



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 273/MP/2021

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: 20th July, 2023

IN THE MATTER OF:

Petition under section 79 (1) (a) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement dated 21.12.2018 executed between NTPC Limited and Uttar Pradesh Power Corporation Limited, seeking compensation due to increase in costs on account of change in rate of Goods & Services Tax amounting to a Change in Law event with respect to the Solar PV Power Project having project capacity of 140 MW at Bilhaur, Uttar Pradesh.

AND IN THE MATTER OF:

NTPC Limited
NTPC Bhawan, Scope Complex,
7 Institutional Area,
Lodhi Road,
New Delhi-110003

...Petitioner

VERSUS

Uttar Pradesh Power Corporation Limited,
Shakti Bhawan,
14 – Ashok Marg,
Lucknow – 226001

...Respondent

Parties present: Shri Gopal Jain, Sr. Advocate, NTPC
Shri Adarsh Tripathi, Advocate, NTPC
Shri Ajitesh Garg, Advocate, NTPC
Shri Vikram Singh Baid, Advocate, NTPC
Shri Aditya, Advocate, UPPCL

आदेश/ ORDER

The Petitioner, NTPC Limited (NTPC) is a central government generating company and is developing a 140 MW solar PV power project at Bilhaur, Uttar Pradesh. The Petitioner has filed the Petition under section 79 (1) (a) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement dated 21.12.2018 executed between NTPC and Uttar Pradesh Power Corporation Limited (UPPCL), seeking compensation due to increase in costs on account of change in rate of Goods & Services Tax amounting to a Change in Law event.

2. The Respondent, UPPCL is responsible for electricity transmission and distribution within the State of Uttar Pradesh.

3. The Petitioner has made the following prayers:

a) Hold and declare that the change in rate of GST applicable to Supply and Service Contracts pursuant to the Notifications mentioned hereinabove, for setting up of Petitioner's solar power plants, amounts to Change in Law events under the PPA;

- b) *Hold and declare that the Petitioner is entitled to a sum of Rs. 14,32,93,612/- (Fourteen Crore ThirtyTwo Lakhs Ninety Three Thousand Six Hundred and Twelve) upwards on total cost of project along with the carrying cost (interest@ 12%) from the date the aforesaid amount becomes payable till the actual date of payment, towards compensation for such Change in Law events to the Petitioner.*
- c) *Direct Respondent to make payment of the sum of Rs. 14,32,93,612/ (Fourteen Crore Thirty Two Lakhs Ninety Three Thousand Six Hundred and Twelve) upwards on total cost of project along with the carrying cost (interest @ 12%) from the date the aforesaid amount becomes payable till the actual date of payment, towards compensation for such Change in Law events to the Petitioner; and*
- d) *Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case.*

Factual Matrix:

4. The brief facts of the case are as under:

Location	At Village Bilhaur in the State of Uttar Pradesh
Nodal agency	UPNEDA
RfS issued on	27.07.2018
Bid submitted by NTPC on	19.09.2018
e-Reverse auction held on	10.10.2018
LOI issued on	22.11.2018
PPA executed on/Effective date of the PPA	21.12.2018
Date of implementation of: Notification No. 24/2018 and Notification No. 27/2018 both dated 31.12.2018	01.01.2019
Capacity (MW)	140 MW
Power	Solar
Tariff	Rs.3.17/kWh
SCoD	21 months from the effective date of the PPA

5. On 27.07.2018, Uttar Pradesh New and Renewable Energy Development Agency (UPNEDA)

floated a Request for Proposal (RfP) dated 27.07.2018 from interested bidders for procurement of Power from the grid connected Solar PV Projects through tariff based competitive bidding process for a total of 500 MW on the basis of international competitive bidding process. NTPC submitted its bid on 19.09.2018, e-Reverse auction held on 10.10.2018, LOI issued on 22.11.2018 and NTPC executed the PPA on 21.12.2018 for 140 MW solar PV at Bilhaur, Uttar Pradesh. NTPC was required to construct, operate and maintain the Solar PV Project and accordingly on 24.12.2018, NTPC issued Notification of Award (NOA) in favour of M/s Vikram Solar Limited with the following details:

- (a) Ex works supply of all Plant and Equipment including mandatory spares amounting to Rs. 487,63,28,524/- for the entire Project (excluding GST).
- (b) Inland transportation, insurance, installation, civil & allied works etc. testing & commissioning and successful completion of Guarantee test and carry out operation and maintenance (O&M) and AMC for a sum of Rs. 51,52,00,000/- (excluding GST).

6. At the time of the submission of the Bid:

- (a) **Supply Contract**: GST at the rate of 5% was payable on such Supply Contracts (i.e., 2.5% of CGST and 2.5% of SGST), in terms of Ministry of Finance's Notification No. 1/2017- Central Tax (Rate) dated 28.06.2017. Subsequently, all the State Governments issued corresponding notifications (Notification No. 1/2017) through which SGST at the rate of 2.5% was made applicable on all Supply Contract for setting up Solar Power Plants.
- (b) **Service Contract**: GST at the rate of 18% was levied (i.e., 9% of CGST and 9% of SGST) on such service contracts, in terms of Ministry of Finance's Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Subsequently (on or about 29.06.2017), all the State Governments issued corresponding notifications (Notification No. 11/2017) through which SGST at the rate of 9% was made applicable on such Service Contracts.

7. After the enactment of GST laws, various issues were raised qua the applicable GST rates for

contracts providing for supply and services (Composite Contracts) for setting up solar power plants. In order to resolve these issues, the Ministry of Finance, on the recommendations of the Goods and Services Tax Council (GST Council), issued:

- (a) Notification bearing No. 27/2018-Central Tax (Rate) adding S. No. 38 to the list provided in Notification No. 11/2017 and hence providing that GST at the rate of 18% will also be levied on, inter-alia, that Solar power based devices, Solar power generating system etc.
- (b) Notification bearing No. 24/2018-Central Tax (Rate), clarifying that for composite contracts, 70% of the taxable value would be treated as the supply component of the contract (to be taxed at 5% - CGST + SGST), and the remaining 30% would be considered as service component of the contract (to be taxed at 18% - CGST + SGST).

8. NTPC is seeking compensation due to increase in costs on account of change in rate of Goods & Services Tax vide Ministry of Finance Notification No.'s 27/2018 and 24/2018 amounting to a Change in Law event with respect to the Solar PV Power Project.
9. The present petition was filed on 10.12.2021 and heard on 24.01.2022 wherein this Commission reserved the order on admissibility of the Petition. On 18.02.2022, this Commission in line with the Electricity (Timely Recovery of Costs due to Change in Law) Rules 2021 dated 22.10.2021 directed the Petitioner to approach the Respondent for settlement of Change in Law claims amongst themselves and accordingly disposed of the matter. The findings of this Commission were challenged before the Appellate Tribunal for Electricity (APTEL). APTEL vide judgement dated 05.04.2022 in in O.P No. 1 of 2022 and Appeal Nos. 116, 74, 75 & 76 of 2022, set aside this Commission's order dated 18.02.2022 and remanded the matter back to the Commission to consider the cases on merits of the claims raised by the parties. Pursuant to the directions of the APTEL, the matter was again listed on 17.05.2022 wherein the Petitioner sought liberty to file an additional affidavit in the matter. This Commission vide order dated 14.06.2022 in Petition No. 8/SM/2022 restored the present petition at the same stage as was existing prior to the disposal of the petition and directed the parties to complete their pleadings within one month. The Commission after going through the submissions of the parties reserved the matter for orders on

14.02.2023.

Submission of the Petitioner:

10. The Petitioner has submitted as under:

On jurisdiction:

- a) The Petitioner being a generating company (Central Public Sector Undertaking) in accordance with section 2 (28) of the Electricity Act, engaged in generation and supply of power throughout the country, falls under the purview of this Commission.
- b) The Commission in Petition No. 279/MP/2022 vide its order dated 01.03.2023 has held that the *“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.”*
- c) There is specific stipulation under section 79 of the Electricity Act thereby conferring jurisdiction upon this Commission to regulate matters pertaining to generating companies such as the Petitioner which a wholly owned Central Government undertaking. The same is not open for the Respondent to draw inference and the intent of the statute and thus the same has to be followed/interpreted as it has been stated. Primarily a contractual clause cannot supersede a statute.
- d) State Commission does not have the jurisdiction to try the present matter as the Petitioner being a generating company as per section 2 (28) of the Electricity act, being wholly owned and controlled by the Central Government comes under the ambit of this Commission. Furthermore, a bare perusal of section 86 of the Electricity Act shows no such specific stipulation with respect to such central government owned generating companies. That it is a settled principle of law that the parties by way of consent cannot confer jurisdiction upon a Court where none exists.

- e) This Commission has admitted and passed several judgments thereby allowing various Petitions pertaining to similar claims arising on account of a change in law event, in favour of the Petitioner itself, filed under the provisions of Section 79 (1) (a) of the Electricity act. Reliance is placed on the Order dated 15.02.2022 passed in 206/MP/2021 as well as ROP dated 08.04.2021 passed in Petition No. 500/MP/2020.
- f) There is specific stipulation under section 79 of the Electricity Act conferring jurisdiction upon this Commission to regulate matters pertaining to generating companies such as the Petitioner which a wholly owned Central Government undertaking. Primarily a contractual clause cannot supersede a statute. Reliance is placed on Hon'ble Supreme Court judgement in the matter of PTC India Ltd. Vs. CERC, *AIR 2010 SC 1338*
- g) UP Electricity Regulatory Commission (UPERC) does not have the jurisdiction to try the present matter as the Petitioner being a generating company as per section 2 (28) of the Electricity act, being wholly owned and controlled by the Central Government comes under the ambit of this Commission. A bare perusal of section 86 of the Electricity Act shows no such specific stipulation with respect to such central government owned generating companies. It is a settled principle of law that the parties by way of consent cannot confer jurisdiction upon a Court where none exists. Reliance is placed on the Hon'ble Supreme Court judgment dated 23.04.2004 in the matter of *New Moga Transport Co. vs. United India Insurance Co. Ltd. & Ors.*
- h) The present case does not come under the ambit of Section 62 of the Electricity Act. The Petitioner has not filed the present petition for the purpose of determination of tariff by way of bidding process under section 63 of the Electricity Act. Mere fact that the tariff adoption exercise took place before UPERC does not confer exclusive jurisdiction upon UPERC.
- i) The Petitioner under present Petition is seeking approval for inclusion of the consequential impact of the Change in Law which being a mere administrative exercise falls under the ambit of regulating the tariff under section 79 (1) (a).

On Merits:

- j) The Petitioner as well as its contractor, M/s Vikram Solar Limited while submitting their respective bids for the projects had considered 5% GST on the supply contract and 18% GST on the contracts for civil work in terms of Ministry of Finance notification no. 11/2017 dated 28.06.2017 read with corresponding notifications dated 29.06.2017 by all state governments.
- k) The government with effect from 01.01.2019, amended the Entry Number 234 of the Notification No. 1/2017 – Central Tax (Rate), which deals with the devices and parts supplied to Solar Projects and specified an effective rate of 5% on such supplies. Simultaneously, Entry Number 38 has been inserted in the Notification No. 11/2017 – Central Tax (Rate), which deals with services provided in relation to setting up of solar projects and specifies an effective rate of 18% GST. Both these entries by way of an ‘Explanation’ provide that these entries have to be read in conjunction and by way of a deeming fiction, carve out a value of 70% to be taken towards supply of goods and 30% towards supply of services. The aforesaid Change in Law Events was beyond the Petitioner’s control. The Petitioner in no manner could have apprehended the promulgation and enactment of GST Laws thereby completely revising the erstwhile tax regime and thus under no circumstances the Petitioner could have ascertained that such change will be brought about.
- l) In terms of the principles of Change in Law under the PPA, the additional recurring/non-recurring expenditures ought to be refunded to the Petitioner and in case of additional income earned by the Petitioner, the same is ought to be refunded by the Petitioner.
- m) In terms of the PPA read with the definition of ‘Law’ and ‘Government Instrumentality’, the notification No.’s 24/2018 and 27/2018 dated 31.12.2018, changing the applicable GST rates on setting up of solar power stations, amount to change in law events, which have a direct impact on the power plant and increase in the resultant expenditure incurred by the Petitioner with effect from 01.01.2019.
- n) Any change in tax and/or change in rate of tax, duties and cess is to be allowed as a pass

through.

- o) The contract between the Petitioner and its Solar PV Project contractor M/s Vikram Solar Limited envisages a similar change in law clause, to cater to such a situation. Based on such change in law clause, the NOAs issued in favour of M/s Vikram Solar Limited were duly amended to cover the revised GST implication on the contract price. Accordingly, the contract agreements with M/s Vikram Solar Limited were amended in order to compensate for the same. Similarly, the Petitioner being the affected party is to be restituted to the same economic position as if such a Change in Law event had not occurred. Reliance is placed on APTEL judgement in the matter of *Coastal Gujrat Power Limited vs. Central Electricity Regulatory Commission and Ors. (Appeal No. 172 of 2017)*.
- p) The detailed computation of impact of Change in Law is as under:

S. No.	Particulars	Basic Amount (in INR) (A)	Existing GST Amount (in INR) (B)	Total © = (A+B)	Revised GST Amount (in INR) (D)	Revised Total (E)=(A+D)	Deviation (E-C)
1.	First contract	487,63,28,524	24,38,16,426 (@5%)	512,01,44,950	43,39,93,238 (@8.9%)	531,03,21,762	(+) 19,01,76,812
2.	Second Contract (Except &M and AMC cost)	51,52,00,000	9,27,36,000 (@18%)	60,79,36,000	4,58,52,800 (@8.9%)	56,10,52,800	(-) 4,68,83,200
						Total	14,32,93,612

- q) The notifications dated 31.12.2018 amount to change in law in terms of the PPA, whereby the Respondent is required to compensate the Petitioner to the tune of Rs. 14,32,93,612/- (Fourteen Crore Thirty Two Lakhs Ninety Three Thousand Six Hundred and Twelve) upwards on total cost of project along with the carrying cost (interest @12%) from the date the aforesaid amount becomes payable till actual date of payment.
- r) The findings of APTEL dated 20.09.2021 in Appeal No. 215/2021 titled as *Tata Renewable Energy Limited Vs. Maharashtra Electricity Regulatory Commission (TATA*

Judgement), shows that the event of promulgation of GST is nothing but an event of change in law owing to the fact that such an event could not have been foreseen and the parties as a matter of fact was significantly impacted. Reliance is placed on Hon'ble Supreme Court judgement in the matter of *Energy Watchdog v. CERC & Ors. (2017) 14 SCC (80)* wherein it was decided that promulgation of GST act/notifications amounts to change in law and the same has to be passed on restitutionary principle.

- s) The case examined by APTEL also pertained to two different contracts for supply and services, which is same as the present case where the Petitioner has awarded two contracts to its EPC Contractor – M/s Vikram Solar Limited for supply and services, and both the contracts are on record. Therefore, the said judgment has exact same fact and circumstances and the said matter as is the matter of consideration herein has already been decided by APTEL.
- t) This Commission in catena of cases has further directed the parties to enter into reconciliation with respect to the actual amount payable which shall always remain under the purview of this Commission for adjudication in case of any dispute/ambiguity therein.
- u) It is nowhere under the PPA, in question or the Law stated that the Petitioner has to specifically provide with the documents as specifically asked for by the Respondent. Therefore, the Respondent has to come forward with proper justification while seeking such documents.
- v) The Petitioner undertakes to provide the CA certificate holding the consequential impact of GST Laws stating the actual amounts payable along with other necessary documents as may be permitted/directed by this Commission.
- w) Carrying cost in accordance of the cost-plus principles of tariff as enshrined under section 61 of the Electricity Act has to be duly passed on. The Hon'ble Supreme Court in *UHBVNL vs. Adani Power Ltd. (2019) 5 SCC 325* has held that the Carrying Cost is allowed on the basis of the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow has to be passed. This principle has been maintained by APTEL as well as the Hon'ble Supreme Court in catena of matters as a

regulatory practice.

Reply filed by UPPCL:

11. The Respondent has submitted as follows:

On Maintainability:

- a) The Petitioner, though a generating company owned by the central government, participated in a bid floated by UPNEDA on behalf of UPPCL. All the parties agreed and consented to the jurisdiction of the State Commission i.e. UPERC. The tariff adoption order has also been passed by UPERC under Section 63, which has not been objected to by the Petitioner, despite it being a central government owned generating company.
- b) The present petition has been filed under Section 79 (1) (a) and not under Section 79 (1) (f), and under Section 79 (1) (b) read with Section 79 (1) (f) nor under the provisions of the PPA in relation to Change in Law. The present Project has been developed by the Petitioner through its participation in competitive bidding, under Section 63 of the Electricity Act, initiated by UPNEDA. The Petitioner submitted its bid for development of 140MW solar PV power plant in the State of Uttar Pradesh. Therefore, the Central Commission is neither determining the tariff of the Project of the Petitioner under Section 62 nor regulating the same as far as the present petition is concerned. This is further confirmed by the fact that it is UPERC which has adopted the tariff determined under the competitive bidding process and not the Central Commission.
- c) The power of this Commission under Section 79(1)(a) of the Act is related to the tariff determined in terms of Section 62(1)(a) of the Act. Both the provisions cannot operate independently. It is UPERC which has the jurisdiction to adjudicate the issues in relation to Change in Law and not this Commission. This is also evident as per the express terms of the PPA that for any relief in relation to Change in Law, it is the State Commission which shall have the jurisdiction. Other bidders which had participated in the same bid, have also approached UPERC for various issues including but not limited to extension of scheduled commercial operation date, change in law and the like.

- d) It cannot be the intent of the PPA to provide jurisdiction to the Central Commission with respect to only one bidder i.e., NTPC for the purposes of Change in Law issue. Had the intent of the parties to the PPA been to exclude the jurisdiction of the State Commission, it would have stated so categorically. NTPC has never raised any objection to the jurisdiction of the State Commission for the determination of tariff. Parties have further agreed in the PPA to empower the State Commission to adjudicate the disputes concerning Change in Law.
- e) It is a settled law that when a certain jurisdiction has been specified in the contract, an intention to exclude all others from its operation may in such cases be inferred. Reliance is placed on Supreme Court judgement in the matter of *A.B.C. Laminart Pvt. Ltd. And Ors v. A.P. Agencies, Salem (1989)2 SCC 163*.
- f) Hence, this Commission does not have jurisdiction in this matter.

On Merits:

- g) The notification 27/2018-CGST inserted a new tariff entry for construction services provided to solar and wind plants but the rate of CGST remained constant. Prior to the introduction of the GST notifications dated 31.12.2018, the rate of CGST for construction services provided to solar power generating station (SPGS) was levied at 9% as per Serial 3 of notification 11/2017- CGST. Therefore, the Petitioner's averments on change in rate of GST is completely baseless. Even in the notification No. 11/2017 - CGST (Rate), there was general entry in Item No. XII of Serial No. 3 covering supply of services for setting up SPGS and the rate of CGST was at 18%. It can be seen that the GST notification No. 27/2018 is only bringing a separate tariff entry for services provided for setting up of SPGS for ease of convenience but the rate of CGST remained as 9% in both pre and post notification No. 27/2018 dated 31.12.2018.
- h) There is no change in law as alleged by the Petitioner. The rate of CGST for supply of goods and services for intra-state supply to SPGS remained at 2.5% for supply of goods to SPGS and 9% for supply of services for constructing SPGS. The GST Notifications no.

24/2018 and 27/2018 was only a way to introduce a specific tariff entry to avoid confusion. However, the rate of tax remained constant i.e., 2.5% and 9% respectively.

- i) A bare reading of the Supply Contract and Services Contract reflects that these are standalone contracts and parties have agreed to procure services on standalone basis. In the instant case, the notification dated 31.12.2018 has no applicability as it has been introduced to enable such parties who are entering into composite contract to assess separate liability for supply and services. Post notification, separate taxation was not stopped and the parties were making payment under the separate head, if there was no confusion on quantum of supply and services.
- j) The Petitioner has failed to understand that APTEL qua the judgment dated 20.09.2021 in Appeal No. 215/2021 (*TATA judgement*) has not given any decision on merits as to whether the introduction of GST Notifications dated 31.12.2018 is a change in law in terms of the concerned PPA or not, rather the main issue before APTEL was whether Maharashtra Electricity Regulatory Commission (MERC) could have applied the test of 'prudent utility practice' while examining the scope of Change in Law provision. Therefore, the submission of the Petitioner that it is covered by the TATA judgment is erroneous. Further, the *TATA judgement* has been challenged by the concerned discoms and is pending before the Hon'ble Supreme Court in Civil Appeal No. 7127/2021. Therefore, the *TATA judgement* cannot be relied upon.
- k) Even if it is assumed that 31.12.2018 is a change in law, then also the Petitioner is under an obligation to prove the impact of such notification. Petitioner has merely produced private party document to claim change in law. Parties are under an obligation to provide documents including but not limited to auditor certificate, GST receipts, RFID tag, documents demonstrating that number of claimed module has not crossed installed capacity.
- l) The Petitioner has not provided complete details of the invoices raised, payments made on account of GST and hence, the compensation sought by the Petitioner cannot be granted.

m) It is a well-established principle of law that the terms of the contract cannot be rewritten by the court while interpreting the contract. It is an equally established principle of law that carrying cost/additional interest can only be awarded if provided under the PPA. The present PPA does not contain any carrying cost provision. Consequently, there is no basis for the Petitioner to make a claim towards compensation due to 'change in law' or otherwise. In absence of such an enabling provision, the Petitioner cannot be awarded any carrying costs as claimed. The claim of the Petitioner for carrying cost cannot be entertained as this is a fixed price contract where a fixed tariff was bid for. It is trite law that the compensation on account of change in law in a PPA pursuant to Section 63 of the Electricity Act can only be made by way of adjustment in tariff.

Analysis and Decision:

12. We have heard the learned counsels for the Petitioner and the Respondent and have carefully perused the records.

13. On the basis of submission of the parties, following issue arises for our consideration:

Issue No.1: *Whether this Commission has the jurisdiction under section 79 (1)(a) & (f) of the Electricity Act, 2003 to adjudicate the disputes between the Petitioner NTPC (a generating company owned by the central government) and the Respondent UPPCL (a distribution licensee)?*

Issue No.2: *Whether the introduction of Notification No.27/2018-Central Tax) dated 31.12.2018 and the introduction of Notification No.24/2018-Central Tax (Rate) issued by the Department of Revenue, Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 21.12.2018?*

Issue No.3: *Whether the Petitioner is entitled for compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA?*

Issue No.4: *Whether the Petitioner is entitled to carrying cost towards compensation for Change in Law?*

14. Now, we discuss and analyse the issues.

Issue No. 1 : Whether this Commission has the jurisdiction under section 79 (1)(a) & (f) of the Electricity Act, 2003 to adjudicate the disputes between the Petitioner NTPC (a generating company owned by the central government) and the Respondent UPPCL (a distribution licensee)?

15. The Petitioner has submitted that NTPC is a wholly owned central government undertaking and therefore, in terms of Section 79(1) (a) this Commission has the requisite jurisdiction to adjudicate the present petition. *Per Contra*, UPPCL has submitted that this Commission does not have the jurisdiction to decide the disputes since the Commission is neither determining the tariff nor regulating the same. Further, the State Commission has adopted the tariff.

16. 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.

17. 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.”*

18. 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 licensees 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.”

19. From the above, we find that Section 79(1)(a) 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.
20. In the instant petition, we note that the Petitioner is a generating company wholly owned and controlled by the central government. The dispute is regarding seeking compensation due to increase in costs on account of Change in Law events viz the notifications No.27/2018 and 24/2018 (*the 2018 GST Notifications*) dated 31.12.2018 because due to the enforcement of the GST notifications, GST @ 8.9% has become payable on supply and service contracts instead of 5% on taxable value of supply contracts and 18% on taxable value of service contracts. It is pertinent to mention here that Article 12 of the PPA stipulates that in case of change in law events having adverse effect on the project, the Petitioner is required to approach the Appropriate Commission for appropriate relief. This involves implementation, application and interpretation of the PPA and is clearly covered under the ambit this Commission under section 79(1) of the Electricity Act.
21. The next issue raised by UPPCL is that as per the terms of Para 2.8.3 of the RfS dated 27.07.2018 and Article 12.2 of the PPA, all the parties consented to the jurisdiction of the State Commission/UPERC. The aforesaid provisions stipulates as under:

RfS:

“2.8 Procurement of RfP document, processing fees

2.8.3 Successful Bidders will deposit the regulators fees sought by UPNEDA at the time of submission of petition for adoption of Tariff to UPERC. ”

PPA:

“12.2 Relief for Change in Law

12.2.1 The aggrieved Party shall be required to approach the State Commission for seeking approval of change in law.

12.2.2 *The decision of the Appropriate (State) Commission to acknowledge a Change in Law and provide relief for the same shall be final and governing on both the parties. ”*

22. Based on the RfS document and Articles of PPA, UPPCL has argued that the jurisdiction is vested in UPERC 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.

23. In this context, we observe that the Hon’ble Supreme Court vide its judgement in the matter of *A.B.C Laminart Pvt. Ltd. & Anr. vs. A.P. Agencies, (1989) 2 SCC 163* 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.”

24. 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.”

25. In the light of the above position of law, we are of the view that merely because the PPA mentions adjudication of dispute in a specific manner, it cannot oust the jurisdiction of this Commission which flows from the provisions of the Act, and hold that adjudication involving the Petitioner being wholly owned by the central government will be governed by this

Commission in terms of the provisions under Section 79 of the Act. However, we would like to observe that the Petitioner should have prudently applied its mind before executing the PPA with UPPCL. The Petitioner was well aware about the applicability of 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 did not do so, 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.

26. 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.
27. Issue No.1 is decided accordingly.

Issue No.2: Whether the introduction of Notification No.27/2018-Central Tax) dated 31.12.2018 and the introduction of Notification No.24/2018-Central Tax (Rate) issued by the Department of Revenue, Ministry of Finance, Government of India amounts to Change in Law events under Article 12 of the Power Purchase Agreement dated 21.12.2018?

28. The Petitioner has submitted that enactment of notification No.'s 27/2018 and 24/2018 (***the 2018 GST Notifications***) dated 31.12.2018 are the events covered as change in law under PPA dated 21.12.2018 and accordingly, GST @ 8.9% becomes payable on Supply and Services Contract for setting up Solar Power Projects instead of 5% on taxable value of Supply Contracts and 18% on tenable value of Services Contracts as envisaged in the 2017 GST notifications. ***Per Contra***, UPPCL has submitted that there is no Change in Law as the rate of CGST for supply of goods and services for for intra-state supply to SPGS remained at 2.5% for supply of goods and 9% for supply of services. The GST Notifications no. 24/2018 and 27/2018 was only a way to introduce a specific tariff entry to avoid confusion. However, the rate of tax remained constant i.e., 2.5% and 9% respectively.

29. We observe that Article 12 of the PPA stipulates as under:

“Article 12: CHANGE IN LAW

12.1 Definitions

In this Article 12, the following terms shall have the following meaning:

12.1.1 The term Change in Law shall refer to the occurrence of any of the following events after the last date of the bid submission, including

- i) enactment of any new law; or*
- ii) an amendment, modification or repeal of any existing law; or*
- iii) the requirement to obtain a new consent, permit or license; or*
- iv) any modification to the prevailing conditions prescribed for obtaining a consent, permit or license, not owing to any default of the Solar Power Generator; or*
- v) any change in the rates of any taxes, duties and cess which have a direct effect on the Project*

However, Change in Law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends or (ii) any change in local taxes (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of availability.

30. As per the GST Notifications No. 11/2017 & 1/2017 (*the 2017 GST Notifications*), the applicable GST rates were as follows:

- a) 5% (i.e., 2.5% - CGST and 2.5% - SGST) on Supply Contracts.
- b) 18% (i.e., 9% - CGST and 9% - SGST) on Service Contracts.

31. We observe that *the Notification No. 11/2017* inter-alia, stipulates as under:

S. No.	Chapter, Section or Heading	Description of Service	Rate (per cent.)	Condition
(1)	(2)	(3)	(4)	(5)
....
3	Heading 9954 (Construction services)	(i) Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.	9	-

		<i>(Provisions of paragraph 2 of this notification shall apply for valuation of this service.)</i>		
		<i>(ii) composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017.</i>	9	-
		<i>(iii) construction services other than (i) and (ii) above.</i>	9	-

Notification No. 1/2017:

Schedule I – 2.5%

S. No.	Chapter / Heading / Sub-heading / Tariff item	Description of Goods
(1)	(2)	(3)
234.	84 or 85	<i>Following renewable energy devices & parts for their manufacture</i> <i>(a) Bio-gas plant</i> <i>(b) Solar power based devices</i> <i>(c) Solar power generating system</i> <i>(d) Wind mills, Wind Operated Electricity Generator (WOEG)</i> <i>(e) Waste to energy plants / devices</i> <i>(f) Solar lantern / solar lamp</i> <i>(g) Ocean waves/tidal waves energy devices/plants</i>

(Similar Notifications were issued by all the State Governments where similar tax structure i.e. 2.5% was levied the renewable energy devices and parts. So, the total rate of CGST was 5%)

32. The 31st GST Council Meeting was convened on 22.01.2018. The recommendations made in the GST Council are as under:

“

- **III. GST on solar power generating plant and other renewable energy plants**
- *GST rate of 5% rate has been prescribed on renewable energy devices & parts for their manufacture (bio-gas plant/solar power based devices, solar power generating system (SGPS) etc) [falling under chapter 84, 85 or 94 of the Tariff]. Other goods or services used in these plants attract applicable GST*
- ***Certain disputes have arisen regarding GST rates where specified goods attracting 5% GST are supplied along with services of construction etc. and other goods for solar power plant.***

- *To resolve the dispute the Council has recommended that in all such cases, the 70% of the gross value shall be deemed as the value of supply of said goods attracting 5% rate and the remaining portion (30%) of the aggregate value of such EPC contract shall be deemed as the value of supply of taxable service attracting standard GST rate.”*

33. The relevant extracts of the 2018 GST Notifications dated 31.12.2018 are as under:

Notification No. 27/2018:

(1)	(2)	(3)	(4)	(5)
“38.	9954 or 9983 or 9987	<p><i>Service by way of construction or engineering or installation or other technical services, provided in relation of setting up of following, -</i></p> <p><i>(a) Bio-gas plant</i></p> <p><i>(b) Solar power based devices</i></p> <p><i>(c) Solar power generating system</i></p> <p><i>(d) Wind mills, Wind Operated Electricity Generator (WOEG)</i></p> <p><i>(e) Waste to energy plants / devices</i></p> <p><i>(f) Ocean waves/tidal waves energy devices/plants</i></p> <p><u>Explanation:- This entry shall be read in conjunction with serial number 234 of Schedule I of the notification No. 1/2017- Central Tax (Rate), published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 673(E) dated 28th June, 2017.</u></p>	9	-”;

Notification No. 24/2018:

“

*against S. No. 234, in the entry in column (3), the following Explanation shall be inserted in the end, namely: -“Explanation: If the goods specified in this entry are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 11/2017-Central Tax (Rate), dated 28th June, 2017 [G.S.R. 690(E)], **the value of supply of goods for the purposes of this entry shall be deemed as seventy per cent. of the gross consideration charged for all such supplies, and the remaining thirty per cent. of the gross consideration charged shall be deemed as value of the said taxable service.**”*

34. We note that any application of new tax or an amendment, modification or repeal of an existing law is covered as 'change in law'. The 2018 GST Notifications stipulate a composite tax structure of 8.9% [i.e. 5% on 70% of the consolidated taxable value of contracts + 18% on 30% of the consolidated taxable value of the contracts].
35. We observe that the enactment of the 2018 GST Notifications has certainly led to change in the methodology of application of the rates of GST, 2017. GST at the rate of 5% was payable on such Supply Contracts (i.e., 2.5% of CGST and 2.5% of SGST), in terms of Ministry of Finance's Notification No. 1/2017- Central Tax (Rate) dated 28.06.2017. Further, GST at the rate of 18% was levied (i.e., 9% of CGST and 9% of SGST) on such service contracts, in terms of Ministry of Finance's Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. Subsequently, vide the 2018 GST Notifications, against S. No. 234, for solar power generating stations if the goods are supplied, by a supplier, along with supplies of other goods and services being a taxable service specified the taxable value of supply of goods is deemed to be seventy per cent and the remaining thirty per cent is deemed to be value of the taxable service. Hence there is change in methodology of application of the rates of GST. In view of above we hold the enactment of the 2018 Notifications as change in law events under Article 12 of the PPA dated 21.12.2018.
36. Issue No.2 is decided accordingly.

Issue No.3: Whether the Petitioner is entitled for compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA?

37. The Petitioner has submitted that it is entitled for compensation towards additional expenditure on account of Change in Law event in terms of Article 12.2 of the PPA dated 21.12.2018. ***Per contra***, UPPCL has submitted that NTPC in its own Notification of Award (NOA) has considered the first contract as the Supply Contract and second one as Services Contract. Hence, these are standalone contracts and the parties have agreed to procure services on standalone basis, whereas the 2018 GST Notifications is applicable only to composite contracts. Secondly,

APTEL qua the judgment dated 20.09.2021 in Appeal No. 215/2021 (*TATA judgement*) has not given any decision on merits as to whether the introduction of GST Notifications dated 31.12.2018 is a change in law in terms of the concerned PPA or not, rather the main issue before APTEL was whether MERC could have applied the test of ‘prudent utility practice’ while examining the scope of Change in Law provision. Therefore, the *TATA judgement* cannot be relied upon.

38. We observe that *Authority for Advance Ruling - Uttar Pradesh*, in proceeding U/S 98 of the Goods and Services Tax Act, 2017 has held as under:

Sub:- GST ACT, 2017 - Advance Ruling U/s 98 - liability to tax under GST Act in respect to application dated 20.09.2018 from M/s Datamatics Global Services Limited, Lucknow, Uttar Pradesh - Order- Reg.

1) M/s Datamatics Global Services Limited, H.No. 1/100, Vinay Khand, Gomti Nagar, Lucknow, Uttar Pradesh, 226010 (here in after called the applicant) is a registered assessee under GST having GSTN: 09AAACD4471B1Z0.

2) The Applicant is primarily engaged in the business of IT Solutions. They alongwith their Consortium Partner have been awarded the contract for “Design, Manufacture, Supply, Installation, Testing and Commissioning of the Automatic Fare Collection System for Phase 1A of the Lucknow Metro Rail Project by the Lucknow Metro Railway Corporation LMRC”.

3) The Applicant has submitted application for Advance Ruling dated 20.09.2018 enclosing duly filled Form ARA-01(the application form for Advance Ruling) along with annexure and attachment.

4) The Applicant in his application sought following questions for determination by the Authority-

i) Whether a contract can be treated as Composite Contract under GST if it involves making of supply of goods and services which are inter--connected and inter--dependent on each other even though BOQ mentions separate value of goods and services.

ii) Whether a pre GST Period Contract can be treated as Composite Contract in GST even though there was separate Sale and Service Billing in Pre-GST period.

...

...
DISCUSSION AND FINDING

...

9) The Authority for Advance Ruling carefully examined the case and observed the following:

9.1) Observation in respect of Question No.1

Applicant's View

In respect of the first question on which Advance Ruling is required, the appellant submitted its view that as per the definition of "Composite Supply and Mixed Supply" under GST law, where all the goods and services are required to work together in an inter-connected and interdependent manner it naturally results in a 'composite supply' fully covered under the definition contained in 2(30) irrespective of item - wise values specified in BOQ.

Department's View

The Authority noticed that as per Section 2 of the Central Goods and Service Tax Act, 2017 (12 of 2017) the 'composite supply' is defined as under:-

"(30) "composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

Illustration:- Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;

Further, under 'mixed supply' is defined as-

(74) "mixed supply" means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.

Illustration- A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drinks and fruit juices when supplied for a single price is a mixed supply. Each of these items can be supplied separately and is not dependent on any other. It shall not be a mixed supply if these items are supplied separately;

In view of the above definitions, it is clear from the definitions above that if the goods and services are naturally required to work together in an inter-connected and inter dependent manner and are required to complete the principal service as clearly stipulated in the illustration of the 'composite supply', the services will fall under the category of 'Composite Supply'.

9.2) Observation in respect of Question No.2

Applicant's View

The appellant submitted that GST law is significantly different from Pre-GST taxation laws as taxation on sales was state list and taxation on services was part of central list under the Constitution of India prior to GST and thus, classification of goods /services can necessarily be done as per the GST provisions for Post - GST taxation purpose.

Department's View

The Authority noticed that in the pre-GST period, there were separate taxation system in respect of both Sale and Service. Sale of the goods was taxed by the State Authorities i.e. VAT and Services were taxed by the Central Tax Authorities i.e. Central Excise & Service Tax. In the GST regime, both sales and services are now covered under GST Law and both State and Centre have been given authority for taxation on sales and services under the GST Law. Further, as discussed in para 1 above that if the goods and services works together in interconnected and inter-dependent manner and fall under the category of 'Composite Supply', the Contract executed under Pre- GST period would be treated as Composite Contract in GST era as in the GST era both sale and supply of services both are covered under GST Laws. **Accordingly, we find that the Contract laid down under Pre GST era be covered under Composite Contract in GST era under GST Laws, if the conditions for 'Composite Supply' are satisfied.**

....

39. We observe that vide Order No. KAR/AAAR/02/2018-19 dated 05.09.2018 in case of M/s Giriraj Renewables Private Limited, Karnataka Appellate Authority for Advance Rulings has held as under:

28. Once the contract in question is that of a multistage supply as already discussed, having been already vivisected into the supply of the PV module by the owner as free issue to the Appellant, what remains to be executed by the Appellant is undertaking the supply of the remaining equipments and components and parts of the Solar Power Plant and supplying the services of design, erection, installation and commissioning of the Solar Power Plant. **We are of the opinion that the supply of this remaining portion of the contract in question (involving the supply of the balance components and parts as well as the service portion) can still be termed as a 'composite supply' in terms of Section 2(30) of the CGST Act, 2017 since the supply of these components and parts as well as the services of erection, installation and commissioning appear to be naturally bundled.**

...

30. In view of our findings and discussions as above, the Ruling dated 21.03.2018 of the Karnataka Authority for Advance Ruling is modified as under:

c) The supply of the remaining portion of the contract in question by the Appellant which involves the supply of the balance components and parts of the Solar Power Plant and the supply of services of Erection, Installation and Commissioning of the

Solar Power Plant is viewed as a 'composite supply' as the supply of goods and services are naturally bundled.

...

40. From the above, we observe that if goods and services are naturally required to work together in an inter-connected and inter dependent manner and are required to complete the principal service, the services will fall under the category of 'Composite Supply'. Further, if the conditions for 'Composite Supply' are satisfied, then the contracts are covered as 'Composite Contract' under GST Laws. The contract involving the supply of the components and parts of the Solar Power Plant and the supply of services of Erection, Installation and Commissioning of the Solar Power Plant is viewed as a 'composite supply' as the supply of goods and services are naturally bundled.
41. In the instant case, we note that NTPC submitted its bid on 19.09.2018 and e-Reverse auction was held on 10.10.2018. On 22.11.2018, the letter of intent was issued in favour of NTPC for setting up 140 MW solar PV at Bilhaur, Uttar Pradesh. NTPC executed the PPA with UPPCL on 21.12.2018 for 140 MW solar PV at Bilhaur, Uttar Pradesh. NTPC was required to construct, operate and maintain the Solar PV Project. On 24.12.2018, NTPC issued separate Notification of Award (NOA) in favour of M/s Vikram Solar Limited with following details:
- a) Ex works supply of all Plant and Equipment including mandatory spares amounting to Rs. 487,63,28,524/- for the entire Project (excluding GST).
 - b) For Inland transportation, insurance, installation, civil & allied works etc. testing & commissioning and successful completion of Guarantee test and carry out operation and maintenance (O&M) and AMC for a sum of Rs. 51,52,00,000/- (excluding GST).
42. We observe that the relevant clauses of the *NOA of contract No. RE-CS-5731-004-9 (R)-FC-NOA-0046 dated 24.12.2018 for ex-works supply of all plant and equipment including mandatory spare for the development of 140 MW solar PV project at Bilhaur in Uttar Pradesh as per Bidding Document No. RE-CS-5731-004-9(R)* stipulate as under:
- 2.0 We confirm having accepted your 'No DEVIATION' Bid [Envelop -I (Techno-Commercial Bid) & Envelop -II (Price Bid)]proposal submitted..... and award*

*on you the contract for the work of Design, Engineering, Manufacture, Supply, shop testing at works, type testing wherever applicable & packing, forwarding and dispatch from manufactures works/ place of dispatch of all the equipments/materials and Mandatory Spares and special tools & tackles to be supplied on Ex-works (India) basis as per specifications and scope defined in the bidding document for the “**Development of 140 MW Solar PV Project at Bilhaur in Uttar Pradesh**” as per Bidding Documents No. RE-CS-5731-004-9 (R) read in conjunction with its Amendments & Clarifications referred to in Para 1.0 above (hereinafter referred to as ‘**First Contract**’).*

*3.0 We have also notified you vide our Notification of Award No. **RE-CS-5731-004-9 (R)-FC-NOA-0047 dated 24.12.2018** for award of “Second Contract” on you for the work of providing all services i.e. Transportation from manufacture’s works/place of dispatch (both in India) to site, Inland Transit Insurance, Delivery at site, Receipt, Unloading, Handling, Storage at site, In-Plant Transportation at site, Insurance covers other than inland transit insurance, Installation, Civil & Allied works, Testing and Commissioning, putting into satisfactory operation, successful completion of Trial Operation and carry out Operation and Maintenance (O&M)for 03 years and AMC of critical equipment (Inverter, SCADA & Tracker (if applicable) for ten (10) years in respect of Plant & Equipment supplied under First Contract referred at para 3.0 below for “**Development of 140 MW Solar PV Project at Bilhaur in Uttar Pradesh**” as per Bidding Document No. RE-CS-5731-00409 (R) read in conjunction with its Amendments & Clarifications referred to in Para 1.0 above (hereinafter referred to as ‘**Second Contract**’).*

43. We observe that relevant clauses of the NOA of contract No. RE-CS-5731-004-9 (R)-FC-NOA-0047 dated 24.12.2018 Inland Transportation, Insurance, Installation, Civil & Allied works etc., Testing and Commissioning and Successful completion of Guarantee Test and carry out Operation and Maintenance (O&M) and AMC for development of 140 MW solar PV project at Bilhaur in Uttar Pradesh as per Bidding Document No. RE-CS-5731-004-9(R) stipulate as under:

*2.0 We confirm having accepted your ‘No DEVIATION’ Bid [Envelop -I (Techno-Commercial Bid) & Envelop -II (Price Bid)]proposal submitted..... and award on you the Contract for the work of providing all services i.e. Transportation from manufacture’s works/place of dispatch (both in India) to site, Inland Transit Insurance, Delivery at site, Receipt, Unloading, Handling, Storage at site, In-Plant Transportation at site, Insurance covers other than inland transit insurance, Installation, Civil & Allied works, Testing and Commissioning, putting into satisfactory operation, successful completion of Trial Operation and carry out Operation and Maintenance (O&M)for 03 years and AMC of critical equipment (Inverter, SCADA & Tracker (if applicable) for ten (10) years in respect of Plant & Equipment supplied under First Contract referred at para 3.0 below for “**Development of 140 MW Solar PV Project at Bilhaur in Uttar Pradesh**” as per Bidding Document No. RE-CS-5731-00409 (R) read in conjunction with*

its Amendments & Clarifications referred to in Para 1.0 above (hereinafter referred to as ‘Second Contract’).

3.0 *We have also notified you vide our Notification of Award No. **RE-CS-5731-004-9 (R)-FC-NOA-0046 dated 24.12.2018** for award of “First Contract” on you for the work of Design, Engineering, Manufacture, Supply, shop testing at works, type testing wherever applicable & packing, forwarding and dispatch from manufactures works/ place of dispatch of all the equipments/materials and Mandatory Spares and special tools & tackles to be supplied on Ex-works (India) basis as per specifications and scope defined in the bidding document for the “**Development of 140 MW Solar PV Project at Bilhaur in Uttar Pradesh**” as per Bidding Documents No. RE-CS-5731-004-9 (R) read in conjunction with its Amendments & Clarifications referred to in Para 1.0 above (hereinafter referred to as ‘First Contract’).*

44. From the above, we observe that the first contract (Supply Contract) includes ex-works supply of all plant and equipment including mandatory spare for the development of 140 MW solar PV project at Bilhaur in Uttar Pradesh whereas the second contract (Services Contract) includes Inland Transportation, Insurance, Installation, Civil & Allied works etc., Testing and Commissioning and Successful completion of Guarantee Test and carry out Operation and Maintenance (O&M) and AMC for development of the same project viz. 140 MW solar PV project at Bilhaur in Uttar Pradesh. Clearly, the contracts are inter-connected and inter dependent and naturally bundled. M/s Vikram Solar Limited is required to work for complete development of 140 MW Solar PV Project at Bilhaur in Uttar Pradesh and hence the work undertaken as per the contracts by M/s Vikram Solar Limited falls under the category of ‘Composite Supply’. We observe that the contracts satisfy the conditions for ‘Composite Supply’. Hence the first contract (Supply Contract) and the second contract (Services Contract) are to be considered as a ‘Composite Contract’ under GST Laws. In view of above, we hold that NOA of contracts to M/s Vikram Solar Limited are not standalone contracts but act as a ‘composite contract’ and hence are covered under the 2018 GST Notifications.

45. We further observe that APTEL vide its judgment dated 20.09.2021 in Appeal No. 215/2021 (*TATA judgement*) has held as under:

“....

6. The Commission examined the claim by subjecting to scrutiny the effect of applicable tax rates at the time of bid submission and the impact of change brought about by notifications issued in December, 2018. The Commission has accepted the case of the appellant that the notifications issued on 31.12.2018 are change in law event but denied the relief on the finding that the contracting practice adopted by it was neither economical nor prudent, such conclusion being predicated on the view that TPREL ought to have entered into three contracts (instead of two contracts) since that would not have led to increase in rate of GST payable post the notifications dated 31.12.2018.

.....
14. **The recourse to composite contract was a business decision of the appellant. It is not fair to deny relief for change in law, otherwise properly made out, only because another business model commends itself as better to the regulator.** Suffice it to apply here the ruling of this tribunal in Karnataka Power Transmission Corporation Limited v. Karnataka Electricity Regulatory Commission & Ors. reported as 2007 ELR (APTEL) 223 wherein it was held that the Commissions cannot micro-manage the affairs and contracting of regulated entities

15. **The appellant could not have conceived in advance as to what changes in GST regime might be brought about by the legislature (or executive) in the period after submission of the bid and execution of the PPA.** The reasons set out by the Commission are nothing but hindsight. There is no scrutiny or certainty as to whether the consideration payable for the supplies or services procured would have been similar, lower or higher to the one paid under the composite contract, if the contracts were to be split into two, one for supplies and the other for services. The entire subject is in the realm of speculation. There is nothing shown that the authorities had inhibited or advised against award of such composite contracts at the time of bidding process or in the period thereafter in the run-up to the execution of the PPA and award of the subject contracts. **There is no illegality attached to the award of composite contract as was the course adopted by the appellant.**

16. If in terms of Article 9.2 of the PPA the **Change in Law event has resulted in adverse financial loss to TPREL, on which issue the Commission has concluded in the affirmative, the relief must be granted such that TPREL 'is placed in the same financial position as it would have been had it not been for the occurrence of the Change in Law', the contractual provision being based on restitutionary principle.** Further, in view of the settled law on the subject, **TPREL is entitled to the compensation claim along with carrying cost.** The issue of Carrying Cost for Change in Law compensation is no longer res integra. Hon'ble Supreme Court in UHBVNL & Anr. v. Adani Power Ltd. & Ors. (2019) 5 SCC 325 held that Carrying Cost is an integral part of the restitutionary principle and is inbuilt in Change in Law provisions of the PPA.

.....
Prudence check cannot be extended to arranging business affairs on the basis of law which will come in future. The impugned view would indeed make Change in Law provision otiose, since prudence would get tested in the context of law to come in

future. This approach is impermissible in view of the decision in Coastal Gujarat Power Limited (supra).”

46. From the above, we observe that APTEL has set aside the observations made by MERC with respect to the promulgation of the GST Act not being a change in law event and held that the event of promulgation of GST is nothing but an event of change in law. APTEL has held that the contracting party could not have conceived in advance as to what changes in GST regime might be brought about by the legislature (or executive) in the period after submission of the bid and execution of the PPA. Prudence check cannot be extended to arranging business affairs on the basis of law which will come in future. APTEL has further held that recourse to composite contract was a business decision. APTEL allowed the change in law claims along with carrying costs. We further observe that though the aggrieved discoms filed an appeal before the Hon'ble Supreme Court vide Civil Appeal No. 7127/2021, the Apex Court has not passed any stay order as such.

In view of the above discussion, we hold that the Petitioner is entitled to compensation towards additional expenditure on account of the impugned 2018 GST Notifications viz. Notifications No. 24/2018 and 27/2018 Notification as per Article 12 of the PPA as change in law events.

47. Issue No.3 is decided accordingly.

Issue No.4: Whether the Petitioner is entitled to carrying cost towards compensation for Change in Law?

48. The Petitioner has submitted that the claim for carrying cost has to be duly passed on to the Petitioner following the restitutionary principles. *Per contra*, UPPCL has submitted that the Petitioner is not entitled for carrying costs. UPPCL has submitted that there is no provision for carrying costs in the PPA.

49. We further observe that APTEL, vide judgement dated 15.09.2022 in A. No. 256 of 2019 & Batch in case title *Parampujya Solar Energy Pvt. Limited & Ors. vs. CERC & Ors.*, remanded the Batch Petitions to the commission with following directions (in paragraph 109):

*“109. The other captioned appeals - Appeal no. 256 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC), Appeal no. 299 of 2019 (Parampujya Solar Energy Pvt. Ltd. v. CERC), Appeal no. 427 of 2019 (Mahoba Solar (UP) Private Limited v. CERC), Appeal no. 23 of 2022 (Prayatna Developers Pvt. Ltd. v. CERC) Appeal no. 131 of 2022 (Wardha Solar (Maharashtra) Private Ltd. v. CERC) and Appeal no. 275 of 2022 (Parampujya Solar Energy Pvt. Ltd. v. CERC) - deserve to be allowed. **We order accordingly directing the Central Electricity Regulatory Commission to take up the claim cases of the Solar Power Project Developers herein for further proceedings and for passing necessary orders consequent to the findings recorded by us in the preceding parts of this judgment, allowing Change in Law (CIL) compensation (on account of GST laws and Safeguard Duty on Imports, as the case may be) from the date(s) of enforcement of the new taxes for the entire period of its impact, including the period post Commercial Operation Date of the projects in question, as indeed towards Operation & Maintenance (O&M) expenses, along with carrying cost subject, however, to necessary prudence check.**”*

50. In view of the above, this Commission holds that the Petitioner shall be entitled to compensation (pre-COD & post-COD) towards additional expenditure on account of Change in Law event in terms of Article 12 of the PPA. The Petitioner, in the instant petitions, shall be eligible for carrying costs starting from the date when the actual payments were made to the Authorities by M/s Vikram Solar Limited (under the NOA of contracts) till the date of issuance of this Order, at the actual rate of interest paid by the Petitioner for arranging funds (supported by Auditor’s Certificate) or the rate of interest on working capital as per the applicable RE Tariff Regulations prevailing at that time or the late payment surcharge rate as per the PPA, whichever is the lowest. Once a supplementary bill is raised by the Petitioner in terms of this order, the provision of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within the due date.

51. The Petitioner has enclosed a copy of the CA certificate as evidence for the payment of GST amount by the Petitioner to M/s Vikram Solar Limited. Accordingly, the Commission hereby directs the contracting parties to carry out reconciliation of additional expenditure on account of introduction of *2018 GST Notifications* by Ministry of Finance, Government of India along with

carrying cost by exhibiting clear and one to one correlation with the projects and the invoices raised supported with Auditor Certificate.

52. The Hon'ble Supreme Court in its Order dated 12.12.2022, in Civil Appeal no. 8880/2022 in the case of "*Telangana Northern Power Distribution Co. Ltd. & Anr. Vs. Parampujya Solar Energy Pvt. Ltd. & Ors.*" (and in similar Orders dated 03.01.2023 and 23.01.2023) has held as under:

"Pending further orders, the Central Electricity Regulatory Commission (CERC) shall comply with the directions issued in paragraph 109 of the impugned order dated 15 September 2022 of the Appellate Tribunal for Electricity. However, the final order of the CERC shall not be enforced pending further orders."

53. Therefore, the directions issued in this Order so far as they relate to compensation for the period post Commercial Operation Date shall not be enforced and shall be subject to further orders of the Hon'ble Supreme Court in Civil Appeal No. 8880/2022 in *Telangana Northern Power Distribution Company Ltd. & Anr. V. Parampujya Solar Energy Pvt. Ltd. & Ors*, and connected matters.

54. The Issue No. 4 is decided accordingly.

55. The Petition No. 273/MP/2021 is disposed of in terms of the above.

Sd/-
पी. के. सिंह
(सदस्य)

Sd/-
अरुण गोयल
(सदस्य)

Sd/-
आई. एस. झा
(सदस्य)