

Rajasthan Electricity Regulatory Commission

Petition No. RERC-1905/21 and 1933/21

In the matter of Petition filed for adoption of tariff for 1070 MW Solar PV power under Section 63 of the Electricity Act, 2003 and

In the matter of Petition under 86(1)(b) of the Electricity Act, 2003 seeking approval and recognition of Article 12.1.3 and 12.2.3 of the Power Purchase Agreement dated 04.03.2021 executed between AEW India North One Private Limited and Solar Energy Corporation of India Limited and appropriate directions thereof.

Coram:

Dr.B.N. Sharma, Chairman

Sh. S. C. Dinkar, Member

Sh. Prithvi Raj, Member

Petitioner : Rajasthan Urja Vikas Nigam Ltd. (1905/21)
AEW India North One Private Limited (1933/21)

Respondents : 1. Solar Energy Corporation of India (in 1905/21 and 1933/21)
2. Green Infra Wind Energy Ltd. (in 1905/21)
3. AEW India North One Private Limited (in 1905/21)
4. NTPC Renewable Energy Ltd. (in 1905/21)
5. Rajasthan Urja Vikas Nigam Ltd. (in 1933/21)

Date of hearings: 23.11.2021, 22.11.2021 and 28.10.2021

Present : Sh. Sh. M.G. Ramachandran, Sr. Advocate for SECI
Sh. Sanjay Sen, Sr. Advocate for Green Infra
Sh. Vishrov Mukherjee, Advocate for Green Infra
Sh. Shri Venkatesh, Advocate for NTPC
Sh. Sujit Ghosh, Advocate for AEW
Ms. Mannat Waraich, Advocate for AEW
Sh. Shubham Arya, Advocate for SECI
Sh. Bipin Gupta, Advocate for RUVN

Order Date:

13.12.2021

ORDER

1. Rajasthan Urja Vikas Nigam Ltd. (RUVN) had filed this petition on 24.03.2021 under Section 63 of the Electricity Act, 2003 for adoption of tariff for 1070 MW Solar PV power to be purchased by three Discoms for which bidding was conducted by SECI.
2. The Order on this petition was issued by the Commission on 23.07.2021.
3. The above order was challenged before Hon'ble APTEL by Green Infra Wind Energy Ltd. bearing appeal no. 251 OF 2021. Hon'ble APTEL on 12.10.2021 passed the order in the matter and directed the Commission to hear the parties further in the light of the observations made by the tribunal and pass further orders specifically in relation to the three 'change in law' event claims presented by the appellant, preferably within two months.
4. Thereafter, matter was listed for hearing on 28.10.2021, wherein Commission granted two weeks time to the Respondents for filing the consolidated submissions and one week to Petitioner to file the reply.

Accordingly NTPC Renewable Energy Ltd. and AEW India North One Private Limited submitted their respective written submissions on 11.11.2021, Green Infra Wind Energy Ltd. on 16.11.2021 and Solar Energy Corporation of India Ltd on 19.11.2021, Rajasthan Urja Vikas Nigam Ltd. filed its reply on 22.11.2021 on the submissions made by the Respondents.

5. M/s AEW India North One Private Limited also filed a petition bearing no. 1933/21 for approval and recognition of Article 12.1.3 and 12.2.3 of the Power Purchase Agreement dated 04.03.2021 executed between AEW India North One Private Limited and Solar Energy Corporation of India Limited and appropriate directions thereof. As the issues that arise in both the petitions for consideration and decision of the Commission are similar, these petitions referred to in cause title are clubbed and are being disposed of by this common order.
6. Both the matters were heard together finally on 23.11.2021. Sh. Bipin Gupta, Advocate appeared on behalf of the Petitioner. Sh. Shubham Arya, Advocate appeared for SECI. Sh. Sanjay Sen, Sr. Advocate appeared for M/s Green Infra. Sh. Shri Venkatesh, Advocate appeared for NTPC, Sh. Sujit Ghosh, Advocate appeared for AEW.
7. M/s Green Infra during the hearing and in its written submissions has submitted as under:
 - 7.1 The present proceedings are remand proceedings wherein GIRPL is seeking declaration of and relief for the following change in law events pursuant to the Order dated 12.10.2021 passed by the Hon'ble Tribunal: -
 - (a) SC GIB Order in terms of which all existing and future overhead low and high voltage powerlines in the Priority and Potential habitats of Great-Indian Bustard shall be undergrounded.

- (b) Levy of BCD on import of Solar Cells, Modules /Panels pursuant to MNRE OM dated 09.03.2021.
- (c) Increase in rates of BCD on import of Solar Inverters pursuant to MoF Notification dated 01.02.2021 whereby Exemption Notification has been rescinded.
- (d) Additionally, GIRPL is seeking relief for a subsequent 'change in law' event being increase of GST from 5% to 12% on renewable energy devices and parts for manufacture pursuant to MoF Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021

7.2 The issues for consideration before the Commission are as follows: -

- (a) Whether increase in rates of BCD on import of Solar Inverters pursuant to the MoF Notification dated 01.02.2021, withdrawing the Exemption Notification qualifies as change in law under the PPA?
- (b) Whether levy of BCD on import of Solar Cells, Modules/Panels pursuant to MNRE OM dated 09.03.2021 with effect from 01.04.2022 qualifies as change in law under the PPA?
- (c) Whether the SC GIB Order qualifies as change in law under the PPA?
- (d) Whether increase in the rate of GST from 5% to 12% on renewable energy devices and parts for manufacture pursuant to MoF Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 qualifies as change in law under the PPA?
- (e) If the answer to the aforementioned issues is in the affirmative, then what relief shall GIRPL be entitled to at this stage?

7.3 The present proceedings are remand proceedings pursuant to the Order dated 12.10.2021. It is settled law that the lower court is bound by the terms of the remand order. Reliance is placed on the order dated

10.08.2010 passed by the Hon'ble Tribunal is Appeal No. 37 of 2010 titled Meghalaya State Electricity Board v Meghalaya State Electricity Regulatory Commission wherein the Hon'ble Tribunal laid down the principles to be followed by the lower court/authority while dealing with the issue of limited remand.

7.4 Imposition of BCD on import of Solar Inverters pursuant to the MoF Notification dated 01.02.2021 whereby Exemption Notification dated 06.01.2011 has been rescinded, qualifies as change in law under the PPA.

(a) Vide MoF Notification dated 01.02.2021, the BCD on the import of Solar Invertors has increased from 5% to 20%.

(b) MoF Notification dated 01.02.2021 issued by the Ministry of Finance falls within the definition of 'Law' under the PPA.

(c) The MoF Notification dated 01.02.2021 was issued after 28.10.2020 which is the cut-off date for consideration of 'change in law'.

(d) The MoF Notification dated 01.02.2021 has been issued by the Ministry of Finance which qualifies as an Indian Governmental Instrumentality under the PPA.

(e) Increase of BCD from 5% to 20% will have an impact on the Project cost.

7.5 Article 12.1.2 of the PPA states that if a change in law event occurs up to inter alia SCD of the Project, GIRPL will be entitled for compensation subject to the condition that such 'change in law' is recognized by the Appropriate Commission.

7.6 Further, Article 12.1.3 specifically provides that in case of change in rates of safeguard duty, GST and basic customs duty after 28.10.2020, resulting in change in Project cost, then such change will be treated as 'change in

law'. Further, the quantum of payment of compensation on account of change in rates of such duties shall be provided to the affected party by the other party as per Article 12.2.3, subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff.

- 7.7 Levy of BCD on import of Solar Cells and Modules/Panels pursuant to MNRE OM dated 09.03.2021 is a change in law in terms of the PPA.
- 7.8 As on the cut-off date i.e., 28.10.2020, BCD on Solar Cells & Modules / Panels was nil. BCD of 25% and 40% on Solar Cells and Modules respectively has been introduced vide MNRE OM dated 09.03.2021. Further, MNRE's proposal to impose BCD on Solar Cells and Modules / Panels at 25% and 40% respectively has been accepted by the Ministry of Finance.
- 7.9 The MNRE OM dated 09.03.2021 qualifies as change in law as:-
- (a) The MNRE OM dated 09.03.2021 is a notification and falls within the definition of 'Law' under the PPA.
 - (b) The MNRE OM dated 09.03.2021 was issued after 28.10.2020 which is the cut-off date for consideration of 'change in law'.
 - (c) The MNRE OM dated 09.03.2021 has been issued by MNRE which qualifies as an Indian Governmental Instrumentality under the PPA. The proposal has also been accepted by the Ministry of Finance.
 - (d) The MNRE OM dated 09.03.2021 will lead to an increase in Project cost due to increase of BCD from 0% to 40% on Solar Modules and 25% on Solar Cells.
- 7.10 Increase in the rate of GST from 5% to 12% on renewable energy devices and parts for their manufacture pursuant to MoF Notification No. 8/2021-

Integrated Tax (Rate) dated 30.09.2021 constitutes a 'change in law' in terms of the PPA.

7.11 As on the cut-off date i.e., 28.10.2020, GST on renewable energy devices and parts for their manufacture was 5%. However, on 30.09.2021, MoF issued the MoF GST Notification increasing the rate of GST from 5% to 12%.

7.12 The MoF GST Notification qualifies as change in law as:

(a) Vide MoF GST Notification, GST on renewable energy devices and parts for their manufacture has increased from 5% to 12%.

(b) MoF GST Notification issued by the Ministry of Finance and falls within the definition of 'Law' under the PPA.

(c) The MoF GST Notification was issued after 28.10.2020 which is the cut-off date for consideration of 'change in law'.

(d) The MoF GST Notification has been issued by the Ministry of Finance which qualifies as an Indian Governmental Instrumentality under the PPA.

(e) Increase of GST from 5% to 12% will have an impact on the Project cost.

7.13 It is submitted that increase in GST rate ought to be considered by the Commission at this stage. Such consideration will be in accordance with the Hon'ble Tribunal's Order dated 12.10.2021 which held that: -

(a) The impact on the cost of the development of the project of such 'change in law' events that have occurred after the submission of the bid and closure of the bid process but before the adoption of the bid discovered price, renders the bid price unrealistic and in terms of Section 86 (1) (b) of the Electricity Act, 2003 it is the duty of

the State Commission to inquire into such claim at the first opportune time and bring in suitable corrections; and

(b) If the event actually constitutes 'change in law' within the four corners of its definition under the PPA, there is no reason why it cannot be duly recognized as a change in law at the stage of tariff adoption

7.14 The Order passed by the Hon'ble Supreme Court in W.P(C) No. 838 of 2019 titled M.K. Ranjitsinh & Ors. v. Union of India & Ors. constitutes as a change in law in terms of the PPA.

7.15 The Hon'ble Supreme Court vide the SC GIB Order directed that all existing and future overhead low and high voltage power lines in the Priority and Potential habitats of Great-Indian Bustard ("GIB") shall be undergrounded.

7.16 Due to the SC GIB Order, there is complete uncertainty regarding the Project with respect to feasibility of undergrounding. Further, the Project is now subject to technical feasibility, availability of land for undergrounding, grant of necessary approvals as may be applicable from the regulatory bodies, etc.

7.17 In view of the above, it is submitted that the SC GIB Order qualifies as change in law as:-

(a) The SC GIB Order results in (i) introduction of a requirement to obtain a new consent, permit, license; (ii) modification in prevailing conditions, i.e. requirement to underground transmission lines; and (iii) introduction of a new law since an order of the Hon'ble Supreme Court has the force of law under the Constitution of India.

(b) The SC GIB Order dated 19.04.2021 was issued after 28.10.2020 which is

the cut-off date for consideration of 'change in law'.

(c) The SC GIB Order has been issued by the Hon'ble Supreme Court of India which qualifies as an Indian Governmental Instrumentality under the PPA.

(d) The SC GIB Order will have an impact on the Project Cost and will require time extensions in respect of the SCD along with corresponding extension of other timelines under the PPA.

7.18 It is pertinent to note that the Hon'ble Tribunal has held the cancellation of coal blocks by the Hon'ble Supreme Court of India in the case of Manohar Lal Sharma vs. UOI to be a change in law event in Judgment dated 21.12.2018 in Appeal No. 193 of 2017 - GMR Kamalanga Energy Limited & Anr. vs. CERC & Ors.

7.19 The aforementioned submissions are without prejudice to GIRPL's claims vis-à-vis Force Majeure including in relation to the SC GIB Order and GIRPL reserves all rights vis-à-vis Force Majeure events affecting the Project.

7.20 GIRPL is entitled to the following reliefs due to the SC GIB Order: -

(a) In terms of Article 2.1.3 of the PPA, the tariff is to be adopted within 120 days from the Effective Date i.e., 27.01.2021. However, in the intervening period, the SC GIB Order was passed on 19.04.2021. Further, the Hon'ble Tribunal has held the tariff adoption order to be inchoate and proceedings incomplete. Therefore, in terms of Article 2.1.4 of the PPA, the SCOD of the Project and all other timelines ought to be extended appropriately till the date on which the Commission passes the final order in the present proceedings, deciding GIRPL's change in law claims thereby completing the tariff adoption process.

(b) Grant in-principle approval for extension of time required to comply

with the SC GIB Order including time required for obtaining consents and approvals, land acquisition and completion of the transmission system;

- (c) Grant in-principle approval for all costs to be incurred for undergrounding, including but not limited to additional land cost.

7.21 It is submitted that the time and cost overrun being claimed by GIRPL herein is provisional and GIRPL reserves all rights to claim any additional time / cost on account of Change in Law / Force Majeure events including the change in law events for which provisional relief has been claimed herein.

7.22 In view of above GIRPL has prayed to:

- (a) Hold and declare that the levy of BCD on the import of Solar Cells and Modules/Panels pursuant to the MNRE OM dated 09.03.2021 with effect from 01.04.2022 is a change in law event under the PPA and that GIRPL is entitled to compensation for actual impact of BCD;
- (b) Hold and declare that the increase in rates of BCD on the import of Solar Inverters pursuant to the MoF Notification dated 01.02.2021 whereby the Exemption Notification dated 06.01.2011 has been rescinded is a change in law event under the PPA and that GIRPL is entitled to compensation;
- (c) Hold and declare that the MoF GST Notification is a change in law event under the PPA and that GIRPL is entitled to compensation;
- (d) Hold and declare that the SC GIB Order qualifies as a change in law event under the PPA and consequently, GIRPL is entitled to compensation and extension of time accordingly;
- (e) Since the Project has already been delayed due to SC GIB Order as well as delay in tariff adoption proceedings, the SCD and other time

lines under the PPA be extended to account for the time spent in the legal proceedings before the Hon'ble Tribunal and this Hon'ble Commission;

- (f) RUVNL be directed to place on record the impact of the SC GIB Order on the downstream transmission line / system.
- (g) Pass any such other and further reliefs as the Commission deems just and proper in the nature and circumstances of the present case.

8. AEW India North One Private Ltd. during the hearing, in its written submissions and in petition no. 1933/21 has submitted as under:

8.1 M/s Green Infra preferred an appeal before the Hon'ble Appellate Tribunal for Electricity (Tribunal) being Appeal No. 251 of 2021 challenging the Order dated 23.07.2021 passed by the Commission in Petition No. 1905 of 2021.

8.2 After hearing the parties in detail, the Hon'ble Tribunal disposed off Appeal No. 251 of 2021 vide its detailed Order dated 12.10.2021. In light of the Order dated 12.10.2021 passed by the Hon'ble Tribunal in Appeal No. 251 of 2021, the present matter has been remanded to the Commission for the consideration of the change in law events raised by the Solar Developers in their Reply filed in the present Petition and also raised in present written submissions being filed hereto.

8.3 On the basis of the aforementioned, the following reliefs are being sought by AEW India from the Commission in the present matter:

- (a) Approval and Recognition of Article 12.1.3 and Article 12.2.3 of the Power Purchase Agreement dated 04.03.2021 executed between AEW India and SECI which specifically provides that change in rate of safeguard duty, GST and basic customs duty after 28.10.2020 will be treated as

'change in law' and every net increase/decrease of 1 lakh per MW in Project cost will be liable for corresponding increase or decrease of an amount equal to Rs. 0.005/kWh;

- (b) Declaration of the Order dated 19.04.2021 by the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 838 of 2019 as 'change in law' in terms of Article 12.1.1 of the Power Purchase Agreement dated 04.03.2021 executed between AEW India and SECI read with Article 12.1.2 and Article 12.2.4 of the PPA.
 - (c) Declaration of increase in Grid Connectivity Charges from Rs 2 lakh per MW to Rs 2.5 lakh per MW to be payable by Renewable Energy Projects, as per the Regulation 89 of the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources), Regulations, 2020 (hereinafter referred to as the 'RE Tariff Regulations, 2020') issued by this Hon'ble Commission vide Notification No. RERC/Secy/Regulation 138, dated 02.11.2020 as an event of Change in law in terms of Article 12.1.1 of the Power Purchase Agreement dated 04.03.2021 executed between AEW India and SECI read with Article 12.1.2 and Article 12.2.4 of the PPA.
- 8.4 M/s AEW in the petition no. 1933/21 prayed for approval and recognition of Article 12.1.3 and 12.2.3 of the Power Purchase Agreement dated 04.03.2021 executed between AEW India North One Private Limited and Solar Energy Corporation of India Limited and appropriate directions thereof.
9. NTPC Renewable Energy Ltd. during hearing and in its written submissions has submitted as under:

- 9.1 On 12.10.2021, the Hon'ble Tribunal by way of its Order disposed of the Appeal filed by M/s Green Infra against the order dated 23.07.2021 of the Commission and remanded the matter back to the Commission.
- 9.2 From a bare perusal of the Article 1.1 and Article 12 of the PPA, the following emerges for consideration of the Commission:
- (a) The definition of law under the PPA is an exhaustive definition which considers all laws issued by an Indian Government Instrumentality. However, for an event to be considered a 'change in law' event, the same ought to be caused by the operation of law or by an Indian Governmental Instrumentality.
 - (b) The term Indian Government Instrumentality covers Government of India, Government of Rajasthan, New Delhi and any ministry, department, board, authority, agency, corporation, commission under direct or indirect control of Government of India.
 - (c) change in law encompasses introduction, increase or modification of any law after last date of Bid submission which have a direct bearing on the Project.
 - (d) The object of the 'change in law' provision is to compensate the Party affected by such an event which was beyond its control so as to restore it, to the same financial position as if such change in law event had not occurred.
 - (e) The event being claimed as change in law should have occurred after the last date of bid submission, i.e., 28.10.2020.
 - (f) Article 12.1.3 of the PPA categorically envisages that any change in rates qua Safeguard Duty, GST and BCD after the last date of bid

submission, i.e., 28.10.2020 which results in a change in overall cost of the project, then in that case such change will be treated as change in law and shall be decided at the time of adoption of Tariff under Section 63 of the i.e., the current proceedings.

- (g) Further, the compensation shall be payable for such change in law event as per Article 12.2.3 of the PPA only when the Appropriate Commission, i.e., the Commission in the instant case approves the same at the time of adoption of Tariff.

9.3 It is a settled position of law that change in taxes and duties which result in additional expenses must be allowed as change in law events. In this regard, reliance is being placed upon the following Judgments:

- (a) Judgment dated 13.11.2019 passed by the Hon'ble Tribunal in Appeal No. 77 of 2016 titled as *Sasan Power Limited vs CERC &Ors.* wherein it was held that compensation ought to be meted out for a change in law event despite the bidder having quoted an all-inclusive tariff, as denial of compensation will render the change in law clause otiose.
- (b) Judgment dated 14.08.2018 passed by the Hon'ble Tribunal in Appeal No. 111 of 2017 titled as *GMR Warora Energy Limited vs CERC*, wherein the Hon'ble Tribunal was pleased to hold that imposition/change in taxes/duty/ cess qualify for change in law event and Power Producer is required to be compensated for same.

9.4 The increase in Concessional Custom Duty on import of inverters in light of the MoF Notification dated 01.02.2021 and MNRE Notification dated 25.02.2021 and levy of BCD on Solar PV Cells and Module/Panels pursuant

- to MNRE's Notification dated 09.03.2021 qualifies as a change in law event.
- 9.5 The Notification referred above as issued by MoF and MNRE which are Indian Government Instrumentality as defined under the PPA executed between the parties qualifies as a change in law events.
- 9.6 The Judgment passed by the Hon'ble Supreme Court of India qualifies as an event of change in law considering the position that it casts upon a new obligation upon NTPC REL to obtain requisite consent in order to install underground power lines in compliance of the direction passed by the Hon'ble Supreme Court of India.
- 9.7 In this regard, reliance is placed upon the Judgment dated 21.12.2018 passed by the Hon'ble Tribunal in Appeal No. 193 of 2017 titled as GMR Kamalanga Energy Ltd vs Central Electricity Regulatory Commission wherein it was held that shortage of coal on account of cancellation of coal block by the Hon'ble Supreme Court of India in M.L. Sharma vs the Principle Secretary & Ors constitutes a change in law event.
- 9.8 In view of the law settled above and on a reading of provisions envisaged under the PPA, it is evident that the event under question would qualify as a change in law event, therefore, NTPC REL is entitled to be compensated for the same.
- 9.9 MoF Notification dated 30.09.2021 qualifies as a change in law event as GST at the rate of 12% is applicable upon renewable energy devices and parts instead of 5% which was initially applicable upon Solar Power Generators.
- 9.10 NTPC REL in terms of Article 12.2 of the PPA is bound to be placed in the same financial position as it would have been had the Amended GST

Notifications not been notified by MoF. In this regard, reliance is being placed upon the Judgment passed by the Hon'ble Supreme Court of India in *Uttar Haryana Bijli Vitran Nigam Limited v. Adani Power Limited &ors.*(2019) 5 SCC 325.

9.11 In view of the law settled by the respective Court of Law and submissions made above, it is evident that:

- (a) The relief sought by NTPC REL squarely qualifies as a change in law event in terms of Article 12 of the PPA.
- (b) The GST Amended Notifications have a direct bearing on the financial cost of the Project under question, therefore, NTPC REL is entitled to be placed in the same financial position as on the bid submission date.

10. SECI in its written submissions has submissions and in its reply in petition no. 1933/21 has submitted as under:

10.1 The judgment dated 12.10.2021 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal No.251 of 2021 in the matter of Green Infra Renewable Energy Limited Vs Rajasthan Electricity Regulatory Commission and Others, inter alia, decides as under:

"16.....it is the duty of the State Commission to inquire into such claim at the first opportune time and bring in suitable corrections, may be first by declaration and followed up by detailed tariff orders. If the event referred to actually constitutes change in law within the four corners of its definition under the PPA, there is no reason why it cannot be duly recognized as a change in law at the stage of tariff adoption, the actual impact and extent of the relief admissible to be determined at the appropriate stage.

17. For the forgoing reasons, we allow the appeal finding the impugned order to be an adjudication that is incomplete and proceedings wherein the appellant had sought the above-mentioned declarations having remained inchoate. The State Commission is directed to hear the parties further in the light of the above observations and pass further orders specifically in relation to the three change in law event claims presented by the appellant, rendering its decision as expeditiously as possible, preferably within two months from today."

10.2 In terms of the above, the Commission may be pleased to recognise the following three events as constituting the change in law events under Article 12 of the respective Power Purchase Agreements (hereinafter 'PPAs'):

"(i) Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification No. 07 /2021-Customs dated 01.02.2021 whereby custom duty exemption notification no. 1/2011 dated 06.01.2011 has been rescinded;"

10.3 It is however submitted that the recognition of Basic Customs Duty on Solar Modules and Cells as a change in law event shall be subject to issuance of appropriate notification by the Ministry of Finance, Government of India (Competent Authority) in the exercise of powers under the Customs Tariff Act, 1975. The above is consistent with Office Memorandum dated 09.03.2021 issued by Ministry of New and Renewable Energy, inter-alia, stating '5. The Ministry of Finance has also advised that the customs notification in this regard shall be issued at appropriate time.

"(ii) Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021;

(iii) The direction issued by Hon'ble Supreme Court of India by its Order dated 19.04.2021 in Writ Petition (Civil) No. 838 of 2019 titled M.K. Ranjitsinh & Ors. v. Union of India & Ors. in terms of which all existing and future overhead low and high voltage power lines in the Priority and Potential habitats of Great-Indian Bustard are necessarily required to be laid under-ground;"

....."

10.4 The nature and extent to which the above events will have an impact is to be considered based on the factual details and circumstances having implications of the above laws on the implementation of project by the Solar Power Developers ('SPDs'). It is the obligation of the SPDs to establish the same as being covered by the change in law at the appropriate stage to the satisfaction of the Commission.

- 10.5 At this stage, what is required to be done, in terms of the decision of the Hon'ble Tribunal, is only the recognition of the change in law events [recognition of Basic Custom Duty on Solar Modules, Cells shall be subject to issuance of appropriate notification by the Ministry of Finance (competent authority)].
- 10.6 Article 12.2.3 of the PPAs provides for a formula for determination of the relief with reference to every net increase/decrease of Rs.1 lakh per MW in the project cost (i.e. the cost incurred by the Project Developer towards supply and services of the project concerned, upto the actual commissioning date of the last part capacity or Scheduled Commissioning Date/Extended Scheduled Commissioning Date, whichever is earlier) as a result of change in law events set out in Article 12.1.3 i.e. in the present case the Basic Custom Duty:
- 10.7 As regards the other changes in law, namely, the implication of the Order dated 19.04.2021 passed by the Hon'ble Supreme Court relating to Great Indian Bustard, the same has to be considered as per Article 12.1.1, 12.1.2, 12.2.1, 12.2.2, 12.2.3, 12.3 etc. of the PPA.
- 10.8 Therefore, Article 12.2.3 of the PPAs [providing formula for determination of relief for change in law applies to all change in law events i.e. those events covered under Article 12.1.3 as well as events covered under Article 12.1.1 of the PPAs.
- 10.9 The implications of the decision dated 19.04.2021 of the Hon'ble Supreme Court in Writ Petition (Civil) No. 838 of 2019 in the matter M.K. Ranjitsinh and Others -v- Union of India & Ors dealing with Great Indian Bustard case has to be considered at the appropriate stage, namely in terms of the recommendation of the Committee appointed by the Hon'ble Supreme Court. Further, it would have to be examined whether it would have any

implication in the present case, and if so to what extent and in what manner.

- 10.10 It is further submitted that in terms of Article 12.2.3 of the PPAs, the actual expenditure incurred by the SPD upto the actual commissioning date of the last part capacity or Scheduled Commissioning Date/Extended Scheduled Commissioning Date (whichever is earlier) is required to be considered and determined for the application of the formula provided in the said provision.
- 10.11 At this stage, for the application of the formula provided in Article 12.2.3 of the PPAs for relief of change in law, the amount constituting the project cost cannot be considered on an estimate basis. The project cost will be available only upon the capital expenditure being incurred as on the actual commissioning date of the last part capacity or Scheduled Commissioning Date/Extended Scheduled Commissioning Date.
- 10.12 In the present case, the order of the commission is to be restricted to the above aspect of the recognition of the three events as change in law. However, the recognition of Basic Customs Duty on Solar Modules and Cells as a change in law event shall be subject to issuance of appropriate notification by the Ministry of Finance, Government of India (Competent Authority). The SPDs are not entitled to claim consideration of any other aspects. The remand direction of the Hon'ble Appellate Tribunal is restricted to recognition of the above three change in law events at the stage of tariff adoption. The Hon'ble Tribunal in the Judgement dated 12.10.2021 has itself clarified that the actual impact and the extent of relief admissible for the above-mentioned change in law events is to be determined at the appropriate stage. It is therefore submitted that at present there is no requirement to hold a detailed hearing except for the

recognition of three events to be admissible as Change in law within the scope of Article 12 of the PPAs.

10.13 SECI in its reply in petition no. 1933/21 submitted that the scheme under Article 12.1.3 of the PPA is that the Commission while adopting the tariff discovered under Section 63 competitive bid process, recognize the events specified therein namely change in rates of Safeguard Duty, GST and Basic Customs Duty after 28.10.2020 and resulting in change in Project Cost. On such recognition, upon the commissioning and commercial operation, the adjustment by way of tariff increase is to be implemented as per the mechanism provided in Article 12.2.3. The recognition made by the Commission in this regard shall govern the Petitioner, the Solar Power Developer (SPD), RUVNL as the Buying Entity and SECI as the intermediary.

10.14 The Commission vide order dated 23.07.2021 in Petition No.1905/2021 has adopted the tariff discovered in the Competitive Bidding Process of 1070 MW Rajasthan (Tranche-III) Scheme. In the said order, the Commission granted liberty to the Solar Power Developers including the Petitioner herein to file fresh Petition regarding the claims in respect of change in law events.

10.15 The present Petition has been filed by the Petitioner in pursuance to the above order dated 23.07.2021 passed by this Commission, restricting the claim to for recognition of the Basic Custom Duty and stating that other claims will be raised by the Petitioner at the appropriate stage. SECI respectfully submits that the Commission may proceed to consider the Petition filed by the Petitioner subject to the following submissions of SECI:

10.16 In the present case, the bid deadline i.e. submission of bid was on 28.10.2020. The cut-off date for consideration of change in law is after 28.10.2020.

10.17 The extent to which the relief (increase in tariff) is admissible for change in law events covered under Article 12.1.3 of the PPA would have to be determined in terms of Article 12.2.3 as and when the capital expenditure is incurred by the Petitioner. As per Article 12.2.3 of the PPA, it is further to the extent of the project cost incurred up to Actual Commissioning date of the last part capacity or Scheduled Commissioning Date/ Extended Scheduled Commissioning Date, whichever is earlier.

11. RUVNL in its reply on the written submissions of RE generators and SECI and in its reply in petition no. 1933/21 has submitted as under:

11.1 In pursuance of the directions of the Hon'ble Appellate Tribunal in appeal no. 251/2021 decided vide judgment dated 12.10.2021, the Hon'ble APTEL has asked the Commission to go into question of change of law events in regard to three changes presented by the Appellant. The three change in law events presented by the appellant before the APTEL were mentioned in paragraph no. 8 of the order dated 12.10.2021 which are reproduced herein under.

- i. Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification No. 07 2021-Customs dated 01.02.2021 whereby custom duty exemption notification no. 1/2011 dated 06.01.2011 has been rescinded;*
- ii. Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021;*
- iii. The direction issued by Hon'ble Supreme Court of India by its Order dated 19.04.2021 in Writ Petition (Civil) No. 838 of 2019 titled M.K. Ranjitsinha Ors.*

v. Union of India &Ors. in terms of which all existing and future overhead low and high voltage power lines in the Priority and Potential habitats of Great-Indian Bustard are necessarily required to be laid under-ground;"

- 11.2 The basic custom duty on import of solar invertors was existing since 06.01.2011 and was also applicable on the last day of submission of the bid. As per the provisions of the RFS, a generator was supposed to quote its prices based on the existing taxes and levies. That vide notification dated 01.02.2021 there is a withdrawal of the exemption which cannot amount to change in law as per the terms and conditions of the change in law event and therefore, it is submitted that the withdrawal of exemption of a custom duty on invertors vide notification dated 01.02.2021 cannot amount to change in law as per the provision of RFS as well as the Power Purchase Agreement and therefore, the generators are not entitled to seek the notification dated 01.02.2021 as a change in law event and therefore their claim deserves to be rejected.
- 11.3 The notification dated 09.03.2021 is a notification issued by Ministry of New and Renewable Energy. That for levy of any custom duty, a notification is required to be issued by the Finance Department and since no such notification has been issued to levy such basic custom duty issued by Finance Department thus, the claims is premature and deserved to be rejected.
- 11.4 The Hon'ble Supreme Court orders are always a law of land and an order dated 19.04.2021 will certainly amount to change in law. However, it is submitted that before declaring an event as change in law, the generators are required to place on record the documents to show how the generators in present case would be affected by the order dated 19.04.2021 and in absence of such documents about the effects of the

same, the claim is not required to be considered and deserves to be rejected and set aside.

- 11.5 Some of the generators have also claimed other change of law events including GST. It is submitted that the generators cannot claim any other change of law except as directed by the Hon'ble Aptel and such other contentions deserves to be rejected.
- 11.6 RUVNL in its reply in petition no. 1933/21 has submitted that under Electricity Act, 2003, there is no provision to declare/approve any article or clause of a PPA. PPA is binding between the parties and is a settled principle of law that if PPA is contrary to the Regulations then Regulation will prevail. Therefore prayers prayed for are misconceived and the petition is liable to be rejected on this count.

Commission's view

12. Commission has considered the submissions of the Petitioner and Respondents in light of the order dated 12.10.2021 passed by the Hon'ble APTEL and the change in law clause in the PPA.
13. The Solar Power Developers (SPDs) Respondents herein have mainly raised the following issues:
- (a) Hold and declare that the increase in rates of Basic Custom Duty (BCD) on the import of Solar Inverters pursuant to the MoF Notification dated 01.02.2021 whereby the Exemption Notification dated 06.01.2011 has been rescinded is a change in law event under the PPA;
- (b) Hold and declare that the levy of BCD on the import of Solar Cells and Modules/Panels pursuant to the MNRE OM dated 09.03.2021 with effect from 01.04.2022 is a change in law event under the PPA;

- (c) Hold and declare that the MoF GST Notification is a change in law event under the PPA;
- (d) Hold and declare that the SC GIB Order qualifies as a change in law event under the PPA and consequently, SPDs are entitled to compensation and extension of time accordingly;
- (e) Since the Project has already been delayed due to SC GIB Order as well as delay in tariff adoption proceedings, the SCD and other timelines under the PPA be extended to account for the time spent in the legal proceedings before the Hon'ble Tribunal and the Commission;
- (f) RUVNL be directed to place on record the impact of the SC GIB Order on the downstream transmission line / system.
- (g) Declaration of increase in Grid Connectivity Charges from Rs 2 lakh per MW to Rs 2.5 lakh per MW to be payable by Renewable Energy Projects, as per the Regulation 89 of the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources), Regulations, 2020 (hereinafter referred to as the 'RE Tariff Regulations, 2020') issued by the Commission vide Notification No. RERC/Secy/Regulation 138, dated 02.11.2020 as an event of change in law in terms of Article 12.1.1 of the Power Purchase Agreement dated 04.03.2021 executed between AEW India and SECI read with Article 12.1.2 and Article 12.2.4 of the PPA.
- (h) Approval and Recognition of Article 12.1.3 and Article 12.2.3 of the Power Purchase Agreement which specifically provides that change in rate of safeguard duty, GST and basic customs duty after 28.10.2020 will be treated as change in law and every net increase/decrease of 1 lakh per MW in Project cost will be liable for corresponding increase or decrease of an amount equal to Rs. 0.005/kWh;

14. SECI in its written submissions has prayed to recognise the following three events as constituting the change in law events under Article 12 of the respective PPA (a) Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification No. 07 /2021- Customs dated 01.02.2021 (b) Levy of Basic Customs Duty on import of Solar Celts, Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021 subject to issuance of appropriate notification by the Ministry of Finance, Government of India (Competent Authority) (c) The direction issued by Hon'ble Supreme Court of India by its Order dated 19.04.2021 in Writ Petition (Civil) No. 838 of 2019 titled M K. Ranjitsinh & Ors. v. Union of India & Ors.
15. SECI in its submissions has also submitted that in the present case, the order of the commission should be restricted to the recognition of the three events as change in law. The Solar Power Developers are not entitled to claim consideration of any other aspects in the present matter.
16. RUVN has submitted that the basic custom duty on import of solar invertors already existed since 06.01.2011 and was also applicable on the last day of submission of the bid therefore does not qualify as change in law. Further, the notification dated 09.03.2021 is a notification issued by Ministry of New and Renewable Energy not by Ministry of Finance therefore notification dated 09.03.2021 also does not qualify as change in law.
17. On the Hon'ble Supreme Court order dated 19.04.2021 RUVN submitted that it will certainly amount to change in law however the generators are required to place on record the documents to show the impact of the said order and in absence of such documents, the claim is not required to be considered and deserves to be rejected. RUVN further submitted that

the generators cannot claim any other change of law except as directed by the Hon'ble Aptel.

18. It is noted that as the issues that arise in both the petitions for consideration and decision of the Commission are similar, these petitions referred to in cause title are clubbed and are being disposed of by this common order.
19. Before going into the merits of the case it is worthwhile to mention the brief facts of the case.
20. M/s Green Infra filed an Appeal No. 251 of 2021 before the Hon'ble Appellate Tribunal for Electricity, challenging the Order dated 23.07.2021 passed by the Commission.
21. The Hon'ble APTEL vide its order dated 12.10.2021 remanded the matter to the Commission for passing further orders on these change in law events. The present proceedings are remand proceedings in pursuance to order passed by Hon'ble APTEL. Hon'ble APTEL vide order dated 12.10.2021 has observed as under:

"16.....it is the duty of the State Commission to inquire into such claim at the first opportune time and bring in suitable corrections, may be first by declaration and followed up by detailed tariff orders. If the event referred to actually constitutes change in law within the four corners of its definition under the PPA, there is no reason why it cannot be duly recognized as a change in law at the stage of tariff adoption, the actual impact and extent of the relief admissible to be determined at the appropriate stage.

17. For the forgoing reasons, we allow the appeal finding the impugned order to be an adjudication that is incomplete and proceedings wherein the appellant had sought the above-mentioned declarations having remained inchoate. The State Commission is directed to hear the parties further in the

light of the above observations and pass further orders specifically in relation to the three change in law event claims presented by the appellant, rendering its decision as expeditiously as possible, preferably within two months from today."

22. The present proceedings are in pursuance to Hon'ble APTEL order dated 12.10.2021 therefore should be restricted to the following change in law events:

- "i. Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification No. 07 2021-Customs dated 01.02.2021 whereby custom duty exemption notification no. 1/2011 dated 06.01.2011 has been rescinded;*
- ii. Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021;*
- iii. The direction issued by Hon'ble Supreme Court of India by its Order dated 19.04.2021 in Writ Petition (Civil) No. 838 of 2019 titled M.K. Ranjitsinha Ors. v. Union of India &Ors. in terms of which all existing and future overhead low and high voltage power lines in the Priority and Potential habitats of Great-Indian Bustard are necessarily required to be laid under-ground;"*

23. It is noted that some of the generators have also claimed relief on other change of law events. In Commission's considered view and as rightly pointed out by RUVNL and SECI in their reply that at this stage, what is required to be done, in terms of the decision of the Hon'ble Tribunal, is only the recognition of the change in law events in respect of aforesaid three events, therefore Commission has looked into the prayers of the Generators strictly in terms of Hon'ble APTEL Order. The generators are not entitled to claim consideration of any other aspects.

24. Further, the nature and extent to which the above events will have an impact is required to be considered based on the factual details at the

appropriate stage to the satisfaction of the Commission. The Hon'ble Tribunal in the Judgement dated 12.10.2021 has clarified that the actual impact and the extent of relief admissible for the above-mentioned change in law events is to be determined at the appropriate stage.

25. We have looked into all the three change in law events in terms of the relevant provisions of the PPAs.

26. The Article 12 of the PPA pertaining to 'change in law' reads as under:

"ARTICLE 12: 'CHANGE IN LAW'

12.1. Definitions

In this Article 12, the following terms shall have the following meanings;

12.1.1. The term "Change in Law" shall refer to the occurrence of the following pertaining to this Project only after 28.10.2020, including

(i) The enactment of any new law; or

(ii) an amendment, modification or repeal of an 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 developer; or

(v) Any change in the rates of any taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from solar power project by the SPD which have a direct effect on the project.

However, change in Law shall not include (i) any change in taxes on corporate income or any withholding tax on income or dividends distributed to the shareholders of the SPD.

12.1.3 However, in case of change in rates of safeguard duty, GST and basic customs duty after 28.10.2020 and resulting in change in Project Cost, then such change will be treated as 'Change in Law' and the quantum of

compensation payment on account of change in rates of such duties and shall be provided to the affected party by the other party as per Article 12.2.3, subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff by the Appropriate Commission and any decision in this regard shall be governing on SPD and Buying Entity.

It is clarified that, any introduction of new tax/duty/cess made applicable for setting up the Solar Power Project and supply of power from the Solar Power Projects by the SPD which have a direct effect on the project, resulting in Change in Project cost, will also qualify under Change in law as per timelines and procedure indicated under Article 12 of the PPA.

It is further clarified that, applicability of Safeguard Duty on "Solar Cells whether or not assembled in modules or panels" which is till 29.07.2021, if gets extended and has a direct effect on the Project, resulting in change in Project Cost, such extension will also Qualify under "Change in Law" as per timeline and procedure indicated under Article 12 of PPA "

27. From the perusal of the aforesaid Article of the PPA, it is clear that as per Article 12.1.3 of the PPA any change in rates qua Safeguard Duty, GST and BCD after the last date of bid submission, i.e., 28.10.2020 which resulted in change in overall cost of the project, then in that case such change will be treated as change in law. In light of these provisions of PPA we may now discuss each event claimed to be change in law event.

Re: Imposition of BCD on import of Solar Inverters pursuant to the MoF Notification dated 01.02.2021

Re: Levy of Basic Customs Duty on import of Solar Cells/Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021

28. SPDs have prayed to hold and declare that the increase in rates of BCD on the import of Solar Inverters pursuant to the MoF Notification dated 01.02.2021 whereby the Exemption Notification dated 06.01.2011 has been rescinded is a change in law event under the PPA.
29. SPDs have further prayed to declare that the levy of BCD on the import of Solar Cells and Modules/Panels pursuant to the MNRE OM dated 09.03.2021 with effect from 01.04.2022 is a change in law event under the PPA.
30. The Article 12.1.3 of the PPA pertaining to 'change in law' reads as under:

"ARTICLE 12: 'CHANGE IN LAW'

12.1.3 However, in case of change in rates of safeguard duty, GST and basic customs duty after 28.10.2020 and resulting in change in Project Cost, then such change will be treated as 'Change in Law' and the quantum of compensation payment on account of change in rates of such duties and shall be provided to the affected party by the other party as per Article 12.2.3, subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff by the Appropriate Commission and any decision in this regard shall be governing on SPD and Buying Entity.

It is clarified that, any introduction of new tax/duty/cess made applicable for setting up the Solar Power Project and supply of power from the Solar Power Projects by the SPD which have a direct effect on the project, resulting in Change in Project cost, will also qualify under Change in law as per timelines and procedure indicated under Article 12 of the PPA.

It is further clarified that, applicability of Safeguard Duty on "Solar Cells whether or not assembled in modules or panels" which is till 29.07.2021, if gets extended and has a direct effect on the Project, resulting in change in Project Cost, such extension will also Qualify under "Change in Law" as per timeline and procedure indicated under Article 12 of PPA."

31. It is noted that there is clear provision in the PPA that if there are changes in the rates of Basic Custom Duty (BCD) after 28.10.2020 and resulting in change in Project Cost, then such change will be treated as 'change in law' subject to the provision that Appropriate Commission recognizes such provisions.
32. Therefore it is clear that in terms of the above-cited Article 12.1.3, although it is agreed that these events are to be treated as change in law events, it is necessary for the same to be acknowledged and recognized by the appropriate Commission. The Commission, after considering all the submissions, deems it appropriate to recognise the clause 12.1.3 of the PPA which treats change in rates of basic customs duty after 28.10.2020 as 'change in law'.

Re: Directions issued by Hon'ble Supreme Court of India by its Order dated 19.04.2021 in Writ Petition (Civil) No. 838 of 2019 titled M.K. Ranjitsinha Ors. v. Union of India &Ors.

33. SPDs have prayed that certain directions issued vide order dated 19.04.2021 passed by the Hon'ble Supreme Court be declared as a change in law event.
34. We observe that Hon'ble Supreme Court of India by its Order dated 19.04.2021 in Writ Petition (Civil) No. 838 of 2019 titled M.K. Ranjitsinh & Ors. v. Union of India & Ors. has issued certain directions in terms of which all existing and future overhead low and high voltage power lines in the Priority and Potential habitats of Great-Indian Bustard are necessarily required to be laid under-ground.
35. It is observed that the above order is applicable to the particular locations which are Potential habitats of Great-Indian Bustard. It is also noted that the bids invited for procurement of solar power by SECI were

not location specific, therefore, SPDs can set up project anywhere in the State therefore they cannot claim the benefit of change in law relating to any specific location.

36. It is also noted that there might be some other unsuccessful bidders who have quoted higher tariff for some other locations which are out of the Priority and Potential habitats of Great-Indian Bustard as stated in the Hon'ble Supreme Court Order. If this unconditional and location agnostic interpretation about 'change in law' event (relating to GIB) is considered to be approved it will be great injustice to those bidders who lost out by the aforesaid bid by SECI.
37. In view of above, the prayer of SPDs to recognize directions issued by Hon'ble Supreme Court of India by its Order dated 19.04.2021 as 'change in law' event is not justified as this bid for procurement of solar power was not location specific and therefore this prayer is disallowed.
38. It is further clarified that the nature and extent to which the events of levy of basic custom duty and increase in basic custom duty will have an impact will be considered separately by the procurer based on the factual details and circumstances.
39. In view of above, the Petitions bearing no. 1905/21 and 1933/21 are disposed of, accordingly.

(Prithvi Raj)
Member

(S. C. Dinkar)
Member

(Dr. B.N. Sharma)
Chairman