



नई दिल्ली  
NEW DELHI

याचिका संख्या./ Petition No. 279/MP/2022  
&  
284/MP/2022

कोरम/ Coram:

श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member  
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member  
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 01<sup>st</sup> of March, 2023

**IN THE MATTER OF:**

Petition under Section 79(1)(a) & (f) of the Electricity Act, 2003 read with Regulation 111 of the CERC (Conduct of Business) Regulations, 1999 and Article 8 of the Power Purchase Agreement dated 30.01.2021 executed between the parties

**AND IN THE MATTER OF:**

**NTPC Renewable Energy Limited.**  
NTPC Bhawan, SCOPE Complex, 7,  
Institutional Area, Lodhi Road Delhi  
New Delhi – 110003

**...Petitioner**

**Versus**

**Gujarat Urja Vikas Nigam Limited**  
Sardar Patel Vidyut Bhavan, Race Course,  
Vadodara, Gujarat- 390007

...Respondent

**IN THE MATTER OF:**

Petition Under Section 79(1)(a) & (f) of the Electricity Act, 2003 read with Regulation 111 of the CERC (Conduct of Business) Regulations, 1999 and Article 8 of the Power Purchase Agreement dated 23.04.2021 executed between the parties.

**AND IN THE MATTER OF:**

**NTPC Renewable Energy Limited.**  
NTPC Bhawan, SCOPE Complex, 7,  
Institutional Area, Lodhi Road Delhi  
New Delhi – 110003

...Petitioner

**Versus**

**Gujarat Urja Vikas Nigam Limited**  
Sardar Patel Vidyut Bhavan, Race Course,  
Vadodara, Gujarat- 390007

...Respondent

**Parties Present:**

Shri Venkatesh, Advocate, NREPL  
Shri Siddharth Joshi, Advocate, NREPL  
Shri Abhishek Nangia, Advocate, NREPL  
Shri Kartikey Trivedi, Advocate, NREPL  
Ms. Swapna Seshadri, Advocate, GUVNL  
Ms. Ashabari Thakur, Advocate, GUVNL

## आदेश/ ORDER

The Petitioner i.e., NTPC Renewable Energy Limited (NREL) is a wholly owned subsidiary of NTPC Limited & was incorporated on 07.10.2020, with a target to accelerate the Renewable Energy capacity. The Petitioner has filed the petitions under section 79(1)(a) & (f) of the Electricity Act, 2003 read with Regulation 111 of the CERC (Conduct of Business) Regulations, 1999. The Petitioner is seeking extension of 13 months and 13 days in achieving Scheduled Commercial Operation Date (SCoD) for the 200 MW Solar Power Project till 25.11.2023 on account of Force Majeure events in terms of Article 8 of the Power Purchase Agreements.

2. The Respondent, Gujarat Urja Vikas Nigam Limited (GUVNL) is the State Distribution Licensee in the State of Gujarat within the meaning of Section 2(17) of the Act.
3. The Petitioner has made the following prayers:

### **In Petition No. 279/MP/2022:**

- (a) *Admit the present Petition;*
- (b) *Declare the aforesaid events as force majeure in terms of Article 8 of the PPA;*
- (c) *Grant an extension of 13 months and 13 days in achieving SCOD for the 200 MW Solar Power Project till 25.11.2023 on account of the above Force Majeure events;*
- (d) *Direct GUVNL not to take any coercive steps against the Petitioner till the pendency of the Petition; and*
- (e) *Pass any such further orders(s) as this Hon'ble Commission may deem fit and proper in facts and circumstances of the present case.*

### **In Petition 284/MP/2022:**

- (a) *Admit the Present Petition:*
- (b) *Declare the aforesaid events as force majeure in terms of Article 8 of the PPA;*
- (c) *Grant an extension of 15 months in achieving SCOD for the 150 MW Solar Power Project till 23.03.2024 on account of the above Force Majeure events;*

- (d) Direct GUVNL not to take any coercive steps against the Petitioner till the pendency of the Petition; and
- (e) Pass any such further orders(s) as this Hon'ble Commission may deem fit and proper in facts and circumstances of the present case.

4. The Brief facts of the case are as follows:

Details	279/MP/2022	284/MP/2022
<b>Nodal agency</b>	GUVNL	GUVNL
<b>Capacity (MW)</b>	200 MW	150 MW
<b>Power</b>	Solar	Solar
<b>RfS issued on</b>	28.09.2020	23.01.2021
<b>LOA issued on</b>	01.01.2021	26.03.2021
<b>Adoption Order (GERC)</b>	08.01.2021	13.05.2021
<b>PPA executed on</b>	30.01.2021	23.04.2021
<b>Tariff</b>	1.99/unit	Rs. 2.20/unit
<b>Date of effectiveness of GST Laws</b>	30.07.2020	30.07.2020
<b>MNRE's OM regarding extension in SCOD</b>	12.05.2021, 29.06.2021, 15.09.2021	12.05.2021, 29.06.2021, 15.09.2021
<b>Original SCOD</b>	30.07.2022	23.10.2022
<b>Extended SCOD</b>	14.10.2022	None

**Hearing dated 10.11.2022:**

5. During the hearing, the Learned counsel for the Petitioner submitted that the present petitions have been filed, inter-alia, seeking extension of the Scheduled Commercial Operation Date (SCoD) of its 200 MW and 150 MW Solar Power Projects being set-up in the State of Gujarat under the Power Purchase Agreements (PPAs) dated 30.01.2021 and 23.04.2021 respectively executed between the NREL and the GUVNL on account of Force Majeure events which were beyond the control of the NREL. NREL has submitted that since the SCoD of these projects under the PPAs has already lapsed and GUVNL has refused to consider the request of the Petitioner for extension of SCoD on the ground of Force Majeure events, appropriate direction(s) may be issued to GUVNL restraining it from taking any coercive actions against NREL

including invocation/encashment of the Bank Guarantee/Performance Bank Guarantee given under the PPAs. GUVNL, on the other hand, has submitted on the aspect of jurisdiction of this Commission and also submitted that NREL has not made out any case for grant of any interim relief/protection. After hearing the parties, the Commission directed them to file their respective written submissions on the aspect of '*admissibility*'. The Commission also directed the parties to maintain status quo with regard to status of the PPAs including the Bank Guarantee/Performance Bank Guarantee furnished there under till issuance of the Order. The Commission reserved the Order on admissibility of the Petition.

**Written Submissions of NREL (Petitioner):**

6. NREL has submitted as under:

a) It has been successful in achieving Financial Closure of the Projects within the extended timelines. However, on account of the following Force Majeure events, they have not been able to achieve the SCoD of the Solar Projects:

- i) Restriction imposed across the country on account of second surge of COVID-19 resulting in delay in completion of project activities.
- ii) Energy crisis in China which led to disruption of supply chain of Solar PV Modules and other equipments which are imperative for construction of a Solar Power Project.
- iii) Geopolitical situation caused due to Russia-Ukraine war resulting in imposition of sanctions and disruption of supply chain of raw material and equipments.
- iv) Non-consideration of Change in Law reliefs towards rise in rate of Goods and Services Tax (GST) on Solar Projects.

**In addition, following are the force majeure events in Petition No. 279/MP/2022**

- i) Delay in grant of extension of 76 days by GUVNL on account of second surge of COVID-19.
- ii) Non-consideration of Change in Law reliefs towards imposition of Basic Custom Duty (BCD) on Solar PV Modules.

- b) NREL is a wholly owned subsidiary of NTPC Limited which is a Government Company partly owned by Central Government and therefore, NREL is covered within the definition of Government Company as defined under Section 2(45) of the Companies Act, 2013.
- c) On a bare reading of the Articles of Association, it is evident that NTPC Limited has direct control over the acts of NREL. The expression “control” is defined under Section 2(27) of the Companies Act 2013.
- d) NTPC Limited, by virtue of appointing majority directors of NREL and by controlling the day to day operations and management exercises direct control over NREL. In terms of Section 79(1)(a) & (1)(f), this Commission has the jurisdiction to adjudicate the present petitions as it has the power to regulate tariff of Generating Companies owned or controlled by the Central Generating Stations and to adjudicate upon disputes involving generating companies relating to matters connected with clause (a) to (d) of Section 79(1) of the Act.
- e) This Commission has already adjudicated upon disputes involving subsidiaries of NTPC Limited under Section 79(1)(a) & (1)(f) of the Act (*Kanti Bijlee Utpadan Nigam Ltd vs Bihar State Power Holding Company Limited &ors.*). On a combined reading of the Articles of Association and Orders referred above, it is submitted that this Commission has the jurisdiction under Section 79(1)(a) of the Act on account of NREL being a wholly owned subsidiary of NTPC Limited a Generating Company owned and controlled by Central Government.

**Submission of GUVNL:**

- 7. GUVNL has filed its reply on 07.11.2022 on the issue of maintainability of Petitions and has submitted as under:
  - a) The petitions are not maintainable since there is a lack of jurisdiction of this Commission to deal with the matter and the Petitioner is engaging in forum shopping insofar as resolution of its disputes with respect to the present PPAs with GUVNL is concerned.

***Re: Lack of Jurisdiction***

- b) NREL has invoked the jurisdiction of this Commission without referring to the provisions of the PPAs (6.6, 9.2, 11.4) and RfS and attempting to project as if this Commission has the jurisdiction to deal with the matter under Section 79 (1)(f) of the Electricity Act, 2003.
- c) This Commission can exercise its adjudicatory power to decide the disputes under Section 79 (1) (f), if there is a dispute between a generating company and a licensee which is specifically covered by the provisions of section 79 (1)(a) to (d) of the Electricity Act, 2003. However, there is no question of determination of tariff for NREL's generating station. There is also no inter-state supply of electricity under the PPAs.
- d) Merely because NREL is a subsidiary of NTPC, a company owned and controlled by the Central Government, does not mean that this Commission has the jurisdiction to decide the disputes, especially when the issue does not pertain to tariff determination or inter-state transmission but adjudication on the terms and conditions of the PPA entered into between the parties.
- e) NREL has agreed to be governed by the jurisdiction of the State Commission and the entire transaction right from approval of the Section 63 process has been conducted by the State Commission. Even in terms of the Judgement of the Hon'ble Supreme Court in *Energy Watchdog v Central Electricity Regulatory Commission*, the jurisdiction of this Commission would get triggered if there is an interstate supply of power and that of the State Commission, if there is an intrastate supply of power.
- f) In view of above, there is a patent lack of jurisdiction of this Commission and the petition deserves to be dismissed on this short ground alone.

***Re: Forum Shopping***

- g) NREL has approached this Commission only to avoid adjudication by the correct forum which is the State Commission. NREL has filed two petitions before the State Commission (Review Petition No. 2059 of 2022 seeking Review of the Order dated

08.01.2021 passed by the State Commission in Petition No. 1923 of 2021; Review Petition No. 2060 of 2022 seeking Review of the Order dated 13.05.2021 in Petition No. 1963 of 2021).

- h) Same issues such as the impact of GST, impact of BCD etc. which have been averred by the Petitioner in the present Petitions have been raised by it by way of the review petitions. Any dispute under the PPAs which has been entered into under the above competitive bidding process approved by the State Commission will have to be adjudicated by the State Commission only.
- i) NREL cannot approbate and reprobate and approach multiple forums for the redressal of similar grievances. It is well settled that litigants ought not to engage in forum shopping since this leads to multiplicity of litigations and also affects the justice delivery system in the country.

***Re: Response to the other averments of NREL on Jurisdiction***

- j) The adjudicatory role of this Commission as contemplated under Section 79 (1) (f) of the Electricity Act, 2003 will not get triggered unless there is a dispute between NREL and GUVNL which pertains to Section 79 (1) (a) to (d) of the Electricity Act, 2003
- k) Reliance placed on the Order dated 15.09.2017 passed by this Commission in Petition No. 62/MP/2013 – *Kanti Bijli Utpadan Nigam Ltd v. Bihar State Power Holding Company Ltd and Ors.* is misplaced. The view taken in the Order dated 15.09.2017 has also been reiterated by this Commission in its subsequent Order dated 29.04.2019. In both these cases, this Commission was determining the tariff and for the said purpose went into the question of whether the generator was owned and controlled by the Central Government so as to be covered under Section 79 (1) (a) of the Electricity Act, 2003. The reliance on these orders would not help NREL to establish jurisdiction.
- l) The Hon'ble Supreme Court in *Gujarat Urja Vikas Nigam Ltd v Essar Power Limited* has construed the powers of the State Commission under Section 86 of the Electricity Act, 2003 and held that any and every dispute between and amongst generating companies



and licensees and not just those pertaining to Section 86 (1)(a) to (e) or (g) to (k) could be amenable to the jurisdiction of the State Commission.

m) The Petitions are not maintainable and should be dismissed.

**Written Submissions of the Petitioner:**

8. The Petitioner has filed its Note for Arguments on 11.11.2022 and Written Submission on 21.11.2022. The Petitioner has submitted as follows:

a) Hon'ble Supreme Court in *PTC India Ltd vs. Gujarat Electricity Regulatory Commission and Anr.*, has categorically held that CERC/SERCs ought to adjudicate on the dispute at hand in a comprehensive manner and should avoid deciding upon preliminary issues. GUVNL's ploy is only to unnecessary delay the adjudication of the present proceedings and on this reason alone, the preliminary objection raised by GUVNL ought to be rejected.

***Re. PPA between NREL and GUVNL mandates that all disputes shall be adjudicated by GERC***

b) Section 79(1)(a) is a special provision and gives CERC wide powers to regulate the affairs of a Central Generating Station. The phrase 'regulate' has been interpreted by the Appellate Tribunal for Electricity (APTEL) in Appeal No. 161 of 2009 titled *Damodar Valley Corporation Limited vs BRPL & Ors.* to interpret that the Appropriate Commission has the inherent power to adjudicate upon disputes between the licensees and the generating companies with respect to implementation, application or interpretation of the provisions of the agreement. In so far as Act and special status of Central Generating Station is concerned, the issue is no more *res integra* and has been dealt by APTEL in matter titled *BSES Rajdhani vs DERC & Anr, Appeal No. 94 of 2012 (in short "BSES judgment).*

- c) The Hon'ble Supreme Court of India in *A.B.C Laminart Pvt Ltd and Another vs A.P. Agencies, Salem* has held that parties through contract cannot confer jurisdiction if the forum otherwise lacks jurisdiction.
- d) The PPA at Article 8.2 provides for available relief in case of Force Majeure. However, no forum has been prescribed to seek such relief. The contract is silent on this matter. Even though under the competitive bidding guidelines, such disputes are to be adjudicated by Appropriate Commission, the Petitioner has invoked statutory right available to it under Section 79(1)(a) read with Section 79(1)(f) of the Act.

***Re. There is no question of determination of tariff of NREL, therefore, CERC would not have jurisdiction***

- e) The phrase 'Regulate' used in Section 79(1)(a) is a complete answer to the above objection. Further, the APTEL in the *BSES Judgment* has categorically held that anything involving a Central Generating Station will be a matter governed by Section 79(1)(f) of the Act.

***Re. The Project in question involves intra state supply of electricity, therefore, as per the Judgement of the Supreme Court in Energy Watchdog vs. CERC [2017 14 SCC 80] only GERC would have jurisdiction***

- f) Energy Watchdog Judgment is wholly not applicable as it decides the meaning of composite scheme which is relatable to Section 79(1)(b) of the Act and not Section 79(1)(a) of the Act. The Judgment of a Court needs to be understood in a context of facts and cannot be read as statute. Reliance is placed upon Judgment titled *Union of India v. Dhanwanti Devi*.

***Re. NREL has indulged in forum shopping as it has filed certain Review Petitions before GERC raising the very same issue***

- g) The statement is misleading because Petition 2060 of 2021 filed before GERC is for seeking review of Adoption Order dated 13.05.2021 passed in Petition No. 1963 of 2021. The review is necessitated by the fact that GUVNL without seeking any prior approval of

GERC had floated a tender with a change in law provision which is in teeth of the guidelines specified by the Central Government. Such an action runs foul of Clause 5.7 of the CBG read with clause 18 of the CBG. Since the bidding was carried out under the aegis of GERC and the adoption order was passed by GERC, NREL had no option but to approach GERC for seeking review of the adoption order.

***Re. GUVNL relies on the Judgment of the Supreme Court in GUVNL vs Essar Power [(2008) 4 SCC 755] to contend that the power of GERC under Section 86(1)(e) is wider and within which any and every dispute between a licensee and a generating company can be adjudicated***

- h) The Judgment relied upon by GUVNL is not applicable to the facts and circumstances of the present case.

**Analysis and Decision:**

9. We have heard the learned counsels for the Petitioner and the Respondent and have carefully perused the records. On the basis of submission of the parties, the only issue that arises for adjudication is:

***Whether this Commission has the jurisdiction under section 79 (1)(a) and (f) of the Electricity Act, 2003 to adjudicate upon the disputes between the NREL being the wholly owned subsidiary of NTPC Limited (which is owned by the Central Government) and the GUVNL a distribution licensee?***

10. The Petitioner has stated that NTPC is a Government Company owned by the Central Government, while the Petitioner (NREL) is a wholly owned subsidiary of NTPC Limited. Therefore, in terms of Section 79(1) (a) and (f), this Commission has the requisite jurisdiction to adjudicate the present petition. *Per Contra*, the Respondent has submitted that merely because NREL is a subsidiary of NTPC, a company owned and controlled by the Central Government, does not mean that this Commission has the jurisdiction to decide the disputes, especially when the issue does not pertain to tariff determination or inter-state transmission but adjudication on the terms and conditions of the PPA entered into between the parties.

11. We observe that Section 79(1) of the Electricity Act, 2003 (the Act, 2003) stipulates as under:

**Section 79. (Functions of Central Commission):** --- (1) *The Central Commission shall discharge the following functions, namely:-*

**(a) to regulate the tariff of generating companies owned or controlled by the Central Government;**

(b) *to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*

(c) *to regulate the inter-State transmission of electricity;*

(d) *to determine tariff for inter-State transmission of electricity;*

(e) *to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;*

**(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;**

(g) *to levy fees for the purposes of this Act;*

(h) *to specify Grid Code having regard to Grid Standards;*

(i) *to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;*

(j) *to fix the trading margin in the inter-State trading of electricity, if considered, necessary;*

(k) *to discharge such other functions as may be assigned under this Act.*

12. We observe that while explaining the scope of term “regulate” under Section 79(1)(a) of the Act, the Appellate Tribunal in its judgment dated 10.12.2009 in Appeal No. 161/2009 (DVC v. BRPL and Ors.) has held as under:

*“18. It cannot be debated that Section 79(1)(a) deals with the generating companies to regulate the tariff. The term “regulate” as contained in Section 79(1)(a) is a broader term as compared to the term “determine” as used in Section 86(1)(a). In various authorities, **the Supreme Court, while discussing the term “regulation” has held that as part of regulation, the appropriate Commission can adjudicate upon disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement and the same will encompass the fixation of rates at which the generating company has to supply power to the Discoms.** This aspect has been discussed in detail in the Judgments of the Supreme Court in 1989 Supp (2) II SCC 52 Jiyajirao Cotton Mills vs. M.P. Electricity Board, D.K. Trivedi & Sons vs. State of Gujarat, 1986 Supp SCC 20 and V.S. Rice & Oil Mills vs. State of A.P., AIR 1964 SC 1781, and also in Tata Power Ltd. Vs. Reliance Energy Ltd. 2009 Vol.7, SCALE 513.”*

13. In this context, the Appellate Tribunal in its judgment dated 4.9.2012 in Appeal No. 94 and 95 of 2012 (*BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission and Ors.*) has also held as under:

*“32. Sections 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff. Determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. For example, interest on working capital which is a component of tariff will depend on the time allowed for billing and payment of bills. This will also have an impact on terms and conditions for rebate and late payment surcharge. Similarly, billing and payment of capacity charge will depend on the availability of power station. Therefore, the scheduling has to be specified in the terms and conditions of tariff.*

*33. Accordingly, **the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement etc. are nothing but terms and conditions of supply.***

*34. Section 79(1)(f) of the Electricity Act, 2003 provides for adjudication of disputes involving a generating company or a transmission licensee in matters connected with clauses (a) to (d) of Section 79. Thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79(1)(f) of the Act.”*

14. From the above, we find that Section 79(1)(a) read with Section 79(1)(f) has got a wider scope and is not merely confined to determination of tariff. It would also involve the adjudication of disputes involving implementation, application or interpretation of the provisions of the PPA and the terms and conditions of supply in cases involving the Central Government owned generating companies.
15. In the instant petition we note that the Petitioner, NREL is a wholly owned subsidiary of the NTPC Limited. The dispute is regarding granting of an extension in achieving SCoD for the Solar Power Projects on account of the Force Majeure events and restricting Respondents from taking any coercive steps against the Petitioner till the pendency of the petition. It is pertinent to

mention here that Article 4.1.9(b) of the PPAs specifically stipulates that in case of delay of commissioning beyond six months the balance capacity not commissioned till SCoD + 6 months shall be terminated. All this involves implementation, application and interpretation of the PPA as also the terms and conditions of supply of power and is clearly covered under the ambit of “regulate” in terms of section 79(1) of the Act. Accordingly, we hold that the matter is covered within the jurisdiction of the Central Commission as per Section 79(1)(a) read with Section 79(1)(f) of the Electricity Act, 2003.

16. The next issue raised by GUVNL is that as per Article 6.6, 9.2 & 11.4 of the PPAs, GERC has the jurisdiction to deal with the matter. We observe that the PPAs in both the petitions are similarly worded. The relevant Recitals and Articles of the PPA stipulate as under:

*AND WHEREAS The Ministry of Power vide Resolution no. 23/27/2017-R7R dated 03.08.2017 has notified the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from grid connected Solar PV Power Projects.*

***Article 3: Obligations of the Power Producer***

....

*(iv) The Power Producer shall sell all available capacity from identified Solar Photovoltaic Grid-Interactive Power Plants to the extent of contracted capacity on first priority basis to GUVNL and not to sell to any third party.*

....

*(d) **Excess Generation:** In case the availability is more than the maximum CUF specified, the Power Producer will be free to sell it to any other entity provided first right of refusal will vest with GUVNL. In case of excess generation, GUVNL shall reserve the right to purchase the excess generation at 75% (seventy-five per cent) of the PPA tariff.*

*(v) The Power Producer shall seek approval of GETCO/ CTU in respect of Interconnection.*

***Article 6: Billing and Payment***

....

***6.6 Disputes:*** *In the event of a dispute as to the amount of any Tariff Invoice, GUVNL shall notify the Power Producer of the amount in dispute and GUVNL shall pay the Power Producer 100% of the undisputed amount plus 85% of the disputed amount within the due date provided either party shall have the right to approach the GERC to effect a*

**higher or lesser payment on the disputed amount.** The Parties shall discuss within a week from the date on which GUVNL notifies the Power Producer of the amount in dispute and try and settle the dispute amicably. **Where any dispute arising out of or in connection with this agreement is not resolved mutually then such dispute shall be submitted to adjudication by the GERC under Section 86 of Electricity Act 2003 and the GERC may refer the matter to Arbitration as provided in the said provision read with Section 158 of Electricity Act 2003.** For dispute beyond the power conferred upon the GERC, such dispute shall be subject to jurisdiction of High Court of Gujarat. If the dispute is not settled during such discussion then the payment made by GUVNL shall be considered as a payment under protest. Upon resolution of the dispute, in case the Power Producer is subsequently found to have overcharged, then it shall return the overcharged amount with an interest of SBI 1 year Marginal Cost of Funds Based Lending Rate (MCLR) per annum plus 7% for the period it retained the additional amount. GUVNL / Power Producer shall not have the right to challenge any Tariff Invoice, or to bring any court or administrative action of any kind questioning/modifying a Tariff Invoice after a period of three years from the date of the Tariff Invoice is due and payable.

## **Article 9: Change in Law**

### **9.1 Definition**

9.1.1 "Change in Law" shall refer to the occurrence of any of the following events notified after the Bid Deadline.

- a) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any statute, decree, ordinance or other law, regulations, notice, circular, code, rule or direction by Governmental Instrumentality or a change in its interpretation by a Competent Court of law, tribunal, government or statutory authority or any of the above regulations, taxes, duties charges, levies etc. that results in any change with respect to any tax or surcharge or cess levied or similar charges by the Competent Government on the generation of electricity (leviable on the final output in the form of energy) or sale of electricity.
- b) Introduction/modification/changes in rates of safeguard duty and/or anti-dumping duty and/or custom duty including surcharge thereon which have direct effect on the cost of solar PV modules.

### **9.2 Relief for Change in Law**

....

9.2.1 In case Change in Law on account of 9.1.1 (a) above results in the Power Producer's costs directly attributable to the Project being decreased or increased by one percent (1%), of the estimated revenue from the Electricity for the Contract Year for which such adjustment becomes applicable or more, during Operation Period, **the Tariff Payment to the Power Producer shall be appropriately increased or decreased with due approval of GERC.**

9.2.2 In case of Change in Law on account of 9.1.1 (b) above, the Power Producer shall be **allowed an increase / decrease in tariff** of 1paise/unit for every increase/decrease of



*Rs. 2 Lakh per MW in the Project Cost incurred upto the Scheduled Commercial Operation Date upon submission of proof of payment made by the Power Producer towards safeguard duty and/or antidumping duty and/or custom duty to the concerned Authority and **with due approval of GERC.** This increase / decrease in tariff due to this change in cost of solar PV modules shall be limited to actual DC capacity or 150% (One hundred & fifty percent) of contracted AC capacity, whichever is lower*

....  
**9.2.4 The revised tariff shall be effective from the date of such Change in Law as approved by GERC,** the Parties hereto have caused this Agreement to be executed by their fully authorized officers, and copies delivered to each Party, as of the day and year first above stated.

**Article 11: Dispute Resolution**

....  
**11.4 In the event that such difference or disputes between the parties are not settled through mutual negotiations within 60 days after such dispute arises, then it shall be adjudicated by GERC in accordance with law”**

17. GUVNL has argued that as per Article 6.6 of the PPAs, it has been agreed upon by the contracting parties that in the event of a dispute as to the amount of any Tariff Invoice either party shall have the right to approach the GERC to effect a higher or lesser payment on the disputed amount. Furthermore, as per Article 9.2 of the PPAs, in case of ‘Change in Law’ the power to adjudicate is also conferred to GERC. As per Article 11.4 of the PPAs, the power to adjudicate on the disputes is also conferred to GERC.
18. Based on the Articles of PPA, GUVNL has argued that the jurisdiction is vested in GERC and not in CERC. We note that it is a well settled principle of law that the parties by their agreement can neither confer jurisdiction upon a forum which does not have the jurisdiction under the law nor can the parties by their agreement oust the jurisdiction of the forum vested under the law.
19. In this context, we observe that the Hon’ble Supreme Court judgement in the matter of *A.B.C Laminart Pvt. Ltd. & Anr. vs. A.P. Agencies, (1989) 2 SCC 163* has held as under:  

*“...where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed*



*to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy.”*

20. We also observe that the Hon’ble Supreme Court judgement in the matter of *New Moga Transport Co. vs. United India Insurance Co. Ltd. & Ors. (2004) 4 SCC 677* has held as under:

*“By a long series of decisions it has been held that where two Courts or more have under the CPC jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in any one of such Courts is not contrary to public policy and in no way contravenes Section 28 of the Indian Contract Act, 1872. Therefore, if on the facts of a given case more than one Court has jurisdiction, parties by their consent may limit the jurisdiction to one of the two Courts. But by an agreement parties cannot confer jurisdiction to a Court which otherwise does not have jurisdiction to deal with a matter.”*

21. In the light of the above position of law, we are of the view that the merely because the PPA mentions adjudication of dispute in a specific manner, cannot oust the jurisdiction of this Commission which flows from the provisions of the Act, and hold that that adjudication involving the Petitioner being a wholly owned subsidiary of a Central Generating Company will be governed by this Commission under Section 79 (1)(f) read with Section 79(1)(a) of the Act. However, before parting, we would like to observe that the Petitioner should have reasonably applied its mind before executing the power purchase agreement with the Respondent GUVNL. The Petitioner was very well aware about the applicability of the Section 79(1)(a) of the Electricity Act, 2003 which confers jurisdiction upon CERC to regulate the generating companies owned/controlled by the Central Government and should have raised this issue of jurisdiction at the RfS stage itself and more so at the time of signing the PPA, which it didn’t do, leading to avoidable confusion about the jurisdiction. We expect the Petitioner to be more responsible in future and make its position clear right at the inception when it participates in such State specific bids.

22. In view of the above discussion we find and hold that only this commission has the jurisdiction. The petitions are admitted accordingly. It is clarified that this Order is limited to determination of issue of the jurisdiction of this Commission and we have not expressed any view on the merit of the issues raised in the Petition. The parties shall complete pleading in the matter within four

weeks of issue of this order. No further extension of time for completion of pleadings shall be permitted.

23. The Petitions shall be listed for hearing in due course for which separate notice shall be issued to the parties.

Sd/-  
पी. के. सिंह  
(सदस्य)

Sd/-  
अरुण गोयल  
(सदस्य)

Sd/-  
आई. एस. झा  
(सदस्य)