the energy supplied by the Petitioner in the past nor has it sought to revise the same for any future energy supplied but has rather only sought a refund of the agreed tariff paid by PSPCL for units generated by the Petitioner by use of solar panels installed in excess of the permitted DC capacity of the project. As such, by no stretch of imagination can it be contended that refund sought by PSPCL changes or revises the agreed tariff under the PPAs. That the Petitioner has relied upon the Judgments in Bangalore Electricity Supply Company case and Food Corporation of India case, to contend that by virtue of Section 70 of the Indian Contract Act, 1872, PSPCL having recovered distribution tariff from its consumers, it cannot seek any refund from the Petitioner. That the Judgments relied upon by the Petitioner do not support the case of the Petitioner, which are on different facts and are not applicable to the present case.The Hon'ble Appellate Tribunal in the Bangalore Electricity Supply Case was dealing with an issue where energy was injected by a generating company into the grid and payments for the same were being disputed by the distribution utility on the ground that Availability Based Tariff (ABT) meters were not installed at the premises without which charges could not be paid. It was observed by the Hon'ble Tribunal in the

facts and circumstances of the case that installation of ABT meters was not required and as such, it held that since energy supplied had been consumed by the distribution utility, payment of tariff for the same could not be withheld. However, in the present case, there is no withholding of tariff by PSPCL; rather, it is the Petitioner who has generated electricity in violation of mandatory stipulations under the RfP/IAs/PPAs and for which tariff payments have already been received by it, refund of which is being sought by PSPCL. Therefore, there is no parity in the facts of the present case and that of the Bangalore Electricity Supply case or the legal principle laid down therein and as such, the said Judgment is inapplicable in the present case.

4.12 Further, as is clear from the language of Section 70, an act to be covered under the said provision must necessarily be an act 'lawfully done' by a person to another person. However, in the present case, the excess energy supplied by the Petitioner to PSPCL has clearly been over and above the energy that was permitted to be injected by the Petitioner in terms of clause 3.2 of the RfP. As such, supply of such energy to PSPCL cannot be considered to be an act 'lawfully' done by the Petitioner so as to attract the provisions of Section 70 of the Contract Act. It is rather a case of breach of the PPAs by the Petitioner, through which it has been able to recover tariff in excess of what it ought to have received if its installed DC capacity had been within the permissible range and therefore, this benefit enjoyed by the Petitioner on account of the said breach is liable to be compensated/refunded as provided under Section 73 of Indian Contract Act. Moreover, the energy supplied by the Petitioner to PSPCL against the excess installed DC capacity could not have been known to it through the joint meter readings, the same was forced upon PSPCL and as such, in

view of the settled legal position, such imposition by the Petitioner is clearly outside the purview of Section 70 as has been held by the Hon'ble Supreme Court in the Judgment of State of West Bengal Vs. B.K. Mondal & Sons [1962 AIR SC 779]:

> *"Section 70 is not intended to entertain claims for compensation made by persons who officiously interfere with the affairs of another or who impose on others services not desired by them. ….. …*
>
> *…… the acceptance and enjoyment of the benefit of the thing delivered or done which is the basis for the claim for compensation under Section 70 must be voluntary".*

In view of the aforesaid clear findings of the Hon'ble Supreme Court, the energy supplied to PSPCL being forced upon it, the plea of Section 70 of the Contract Act, 1872 cannot be made available to the Petitioner.

4.13 That the Advisory/Clarification dated 5.11.2019 is completely inapplicable to the case of the Petitioner inasmuch as,

i) A bare reading of Paras 1 and 3 of the Clarification dated 5.11.2019 reveals that the said Clarification has been issued in relation to those PPAs where the generators are obligated to meet a committed Capacity Utilization Factor (CUF) and the PPA provides for a range of energy supplied based on the CUF where, while the procurer is not obligated to buy energy beyond this range, the generator is liable for penal charges for supply the energy less than this range. However, in the present case, the obligations of the Petitioner and PSPCL under the PPAs are not defined in relation to a range of CUF but rather 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 and the Petitioner is liable to supply the entire energy generated by it. Thus,

the aforesaid clarification by MNRE is clearly inapplicable to the present case where the entire energy being supplied to PSPCL is liable to purchase and no penal charges are imposed upon the Petitioner for supply below any range.

ii) In regard to reliance by the Petitioner on the Judgment dated 16.11.2021 of the Hon'ble Appellate Tribunal passed in Appeal Nos.163 and 171 of 2020 titled Nisagra Renewable Energy Pvt. Ltd. Vs. Maharashtra Electricity Regulatory Commission & Anr., PSPCL submits that the said Judgment is also wholly inapplicable to the present case for the reason that the PPAs in question in the said Judgment were also of the nature mentioned in the Clarification dated 5.11.2019 whereunder, they provided for a range of energy supplied based on the CUF and while the procurer was not obligated to buy energy beyond this range, the generator was liable for penal charges for supply the energy less than this range. It was in light of these obligations that Hon'ble Appellate Tribunal (as also the MNRE) had held that designing of DC capacity by a developer was to be left on its own so that it could maintain the minimum CUF. However, since there is a complete absence of any such obligation under the present PPAs, neither the MNRE clarifications nor the Judgment of the Hon'ble Appellate Tribunal can be of any assistance to the Petitioner.

4.14 That the contention of the petitioner that it had a vested right is misplaced. The vested right of the petitioner is only a contractual right available to it under the PPAs to receive the agreed tariff. There is no vested right of the Petitioner to receive the agreed tariff for the energy unlawfully supplied under the PPAs. As regards, the contention of the Petitioner that it is its legitimate expectation to receive agreed tariff from

PSPCL, since the energy supplied by the Petitioner is beyond the permitted range of supply under the provisions of RfP, IAs and the PPAs, there can be no *"legitimate expectation"* of the Petitioner for recovery of tariff against such unlawfully injected energy.

4.15 That the Petitioner has sought to contend that during the operation of the projects, it was observed that solar PV panels installed by it had degraded significantly more than the guaranteed 3.4% at the end of 3 years from the date of shipment which constrained the Petitioner to replace some of the underperforming and defective modules with new modules which was duly informed to PSPCL vide letter dated 14.1.2019. The Petitioner's reliance on the letter dated 14.1.2019 is wholly erroneous in as much as the said letter has never been received by PSPCL. The said letter thus, is a frivolous attempt on part of the Petitioner to justify its illegal actions and the Petitioner therefore cannot be permitted to rely upon the same.

4.16 That the extent of the said energy that may be generated by PSPCL is prescribed under clause 3.2 of the RfP wherein the Petitioner has been mandated to maintain its installed DC capacity under 52.5 MW. A combined reading of the provisions shows that the arrangement between the parties is that the Petitioner can have a maximum installed DC capacity of 52.5 MW and whole of the energy generated therefrom is to be supplied to PSPCL at the agreed tariff. This energy (the AC power output) is bound to be less than 52.5 MW/50 MW owing to various factors like location of the plant, weather parameters, orientation of PV modules etc. Thus, nowhere under the PPAs, an express stipulation has been made that the Petitioner must generate the contracted capacity of 50 MW failing which an adverse action may be taken against it and

therefore it must undertake repowering/replacement of PV modules to ensure generation of 50 MW power. Under this arrangement, it is obvious that the repowering/replacement of the modules has been done by the Petitioner on its own accord and not on account of any mandate under the PPAs and therefore, any such repowering/replacement which ultimately leads to enhancement of the installed DC capacity in contravention of clause 3.2 of the RfP/IAs/PPAs ought not to be absolved by the Commission.

4.17 That the Petitioner has also raised a misplaced contention that since it had undertaken the exercise of repowering/ replacement of the PV modules since 14.1.2019, intimation whereof had been duly given to PSPCL, in case PSPCL was of the view that the same was to enhance the DC capacity of the projects, it should have instructed the Petitioner to stop supply of power at that point itself. As stated above, the said letter dated 14.1.2019 has never been received by PSPCL, the Petitioner therefore cannot be permitted to rely upon the same. Further, the plea of waiver and acquiescence is not available to the Petitioner in view of the clear stipulation under Article 27 of the PPAs. The act of the Petitioner being an Event of Default and being proceeded under Article 13 of the PPAs, the plea of waiver/acquiescence is also inadmissible in terms of Article 13.5.0 of the PPAs. With regard to the reliance of the Petitioner on the Judgment dated 19.4.2017 of the Hon'ble Appellate Tribunal in Appeal No.161/2015, Sasan Power Ltd. Vs. Central Electricity Regulatory Commission, PSPCL submitted that the Judgment has been rendered by the Hon'ble Appellate Tribunal in completely different facts and circumstances from those existing in the present case

and as such, selective reliance of the Petitioner on the same is liable to be rejected by the Commission.

4.18 That, it is submitted that no doubt the 2003 Act has a clear mandate of promoting energy generation from renewable sources; however, the same cannot absolve any renewable power generator to generate electricity de-hors the contractual provisions. The Petitioner, being a generating company under the 2003 Act and also as signatory of the PPAs and the IAs executed on the basis of the RfP, is bound to adhere to the terms thereof, and in case of any deviation from or breach of the same, the Petitioner cannot be allowed to hide behind the mandate under the 2003 Act to promote energy generation from renewable sources.

Rejoinder filed by the Petitioner

5. PDPL filed rejoinder to the reply filed by PSPCL. While, reiterating its earlier submissions, PDPL has further submitted that:

5.1 That the comparison of the units generated by Projects of PDPL in the months of October 2021 to February 2022 and the preceding years (i.e., right after removal of the excess DC capacity) is completely irrational and baseless. PSPCL has selectively chosen to compare generation data of only 5-months to establish an erroneous conclusion solely with the intent to mislead the Commission with such selective data.The downward generation for such 5 months periods as demonstrated by PSPCL is completely incidental and it is not reliable to arrive at a conclusion that it was on account of removal of such alleged additional DC capacity/module.

The petitioner has submitted the generation data of the projects since commissioning of the projects to explain variation in generation and submitted as under:-

(a) A bare perusal of the generation data of both the Projects for the period July to January evinces that generation from the Projects had increased in FY 2018-19 for most of the month as compared to previous FY i.e., FY 2017-18 and again decreased during the same months of FY 2019-20 and then increased in FY 2020-21 again.

(b) During the month of May, generationfor Sardargarh Project had decreased in FY 2018-19 and then increased in FY 2019-20 and further decreased again in FY 2020-21. Whereas in Chughekalan Project, the generation pattern is not same, as generation had been increasing up to FY 2019-20 and then decreased from FY 2020-21 onwards.

(c) During month of June, generation of Chughekalan Project had decreased inFY 2018-19 but increased in FY 2019-20 and again fell down in FY 2020-21 and increased in FY 20210-22. However, in Sardargarh Project generation had decreased once in FY 2018-19 and increased thereafter from FY 2019-20.

(d) Similarly for the months of September, generation from both the Projects increased in FY 2017-18 but decreased in FY 2018-19 and again increased in FY 2019-20 and decreased in FY 2020-21.

(e) For the months of December, generation from Sardargarh Project was increasing up to FY 2018-19 then decreased in FY 2019-20 and further increased from FY 2020-21. Same was not the case for Chughekalan Project.

(f) During January month for Sardargarh Project it follows decreasing pattern continuously whereas in Chughekalan project generation had increased first in FY 17-18 and started decreasing from FY 2018-19.

(g) During February month, generation for both the Project had increased in FY 17-18 and decreased in FY 2018-19 and increased again in FY 19-20 and decreased thereafter.

The data provided by PSPCL confirms PDPL's contention that generation from a solar project cannot be uniform and varies depending on various factors beyond the control of the generator. There are variations/ inconsistency and no fixed pattern in generation of power from both the Projects as evident from above data. That inconsistency in generation and variation from previous FY are solely due to change in solar irradiation, temperature, and other weather parameter, which are beyond the control of PDPL. It is further submitted that JMR reading will provide the actual AC power generation in MW only. The actual conversion of DC Power to AC power depends on various technical factors. The AC power output of Solar PV Plant depends upon various factors like location of the plant, weather parameters, orientation of solar PV modules, O&M practices etc., as such the output may or may not be equal to installed AC or DC capacity of the plant. The DC capacity of any solar power station in megawatts peak (MWp) is the accumulated peak capacity of all the solar modules which it contains.

5.2 The contention of PSPCL that in terms of the PPA, PDPL is entitled to receive the agreed tariff only for the energy supplied through the permissible installed DC capacity of 52,5 MW is wrong and denied. That PSPCL in its reply has categorically admitted that it is obligated to purchase the entire energy generated from PDPL's 50 MW Projects at the tariff agreed under the PPA. It is a settled position of law that facts admitted need not be proved. Admissions in pleadings or judicial admissions, made by the parties are fully binding on the party that makes

them and constitute a waiver of proof. The petitioner relied in this regard, on the judgments in case of *Nagindas Ramdas vs. DalpatramIchharam*, (1974) 1 SCC 242 and *Gautam Sarup vs. Leela Jetly*, (2008) 7 SCC 85.

5.3 That it is submitted that PSPCL in its report for site inspection conducted on 02.06.2021 - while computing the total DC capacity of the Projects has considered and included these defective and electrically disconnected modules also. Hence, the same is not the true representation of the actual installed DC Capacity of the Projects, which was being used by PDPL for generation and supply of power to PSPCL.

OBSERVATIONS AND DECISION OF THE COMMISSION

6. The Commission has examined the submissions made in the petition, reply submitted by the respondent PSPCL, rejoinder filed by the petitioner PDPL, arguments made by the parties and written submissions made thereof. The petitioner is 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 observations & decision of the Commission on the same is as under:

6.1 Obligations/Rights of the parties with respect to the installed capacity of the Projects, procurement of power thereof and maintenance of the Projects:

The petitioner's plea is that the repowering of capacity and replacement of defective/damaged Solar PV Panels is a permissible O&M activity under the PPAs and it has a right to receive the agreed tariff for every unit of power supplied upto the Contracted Capacity of 50 MW under each PPA for the entire period of 25 years. It was submitted that there is no restriction under the PPAs with respect to installation of DC/installed

capacity and PSPCL's reliance on the RFP specifying that only +5% tolerance is allowed on the installed capacity is misplaced in view of Hon'ble APTEL judgments and the MNRE Advisory/Clarification in the matter.

Whereas, PSPCL is contending thatthe 50 MW capacities referred to under the PPAs is the installed capacity with permissible 5% positive deviation as stated in RfPand the Petitioner's right to carry out the required maintenance/ overhauling is subject to maintaining the permissible installed capacity. The issue of installed capacity is relevant in the context that under the PPAs executed with the solar power generators; PSPCL is under an obligation to accept all energy made available to it. This obligation to accept all energy made available by the Projects comes with the attached conditionality that only the permissible installed DC capacity under the RfP read with the IAs and PPAs would form basis for injection by the generators. The PPAs also have a categorical negative covenant that no additional payment on any account shall be made to the Petitioner. Thus, for the excess energy supplied by PDPL in violation thereof, PSPCL is not liable to make any tariff/payment but also to recover any extra paid earlier alongwith interest.

In order to examine the obligations/rights of the respective parties pertaining to the said issues, the Commission refers to the relevant provisions of PPAs/IAs/RfP alongwith the MNRE Advisory/Clarification dated 05.11.2019 and Hon'ble APTEL judgments cited by the petitioner:

a) Provisions of the PPAs/IAs/RfP:

i) Power Purchase Agreements (PPAs) dated 12.1.2016.

"……

WHEREAS

d) Implementation Agreement signed by M/s Prayatna Development Pvt.Ltd. …, Ahmadabad 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.

……..

1.0.0 DEFINITIONS

……..

*"**Installed Capacity**" means 50 MW which is the allocated capacity of the Project as per the Implementation Agreement.*

……..

2.0.0 ENERGY PURCHASE AND SALE

2.1.0 Sale of Energy by Generating Company.

2.1.1 The PSPCL shall purchase and accept all energy made available at the Interconnection Point from the Generating Company's Facility, pursuant to the terms and conditions of this Agreement which is set out below:

(i) Rs___per unit for Solar Photo Voltaic Power Project of 50 MW capacity as per competitive bidding done by PEDA. This tariff shall be applicable for tariff period of 25 years from scheduled date of commercial operation.

(ii) As per RE Regulations the tariff shall remain constant throughout the Tariff Period following the year of commissioning. No additional payment shall on any account be payable by PSPCL.

……

2.1.3 In order to protect the interests of the PSPCL/ PSTCL and the consumers in general the Generating Company shall continue to supply whole of the generated power to PSPCL at the rate prescribed in Article 2.1.1 above during the term of the agreement.

……..

5.0.0 ***GENERATION FACILITIES- OPERATION & MAINTENANCE***

……..

5.2.0 The Generating Company shall be responsible at its own expense for ensuring that the Power Station is operated and maintained in accordance with all legal and regulatory requirements ……..and Prudent Utility Practices within the acceptable technical limits ……..

……

5.4.0 PSPCL shall have the right to designate from time to time its officers/officials who shall be responsible for inspecting the Generating Facility for the purpose of verifying the Generating Company's compliance with this Agreement.

……..

5.6.0 The Generating Company shall carry out regular maintenance and overhauls of the Generating Facility as per recommended schedules and procedures of the equipment suppliers. ….."

ii) And, Clauses 4.4 and 6.2 of the IAs specifies as under:

"4.4**…….**

The Company shall establish, operate and maintain the Solar PV Power Project and facilities for power evacuation from the project as per provisions of RfP, this IA & PPA…..

……..

6.2 ***Obligations of Company:***

(i)The Company shall act as per the terms and conditions of RfP.

……..."

iii) Further, Clause 3.2 of the RfP specifies as under:

"3.2 ***Capacity of each Project***

The total capacity to be allotted is as under:

Nature of Eligible Bidding Company	*Capacity of Projects*
……..	……

Note:

i. +5% tolerance is allowed on the capacity of the project. E.g. 25 MW capacity project can have 26.25 MW as DC capacity based on the rated capacity of PV modules at STC conditions

(1000 W/m2, 25°C, AM1.5). No negative tolerance is acceptable."

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's50 MW projectscan 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.

b) **Hon'ble APTEL Judgment dated 19.04.2017:**

The Petitioner is countering the reliance on the provisions of the RFP with the submission that in Hon'ble APTEL Judgment dated 19.04.2017 passed in Appeal No. 161 of 2015 titled Sasan Power Limited vs. CERC, 2017 ELR (APTEL) 0508, it has been held that:-

"44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as a Change in Law. ……."

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 petitioner also submitted thateven the enhancement of the Project installed capacity would not amount to violation of the RFP or the PPAs in terms of MNRE advisory/clarification dated 05.11.2019 and Hon'ble APTEL Judgment dated 16.11.2021,wherein it has been held that it is the prerogative of the generator/developer to finalize the optimal DC capacity for its Project in a manner that can deliver the Contracted Capacity of 50 MW from each Project.

The Commission refer to the said MNRE Advisory/Clarification and Hon'ble APTEL Judgment as under:

(i) The MNRE Advisory/clarification issued vide F. No. 283/63/2019-Grid Solar dated 05.11.2019 has advised as under:

" (4) Accordingly, all concerned are hereby advised that:

*i. As long as the solar PV power plant is **in accordance with the contracted AC capacity** and meets the range of energy supply based on Capacity Utilisation Factor (CUF) requirements, the design and installation of solar capacity on the DC side should be left to the generator/developer**.***

*ii. Even if the installed DC capacity (MWp) [expressed as the sum of the nominal DC rating (Wp) of all the individual solar PV modules installed] in a solar PV power plant, is in excess of the value of the contracted (AC) capacity (MW), it is not violation of PPA, as long as theAC capacity of the solar PV power plant set up by the developer corresponds with the contracted AC capacity, and that, at no point, the Power (MW) scheduled from the solar PV power plant is in excess of the contracted AC capacity, **unless there is any specific clause in the PPA restricting such D.C. capacity**.*

……..."

(ii) And, Hon'ble APTEL in Judgment dated 16.11.2021 in Appeal Nos. 163 & 171 of 2020 titled ***Nisagra Renewable Energy Private Limited v. MERC & Anr*** has held as under:-

*"31…..As pointed out by the appellants there is no finding returned that the **higher DC capacity** or higher CUF **in relation to the projects in hand is imprudent**.*

*33. ……The appellants have **only exercised the right given by RfS and PPA to design their projects** in a manner that can deliver the Contracted Capacity and achieve declared CUF. ……..*

……

*36. In our view, under the PPAs, **there is no restriction on the DC capacity to be set up** or the maximum declared CUF. …….. MSEDCL has already taken the benefit of higher generation at a lower tariff. ……..."*

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 tothe instantcase.

6.2 Whether the Petitioner's installed Capacityis in violation of the PPAs or RFP:

The petitioner is pleading that, it is not in default/violation of the PPAs or RFP. It was submitted that, PSPCL is erroneously contending that it has enhanced the capacity of the projects beyond the permissible limit under the PPAs. In fact, since commissioning, Chughekalan Project has recorded peak injection of 43.5 MW only and Sardargarh Project has recorded peak injection of 43.4 MW only. It was submitted that PSPCL regularly monitors and is duly aware of the injection of power from the Projects through the Joint Meter Readings (JMRs) at the Inter connection Points recorded by the representatives of PDPL and PSPCL each month; in terms of the same, even after repowering/ replacement, the peak power output from the projects remained below the contracted capacity of 50 MW under PPAs. PSPCL has not provided any evidence to establish that the installed capacity of the Projects or power output from the Projects had increased beyond 50 MW. PSPCL, in its report for site inspection conducted on 02.06.2021, while computing the total DC capacity of the Projects, has considered and included the defective and electrically disconnected modules also. The defective modules though physically existing at the Project site were disconnected and not generating any electricity. They were left on the mounting structure merely to avoid additional costs of removal, shifting and storage. However, upon the insistence of PSPCL, they along with their mounting structure were completely removed from the Projects sites by 30.09.2021. The petitioner in its rejoinder has further submitted that there are variations/ inconsistencies and no fixed pattern in the generation data comparison provided by PSPCL. Also, the JMR reading will provide the actual AC power generation in MW only and the actual conversion of DC Power to AC power depends on various factors like location of the plant, weather parameters, orientation of solar PV

modules, O&M practices etc. The DC capacity of any solar power station in megawatts peak (MWp) is the accumulated peak capacity of all the solar modules which it contains.

Whereas, PSPCL is contending that upon inspection of the Petitioner's Generation Facilities on 02.06.2021, the installed DC capacities were found as 58.228 MW at Sardargarh Project and 55.256 at Chugekalan Project i.e. in excess of the permissible tolerance limit in violation of RfP and consequently a material breach under the PPAs. The Petitioner plea that the defective modules were disconnected and no electricity was being generated from the said modules is contrary to the observation of PSPCL during the inspection, as is evident from the inspection report counter signed by its official. Further, the plea that JMR can establish the compliance of PPA as regards capacity installed at the Projects is misplaced; The JMR reveals AC power output, which in a solar PV plant depends upon various factors like location of the plant, weather conditions, orientation of solar PV modules, O&M practices etc. As such, a lower AC output of the projects could not be construed to mean that the installed DC capacity was within permissible limits and the Petitioner's contention that it has never supplied power more than 50 MW is therefore misleading. Further, the installed DC capacity in a solar PV power plant is the summation of ratings of all solar modules which could only be seen through physical inspection of the solar modules and not through any meter readings.

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. Also, both the parties seems to have come on the

same page regarding the fact that the Joint Meter Readings (JMRs) recorded at the inter connection points depict the AC power output of the Projects andwith 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 Commission refers to the report of inspection dated 02.06.2021 of the projects; wherein the installed DC capacity has been reported to be found as 58.228 MW and 55.256 MW for the Sardargarh and Chugekalan projects respectively. The report also contains the signatures of representative of the petitioner with the 'Note' stating that *"Extra Modules are put in compensation for degraded modules".* The said note by its representative do not supports the Petitioner plea that the defective modules though physically existing at the Projects site were disconnected. Thus, it can be concluded irrefutably that the installed DC capacity of the petitioner projects found during the inspection on 02.06.2021 for each of the project, was in excess/ breach of the permissible maximum contractual limit of 52.50 MW. The Commission also notes that as per submission of the parties, the said default stands cured on 30.09.2021 upon removal of the said Modules from the Projects site.

6.3 Having observed that PSPCL's obligation to purchase/ accept energy from the petitioner projects at the tariffs agreed/stated in the PPAs, is limited to

the maximum installed DC capacity of 52.5 MW each and the installed DC capacity on each of the project, found upon physical inspection, to be in excess of the said maximum permissible contractual limit, the Commission further examines the other issues raised by the Petitioner with regard to the issuance of the impugned demand notices by the PSPCL as under:

6.3.1 The Petitioner ispleading that, PSPCL has issued the impugned demand notices based on an erroneous assumption that PDPL has supplied excess energy from its Projects during the period from 18.05.2018 to 30.09.2021. And, PSPCL has not furnished any details/data regarding the basis for arriving at the calculation of the alleged excess generation by PDPL.

Whereas, PSPCL is contending that upon inspection of Petitioner's plants on 2.06.2021, it was found that the installed DC capacity of the projects were 58.228 MW (at Sardargarh project) and 55.256 MW (at Chugekalan project), which was in excess of the permissible tolerance limit in violation of clause 3.2 of the RfP and consequently a material breach of the PPAs has occured. Accordingly, on 23.6.2021, PSPCL issued Default Notices to the Petitioner under Article 13.3.0 of the PPAs stating as under:

"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 W1m2,25°C, AM 1.5). However, upon checking of your above said project by PSPCL on 02.06.2021, the installed DC capacity has been found …..in excess of the permissible tolerance ..... You are thus in violation of the express and mandatory contractual obligations under the RfP as also the lA 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 lA and the PPA and the same are liable to be recoverable alongwith 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.

.....”

And, since the response of the Petitioner was not satisfactory, PSPCL was constrained to issue the impugned Demand Notices on 03.12.2021. The Petitioner was thus informed that it had supplied unauthorized energy by installing DC capacity in excess of the permissible capacity and as such had received excess tariff from PSPCL beyond the contracted obligations as per PPA, which it was bound to refund.

The Commission has held in the previous paras that the contract between the parties is for a maximum of 52.50 MW as the installed DC capacity at each of the projectand evacuation of power thereof. Thus, it is obvious that the power generated from the DC capacity installed in excess of the said contractual limit do not come under the purchase obligations of PSPCL. Further, the Commission refers to

the default notices and the demand notices issued by PSPCL to the petitioner. It is observed that, vide the default notices dated 23.06.2021, in addition to asking the Petitioner to cure the default by removing the excess installed DC capacity, the petitioner was also asked to explain as to 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. And, the demand notices dated 03.12.2021 indicated the quantum of un-authorised energy supplied and corresponding recoverable payments thereof, considering the duration of the default from 18.05.2018 (after the date of MOM vide which DC capacity of the plants was last verified to be within prescribed limits) to 30.09.2021 (date of removal of excess installed DC capacity). The calculation sheets of the same, corroborating the demand raised in the impugned notice, were furnished by PSPCL in its reply to the petition, which has not been contested by the Petitioner in its rejoinder to PSPCL's reply. Thus, the Commission is of the view that the Petitioner's plea in this regard is not maintainable and is disallowed.

6.3.2 Whether, the issuance of the impugned Demand Notices are barred by limitation:

The petitioner has pleaded that unilateral deduction of tariff by PSPCL is not permitted under the PPAs and the Electricity Act, 2003. It was submitted that the demand notices issued by PSPCL are in violation of Article 3 of the PPAs, since PSPCL had not disputed the monthly tariff invoices raised by PDPL for the period 18.05.2018 to 30.09.2021 within the prescribed time frame and the same have attained finality. In terms of Article 16 of the PPA any disputes between the parties, if not resolved

amicably within 90 days, has to be adjudicated by the Commission. Also, PSPCL's right to challenge the Tariff Invoices for the period prior to December 2018 is barred by limitation, in terms of the Limitation Act 1963.

Whereas, PSPCL has contended that the Article 3 of the PPAs pertains to the tariff payments to be made in accordance with the JMRs, demonstrating the AC power output and not the installed DC capacity. Therefore, while monthly tariff payments have been made to the Petitioner based on the JMRs, there has been no occasion for PSPCL to know the actual installed DC capacity of the projects till the joint inspection was carried out on 02.06.2021. It was only upon inspection of the project sites that it was found that the installed DC capacity of the projects is in excess of the permissible limits. In the present case, the demand is based upon an Event of Default being committed by the Petitioner and has therefore been agitated by PSPCL under the provisions of Article 13 of the PPAs. Thus, the contention of the Petitioner that the demand is barred by limitation in terms of Article 16 of the PPAs is also misplaced in as much as it merely provides that disputes between the parties should ideally be discussed and amicably resolved within 90 days.

The Commission refers to the Article 3 and 16 of the PPAs, which specifies as under:

"3.0.0 BILLING PROCEDURE AND PAYMENTS;

3.1.0 The designated representative of the parties shall record joint reading of the meters at the interconnection Point……..

3.2.0 Monthly energy account shall be prepared by the PSPCL. This account shall depict energy delivered to the PSPCL at the Interconnection Point, energy imported by the generating Company during shut down/startup of the project and net energy sold to the PSPCL during the month……..

3.3.0 ……The PSPCL shall make full payment of such Monthly Invoice within 60 days of receipt of the Monthly Invoice ……..

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 evident, 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, de hors through a court of law...*" Thus, the Commission does not agree with the petitioners' plea that the impugned Demand Notices are barred by limitation.

6.3.3 Whether, the Demand Notices issued by PSPCL seeks to revise/alter the tariff stipulated in the PPAs:

The Petitioner has pleaded that, the Demand Notices seek to revise the Tariff agreed under the PPAs. It was submitted that the tariff discovered through competitive bidding under Section 63 of the Electricity Act, adopted by the Commission and incorporated in the PPA cannot be altered by PSPCL or the Commission in view of a catena of Judgments passed by the Hon'ble Supreme Court and Hon'ble APTEL.

Whereas, PSPCL has contended that it has only sought a refund of the tariff/amount paid by PSPCL for units generated by the Petitioner by use of solar panels installed in excess of the permitted DC capacity of the project. There is no attempt to revise/alter the tariff as being alleged by the Petitioner. The fundamental basis for invitation of bids and selection of bidders has been that projects are to not to exceed 5% of the allotted project capacity and the obligation of PSPCL is to purchase and pay the agreed tariff for power generated from the project commensurate with such installed capacity and not beyond. When solar power was otherwise available on much lesser tariffs, it was imperative (besides being a contractual commitment) that no power from capacity over and above the agreed DC capacity was injected from each of the projects of the Petitioner. The Petitioner was thus informed that it had supplied unauthorized energy by installing DC capacity more than the permissible capacity and as such had recovered extra tariff from PSPCL which it was bound to refund. Exercising the contractual right to pay only as agreed under the PPAs cannot amount to alteration of tariffs. The tariffs continued to remain the same and the judgments relied upon by the Petitioner in support of its misplaced pleas are therefore not applicable.

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 of 52.5 MW. 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.

6.3.4 Whether, the Demand Notices violates vested right and legitimate expectation of PDPL:

The Petitioner is pleading that PDPL has a right to receive tariff of Rs. 5.95 for every unit of power supplied under the Chughekalan PPA and tariff of Rs. 5.80 for every unit of power supplied under Sardargarh PPA for the entire period of 25 years. This is a vested right in favour of PDPL, which cannot be taken away. Also, PDPL's decision to invest in the State of Punjab was directly linked to the said discovered tariff, which was to remain constant for a period of 25 years. Therefore, there was a legitimate expectation that the tariff determined through competitive bidding, adopted by the Commission and incorporated in the PPAs signed between the parties would be honored. The refund being sought by PSPCL is violative of PDPL's vested right and legitimate expectation. In this regard reliance is placed upon : -

a) The Hon'ble Supreme Court judgment in ***J.S. Yadav vs. State of U.P*** **(2011) 6SCC 570, ,** wherein it was held that:: -

"22. Thus, "vested right" is a right independent of any contingency. Such a right can arise from a contract, statute or by operation of law. A vested right can be taken away only if the law specifically or by necessary implication provides for such a course.

23. The appellant had been appointed under the provisions of the 1993 Act which did not require seven years' experience as a District Judge. In the instant case, the 2006 Amendment Act came into force on 23-11-2006. The State of U.P. did not take any step for discontinuation of the appellant up to May 2008 on the ground that he did not possess the eligibility as per the 2006 Amendment Act."

b) Hon'ble Supreme Court Judgment in ***Delhi Electricity Regulatory Commission v. BSES Yamuna Power Ltd*, (2007) 3 SCC 33,** wherein it was held that:

"42…Therefore, the Policy Directions invited bids from the private sector on the basis of certain assurances. Under the above circumstances, on the facts of the present case, legitimate expectation was built into the investments made by the DISCOMs herein. …….. In other words, the return on the total package becomes illusory if the rate of depreciation is reduced from 6.69% to 3.75%. The certainty for 5 years is also obliterated for reducing the rate of depreciation. This violation also infringes the doctrine of legitimate expectation of the DISCOMs to get lawful and reasonable recovery of expenditure...."

(c) 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, wherein it has been held that:

"129. ……. The considerations at that stage would include not only consumers' interest but also all relevant factors set out in law (section 61) including the need to promote renewable energy, the proper thermal hydro mix, the legitimate expectation of reasonable returns for the generator, capital expenditure, additional cost such as wheeling charges, transmission or operational losses etc. and, of course, the National Tariff Policy….."

However, PSPCL is contending that, the vested right and legitimate expectation of the petitioner to receive agreed tariff from PSPCL, is only as per contractual provisions available to it under the PPAs. There is no vested right or legitimate expectation to receive the same agreed tariff for the energy unlawfully supplied beyond the permitted range specified under the provisions of RfP, IAs and the PPAs.

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.

6.3.5 The issue of Waiver/Acquiescence by PSPCL

The Petitioner has pleaded that PSPCL was unequivocally aware of the repowering of capacity and replacement of modules carried out by PDPL since 14.01.2019 (i.e., when PDPL wrote to PSPCL informing about the same) and 02.06.2021 (i.e., when PSPCL carried out physical inspection of the Project sites). It was submitted that if PSPCL was of the view that it has enhanced the DC capacity/installed capacity of the Projects resulting in excess generation by PDPL, it ought to have issued necessary instructions to PDPL to stop supplying such excess power at that point itself. However, PSPCL continued availing the power and has belatedly raised the Demand Notices after almost 3 years as an after thought. Such conduct of PSPCL amounts to waiver and acquiescence by conduct. In this regard reference is made to the **Hon'ble Supreme Court judgment in *Kanchan Udyog Limited v. United Spirits Limited***, **(2017) 8 SCC 237,** wherein it has been held as under: -

> *"22. …….Much will again depend on the nature of the contract, and the facts of each case. Waiver involves voluntary relinquishment of a known legal right, evincing awareness of the existence of the right and to waive the same……. If a party entitled to a benefit under a contract, is denied the same, resulting in violation of a legal right, and does not protest, foregoing its legal right, and accepts compliance in another form and manner, issues will arise with regard to waiver or acquiescence by conduct. In the facts of the present case, the conduct of the appellant in placing orders and receiving supply of concentrates directly from M/s VEC, for a period of nearly one year, and continuing to do so even after it wrote to the respondent in this regard, without recourse to any legal remedies for denial of its legal right to receive concentrates from the respondent, undoubtedly*

amounts to waiver by conduct and acquiescence by it to the new arrangement. …..”

Whereas, PSPCL’s contention is that the plea of waiver and acquiescence is not available to the Petitioner in view of the clear stipulation under Article 27 of the PPAs. In any case, the Petitioner’s reliance on the letter dated 14.01.2019 is wholly erroneous in as much as the said letter has never been received by PSPCL. Also, the act of the Petitioner being an Event of Default and being proceeded under Article 13 of the PPAs, the plea of waiver/acquiescence is inadmissible in terms of Article 13.5.0 of the PPAs.

The Commission observes that PSPCL’s submission in its reply to the petition, that the letter dated 14.01.2019 was not received by its office, has not been contested by the Petitioner in its rejoinder to PSPCL’s reply. And, the physical inspection of the Projects on 02.06.2021 cited by the Petitioner is the basis of the impugned demand notices issued by PSPCL. Further, the Commission also refers to the Articles 13.5.0 and 27 of the PPAs, which specifies as under:

“13.5.0 Failure by either the PSPCL or the Generating Company to exercise any of its rights under this Agreement shall not constitute a waiver of such rights. Neither party shall be deemed to have waived any failure to perform by the other unless it has made such waiver specifically in writing.

……

27.0.0 NON WAIVER

No delay or forbearance of either party in the exercise of any remedy or right will constitute a waiver thereof and the exercise

or partial exercise of remedy or right shall not preclude further exercise of the same or any other remedy or rights."

In view of above specific provisions in the PPAs, the Commission is of the view that the Petitioners plea of waiver and acquiescence is not sustainable in the instant case.

6.3.6 Whether, the Demand Notices are violative of the Electricity Act and the National Electricity Policy:

The petitioner has pleaded that under Sections 61(h) and 86(1)(e) of the Act and Clauses 5.12.1 to 5.12.3 of the NEP, there is an express mandate to promote generation from renewable energy. Also as per law, setting up of generation capacity is an unlicensed activity and any person is entitled to set up any capacity.

Whereas, PSPCL's contention is that, the mandate of promoting energy generation from renewable sources of energy cannot absolve any RE generator to generate electricity de-hors the contractual provisions agreed thereto. The petitioner as a signatory to the PPAs and the IAs executed on thebasis of the RfP, is bound to adhere to the terms thereof.

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 specify 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 do 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.

6.3.7 Unjust enrichment on part of PSPCL:

The Petitioner is pleading that the Demand Notices amount to unjust enrichment on the part of PSPCL, as the tariff paid by PSPCL during 18.05.2018 to 30.09.2021 is factored in the power purchase cost of PSPCL, which got incorporated in the retail tariff levied by PSPCL/DISCOM in terms of the Commission's Tariff Orders issued from time to time. Further, PDPL has supplied power as per its contractual obligation and PSPCL has consumed such power and enjoyed the benefit of reporting RPO compliance thereon, PSPCL ought not to be permitted to seek refund for the tariff already paid. In this regard PDPL has cited Hon'ble APTEL Judgment dated 24.01.2013 in Appeal No. 170 of 2012 (Bangalore Electricity Supply Company Limited Vs. Reliance Infrastructure Ltd. &Ors) and the Hon'ble Supreme Court judgement in Food Corporation of India v. Vikas Majdoor Kamdar Sahkari Mandli Ltd,(2007) 13 SCC 544.

Whereas, PSPCL contended that refund being demanded of the excess payments made for the energy supplied in excess of the permissible limits by the the petitioner will not cause enrichment of PSPCL since the same will also be a pass through in its future ARRs. Nor has the excess energy received contributed to fulfillment of its RPO obligations, PSPCL being

already surplus in power. It was further submitted that the Judgments relied upon by the Petitioner are on different facts and are not applicable to the present case. Further, as is clear from the language of Section 70of the Contract Act, an act to be covered under the said provision must necessarily be an act 'lawfully done' by a person to another person. It is rather a case of breach of the PPAs by the Petitioner and is liable to be dealt under Section 73 of Indian Contract Act. Moreover, as the energy supplied by the Petitioner to PSPCL against the excess installed DC capacity could not have been known to it through the joint meter readings, the same was forced upon PSPCL and as such, in view of the settled legal position, such imposition by the Petitioner is clearly outside the purview of Section 70 as has been held by the Hon'ble Supreme Court in the Judgment of State of West Bengal Vs. B.K. Mondal& Sons [1962 AIR SC 779]; that Section 70 is not intended to entertain claims for compensation made by persons who impose on others services not desired by them and the acceptance and enjoyment of the benefit of the thing delivered or done which is the basis for the claim for compensation under Section 70 must be voluntary.

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 ofthe 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 ARRs and thus cannot be considered to be causing unjust enrichment to PSPCL.

6.3.8 The Petitioner in its rejoinder to PSPCL's reply has also contended that PSPCL in its reply has categorically admitted that it is obligated to purchase the entire energy generated from PDPL's 50 MW Projects at the tariff agreed under the PPA. In this regard the petitioner has submitted that admissions in pleadings or judicial admissions made by the parties are fully binding on the party that makes them and constitutes a waiver of proof.

The Commission refers to PSPCL's submission made under Para 22 in its reply to the Petition stating as under:

"22……., Respondent No.1 respectfully submits as under:

(ii)…….. Since under Article 2.1.1, Respondent No.1 is obligated to purchase all energy made available to it by the Petitioner at the Interconnection Point at the agreed tariff, this energy is necessarily to be compliant of the provisions of the RfP and the IAs which clearly mandate maintaining the installed DC capacity of the projects between the range of 50 MW to 52.5 MW and not beyond. Therefore, any AC energy output achieved by the Petitioner by use of solar panels in excess of the above said DC capacity is not liable to be purchased by Respondent No.1 and tariff payments made against such excess energy sold to Respondent No.1 is consequently liable to be refunded;

…….

(v) the reliance of the Petitioner on clause 2.1.3 and 2.2.1 of the PPAs to contend that Respondent No.1 is obligated to purchase the entire energy supplied to it at Interconnection Point is dehors the context of contractual provisions. The obligation of Respondent No.1 to purchase all energy made available at the interconnection point is necessarily to be construed in light of the fundamental basis on which the PPAs have been executed viz. the mandatory conditions of the RfP which mandates a maximum installed DC capacity of 52.5 MW. Therefore, the liability of Respondent No.1 under the aforesaid provisions is clearly only towards purchase of energy made available to it which has been generated in compliance of the mandatory conditions of the RfP i.e. through the permissible installed DC capacity and not beyond. The PPAs also unequivocally record that besides the agreed tariff, the Petitioner is not entitled to any additional payments. Therefore, the contention of the Petitioner that even though the energy made available to Respondent No.1 is in contravention of clause 3.2 of the RfP, it would still be obligated to purchase the same under clause 2.1.1 and 2.1.3 of the PPAs, is wholly erroneous and is liable to be rejected;"

As is evident, the Petitioner seems to be relying on the partial texts of PSPCL's reply, which is not acceptable under the law. This plea of the Petitioner too does not stand scrutiny and is rejected.

The prayers of the petitioner are thus disallowed and the petition and IA are disposed of in terms of the above Order.

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

Chandigarh
Dated: 08.08.2022