



नई दिल्ली  
NEW DELHI

याचिका संख्या./ Petition No. 240/MP/2023

कोरम/ Coram:

श्री जिष्णु बरुआ, अध्यक्ष/Shri Jishnu Barua, Chairperson  
श्री रमेश बाबू वी., सदस्य/Shri Ramesh Babu V., Member  
श्री हरीश दुदानी, सदस्य/Shri Harish Dudani, Member

आदेश दिनांक/ Date of Order: 20<sup>th</sup> of February, 2025

**IN THE MATTER OF:**

Petition under Section 79(1)(b) & (f) of the Electricity Act, 2003 read with Regulation 111 of the CERC (Code of Business) regulations, 1999 and article 12 of PPA dated 08.12.2021 for approval of change in law and determination of quantum and mechanism of compensation on account of change in law event.

**AND IN THE MATTER OF:**

**M/s. T.P. Saurya Limited,**  
Corporate Center, Block A, 34,  
Sant Tukaram Road, Carnac Bunder,  
Mumbai, Maharashtra – 400009

**...Petitioner**

**Versus**

**Kerala State Electricity Board Limited**  
Vydyuthi Bhavanam,  
Thiruvananthapuram,  
Kerala – 695004

**...Respondent**

**Parties Present:** Shri Venkatesh, Advocate, TPSL  
Shri Suhael Buttan, Advocate, TPSL  
Shri Vineet Kumar, Advocate, TPSL  
Shri Nikunj Bhatnagar, Advocate, TPSL  
Shri Prabhas Bajaj, Advocate, TPSL  
Shri Priyanshu Tyagi, Advocate, TPSL

### **आदेश/ ORDER**

The Petitioner, M/s TP Saurya Limited (TPSL), is a 100% wholly owned subsidiary of Tata Power Renewable Energy Limited (TPREL) and a downstream subsidiary of The Tata Power Company Limited (TPCL). TPSL has developed a 110 MW Solar PV Project in Noorsar in the State of Rajasthan. Power Purchase Agreement was executed between TPSL and Kerala State Electricity Board Limited (KSEBL) on 08.12.2021. TPSL has filed the present Petition seeking approval of the Change in Law (CIL) event, being the imposition of Basic Customs Duty (BCD) of 40% (plus applicable Cess and GST) on the import of solar modules on account of Notification No. 283/3/2018-GRID SOLAR dated 09.03.2021 (2021 BCD Notification) issued by the Ministry of New and Renewable Energy (MNRE), Government of India.

2. Respondent No. 1, Kerala State Electricity Board Limited (KSEBL) is the successor entity of Kerala State Electricity Board, which was constituted by the Government of Kerala under the Electricity (Supply) Act, 1948 for carrying out the business of Generation, Transmission and Distribution of electricity in the State of Kerala.
3. The Petitioner has made the following prayers:
  - a) *Declare the Notification No. 283/3/2018-GRID SOLAR dated 09.03.2021 issued by Ministry of New and Renewable Energy as a Change in Law event in terms of Article 12 of the PPA;*
  - b) *Declare and allow the Petitioner to claim additional cost of Rs 130,77,70,723 (Rupees One Hundred and thirty Crores seventy seven lakhs seventy thousand seven hundred and twenty three only) (including GST of 8.9% and SWS @10% of BCD) along with an estimated carrying cost of Rs. 4,28,40,464 (Rupees Four Crores twenty eight lakhs forty thousand four hundred and sixty four only.) on account of the change in law event, i.e. imposition of BCD and direct the Respondent to pay in terms of 12.1.1 (5) of PPA;*

c) *Pass such other order/orders, as may be deemed fit and proper in the facts and circumstances of the case.*

**Factual Matrix:**

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

Location	Village-Noorsar, Tehsil & District-Bikaner, Rajasthan
Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects ( <i>the Guidelines</i> )	03.08.2017
RfS issued on	18.09.2020
Bid submitted by TPSL on	16.10.2020
eReverse auction held on	12.11.2020
Letter of Award (LoA) issued on	06.01.2021
Tariff	Rs.2.44/kWh
Nodal Agency	KSEBL
Capacity (MW)	110 MW
Power	Solar PV Project
O.M. No. 283/3/2018-GRID SOLAR ( <i>MNRE O.M. 2021</i> )	09.03.2021
PPA executed on	08.12.2021
SCoD (18 months from the date of execution of the PPA)	08.06.2023
Date of Commissioning	29.05.2023
Commercial Operation Date (COD)	01.06.2023

5. The present petition was filed on 31.07.2023. The petition was listed for hearing on 19.01.2024, wherein the Commission, after hearing the submission of the parties admitted the Petition. During the course of the hearing conducted on 08.10.2024, TPSL and KSEBL made detailed submissions on the preliminary issue of jurisdiction. Based on their request, the Commission permitted the parties to file the written submissions/notes of arguments. Subject to the above, the Commission reserved the matter for order on the aspect of ‘jurisdiction.’
6. It is pertinent to mention here that TPSL has filed the written submissions on 17.10.2024, whereas KSEBL has not filed any written submissions till date.

7. Briefly, KSEBL has submitted as under:

- a) The Petition is neither maintainable nor sustainable in law. It deserves to be rejected by order of this Commission. The Respondent prays accordingly.
- b) The Agreement between the parties, i.e., the PPA dated 08.12.2021 clearly states that any claim of *Change in Law* shall be adjudicated by the Appropriate Commission (Clause 12.2.1 of the PPA). Further, the Appropriate Commission has been defined in the Agreement as the Kerala State Electricity Regulatory Commission (KSERC). TPSL is also bound by the terms thereof and the present Petition filed by TPSL before this Commission is not maintainable and deserves to be rejected on this ground alone.
- c) On 03.08.2017, the Ministry of Power (MoP) issued Competitive Bidding Guidelines under Section 63 of the Electricity Act 2003, thereby providing a standardized and uniform procedure for long-term procurement of electricity from grid-connected Solar Photo Voltaic Power Projects, having a size of 5 MW and above, through competitive bidding.
- d) KSEBL issued a Request for Selection (RfS) dated 18.09.2020, followed by its clarifications /amendments, to purchase power generated from selected ground-mounted Grid-connected Solar PV Projects for a capacity of up to 200 MW for 25 years.
- e) The Kerala State Electricity Regulatory Commission (KSERC) vide its order dated 25.08.2020 in Petition No. OP 09/2020 granted approval to KSEBL for inviting bids on a reverse e-bidding basis for procuring 200 MW solar power from solar PV plants through a competitive bidding route on an all-India basis.
- f) KSEBL floated an e-tender on 18.09.2020 through the National e-bidding Portal for Long Term Solar Power procurement under the DEEP portal of MSTC Limited. NTPC and TPCL were the successful bidders in the said bidding process.
- g) KSEBL issued the Letter of Award on 06.01.2021 to TPCL. On 05.02.2021, KSEBL initialled the draft PPA with TPCL for the procurement of 110 MW solar power at Rs. 2.97/unit.
- h) Subsequently, TPCL requested KSEB Limited to seek permission from KSERC to execute the PPA through the Petitioner (TPSL), a 100% wholly owned subsidiary of TPCL.
- i) KSEBL filed a petition before KSERC seeking permission to execute the PPA with TPSL. KSERC vide order dated 23.06.2021 in OP No 11/2021 (Part-II) granted permission to KSEBL to sign the PPA with TPSL.
- j) After discovering the rate of Rs. 2.97/unit, KSEBL noticed that the rate discovered through the bidding route for the procurement of 200 MW solar power @ Rs 2.97/unit is relatively

higher in comparison with various offers of SECI. The rate offered by SECI from Tranche IX ISTS tender was Rs. 2.44 per unit (including trading margin @ 7 ps per unit).

- k) Considering the financial liability as above, KSEBL called upon TPSL and NTPC Limited, to intimate whether they would reconsider the rates offered by them. TPSL, vide its letter dated 27.09.2021, offered to reduce the rate to Rs 2.44/unit in place of Rs 2.97/unit. Subsequent to the offer submitted by TPSL on 27.09.2021, KSEBL decided to procure 110 MW Solar Power from TPSL at Rs. 2.44 per unit as per their proposal, subject to the condition that any claim of Change in Law shall be as per Clause 5.7.1 of the Central Guidelines and Article 12 of the initialled PPA, and any such claim shall be decided by KSERC. Accordingly, KSEBL entered into PPA with TPSL, for procuring 110 MW power on 08.12.2021.
- l) KSERC, vide order dated 28.01.2022, has adopted the tariff at Rs. 2.44 per unit and approved the PPA.
- m) In terms of the PPA between KSEBL and TPSL, any claim of Change in Law shall be decided as per clause 5.7.1 of the Central Guidelines and Article 12 of the PPA, and the appropriate Commission to decide any such claim shall be KSERC.
- n) As per articles 12.2.1 and 12.2.2, the decision of the Appropriate Commission shall be final and binding on both parties in case of 'Change in Law.'
- o) Further, as per Clause 1.1(5) of the mutually agreed PPA, the Appropriate Commission shall mean the "Kerala State Electricity Regulatory Commission".
- p) Thus, as per the PPA, the appropriate forum to deal with any claim of Change in Law is KSERC. However, TPSL has never raised these issues before KSERC. On this ground alone, the present Petition filed by TPSL before this Commission – is not maintainable and deserves to be dismissed at the threshold itself.

**On merits:**

- q) A cumulative reading of the provisions of the RfS and PPA makes it abundantly clear that the date of submission of the Bid is the cut-off date, and it is only the Change in Law after the said cut-off date that would be construed as a Change in Law. The provision of Clause 12.1.1 also stipulates that the Change in Law means the occurrence of any event after the last date of Bid submission. In the facts of the present case, the date of Bid submission is 27.09.2021, i.e., the date on which TPSL submitted its revised Bid. All Change in Law events prior to submission of the Bid is deemed to be accounted for and included in the

Bid. Thus, it is only the Change in Law events after 27.09.2021 that would deserve to be treated as a “Change in Law” in the facts and circumstances of the present case. All contentions to the contrary are erroneous, misconceived, and unsustainable.

- r) The notification dt. 09.03.2021 issued by MNRE is prior to the bid submission date, i.e. 27.09.2021, and, thus, the said notification cannot be treated as a Change in Law event. The taxes imposed vide the said notification are to be treated as accounted for and included in the Bid/tariff quoted by TPSL vide its letter dt. 27.09.2021. The present Petition seeking declaration of the notification dt. 09.03.2021, as a Change in Law event, would deserve to be rejected on this ground as well, being devoid of any merits.
- s) It is a matter of record that even when the notification for the imposition of Basic Customs Duty (BCD) on the import of solar modules was issued on 09.03.2021. The said notification itself provided that the duty would come into force w.e.f. 01.04.2022, i.e., 13 months after the date of issuance of the said notification. In other words, TPSL (Solar Power Generator) had 13 months to import the solar modules without facing imposition of any BCD.
- t) TPSL has voluntarily chosen to import the solar modules after 01.04.2022, i.e., the date on which the imposition of BCD came into force. It is respectfully submitted that it is on account of the commercial decision of TPSL to import the solar modules only after 01.04.2022 (even when TPSL had 13 months to import the solar modules without facing any imposition of BCD) that TPSL has to bear the imposition of the BCD in terms of the notification dt. 09.03.2021.
- u) In such facts and circumstances, where TPSL itself took the voluntary commercial decision to wait for 13 months before importing the solar modules – the provision of Article 12, i.e., “Change in Law” (which envisages an involuntary financial burden on account of a new / modified law, etc.) would not have any applicability. The claims and contentions of TPSL that it ought to be granted relief as “Change in Law” by taking into consideration the BCD notification dt. 09.03.2021 – would not be sustainable and would deserve to be rejected on this ground as well.
- v) The date of bid submission is 27.09.2021, i.e., the date on which TPSCS submitted its revised bid. CIL can only be considered for an event that has occurred post-bid submission date. All CIL events prior to the submission of the bid are deemed to be accounted for and included in the bid.

- w) In view of the above, the present Petition is neither maintainable nor sustainable and deserves to be rejected by orders of this Commission.

**Rejoinder by TPSL:**

8. Submission by TPSL is as follows:

***Re. Issue of jurisdiction is no longer res integra***

- a) A composite scheme refers to situations where electricity is generated by a company in one state and sold in another or multiple States, involving inter-state transmission and supply of electricity. On the said basis, the jurisdiction of the appropriate regulatory commission, i.e., whether this Commission or the respective SERCs, is decided.
- b) In the *Energy Watchdog Judgment*, the Hon'ble Supreme Court clarified the jurisdictional boundaries under the Electricity Act, 2003 (the Act). It was held that when electricity is generated and supplied within one State, the SERC has jurisdiction under Section 86 of the Act. However, when electricity is generated in one State and supplied to another (inter-state), it falls under a *composite scheme*, placing it squarely within the jurisdiction of this Commission under Section 79 of the Act. The term *composite scheme* simply refers to any arrangement involving electricity generation and sale across more than one State.

***Re. Legal position leading up to Energy Watchdog Judgment***

- c) Prior to the *Energy Watchdog judgment*, this Commission had already established that the conveyance of electricity across State boundaries qualifies as a composite scheme of generation under Section 79(1) of the Act. In such instances, this Commission's jurisdiction is invoked to adjudicate disputes between the generator and the involved licensee. Reliance is placed on this Commission's Order dated 21.08.2012 passed in Petition No. 45 of 2010 titled as *Uttar Pradesh Power Corporation Limited vs. Secretary, Energy Department, Madhya Pradesh Government & Ors.*
- d) In the *Energy Watchdog judgment*, both this Commission and the Hon'ble Supreme Court thoroughly examined the meaning/implications of a *composite scheme* of electricity generation, as well as the scope of jurisdiction under Section 79(1) of the Act as well as Section 86 of the Act and concluded that jurisdiction of a SERC, in any given case, is made out only when the generation and sale of the generated electricity remain within the bounds of a particular State. However, the moment the sale and generation of supply is in more than one State, i.e., when any there is conveyance of electricity is from one State to another, Section 79(1) of the Act comes into play, and the Appropriate Commission is this



Commission.

- e) Juxtaposing the position with the facts of the instant case, it is seen that the Project is located in the State of Rajasthan, and the supply of power is in the State of Kerala. Therefore, in terms of the law settled by the Hon'ble Supreme Court, this Commission has the jurisdiction to adjudicate the present case.

***Re. Applicability Section 64(5) of the Act***

- f) KSEBL, in the present case, has raised an objection to the jurisdiction of this Commission, asserting that the present dispute falls within the jurisdiction of KSERC. KSEBL has contended that pursuant to Article 1.1(5) of the PPA read with Section 64(5) of the Act, the term '*Appropriate Commission*' is expressly defined as KSERC, and TPSL, being a signatory to the PPA, is bound by its terms. Therefore, since KSERC had approved the PPA as well as adopted the tariff, TPSL had to be submitted to the jurisdiction of KSERC.
- g) A conjoint reading of Sections 64(1) and 64(5) of the Act shows that what has been prescribed in the said provision is a procedure to be followed by the Appropriate Commission while passing an order for determining tariff under Section 62 of the Act. Section 64(5) can only apply if the jurisdiction otherwise being with this Commission alone, upon a joint application by the parties concerned, jurisdiction is to be given to the SERC having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity.
- h) The Hon'ble Supreme Court, in the *Energy Watchdog Judgment*, while considering the objection raised by the parties contending that this Commission lacked the jurisdiction to adjudicate the petition filed by Adani Power in light of Section 64(5) of the Act, categorically held that *Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity.*
- i) Therefore, in terms of the *Energy Watchdog Judgment*, Section 64 (5) of the Act is not applicable in the present case, as, admittedly, there is no joint application.

***Re. Section 64 (5) of the Act is not applicable to projects governed by Section 63 of the Act***

- j) Section 64(5) serves as a procedural guideline for tariff determination but does not confer jurisdiction to adjudicate disputes between the generating companies and the licensees, which remains within the purview of Section 79(1) of the Act.
- k) The prime distinction between Section 62 and Section 63 of the Act is that while under



Section 62, the Appropriate Commission ‘*determines*’ the tariff, under Section 63, the Appropriate Commission ‘*adopts*’ the tariff determined through a competitive bidding process. This demonstrates that Section 64(5) of the Act is irrelevant in cases where a tariff is adopted by the Appropriate Commission under Section 63 of the Act, which deals with tariffs arrived at through a competitive bidding process. Reliance is placed on the *Energy Watchdog Judgment*, wherein the Hon’ble Supreme Court has categorically noted the distinction between ‘*determination*’ and ‘*adoption*’ of tariff. The aforesaid position has been followed by this Commission in an Order dated 21.02.2018 passed in Petition No. 131/MP/2016 titled *GMR-Kamalanga Energy Limited & Anr. vs. Dakshin Haryana Bijli Vitran Nigam Limited & Ors.*, wherein this Commission concluded that: (i) Section 64(5) has no application in cases of tariff discovered under competitively bidding process and adopted by the Commission under Section 63 of the Act and (ii) as Section 64 provides for the procedure for determination of tariff under Section 62, the Section 64(5) would be applicable only in respect of determination of tariff under Section 62 of the Act.

- l) Petition for adoption of tariff before the SERC can in no manner be construed as a Joint Application under Section 64 (5) of the Act.
- m) Therefore, KSEBL’s contention that the present petition should have been filed before KSERC on the basis that the PPA defines the ‘Appropriate Commission’ as KSERC and that the tariff was adopted by KSERC falls flat:
  - (i) Section 64(5) of the Act only applies when parties, by mutual consent, file a joint application to submit to the jurisdiction of the State Commission, even though the jurisdiction would ordinarily lie with this Commission under Section 79.
  - (ii) As per the *Energy Watchdog judgment*, the jurisdiction of this Commission remains intact for inter-State generation and sale of electricity, particularly under a composite scheme.
  - (iii) In the present case, there has been no joint application to invoke Section 64(5), and the Project in question falls under Section 63, and as per the GMR Kamalanga Judgment (*Supra*) of this Commission, Section 64(5) would be applicable only in respect of the determination of tariff under Section 62 of the Act and not Section 63.
  - (iv) As has been held by this Commission, merely filing of tariff adoption petition before the SERC does not tantamount to a Joint Application under Section 64(5) of the Act.
  - (v) Therefore, KSEBL’s argument that TPSL submitted to KSERC’s jurisdiction merely by virtue of the PPA and tariff adoption being done by KSERC is without merit. The

jurisdiction lies with this Commission under Section 79(1)(b) of the Act.

***Re. Position post Energy Watchdog Judgment***

- n) On several occasions, this Commission, as well as the Tribunal have been faced with the question to interpret Section 64(5) and adjudicate upon the question of jurisdiction. While relying on the *Energy Watchdog Judgment*, a consistent view is that Section 64 (5) is limited to tariff determination under Section 62 of the Act. Further, Section 64 (5) can only be invoked in a scenario when the jurisdiction otherwise lies before this Commission and parties, by way of a joint application, submit to the jurisdiction of the appropriate SERC. TPSL has placed its reliance on the following decisions: Order dated 20.07.2018 passed in Petition No. 229/MP/2017, titled *NTPC Vidyut Vyapar Nigam Limited Vs. Power Company of Karnataka Limited*; Order dated 28.01.2023 passed in Petition No. 177/MP/2020, titled *KSK Mahanadi Power Company Limited Vs. Uttar Pradesh Power Corporation Limited and Ors.*; Order dated 20.01.2024 passed in Petition No. 305/MP/2022 titled as *RKM Powergen Pvt Limited v Haryana Power Purchase Centre & Ors.*; Order dated 06.06.2018 passed in Petition Nos. 305/MP/2015 and 255/MP.2017 titled as *Adhunik Power & Natural Resources Limited v West Bengal State Electricity Distribution Company Limited & Ors.*; Order dated 18.01.2019 passed in Petition No. 224/MP/2018 titled *MB Power (Madhya Pradesh) v Uttar Pradesh Power Corporation Limited & Ors.*; Order passed in the matter of *CESC Limited vs. Central Electricity Regulatory Commission* and *West Bengal State Electricity Dist. Co. Limited vs. Central Electricity Regulatory Commission* 2010 SCC OnLine APTEL 18; Order passed in the matter of *GRIDCO Limited Janpath Bhubaneswar vs. Odisha Electricity Regulatory Commission & Anr.*, 2022 SCC OnLine APTEL 4.

**Analysis and Decision:**

9. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records and considered the submissions of the parties on the preliminary issue of jurisdiction.
10. On the basis of the submission of the parties, the only issue that arises for adjudication is:

***Whether this Commission has jurisdiction under section 79 (1)(b) and (f) of the Electricity Act, 2003 to adjudicate upon the disputes between the Petitioner and the KSEBL?***

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. Section 86 (1) of the Act stipulates as under:

***Section 86: Functions of State Commission***

***(1) The State Commission shall discharge the following functions, namely:--***

- (a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State: PROVIDED that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;*
- (b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;***
- (c) facilitate intra-State transmission and wheeling of electricity;*
- (d) issue licenses to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;*
- (e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of*

*electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;*

***(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;***

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

*(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;*

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

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

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

13. The relevant provisions of Section 64 of the Act. The same is reproduced hereunder:

**“Section 64. (Procedure for tariff order):**

***(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.”***

.....

***(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.***

14. We observe that while explaining the scope of the 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.”*

15. In this context, the Appellate Tribunal, in its judgment dated 04.09.2012 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.”*

16. The Appellate Tribunal, in its judgment dated 13.08.2024 in Appeal No. 414 of 2022 titled *SECI vs KSERC & Anr.* has held that KSERC could not adjudicate disputes arising from interstate transactions, as these fall under the exclusive jurisdiction of this Commission. The extract of the judgment is as under:

*20. The operations of the Central Commission and the State Commission are prescribed in Sections 79 and 86 of the Electricity Act, 2003 respectively. **Bare reading of these Sections would reveal that they operate in different fields and are totally independent of each other.** It would be advantageous to note the comparative provisions of these two Sections by way of the table mentioned below:-*

...  
...

*21. Section 79(1)(f) of the Act empowers the Central Commission to adjudicate upon the disputes involving generating companies or transmission licensees in the matters connected with clauses (a) to (d) of the said Section. Therefore, any dispute involving a generating station or a transmission licensee covered under Clauses (a)(b) & (c) will fall within the jurisdiction of the Central Commission. It appears that since the generating companies owned by Central Government and the generating companies having a composite scheme for generation and sale of Electricity in more than one State have Pan India presence, the Parliament found it proper and prudent to subject such companies to a special treatment and, therefore, have been brought under the jurisdiction of the Central Commission vide Section 79 of the Act. The primary object for such exercise appears to be uniformity of tariff amongst more than one State beneficiaries and prescribing uniform terms and conditions of supply of electricity to more than one State.*



22. It is notable that Clauses (a) (b) & (c) of Section 79 (1) of the Act begin with the expression “to regulate”. It is only the clause (d) which begins with the term “to determine tariff”. “Regulation of Tariff” is totally distinct from “Determination of tariff”. Regulation of Tariff includes all the necessary terms and conditions relating to the tariff such as billing, consequences of delay in payment of electricity charges, rebate, termination, suspension of electricity supply, payment of security, etc.

23. Section 86(1)(b) of the Act, provides for regulating the role of Distribution Licensees in the procurement of power and 86(1)(f) relates to adjudication upon the disputes between the licensees and generating companies by the State Commission. These are general provisions and have to be read subject to Section 79(1) (a) to 79(1)(d) of the Act. In so far as the generating companies who have a composite scheme for generation and sale of electricity in more than one State, the role of the State Commission would be only to decide whether the PPA to be entered into by them and a distribution company for sales/purchase of electricity at the tariff determined by Central Commission, has to be approved or not. In doing so, the State Commission would take into consideration various factors including the availability of power from other sources at a cheaper or in a more economical manner to be supplied to the consumers in the State. Thus, the State Commission has a limited role to play with regards to the sale of electricity under a composite scheme and it has no power to suggest any modifications to the terms and conditions of the PPA/PSA to be executed between a generating company, a distribution company and an intermediary.

24. In view of the scheme of the Act, as specified more particularly in Section 79 & 86, it would be anomalous to permit State Commission to claim concurrent jurisdiction along with the Central Commission in any dispute arising out of a composite scheme for generation and sale of electricity in more than one State, which is covered by Section 79(1) (b) of the Act. The jurisdiction of the Central Commission would be only in respect of the matters other than those which fall within the jurisdiction of the State Commission under Section 79 of the Act. In other words, if any matter falls under the scheme of 79(1)(a) to 79(1)(d) of the Electricity Act, 2023, the provisions of Section 86(1)(f) are of no application. In this context, we find it apposite to quote the observations of the Hon’ble Supreme Court in Energy Watchdog Vs. CERC & Ors., (2017) 14 SCC 80.

“24. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in clauses (a), (b) and (d), and “intra-State” in clause (c). **This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission.** The State Commission's jurisdiction is only where generation and supply takes place within the State. **On the other hand, the**

*moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State. ....*

*26. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that the expression “composite scheme” does not have some special meaning — it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.”*

*....*

*27. On the other hand, the jurisdiction of the State Commission under Section 86(1)(b) of the Act refers only to initial stage where approval is to be granted or not to be granted to the Power Purchase Agreement providing for purchase of power at the price and other terms and conditions specified therein. This provision does not empower the State Commission to regulate implementation of Power Purchase Agreement for all times to come in future also and to adjudicate upon the disputes arising between the parties therein. Holding otherwise would tantamount to permit the State Commissions to make inroads with the functioning of the Central Commission which would militate against the very scheme of Act, as discussed hereinabove.”*

17. The Hon’ble Supreme Court in *Energy Watchdog Vs. CERC & Ors.*, (2017) 14 SCC 80 has, *inter-alia*, held as under:

*18. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not “determine” tariff but only “adopts” tariff already determined under Section 63. Thirdly, such “adoption” is only if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a standalone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this section on 19-1-2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the*



*appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4.”*

...

*27. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. **Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity.** We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.*

18. We find that Section 79(1)(b) read with Section 79(1)(f), has a wider scope and is not merely confined to the determination of tariffs. Section 79(1)(f) of the Act empowers the Commission to adjudicate upon the disputes involving generating companies or transmission licensees in the matters connected with clauses (a) to (d) of the said Section. The generating companies having a composite scheme for the generation and sale of electricity in more than one State have been brought under the jurisdiction of the Commission vide Section 79 of the Act. Sub-Section (a) (b) & (c) of Section 79 (1) of the Act begin with the expression “to regulate”. It is only clause (d) that begins with the term “to determine tariff.” “Regulation of Tariff” is distinct from “Determination of tariff”. Regulation of tariff includes all the necessary terms and conditions relating to the tariff, such as billing, consequences of delay in payment of electricity charges, rebate, termination, suspension of electricity supply, payment of security, etc.
19. Further, we observe that Section 64 of the Act mandates the procedure to be undertaken specifically for tariff orders. Section 64(5) of the Act starts with a non-obstante clause, which indicates that in all cases involving inter-State supply, transmission, or wheeling of electricity, this Commission alone has jurisdiction. From the harmonious reading of Section 64(1) & Section 64(5) of the Act, it is observed that upon application made by the parties to the State Commission (having jurisdiction in respect of licensee), the State Commission can determine tariff under section 62 of the Act, for any inter-State supply. Section 64 (5) of the Act relates to only determination of tariff under Section 62 of the Act and has no application to projects established under Section 63 of the Act. Section 79 empowers this Commission to adjudicate

in matters involving inter-State schemes for the generation and sale of electricity. It is pertinent to mention here that the project in question falls under Section 63 of the Act. We also observe that in the instant case, the power project is located in the State of Rajasthan, and the power is procured by the distribution licensee in Kerala. The entire arrangement of generation and sale of electricity is inter-State in nature, and thus, the generating station in question has a composite scheme as envisaged under Section 79(1)(b) of the Act. For the generating companies that have a composite scheme for the generation and sale of electricity in more than one State, the Hon'ble Supreme Court has held that *it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State*. Accordingly, we hold that the matter is covered within the jurisdiction of the Central Commission as per Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003. The above view is also consistent with the view taken by the Commission in its earlier order dated 21.12.2021 in petition no. 210/AT/2021.

20. The next issue raised by KSEBL is that subsequent to the offer submitted by TPSL on 27.09.2021, KSEBL decided to procure 110 MW Solar Power from TPSL at Rs. 2.44 per unit as per their proposal, *subject to the condition that any claim of Change in Law shall be as per Clause 5.7.1 of the Central Guidelines and Article 12 of the initialled PPA, and any such claim shall be decided by the KSERC*. The relevant Recitals and Articles of the PPA dated 08.12.2024 stipulate as under:

*Recitals*

*H) Subsequent to the offer submitted by M/s TP Saurya Ltd on 27.09.2021, the Board of Directors of KSEBL in the 61st meeting held on 30.10.2021 resolved to procure 110 MW Solar power from M/s TP Saurya Limited (100% subsidiary of M/s The Tata Power Company Ltd) @ Rs 2.44 per unit as per their proposal dated 27.09.2021 as the lowest offer in the KSEBL tender subject to the condition that **the rate change due to change in law (including BCD) shall be as per clause 5.7.1 of the Central guidelines and Article 12 of Change in Law of the initialed PPA to be decided by the KSERC.***

**ARTICLE 1 - DEFINITIONS AND INTERPRETATIONS**

**1.1 Definitions:**

**5. Appropriate Commission shall mean the Kerala State Electricity Regulatory Commission (KSERC) or such other succeeding authority or commission Articles**

**ARTICLE 12 - CHANGE IN LAW**

*In the event a Change in Law results in any adverse financial loss/ gain to the Solar Power Generator then, in order to ensure that the Solar Power Generator 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 Solar Power Generator/ Procurer shall be entitled to compensation by the other party, as the case may be, subject to the condition that the quantum and mechanism of **compensation payment shall be determined and shall be effective from such date as may be decided by the KSERC.***

#### *12.1 Definitions*

*In this Article 12, the following terms shall have the following meanings:*

*12.1.1 “Change in Law” means the occurrence of any of the following events after the last date of bid submission including*

*(1) the enactment, coming into effect, adoption, promulgation, amendment, modification, notification or repeal (without re-enactment or consolidation) in India, of any Indian Law, including rules and regulations framed, pursuant to such Law;*

*(2) a change in the interpretation or application of any Indian Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*

*(3) the imposition of a requirement for obtaining a new Consent, Clearance and Permit which was not required earlier;*

*(4) a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the SPG;*

*(5) any change in tax or introduction of any tax which have a direct effect on the project as per the terms of this Agreement including any change in rate of taxes, duties and cess but shall not include (i) any change in taxes on corporate income or any change in any withholding tax on income or dividends distributed to the shareholders of the SPG, or (ii) any change on account of regulatory measures by the **KSERC** including calculation of CUF.*

#### *12.2 Relief for Change in Law*

*12.2.1 The aggrieved Party shall be required to approach the **appropriate Commission** for seeking approval of Change in Law.*

*12.2.2 The decision of the **appropriate Commission** shall be final and governing on both the Parties.*

### **ARTICLE 17 - GOVERNING LAW AND DISPUTE RESOLUTION**

#### **17.3 Dispute Resolution**

*All disputes relating to any matter relating to this contract shall be adjudicated by the appropriate Commission or shall be referred for arbitration by the appropriate Commission. Appeal against the decisions of the **appropriate Commission** shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.*

*17.4 Parties to Perform Obligations: Notwithstanding the existence of any dispute and difference referred to the Appropriate Commission or the Arbitration Tribunal as provided in Article 17 .3 and save as the **Appropriate Commission** or the Arbitration Tribunal may otherwise direct by a final or interim order, the Parties hereto shall continue to perform their respective obligations (which are not in dispute) under this Agreement.*

21. KSEBL has argued that as per PPA, it has been agreed upon by the contracting parties that in the rate change due to a change in law (including BCD) shall be as per clause 5.7.1 of the Central guidelines and Article 12 of Change in Law of the initialled PPA to be decided by the

KSERC and that Appropriate Commission shall mean the KSERC.

22. We note that it is a well-settled principle of law that the parties, by their agreement, can neither confer jurisdiction upon a forum that 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 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.”*

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 the dispute in a specific manner, it cannot oust the jurisdiction of this Commission, which flows from the provisions of the Act. Hence, we hold that adjudication involving the parties will be governed by this Commission under Section 79 (1)(f), read with Section 79(1)(b) of the Act.

26. 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 the determination of issues 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 pleadings in the matter within four weeks of the issue of this order. No further extension of time for completion of pleadings shall be permitted.

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

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