

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 211/AT/2021**

**Coram:**

**Shri I.S. Jha, Member**

**Shri Arun Goyal, Member**

**Shri P. K. Singh, Member**

**Date of Order: 8<sup>th</sup> March, 2022**

**In the matter of**

Petition under Section 63 of the Electricity Act, 2003 for adoption of tariff for 2000 MW Solar Power Projects (Tranche-IX) connected through inter-State Transmission System and selected through Competitive Bidding Process as per the Guidelines dated 3.8.2017 of Ministry of Power, Government of India.

**And**

**In the matter of**

Solar Energy Corporation of India Limited,  
6<sup>th</sup> Floor, Plate-B, NBCC Office Block Tower-2,  
East Kidwai Nagar,  
New Delhi –110023.

....**Petitioner**

**Vs**

**1. Avikiran Surya India Private Limited,**  
14th Floor, Tower B, Vatika Towers,  
DLF Golf Course Road, Suncity, Sector 54,  
Gurugram -122 003.

**2. Solarpack Corporacion Tecnologica SA,**  
Avenida de Algorta 16, 3  
48992 Getxo-Vizcaya,  
Espana, Spain

**3. AMP Energy Green Private Limited,**  
309, Rectangle One, Behind Sheraton Hotel,  
Saket,  
New Delhi - 110 017.

**4. Eden Renewable Bercy Private Limited,**  
Unit No 236 B &C, 1st Floor,  
DLF South Court, Saket,  
New Delhi - 110 017,

**5. IB Vogt Singapore Pte Limited,**  
80 Robinson Road, #02-00,  
Singapore-068898.

**6. Ayana Renewable Power Private Limited,**  
3d Floor, Sheraton Grand Hotel,  
Brigade Gateway, 26/1,  
Dr. Rajkumar Road Malleswaram (West),  
Bangalore- 560 055, Karnataka

**7. ReNew Solar Power Private Limited,**  
ReNew Hub, Commercial Block-1,  
Zone 6, Golf Course Road, DLF City  
Phase V, Gurugram- 122 009,  
Haryana

**8. Thar Surya 1 Private Limited,**  
14th Floor, Tower B, Vatika Towers,  
DLF Golf Course Road, Suncity, Sector 54,  
Gurugram - 122 003

**9. BSES Yamuna Power Limited,**  
Shakti Kiran Building, Kakardooma,  
Delhi - 110 092

**10. BSES Rajdhani Power Limited,**  
BSES Bhawan, Nehru Place,  
Delhi - 110 019.

**11. Uttarakhand Power Corporation Limited,**  
Victoria Cross Vijeyta Gabar Singh Urja Bhawan,  
Kanwali Road, Balliwala Chowk,  
Dehradun, Uttarakhand - 248 001.

....Respondents

**The following were present:**

Shri M. G. Ramachandran, Senior, Advocate, SECI  
Ms. Tanya Sareen, Advocate, SECI  
Ms. Srishti Khindaria, Advocate, SECI  
Shri Atulya Kumar Naik, SECI  
Shri Shibasish Das, SECI

Shri Mudit Jain, SECI  
Shri Hemant Sahai, Advocate, Eden Renewable  
Shri Nitish Gupta, Advocate, Eden Renewable  
Ms. Shefali Tripathi, Advocate, Eden Renewable  
Ms. Rakshika Kaul, AMP Energy  
Ms. Jyotsna Khatri, AMP Energy  
Shri Shourya Choudhary, AMP Energy  
Shri Abhilash Yadav, AMP Energy  
Shri Kulbhusan Kumar, IB Vogt  
Shri Jafar Alam, Advocate, Avikiran Surya and Thar Surya  
Shri Saahil Kaul, Advocate, Avikiran Surya and Thar Surya  
Ms. Shikha Ohri, Advocate, ReNew Power  
Ms. Surabhi Pandey, Advocate, ReNew Power  
Shri Ishan Nagpal, ReNew Power

### **ORDER**

The Petitioner, Solar Energy Corporation of India Limited ('SECI'), has filed the present Petition under Section 63 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') for adoption of tariff for 2000 MW solar power projects (Tranche-IX) connected to inter-State transmission system ('ISTS') and selected through competitive bidding process as per the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" (hereinafter referred to as 'the Guidelines') dated 3.8.2017 issued by Ministry of Power, Government of India. The Petitioner has made the following prayers:

*“(a) Adopt the tariff discovered in the tariff based competitive bid process for the individual power projects as stated in Table-1 at Paragraph 8 (iv) above on the terms and conditions contained in the Power Purchase Agreements entered/ to be entered into with the Respondent Nos.2 and 8 read with the Power Sale Agreements executed with Respondent Nos. 9 and 10;*

*(b) Approve Trading Margin of Rs.0.07/kWh as agreed to by the Distribution Companies in the signed PSAs in terms of Regulation 8 (1) (d) of the Trading License Regulations, 2020; and*

*(c) Recognize, in terms of Article 12.2 of the PPAs and Article 8.2 of the PSAs, that the change in rates of Safeguard Duty, GST and Basic Customs Duty after 22.06.2020, if*

*any, will be considered as Change in Law subject to the fulfillment of the conditions contained therein.”*

### **Submission of the Petitioner**

2. The Petitioner, SECI has submitted that it issued Request for Selection ('RfS') along with draft Power Purchase Agreement ('PPA') and draft Power Supply Agreement ('PSA') for selection of 2000 MW ISTS-connected solar power projects (Tranche-IX) as per the Guidelines and floated the same on ISN Electronic Tender System (ETS) e-bidding portal on 20.3.2020. In response, eleven bids were received offering an aggregate capacity of 5280 MW and were found to fully meet the technical criteria. As per the eligibility criteria mentioned in the RfS, nine bidders were shortlisted for participating in the e-reverse auction. The e-reverse auction was conducted on 30.6.2020 on ISN ETS e-bidding portal and pursuant thereto seven bidders offering aggregate capacity of 2000 MW were selected and issued Letters of Award. As on date of filing of Petition, the Petitioner has entered into PPA with Thar Surya 1 Private Limited (Project Company of successful bidder - Avikiran Surya India Private Limited) for 300 MW capacity @ Rs.2.37/kWh and PSAs with distribution companies, Respondents No. 9 - BSES Rajdhani Power Limited and Respondent No. 10 - BSES Yamuna Power Limited for 210 MW and 90 MW respectively. The Petitioner has submitted that the selected solar power projects are scheduled to be commissioned during 2022-23 and will enable the distribution companies in meeting their Renewable Purchase Obligations apart from providing power at very economical rates. It has been further submitted that in addition to tariff, there will be the trading margin of Rs. 0.07/kWh to be recovered from the distribution companies, which have been duly agreed to by the distribution

companies in the PSAs. The Petitioner has submitted that Article 12.1.3 of the PPAs entered into/ to be entered into between SECI and Solar Power Developers and Article 8.1.3 of the PSAs entered into by SECI with distribution companies provide that change in rates of Safeguard Duty, GST and Basic Custom Duty after 22.6.2020, if any, will be considered as Change in Law subject to the provision that the Appropriate Commission recognizes such provisions at the time of adoption of tariff and, accordingly, the Petitioner has prayed for recognition of the above provisions.

3. The Petitioner (SECI) vide its affidavit dated 10.11.2021 placed on record (a) its letter dated 26.11.2020 and e-mail dated 13.1.2021 to Ministry of New and Renewable Energy ('MNRE'), Government of India requesting to modify certain provisions of the Standard Bidding Guidelines and in meantime allowing SECI to make changes with respect to certain provisions in the scheme documents to accommodate concerns of various stakeholders, to enable SECI to enter into PSAs and PPAs, etc., (b) letters dated 1.3.2021 and 18.12.2020 of MNRE to SECI, in exercise of its powers to issue clarification/ modifications under the Guidelines, whereby MNRE gave *ex-post facto* approval for changes in respect of certain provisions vis-à-vis Standard Bidding Guidelines in respect of (i) bid that have been issued but not closed; and (ii) bid that have been issued and closed by SECI, and (c) copy of PSA dated 12.10.2021 signed between SECI and Uttarakhand Power Corporation Limited ('UPCL') for sale of 100 MW solar power. SECI also filed an amended memo of parties impleading UPCL as party to the present Petition.

**Hearing dated 11.11.2021**

4. The matter was heard on 11.11.2021 and notices were issued to the Respondents to file their reply. During the course of hearing, the Commission observed that there appeared to be inordinate delays in signing of PPAs and PSAs after conclusion of the bidding and issuance of LoAs to successful bidders on 15.7.2020. It was also observed that as on date, the Petitioner had only placed on record PPAs and PSAs for 300 MW out of 2000 MW. Accordingly, the Commission sought clarification from the Petitioner on the following:

- (i) Status of LoAs issued in favour of the selected developers, including their validity period, if any;
- (ii) Status of compliances of the various terms and conditions specified in the LoAs by the selected developers;
- (iii) Status of execution of PPAs and PSAs with the developers and the buying entities;
- (iv) Reason for inordinate delays in execution of the PPAs;
- (v) Justification for seeking adoption of tariff for entire capacity of 2000 MW in absence of PPAs and PSAs beyond capacity of 300 MW.

5. Pursuant to the notice, reply to the Petition has been filed by Respondent No.1 & Respondent No.8, Respondent No. 4, Respondent No. 7 and Respondent No.3 which have been dealt with in succeeding paragraphs.

6. Respondent No.1, Avikiran Surya India Private Limited ('AS IPL') and its Project Company Respondent No.8, Thar Surya 1 Private Limited (in short, 'Thar Surya'), vide their combined reply, have mainly submitted as under:

- (a) Pursuant to AS IPL having been declared as one of the successful bidders, Thar Surya has executed PPA dated 20.8.2021 with SECI for development of solar power project and sale of 300 MW power to SECI.

(b) The development of the aforesaid project by Thar Surya is at an advance stage and, therefore, adoption of tariff is a critical milestone to ensure continued and orderly disbursement of funds from its lenders and commissioning of the project in stipulated timelines. The details of various development activities undertaken by Thar Surya towards development of the project and the expenditure incurred so far have also been set out in the reply.

(c) The adoption of tariff for the project ought not to be delayed on account of SECI's inability to execute firm agreement for the entire bid capacity of 2000 MW. Any delay would severely prejudice the development of its project and subject Thar Surya to unwarranted risks and uncertainties.

(d) Additionally, in terms of Article 12.1.3 of the PPA, any change in the rate of Safeguard Duty, GST and Basic Custom Duty after the date of submission of bid i.e. 22.6.2020 that increases in Project cost is required to be recognized by the Commission at the stage of adoption of tariff. Accordingly, appropriate declaratory orders be passed in this regard as per Article 12.1.3 of the PPA.

7. Respondent No. 4, Eden Renewable Bercy Private Limited ('ERBPL') vide its reply dated 15.12.2021 has mainly submitted the following:

(a) ERBPL is, as such, not challenging the adoption of tariff being sought by the Petitioner. However, the present reply is being filed to the limited extent of bringing to the notice of the Commission, the deviations made by SECI in RfS and PPAs from the Guidelines.

(b) A conjoint reading of Clause 3.1 and Clause 18 of the Guidelines makes it clear that the bidding documents are mandatorily required to be prepared in conformity with the Guidelines and the deviation in the provisions in the bidding documents issued by the procurer from the Guidelines is required to be approved by the Appropriate Commission.

(c) The provisions as regards Change in Law envisaged in the Guidelines at Clause 5.7 are all-encompassing provisions and seek to cover all events that have a direct impact on capital and operational cost of the project. As per the Guidelines, any event occurring before and after the commissioning of the project and having a direct impact i.e. either financial loss or gain on the project, would qualify as Change in Law event. Consequently, on the occurrence of such event, solar power generator is liable to be compensated/ restituted in order to be brought to the same financial position as it would have been had it not been for the occurrence of the Change in Law.

(d) Under the RfS, which SECI had categorically stated to have been prepared on the basis of Guidelines, perusal of Clause 6 therein, makes it clear that it contemplated to include all such events which could have a direct effect on the Project either before or after the commissioning as Change in Law events.

(e) However, there are certain deviations in Article 12 (Change in Law) of the standard PPA and the provisions as envisaged in the Guidelines. The Change in Law clause envisaged in the PPA is in contradistinction to the Change in Law clause as provided in the Guidelines and seeks to impose restriction on the Change in Law clause of the Guidelines as it provides that:

(i) In case of occurrence of any of events provided under Article 12.1.1 which results in any increase/ decrease in the Project Cost (*i.e., cost incurred by the developer towards supply and services only for the Project concerned, upto Scheduled Commissioning Date*), the Solar Power Developer would be entitled to compensation, as determined by the Appropriate Commission, which means that the Change in Law clause only covers the events resulting in increase/ decrease in the project cost upto the Scheduled Commissioning Date and any impact of events post the Scheduled Commissioning Date have not been covered thereunder;

(ii) Change in rates of Safeguard duty, GST and basic customs duty after the last date submission of bid (*i.e., 22.6.2020 in the present case*) and resulting in change in project cost, would be treated as 'Change in Law'. This provision is subject to the approval of this Commission;

(iii) The quantum of compensation payment on account of change in rates of



such duties would be provided to the affected party as per the pre-determined computation, i.e., every net increase/ decrease of Rs.1 lakh per MW in the project cost (i.e. cost incurred by the SPD for supply and services in the project concerned, up to Schedule Commissioning Date or extended Schedule Commissioning Date, for reasons other than those wherein such extension is on account of payment of liquidated damages, penalty or any other charges, as the case may be), would be liable for corresponding increase/ decrease of an amount equal to Rs 0.005/kWh. Even this provision is subject to the approval of this Commission at the time of adoption of tariff.

(f) SECI's letter dated 26.11.2020 and subsequent email dated 13.1.2021 have been issued in ignorance of the specific stipulation under the Guidelines, which require the Petitioner to seek approval for any deviation in the bidding documents from the Guidelines from the Appropriate Commission. Further, MNRE in clear defiance of the Guidelines has wrongly allowed the Petitioner to make changes/ deviations as proposed by SECI in the bids which have already been closed.

(g) Approval accorded by MNRE is of no consequence in law as the relevant authority/ power to grant such approval is with the Appropriate Commission. Further, the Guidelines were issued by MoP, whereas MNRE vide its letter dated 1.3.2021 has sought to amend the said Guidelines by according an *ex post-facto* approval, which is contrary to the settled principles of law. As per the express provision contained in Clause 18 of the Guidelines, as have been detailed hereinabove, only this Commission is vested with the powers to allow/ approve any changes/ deviations from the Guidelines in the bidding documents. Further, considering that MoP has not amended the Guidelines issued by it, by way of an appropriate notification, the *ex post-facto* approval granted by MNRE to the changes/ deviations made by SECI cannot be interpreted as an 'approval of deviations' contemplated under Clause 3.1.1 of the Guidelines issued by MoP.

(h) The definition of Change in Law provided under Clause 5.7 of the Guidelines is an inclusive definition, and has a wider scope of application to

events resulting in any adverse financial loss/ gain to the Solar Power Generator after the last date of submission of bid. Pertinently, the said provision also entails inclusion of any event which may have a direct effect on the project and which could have occurred before or after the commissioning of the project. However, on the contrary, Article 12 of the standard PPA restricts the inclusion only to the events occurring “*upto Scheduled Commissioning Date or extended Scheduled Commissioning Date*” of the project, which is in clear non-conformity of the Guidelines and is clearly a deviation.

(i) The Commission in its order dated 2.6.2021 in Petition No. 721/AT/2021 ("NHPC Ltd. v. MNRE & Ors.) directed the Petitioner therein to remove Article 12.1.1(g) of the PPA, which is similar to the provision under Article 12.2.3 of the standard PPA, in view of it being in non-conformity of the provisions of the Guidelines and also the fact that the prior approval of this Commission was not sought in this regard. Further, this Commission adopted the tariff for solar projects agreed to by the successful bidders, subject to removal of Article 12.1.1 (g) of the PPAs therein and the same was to be effective from the date of execution of the supplementary PPA to be executed between the parties for an appropriate Change in Law clause in conformity with the Guidelines.

(j) By restricting the scope of Change in Law clause (Article 12) of the PPA, the purpose of restitutive relief envisaged in the Guidelines stands defeated. The cornerstone of Change in Law relief is restitution i.e. relief to be granted in a manner so as to place an affected party in the same economic position as if such Change in Law had not occurred. If the present Change in Law clause is not corrected in the PPA, the same would have consequential impact of burdening the Respondent with various hidden costs that may become payable due to occurrence of Change in Law event, which are liable to be compensated in accordance with the Guidelines.

(k) Accordingly, the Commission may strike down Article 12 (Change in Law) of the standard Power Purchase Agreement issued by the Petitioner along

with RfS and SECI may be directed to sign PPA with the Respondent containing a Change in Law clause in conformity with the Guidelines.

8. Respondent No. 7, ReNew Solar Power Private Limited ('RSPPL') vide its reply dated 29.11.2021 has submitted that pursuant to the tariff based competitive bidding conducted by SECI, RSPPL emerged as successful bidder at a tariff of Rs.2.38/kWh with allotted capacity of 400 MW and was issued LoA on 15.7.2020. Thereafter, vide separate letters dated 15.9.2021 to SECI, RSPPL has undertaken to reduce the tariff offered from Rs.2.38/kWh to Rs.2.37/kWh. Accordingly, the Commission may consider the prayers made by SECI in the instant Petition and approve the tariff of its SPDs/ Project Companies i.e., ReNew Aayan Pvt. Ltd. and ReNew Vihaan Pvt. Ltd. for sale of 300 MW and 100 MW solar power respectively at the earliest.

9. Respondent No. 3, AMP Energy Green Private Limited ('AEGPL') vide its reply dated 21.12.2021 has mainly submitted the following:

(a) Pursuant to issuance of LoA on 15.7.2020, Respondent submitted all relevant documents as specified therein on 18.9.2020 and, hence, qualified for timely execution of the PPA i.e. within 90 days from the date of issuance of LoA. However, SECI has not executed the PPA as on date. The Respondent is willing to implement the project and has obtained the connectivity at Bhadla-2 sub-station.

(b) Subsequent to submission of bid i.e. on 22.6.2020, following events have occurred which has resulted in increased capital expenditure for the Respondent:

(i) On 1.2.2021, Ministry of Finance (Department of Revenue) issued Notification being No. 2/2021-Customs whereby the Government has increased the rates of Basic Customs Duty on import of Solar inverters

from 5% to 20%.

(ii) On 9.3.2021, MNRE issued Office Memorandum regarding imposition of Basic Customs Duty on solar cells and modules without grandfathering of bid out Projects) w.e.f. 1.4.2022. Basic Customs Duty on solar modules with HSN Code 85414012 and solar cells (85414011) is 40% and 25% respectively.

(iii) On 19.4.2021, Hon'ble Supreme Court in its order in Writ Petition (Civil) No. 838 of 2019 titled M.K. Ranjitsinh & Ors. V. Union of India & Ors. issuing directions/ measures to be adopted *inter alia* towards existing and future laying of over-head transmission lines in the Priority and Potential habitats of the Great Indian Bustard (GIB).

(iv) Ministry of Finance vide its Notification dated 30.9.2021 has levied 12% Goods & Services Tax (GST) on solar photo-voltaic (PV) module and other renewal energy equipment with effect from 1.10.2021.

(c) The higher rate of Basic Custom Duty (BCD) on solar inverters from 5% to 20%, modules from 0% to 40% and solar cells from 0% to 25% and GST on solar PV from 5% to 12 have substantially increased the capital cost of the project. Although the Petitioner has given waiver from claiming compensation towards BCD on modules and solar cells, if SECI fails to sign PPA by 31.12.2021, the Petitioner has liberty to claim Change in Law compensation for additional expenditure incurred in relation to BCD Notification dated 9.3.2021.

(d) The Respondent placed the bid considering the feasibility of installing overhead transmission line and, accordingly, determined the capital expenditure of the project. However, with the Hon'ble Supreme Court's directions dated 19.4.2021, the Respondent would be compelled to lay underground transmission cables which is commercially unviable at the present tariff as supply and service cost of underground cable is much higher than that of an equivalent voltage of overhead transmission cables. Such additional cost could not have been envisaged at the time of submission of bid for the project.

(e) Tariff rate of Rs.2.37/kWh was quoted by the Respondent considering the events and circumstances prevalent at the time of submission of bid. The aforesaid events have occurred subsequent to 7.12.2020 and the Respondent,

at the time of submitting the bid, was in no position to foresee such additional capital expenditure. Accordingly, as per Article 12.2.1 of the PPA, the said events clearly qualify as Change in Law events.

(f) Appellate Tribunal for Electricity vide order dated 12.10.2021 passed in Appeal No. 251 of 2021 titled as *Green Infra Renewable Energy Limited v. Rajasthan Electricity Regulatory Commission and Ors.* ('Green Infra case') has held that 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.

(g) Article 12.2 of the PPA clearly specifies the methodology of compensation for claiming relief towards Change in Law event which has been overlooked by SECI in the instant Petition. Accordingly, the Commission may recognize the aforesaid methodology of claiming Change in Law compensation and record Article 12.2 of the PPA in the order and confirm that the compensation for Change in Law is to be paid as per the mechanism stipulated in Article 12.2.3 of the PPA. It is pertinent to recognize the provision of methodology for computation of compensation towards Change in Law in the order to avoid multiplicity of proceedings in future.

10. SECI vide its rejoinder to the reply filed by the Respondent No.4, ERBPL has submitted as under:

(a) The Respondent, ERBPL has wrongly claimed that Change in Law provision of PPA is in deviation with Change in Law provision in the Guidelines.

(b) There is no deviation when the PPA provides for details of provisions so long as the provisions are not inconsistent or in conflict with the provisions of the Guidelines. As per the settled principle, the test of repugnance needs to be considered on the basis that it is of conflicting nature so that one set of provisions contained in the PPA cannot be given effect without violating the command in the Guidelines.

(c) Clause 3.1.1(c)(ii) of the Guidelines itself provides that detailing of the provisions in the draft PPA will not be considered as deviation from the Guidelines.

(d) The Guidelines empower MNRE to issue clarifications and modifications to the Guidelines. In this regard, SECI vide its letter dated 26.11.2020 and e-mail dated 13.1.2021 requested MNRE to modify certain provisions of Standard Bidding Guidelines and in the meantime allow SECI to make changes with respect to certain provisions in the scheme documents to accommodate the concerns of the various stakeholders to enable SECI to enter into PSAs and PPAs, etc. MNRE vide notifications dated 1.3.2021 and 18.12.2020, in exercise of its powers to issue clarification/ modification under the Guidelines, gave ex-post facto approval for changes *inter alia* with regard to Change in Law provisions vis-à-vis Standard Bidding Guidelines in respect of (i) bids that have been issued but not closed and (ii) bids that have been issued and closed by SECI.

(e) On 4.6.2020 (prior to the date of submission bid i.e. 22.6.2020), SECI issued clarification to the queries of the developers on RfS documents including on the Change in Law provisions contained in the standard PPA.

(f) The Respondent, ERBPL was fully aware and duly accepted the above position without any reservation or condition when it submitted the bid. It is not open to the Respondent to claim that the proposed bid terms and not acceptable for signing of the PPA. Such a claim made by ERBPL constitutes a breach of the terms of the bid.

(g) Reliance placed by the Respondent on the Commission's decision dated 2.6.2021 in Petition No. 721/AT/2021 is misplaced. In the instant case, MNRE vide Notifications dated 1.3.2021 and 18.12.2020 in the exercise of its powers to issue clarification/ modification under the Guidelines gave ex-post facto approval for changes *inter alia* in regard to Change in Law provisions vis-à-vis Standard Bidding Guidelines.

11. SECI vide its rejoinder to the reply filed by the Respondent No.3, AGEPL has submitted as under:

(a) With regard to signing of PPA, SECI can extend the stipulated timeline (i.e. 90 days from LoA) in the event of delay in signing of PSA. Accordingly, SECI will sign PPA with the Respondent after signing of PSA with buying entity for corresponding quantum of power.

(b) The events of increase in BCD on import of solar inverters in terms of Ministry of Finance Notification No.2/2021-Customs dated 1.2.2021 and Notification of GST @12% on Solar PV modules and other renewable energy equipment in terms of Ministry of Finance Notification dated 30.9.2021 being statutory notifications, constitute Law. The order dated 19.4.2021 in Writ Petition (Civil) No. 838 of 2019 is a law laid down by the Hon'ble Supreme Court. Therefore, these events fall within the scope of Article 12 of the respective PPAs dealing with Change in Law. However, the recognition of Basic Custom Duty on solar modules and cells as a Change in Law event shall be subject to the issuance of appropriate notification by the Ministry of Finance, Government of India in exercise of powers under the Customs Tariff Act, 1975.

(c) 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 the project by the developers. It is the obligation of the project developer to establish the same as being covered by the Change in Law at the appropriate stage to the satisfaction of the Commission.

(d) At this stage of consideration of adoption of tariff, in terms of Article 12.1.3 of the PPAs and decision dated 12.10.2021 of the APTEL in Appeal No. 251 of 2021, only the recognition of Change in Law events as mentioned above is required. The actual impact and the extent to which the relief is admissible and terms and conditions to be fulfilled and manner of implementation, etc. are all to be considered at the appropriate stage when the expenditure is incurred and the commencement of supply takes place.

(e) Article 12.2.3 of the PPA provides for a formula for determination of relief with reference to every net increase/ decrease of Rs. 1 lakh/MW in the project cost 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 and GST. In regard to Change in Law events other than those identified and covered in Article 12.1.3 of the PPAs, namely, implication of the order dated 19.4.2021 passed by the Hon'ble Supreme Court relating to GIB, the same has to be considered as per Articles 12.1.1, 12.1.2, 12.2.1, 12.2.2, 12.2.3 and 12.3. 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 covered under Article 12.1.3 as well as events covered under Article 12.1.1 of the PPAs.

(f) At this stage, for application of 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 estimate basis. The project cost will be available only upon the capital expenditure being incurred.

(g) In the present case, the consideration is to be restricted to the aspect of the recognition of the above mentioned four events as Change in Law within the scope of Article 12 of the PPAs, while adopting the tariff discovered through competitive bidding. However, the recognition of Basic Custom Duty on Solar Modules and Cells as a Change in Law event shall be subject to issuance of appropriate notification by Ministry of Finance, Government of India. The power developers are not entitled to claim consideration of any other aspects. 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 as decided by APTEL in its order dated 12.10.2021 in Appeal No. 251 of 2021.

(h) During the pendency of the above Petition, the Central Government, in exercise of powers under Section 176 of the Act, has on 22.10.2021 notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (hereinafter referred to as 'the Change in Law Rules'). Rule 3 of the Change in Law Rules provides for the manner of dealing with the Change in Law and



consequential effect to be given. Further, the Commission in its order dated 21.12.2021 in Petition No. 179/AT/2021 has, *inter alia*, dealt with the Change in Law Rules and the aspect of recognition of the Change in Law events at the stage of adoption of tariff.

12. In response to the certain clarifications sought by the Commission vide Record of Proceedings for the hearing dated 11.11.2021, SECI vide affidavit dated 10.12.2021 has submitted as under:

(a) As to the status of LoAs issued and their validity, SECI has issued LoAs dated 15.7.2020 to all the seven successful bidders, which have been duly accepted by them and are also valid as on date.

(b) As regards status of compliance of various terms and conditions specified in the LoAs by the selected developers, the Evaluation Reports dated 24.2.2021 were issued by Evaluation Committee constituted by SECI for verification of the documents submitted by each selected developer in terms of LoA. As per Evaluation Reports, based on the evaluation of the submitted documents as per the RfS and LoA, the selected bidders have been found to be fulfilling the requirements prior to signing of PPA. Further, recommendation of Evaluation Committee for signing of PPA with developer is subject to signing of PSA with buying entity, which is consistent with Clause 14.3 of RfS and Clause 1.10 of the LoA.

(c) The Commission may take into consideration the reduction in tariff from Rs. 2.38/kWh to Rs. 2.37/kWh as undertaken by ReNew Solar Power Pvt. Limited in respect of its SPVs, ReNew Surya Aayan Pvt. Limited and ReNew Surya Vihaan Pvt. Limited for 300 MW and 100 MW respectively.

(d) As regards status of execution of PPAs and PSAs, SECI has signed PSAs for aggregate quantum of 400 MW - PSA dated 20.7.2021 with BRPL for 210 MW, PSA dated 20.7.2021 with BYPL for 90 MW and PSA dated 12.10.2021 with Uttarakhand Power Corporation Limited for 100 MW. SECI has signed PPA dated 20.8.2021 for 300 MW with Thar Surya and PPA for 100 MW

quantum of power tied up with UPCL is under progress. Further, SECI is having discussions with various other buying utilities for signing of PSAs and PPAs with the successful bidders/ SPVs for remaining quantum of solar power (1600 MW).

(e) As regards reasons for inordinate delays in execution of the PPAs, the PPAs with SPDs are to be executed subsequent to the execution of PSAs with buying utilities and the same is consistent with the provisions of the RfS. SECI can extend the stipulated timeline (i.e. 90 days from LoA) for signing of PPA in terms of Clause 1.10 of the LoA, which enables SECI to extend the said time line and further provides that in extraordinary cases of unavoidable delays on part of SECI in signing PPAs or PSAs, the effective date of PPA shall be the date as on 7 days from signing date of PSA for total capacity of respective project. Successful bidders have provided necessary extensions of the validity of their respective bids as required. Bids of all the bidders, with whom the PPAs are yet to be signed, are valid till 30.6.2022 except for ReNew Solar Power Private Limited, whose bid is valid till 31.3.2022.

(f) Since tariff for entire offered capacity of 2000 MW solar power projects under ISTS Tranche IX has been discovered through tariff based competitive bidding process (e-reverse auction), SECI has sought adoption of tariff for the entire awarded capacity 2000 MW to avoid multiplicity of proceedings. This will enable SECI to offer power to the buying utilities and execute PSAs and PPAs in the course of time.

### **Hearing dated 21.1.2022**

13. The matter was listed for hearing on 21.1.2022 through video conferencing. During the course of hearing, the learned senior counsel for the Petitioner and the learned counsel for the Respondents made detailed submissions. Pursuant to the liberty granted by the Commission, the parties have filed their respective written submissions.

14. The Respondent No. 7, RSPPL vide its written submissions dated 3.2.2022 has submitted that the Respondent, as stated at paragraph 10 of its reply, vide its letters dated 15.9.2021 to SECI, has undertaken to reduce the tariff offered from Rs.2.38/kWh to Rs.2.37/kWh. The Respondent has further submitted that it supports the Petition and requests the Commission to allow the prayers made by SECI.

15. The Respondent No.4, ERBPL vide its written submissions dated 4.2.2022 has additionally submitted as under:

(a) Considering that the Petitioner in the present case has made material deviation in the standard PPA from the principles envisaged in the Guidelines, the Commission may pass appropriate direction to the Petitioner to ensure that clause 5.7 of the Guidelines be included appropriately in Article 12 of the PPA.

(b) As to the reliance placed by SECI on the clarification to queries of the developers on RfS, *inter alia*, on the Change in Law provisions to state that the Respondent was fully aware of the above position regarding exclusion of the events after SCOD/COD as Change in Law, the Article 12 of the standard PPA itself provides for recognition of Change in Law clause by this Commission at the stage of adoption of tariff. Further, it is trite to state that it is the duty of this Commission to provide regulatory certainty at the first opportunity and also make suitable modifications. In this regard, reliance is placed on Judgment dated 12.10.2021 passed Hon'ble Appellate Tribunal in Appeal No. 251 of 2021 titled "*Green Infra Renewable Energy Limited v. Rajasthan Electricity Regulatory Commission & Ors.*", wherein, it has been observed that regulatory certainty is of utmost significance to the generation developers. Thus, it is essential that clarity as regards deviations highlighted by the Respondent in Article 12 be given at this stage of adoption of tariff itself.

(c) Therefore, it is important that this Commission may clarify at this stage itself that clause 5.7 of the Guidelines is to be included appropriately in Article

12 of the Standard PPA, either explicitly, or by reference such that Clause 5.7 of the Guidelines becomes an integral part of Article 12 of the Standard PPA, to give clarity to the proposed lenders of ERBPL as well as other solar power generators.

(d) Despite the Guidelines being crystal clear as regards the principles of restitution to be embodied in the Change in Law clause in the bidding documents, the Petitioner has failed to include the same in Article 12 of the standard PPA, thereby disentitling the solar power generator from the carrying cost along with the compensation for Change in Law event.

(e) APTEL vide its judgment dated 14.8.2018 in Appeal No. 119 of 2016 (Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission & Ors.) has reiterated the position taken in its earlier judgments and elaborated on the necessity of an express provision in the PPA with respect to restitution, in order to make the affected party eligible for carrying cost for such allowed Change in Law event(s). Thus, in the absence of express language regarding restitutive relief in Article 12 of the standard PPA, the solar power generator shall be rendered remediless insofar as grant of carrying cost is concerned.

(f) While it has been admitted by the Petitioner that the Change in Law Rules provide for adjustment in tariff on occurrence of Change in Law and specifically entitle the affected party to be restored to the same economic position as if such Change in Law event had not occurred, the Respondent's entitlement for the carrying cost flows from Clause 5.7 of the Guidelines.

(g) The submission of SECI that since the Change in Law Rules provide for grant of carrying cost, therefore, there is no requirement of a specific clause in the PPA/ standard PPA to that effect, may not be legally tenable insofar as the definition of "Change in Law" in Rule 2(1)(c) of the Change in Law Rules specifically excludes cases where "Change in Law" is already defined in the PPA executed between the parties. A perusal of the said provision makes it clear that even if the Change in Law Rules are applicable on the Respondent

generators, the definition of “*Change in Law*” may flow from the provisions of the PPA only. As such, it is imperative that the principle of restitution be enshrined in clear terms in Article 12 of the standard PPA. Further, considering that life of the PPA is 25 years, there may arise a situation where the Change in Law Rules are amended/ repealed and as such, it cannot be stated with certainty that the Change in Law Rules will remain applicable for the entire duration of the PPA.

(h) The letter dated 26.11.2020 and email dated 13.1.2021 issued by the Petitioner to MNRE vide which ex post-facto approval of deviation is being claimed by the Petitioner itself shows that MNRE’s approval was sought for a Change in Law clause having restitution provision. However, the Change in Law clause as contained in the standard PPA does not contain the said provisions. Therefore, the principle of restitution has to be included in the Change in Law clause and to this extent, learned senior counsel for SECI also conceded during the course of oral arguments.

16. SECI also filed its written submission on 11.2.2022 whereby, in furtherance to the submissions already made in its reply, SECI has mainly submitted as under:

(a) All the participating bidders were required to give specific acceptance as part of covering letter while submitting their bids, which, *inter alia*, giving unconditional acceptance to RfS, standard PPA and PSA, unconditional and irrevocable acceptance to the decision made by SECI in respect of any matter regarding or arising out of RfS to be binding on the bidders and to waive and withdraw any deviations and all claims in respect of the process.

(b) ERBPL duly accepted the provisions of the Standard PPA before the bidding and submitted the bid on the said basis. Before the bid submission date i.e. 22.6.2020, it was fully aware about the provisions of Article 12 of the Standard PPA circulated along with the RfS documents. ERBPL duly accepted the above position without any reservation or condition when it participated in the bidding based on the above and submitted the bid. It is thereafter not open

to ERBPL to claim that the proposed bid terms are not acceptable for signing the PPA.

(c) It is well settled principle of law that having accepted the terms and conditions and having submitted the bid on the said basis, it is not open to the selected bidder to raise any issue after the Letter of Award has been issued or for signing the contract documents. In this regard, reliance has been placed on the decisions of the Hon'ble Supreme Court in the cases of (i) National High Speed Rail Corporation Limited v. Monte carlo Limited and Anr. [2022 SCC OnLine SC 111], (ii) Har Shanker v. Excise & Taxation Commr. [(1975) 1 SCC 737], (iii) Meerut Development Authority v. Assn. of Management Studies[ (2009) 6 SCC 171].

(d) The Respondent No. 8, Thar Surya, which is one of the selected bidders has signed the PPA on 20.8.2021. The other selected bidders, namely, Respondents 2, 3, 5, 6 and 7 have not raised any such issues which have been raised by ERBPL.

(e) The claim of ERBPL for allowing the impact of Change in Law events resulting in increase/ decrease in project cost after the SCD/ extended SCD as provided for in Article 12 of the Standard PPA on the ground of alleged deviation from the Guidelines is patently erroneous and cannot be sustained.

(f) Even otherwise, the project cost relates to the establishment of the project. It has to have a certainty of the period up to SCD/ extended SCD. There is no provision envisaged for additional capitalization incurred after SCD/ extended SCD to be factored for the purpose of tariff. There cannot, therefore, be any consideration of the additional project cost to be allowed after SCD/ extended SCD.

(g) In the subject Standard PPA, SECI had specifically restricted the consideration of the project cost till Scheduled Commissioning Date or extended Scheduled Commissioning Date, which excludes the consideration of the project cost incurred during the period of delay on the part of the

developers. The developers including ERBPL are bound by the said provision limiting the consideration to Scheduled Commissioning Date/ extended Scheduled Commissioning Date, having accepted the standard terms of the bidding documents and submitted the bid.

(h) In the facts and circumstances of the case, the order dated 2.6.2021 in Petition No.721/AT/2020 in the matter of NHPC Limited v. Ministry of New and Renewable Energy and Ors. is distinguishable and not applicable to the present case in view of the approval granted to SECI by the MNRE.

(i) Reliance placed by ERBPL on the order dated 21.12.2021 in Petition No.179/AT/2021 in the matter of SECI v. ABC Renewable Energy Private Limited, does not support the case of ERBPL. In the said decision, this Commission has approved the ex post facto sanction given by MNRE, Central Government as in the present case. The observations contained in the said case in regard to SECI are for the future. In the present case, the bid submission date was on 22.6.2020.

(j) In regard to the issue of restitution/ carrying cost raised by ERBPL, Rule 3(1) of the Change in Law Rules notified by the Government of India will govern the issue particularly as the Scheduled Commissioning Date of the projects is after the notification of the Change in Law Rules.

17. In compliance with direction of the Commission, SECI vide affidavit dated 11.2.2022 has filed a comparative statement indicating the steps and processes followed by it in the bidding/ tender and mapping the same to the corresponding enabling provisions of the Guidelines issued by the Central Government.

### **Analysis and Decision**

18. We now proceed to consider the prayers of the Petitioner as regards adoption of tariff in respect of solar power projects discovered pursuant to the competitive bid

process carried out in terms of the Guidelines issued by the Ministry of Power, Government of India under Section 63 of the Act.

19. Section 63 of the Act provides as under:

*“Section 63. Determination of tariff by bidding process: Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”*

20. Thus, in terms of Section 63 of the Act, the Commission is required to adopt the tariff, on being satisfied that transparent process of bidding in accordance with the guidelines issued by the Government of India under Section 63 of the Act has been followed in determination of such tariff.

21. Ministry of Power, Government of India has notified the Guidelines under Section 63 of the Act vide Resolution No.23/27/2017-R&R on 3.8.2017. The Guidelines have been subsequently amended by the resolutions dated 14.6.2018, 3.1.2019, 9.7.2019, 22.10.2019 and 25.9.2020. The salient features of the Guidelines are as under:

(a) The Guidelines are applicable for procurement of power from grid connected solar PV power projects having size of 5 MW and above through tariff based competitive bidding to be conducted by procurers which includes distribution licensees, or the Authorized Representative(s), or Intermediary procurers.

(b) The procurer shall prepare the bid documents in accordance with the Guidelines and the Standard Bid Documents notified by the Ministry of Power, Government of India. If any deviation is proposed to be made in the Guidelines and Standard Bid Documents, approval of the Appropriate Commission would



be necessary. Intimation about initiation of the bid process shall be sent by the procurer to the Appropriate Commission.

(c) Bids shall be designed in terms of a package. The minimum size of a package should be 50 MW in order to have economies of scale. Bidders shall quote for entire package.

(d) The procurer has option to choose to invite the two bids, namely, (i) power capacity (MW) terms, or (ii) energy quantity (kWh or million units i.e. MUs) terms. For procurement of power, the procurer may opt for either tariff or viability gap funding as bidding parameter.

(e) Draft PPA proposed to be entered into with the successful bidder and draft PSA, if applicable, shall be issued along with the RfS. Standard provisions to be incorporated as part of the PPA shall include, *inter-alia*, PPA period, quantum of power/ energy to be procured, payment security, generation compensation of off-take constraint, event of default and consequences thereof and Change in Law and shall be provided for, on back-to-back basis, in the PSA.

(f) Procurer and Intermediary procurer shall provide payment security to the solar power developer through revolving Letter of Credit of an amount not less than one month average billing and Payment Security Fund for at least three months' billing of all the projects tied up with such fund. In addition, the procurer may also choose to provide State Government Guarantee.

(g) End procurer shall provide payment security to the intermediary procurer through revolving Letter of Credit of an amount not less than one month's average billing from the project under consideration and State Government Guarantee. In addition, end procurer may also choose to provide Payment Security Fund with at least three months' billing of all the projects tied up with such fund.

(h) The procurer shall call the bids adopting a single stage bidding process to be conducted through electronic mode (e-bidding). The procurers may adopt e-reverse auction, if it so desires. For this purpose, e-procurement platforms

with a successful track record and with adequate safety, security and confidentiality features will be used. In case of solar park specific project, procurer shall provide intimation to the solar power park developer about initiation of the bidding process and arrange the access of the bidders to the drafts of Implementation Support Agreement and land related agreement.

(i) RfS notice shall be issued in at least two national newspapers and on the websites of the procurer to provide wide publicity. Standard documentation to be provided in the RfS stage shall include technical criteria, financial criteria, quantum of earnest money deposit and lock-in requirements for the lead members of the consortium.

(j) The procurer shall constitute committee for evaluation of the bids (Evaluation Committee), with at least three members, including at least one member with expertise in financial matters/ bid evaluation.

(k) Bidder shall submit non-refundable processing fee and/or project development fee as specified in the RfS, separate technical and price bids and bid guarantee. To ensure competitiveness, the minimum number of qualified bidders shall be two. If the number of qualified bidders is less than two even after three attempts of bidding, and the procurer still wants to continue with the bidding process, the same may be done with the consent of the Appropriate Commission.

(l) The PPA shall be signed with the successful bidder or an SPV formed by the successful bidder. After conclusion of bidding process, Evaluation Committee shall critically evaluate the bids and certify that the bidding process and the evaluation have been conducted in conformity with the provisions of RfS. After execution of the PPA, procurers shall disclose the name(s) of the successful bidder(s) and the tariff quoted by them in its website. Accordingly, the distribution licensee or the intermediary procurer shall approach the Appropriate Commission for adoption of tariff in terms of Section 63 of the Act.

22. In terms of the provisions of the Section 63 of the Act, we have to examine whether the process as per provisions of the Guidelines has been followed in the present case for arriving at the lowest tariff and for selection of the successful bidder(s).

23. The Petitioner has been designated as the nodal agency for implementation of MNRE Schemes for setting up of inter-State Transmission System connected/ State specific wind/ solar power/ wind-solar hybrid power projects; to invite bidding under tariff based competitive bidding process; to enter into PPAs with developers at the tariff discovered in the competitive bid process; and to enter into PSAs with the distribution licensees to enable them to fulfill their Renewable Purchase Obligations under Section 86(1)(e) of the Act. SECI acts as an intermediary agency in purchase and sale of power under PPAs and PSAs on back-to-back basis.

24. The Guidelines provide for procurement of solar power at a tariff to be determined through transparent process of bidding by the procurer(s) from grid-connected solar power projects having size of 5 MW and above. As per the Guidelines, SECI in the capacity of intermediary procurer, invited proposals for selection of solar power developers for setting up 2000 MW ISTS connected solar power projects (Tranche- IX). As per the arrangements, SECI is to procure the power by entering into PPAs with the successful bidder with back-to-back PSAs for sale of power to the distribution licensees.

25. The key dates in the bidding process were as under:

| <b>Sr. No.</b> | <b>Event/Milestone</b> | <b>Date</b> |
|----------------|------------------------|-------------|
|----------------|------------------------|-------------|

|   |   |                    |
|---|---|--------------------|
| 1 | Issuance of RfS documents               | 20.3.2020          |
| 2 | Amendments to RfS documents             | 4.6.2020-10.6.2020 |
| 3 | Last date for submissions of online bid | 22.6.2020          |
| 4 | Opening of technical bid                | 22.6.2020          |
| 5 | Opening of financial bid                | 29.6.2020          |
| 6 | e-Reverse Auction                       | 30.6.2020          |
| 7 | Issuance of Letter of Award             | 15.7.2020          |

26. On 20.3.2020, SECI issued the RfS documents, along with draft PPA and PSA for selection of Solar Power Developers for setting up of 2000 MW ISTS-connected solar power projects (Tranche-IX) under tariff-base competitive bidding. As per Clause 6.4 of the Guidelines, RfS notice is required to be published in at least two national newspapers and its own website to accord wide publicity. In this regard, SECI has placed on record documents demonstrating publication of RfS on the e-publishing system, Government of India. It has been further submitted that it did not publish the notices in the newspapers as per the advisory issued by Ministry of Information and Broadcasting, Government of India dated 17.5.2017 mandating e-publishing of advertisements in the relevant portal. Accordingly, on 3.7.2018, SECI published notification indicating that tenders of SECI would be published in its website and not in newspapers.

27. As per Clause 3.1.1(b) of the Guidelines, procurer is required to inform the Appropriate Commission about initiation of the bidding process. SECI vide its letter dated 5.5.2020 had informed the Commission that it has initiated the competitive bidding process for procurement of power from grid-connected solar power projects.

28. The Bid Evaluation Committee (BEC) comprising of the following was constituted for opening and evaluation of bids for RfS dated 20.3.2020:

| Tender  | Department | Offline and Online Techno- commercial and Financial Bid Opening | Techno-commercial and Financial evaluation and post-e-RA recommendation |
|---|------------|---|---|
| Selection of Solar Power Developers for setting up of 2000 MW ISTS-connected solar power projects in India under tariff-based competitive bidding (ISTS-IX) | Solar      | Shri Sanjeev Singh, Manager (PS)                                | Shri Sanjeev Singh, Manager (PS)  |
|   | Contracts  | Shri Pratik Prasun, Deputy Manager (C&P)                        | Shri Pratik Prasun, Manager (C&P)                                       |
|   | Finance    | Shri Ajit Sharma, Deputy Manager (finance)                      | Shri Ajit Sharma, Deputy Manager (Finance)                              |

29. Last date of submission of bid was 22.6.2020 and the technical part of the bid was opened on the same day. Response to RfS was received from the following eleven bidders:

| Sr. No. | Name of Bidders                       |
|---------|---------------------------------------|
| 1.      | Eden Renewable Bercy Private Limited  |
| 2.      | Azure Power India Private Limited     |
| 3.      | IB Vogt Singapore Pte. Limited        |
| 4.      | ReNew Solar Power Private Limited     |
| 5.      | Avikiran Surya India Private Limited  |
| 6.      | NTPC Limited                          |
| 7.      | Solarpack Corporacion Tecnologica SA  |
| 8.      | AMP Green Energy Private Limited      |
| 9.      | O2 Power SG Pte. Limited              |
| 10.     | Ayana Renewable Power Private Limited |
| 11.     | The Tata Power Company Limited        |

30. The financial bids of all eleven technically qualified bidders were opened on 29.6.2020 on ISN ETS e-bidding portal and as per the criteria mentioned in RfS documents, nine bidders for capacity aggregating 3800 MW were shortlisted for e-

reverse auction. E-reverse auction was carried out on 30.6.2020 on ISN ETS e-bidding portal. The final tariff and the selection of the bidders were arrived after completion of e-reverse auction. The result of e-reverse auction is as under:

| <b>Sr. No.</b> | <b>Bidders</b>                        | <b>Bidder's Quantity (MW)</b> | <b>Tariff (Rs./kWh)</b> | <b>Allotted Capacity (MW)</b> |
|----------------|---------------------------------------|-------------------------------|-------------------------|-------------------------------|
| 1.             | Solarpack Corporacion Tecnologica SA  | 300                           | 2.36                    | 300                           |
| 2.             | Avikiran Surya India Private Limited  | 300                           | 2.37                    | 300                           |
| 3.             | AMP Energy Green Private Limited      | 100                           | 2.37                    | 100                           |
| 4.             | Eden Renewable Bercy Private Limited  | 300                           | 2.37                    | 300                           |
| 5.             | IB Vogt Singapore Pte Limited         | 300                           | 2.37                    | 300                           |
| 6.             | Ayana Renewable Power Private Limited | 300                           | 2.38                    | 300                           |
| 7.             | ReNew Solar Power Private Limited     | 1200                          | 2.38                    | 400                           |
| <b>Total</b>   |                                       |                               |                         | <b>2000 MW</b>                |

31. On 15.7.2020, SECI issued Letters of Award to the aforesaid successful bidders. Relevant extract of Letter of Award issued to one of the successful bidders, namely, Avikiran Surya India Private Limited, is as under:

*"In reference to above and subject to the provisions of RfS, we confirm having accepted your final offer concluded as a result of e-RA and issue this letter of award as per the following details:*

| <b>Allotted Project ID</b> | <b>Project Capacity (MW)</b> | <b>Applicable Tariff (INR/kWh) in figure</b> | <b>Applicable Tariff (INR/kWh) in words</b> |
|----------------------------|------------------------------|--|---|
| SPD-ISTS-T9-ASIPL-P1-300MW | 300                          | 2.37   | Rupees Two and Thirty-seven paise only      |

*It is to be noted that as per the provisions of the RfS, the SPD is allowed to change the project location and Delivery Point for the awarded Project subsequent to issuance of LoA.*

*SECI shall purchase the power generated from the proposed ISTS-connected Solar PV Power Project under the above scheme subject to the following terms and conditions as stated in various documents referred above and briefly brought out hereinafter:*

1.0 The applicable tariff as mentioned above for power generated from the proposed Solar PV Power Project for the term of Power Purchase Agreement (PPA) to be entered into between Project Company or the Solar Power Project (SPD) and M/s SECI, for the Project, shall be firm for the entire term of the PPA.

1.1 The SPD will be free to avail fiscal incentives like Accelerated Depreciation, Concessional Customs Duties, Tax Holidays, etc. as available for such projects. No claim shall arise on SECI for any liability if the SPD is not able to avail fiscal incentives and this will not have any bearing on the applicable tariff.

1.2 The award of the above Project is subject to the Guidelines including amendments/ clarifications issued by Government of India and terms and conditions of the RfS document including its clarifications/ amendments/ elaborations/ notifications issued by SECI.

1.3 No change in the shareholding of the Bidding Company or Bidding Consortium shall be permitted from the date of submission of response to RfS till the execution of the PPA. However, in case the Project is being set up by a listed Company, this condition will not be applicable. Controlling shareholding (holding more than 50% of the voting rights and paid up share capital in the Company) of the Project Company of the SPD shall not change until three year after the COD of the Project, except with the prior approval of SECI. However, in case the Project is being set up by a listed Company, this condition will not be applicable.

1.4 In case of companies having multiple promoters (but none of the shareholders having more than 50% of voting rights and paid up share capital), it shall be considered as a company under joint control. In such cases, the shareholding pattern in the company as submitted at the time of bidding, shall be maintained for a period of 03 (three) year after COD.

1.5 The successful Bidder, if being a single company, shall ensure that its shareholding in the SPV/ project company executing the Power Purchase Agreement (PPA), shall not fall below 51 % at any time prior to 3 (three) year after the COD, except with the prior approval of SECI. In the event, the successful bidder is a consortium, then the combined shareholding of the consortium members in the SPV/project company executing the PPA, shall not fall below 51% at any time prior to 3 (three) year after COD, except with the prior approval of SECI. However, in case the Project is being set up by listed Company, this condition will not be applicable.

1.6 The SPD shall pay to SECI, Success Charges of Rs.1 lakh/MW/project +18% GST within 30 days of issuance of this Letter of Award (LoA), in line with Clause 12, Section-III of the RfS, towards administrative overheads, coordination with State Authorities and others, DISCOM/ STU/ CTU, pre-commissioning and commissioning expense. Performance Bank Guarantee(s)/ Payment on Order Instrument (POI) for a value of @Rs.8 Lakh/MW per Project shall be submitted by the SPD at least 07 working days prior to signing of PPA (PPA signing date to be intimated by SECI) in line with Clause 11, Section-III of the RfS.

1.7 PPA will be executed between SECI and SPD as per the breakup of the cumulative Project capacity awarded to the Bidder. This LoA is being issued in line with the Project



*breakup of the cumulative capacity quoted in the Covering Letter as part of your response to RfS and amended subsequently, as applicable.*

*1.8 The final project configuration, adding up to the cumulative capacity awarded to the bidder may be intimated to SECI at the time of signing of PPA, which shall then remain unchanged subsequent to signing of PPA. Delays in connectivity and/or LTA for the Project(s) on account of such changes in Project parameters, which differ from the details provided in the Covering letter, shall be at the risk and cost of the Successful Bidder. The PPAs shall be valid for a period of 25 years from the scheduled commissioning date of the projects.*

*1.9. The SPD will have to submit the required documents as mentioned below to SECI within 70 days from the date of this LoA. In case of delay in submission of documents beyond the timeline as mentioned above, SECI shall not be liable for delay in verification of documents and subsequent delay in signing of PPA:*

- 1) Copy of the Certificate of Incorporation of the Solar Power Developer.*
- 2) The details of promoters and their shareholding in the SPD, duly certified by the practicing Chartered Accountant/ Company Secretary in original at least 7 (seven) days prior to date of their document submission (certificate date should be after the date of LoA) along with latest documents filed with ROC).*
- 3) Copy of the Memorandum of Association (MoA) of the SPD highlighting the object clause related to generation of Power/ Energy/ Renewable Energy/ Solar Power plant development.*
- 4) In case the project being executed by a Special Purpose Vehicle (SPV) incorporated by successful bidder, such SPV shall be at least 76% shareholding subsidiary, in line with provisions of the RfS. Further, the Successful Bidder shall submit a Board Resolution prior to signing of PPA with SECI, committing total equity infusion in the SPV as per the provisions of RfS.*

*Further, the PPA shall be signed only upon receipt of the Success Charges and total Performance Guarantees/Payment on Order Instrument of requisite value. The EMD submitted shall be released only after receipt and successful verification of the total Performance Bank Guarantee/ Payment on Order Instrument in the acceptable form.*

*1.10 SECI shall have the right to verify original documents of the SPD for which copies have been submitted from the date of submission of response to RfS till date, if required. PPA as per the format given along with RfS has to be signed within 90 days from the date of issue of LoA, if not extended by SECI. In case of unavoidable delays on the part of the SPD in submission of requisite documents prior to signing of PPAs or otherwise, the Effective Date of the PPA shall remain the date as on 90th day from the issuance of LoA, irrespective of the date of signing of PPA. In extraordinary cases of unavoidable delays on the part of SECI in signing the PPAs or PSAs, the Effective Date of the PPA shall then be the date as on 7 days from signing date of PSA for total capacity of respective project.*

*1.11. In case, the SECI offers to execute the PPA with the SPD and the selected Bidder refuses to execute the PPA within the stipulated time period, the Bank*



*Guarantee equivalent to the amount of the EMD shall be encashed by SECI from the Bank Guarantee available with SECI (i.e. either EMD or PBG/POI) as liquidated damages not amounting to penalty, and the selected Project(s) shall stand cancelled and the selected Bidder expressly waives off its rights and objections, if any, in that respect.*

*1.12 The SPD shall meet financial closure requirements for the Project in line with clause 15, Section-III of the RfS document, within 12 (twelve) months from the Effective Date of the PPA. Accordingly, the SPD shall furnish the documents pertaining to compliance of financial closure as per the above provisions.*

*1.13 The SPD/Project Company shall achieve commissioning of full capacity of the Project within 18 months from the Effective Date of the PPA as per the conditions stipulated in Clause 16, Section-III of the RfS and relevant articles of PPA. In case of failure to achieve this milestone, liquidated damages not amounting to penalty shall be levied on the SPD as per the above provisions....'*

32. It has been submitted by the Petitioner that the selection of the aforesaid bidders for supply of power and the quantum of capacity available for procurement from the selected bidders were communicated to the concerned distribution companies/ buying utilities and that PSAs have been signed as under:

| <b>Sr.</b> | <b>Buying Utilities</b>                      | <b>Date of PSA</b> | <b>Capacity of Project (MW)</b> |
|------------|--|--------------------|---------------------------------|
| 1          | BSES Rajdhani Power Limited (BRPL)           | 20.7.2021          | 210                             |
| 2          | BSES Yamuna Power Limited (BYPL)             | 20.7.2021          | 90                              |
| 3          | Uttarakhand Power Corporation Limited (UPCL) | 12.10.2021         | 100                             |
|            | <b>Total</b>                                 |                    | <b>400</b>                      |

33. On the above basis, PPAs have been signed with the following successful bidder/ Project Company formed by the successful bidder:

| <b>Sr.</b> | <b>Name of Successful Bidder</b>     | <b>Project Company formed for executing PPA</b> | <b>Date of signing of PPA</b> | <b>Capacity of Project (MW)</b> | <b>Applicable Tariff (Rs./kWh)</b> |
|------------|--------------------------------------|---|-------------------------------|---------------------------------|------------------------------------|
| 1          | Avikiran Surya India Private Limited | Thar Surya 1 Private Limited                    | 20.8.2021                     | 300                             | 2.37                               |

34. Admittedly, the Petitioner has been able to enter into PPA for only 300 MW while for balance 1700 MW, PPAs have not been signed. While the Petitioner has submitted that it was in process of entering into PPA for 100 MW capacity corresponding to the PSA signed with Uttarakhand Power Corporation Limited (UPCL) on 12.10.2021, no detail has been placed on record regarding signing of PPA for this 100 MW capacity. The Petitioner has submitted that PPAs with the solar power developers are to be executed subsequent to the execution of PSAs with distribution licensees and the same is consistent with the provisions of the RfS. The Petitioner has submitted that it is entitled to extend the stipulated timeline (i.e. 90 days from the LoA) for signing of PPAs and that the successful bidders have also provided the necessary extensions of the validity of their respective bids as required. However, we note that even after considerable amount of time having elapsed from issuance of LoA to the successful bidders, the supply of electricity from the generating station(s) to the distribution licensee(s) has been tied up only with respect to 300 MW out of the total selected capacity of 2000 MW and the identification of distribution licensees (except for UPCL for 100 MW – for which PPA is yet to be executed) and consequently, execution of PPAs for the balance capacity are yet to take place. In such circumstances, we deem it appropriate to restrict adoption of the tariff only with respect to the quantum for which PPA has been executed with solar power developers for supply of power to the identified distribution licensees through PSA with the Petitioner.

35. The Petitioner has submitted that it has incorporated certain changes in the bid documents in deviation to the provisions of the Guidelines with regard to Change

in Law. However, such changes have been incorporated pursuant to post facto approval of MNRE vide letters dated 18.12.2020 and 1.3.2021, whereby it has been claimed by the Petitioner that MNRE in exercise of its powers to issue clarification/ modification under the Guidelines, accorded *ex-post facto* approval for changes in respect of certain provisions vis-à-vis Guidelines in respect of (i) bids that have been issued but not closed; and (ii) bids that have been issued and closed by SECI. Aforesaid letters of MNRE have been placed on record by SECI vide its affidavit dated 10.11.2021.

36. We have considered the submissions made by the Petitioner. Article 12 of the standard PPA issued along with RfS documents 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 In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after [Insert last date of bid submission] 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 an 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 the 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 (ii) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD.*

*12.1.2 In the event of occurrence of any of events as provided under Article 12.1.1 which results in any increase/ decrease in the Project Cost (i.e. cost incurred by the SPD towards supply and services only for the Project concerned, upto Scheduled Commissioning Date or extended Scheduled Commissioning Date, as the case may be), the SPD/ SECI / Buying Utility(ies) shall be entitled for compensation by the other party, as the case may be, subject to the condition that the such ‘Change in Law’ is recognized by the Appropriate Commission. Compensation payment on account of such ‘Change in Law’ shall be determined and shall be effective from such date as may be decided by the Appropriate Commission.*

12.1.3 However, in case of change in rates of safeguard duty, GST and basic customs duty after [Insert last date of bid submission] 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.

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

12.2.1 Save and except as provided under Article 12.1.3, the aggrieved Party shall be required to approach the Hon'ble CERC for seeking approval of Change in Law.

12.2.2 The decision of the Hon'ble CERC to acknowledge a Change in Law and the date from which it will become effective, provide relief for the same, shall be final and governing on SPD and Buying Entity.

12.2.3 In case of Change in Law as approved by the Appropriate Commission pursuant to Article 12.2.1 or as provided under Article 12.1.3, the SPD/ SECI/ Buying Entities (as the case may be) shall be entitled for relief as follows:

Every net increase/decrease of Rs.1 lakh per MW in the Project Cost (i.e cost incurred by the SPD for the supply and services in the Project concerned, upto Schedule Commissioning Date or extended Schedule Commissioning Date, for reasons other than those wherein such extension is on account of payment of liquidated damages, penalty or any other charges, as the case may be), shall be liable for corresponding increase/decrease of an amount equal to Rs 0.005 /kWh.

Any such change, shall be considered upto three digits after the decimal point, and remaining digits, if any, shall be ignored.

For e.g. in case the change in tariff payable is calculated as Rs. 0.14678/kWh, it shall be modified as Rs. 0.146/kWh.

12.2.4 In case Change in Law results in delay in commissioning or supply of power, where cause and effect between these two can be clearly established, the SECI under intimation to the Buying Entities may provide suitable time extension in Scheduled Commissioning Date or Scheduled Date of Commencement of Supply of Power, as the case may be.

12.2.5 In the event of any decrease in the project cost by the SPD or any income to the SPD on account of any of the events as indicated above, SPD shall pass on the benefit of such reduction at a rate as provided in Article 12.2.3 to SECI which shall be further passed on to the Buying Entity. In the event of the SPD failing to comply with the above requirement, SECI shall make such deductions in the monthly tariff payments on immediate basis. Further, at the time of raising of 1st Monthly Tariff Payment 361 Bill, SPD shall be required to provide a statutory auditor certificate supported by Board Resolution in regard to implications (loss/ gain) arising out of Article 12.

37. It is observed that while the Guidelines provide for determination of quantum of compensation for off-setting the financial impact due to increase/ decrease in the costs on account of occurrence of Change in Law event by the Appropriate Commission, the Petitioner in PPA and PSA has provided for pre-determined quantum of compensation for Change in Law events, whereby for every net increase/ decrease of Rs.1 lakh per MW in the project cost, there shall be corresponding increase/ decrease of an amount equal to Rs.0.005/kWh.

38. The Petitioner has submitted that such changes have been approved by the Ministry of New and Renewable Energy, Government of India and vide affidavit dated 10.11.2021, it has placed on record the correspondence exchanged with MNRE in this regard. The Petitioner, SECI has placed on record its letter dated 26.11.2020 and e-mail dated 13.1.2021 sent to MNRE requesting for certain modifications to the Guidelines to accommodate the concerns of various stakeholders, to allow SECI to incorporate changes in the scheme documents and to enter into PSAs and PPAs, etc. The Petitioner has also placed on record letter dated 1.3.2021 issued by MNRE to SECI, whereby MNRE in exercise of its powers to issue clarifications/ modifications under the Guidelines, granted ex-post facto approval for changes in respect of certain provisions including Change in Law provisions vis-à-vis the Guidelines in respect of (i) bids that have been issued but not closed; and (ii) bids that have been issued and closed by SECI. The relevant extract of the letter of MNRE dated 1.3.2021 is as under:

*“The Chairman & Managing Director  
Solar Energy Corporation of India (SECI)*

*Sub: SECI's request for allowing Deviation from Standard Bidding Guidelines, in respect of Bids by SECI for procurement of power-Reg*

*Sir,*

*This is in reference to the SECI's letter No. SECI/SD/Misc/40098 dated 26.11.2020 (Copy enclosed) and subsequent email dated 13.01.2021 (copy enclosed) on the subject issue:*

*2. In this regard, the undersigned is directed to inform SECI that:*

*.....*

*III. Meanwhile, SECI is allowed to make changes/deviations, as per SECI's proposal in aforesaid letter/email, on the points mentioned below, both in bids that have been issued but not closed and in bids that have been issued and closed. However, where the bids have been closed, SECI should be very carefully ensure that no additional benefit accrues to the successful bidder and there is no impact on the discovered tariff;*

- a. Termination compensation on Account of Non-Natural Force Majeure Conditions;*
- b. Option of taking over of the Project assets by the Buying Entities in case of SPD's Event of Default.*
- c. Change in Law provisions*
- d. Additional Risk Premium of Rs.0.10/kWh.*

*3. This issues in line with the approval of Hon`ble Minister (NRE & Power)...”*

39. Thus, as per above letter of MNRE, SECI has been permitted to make changes/ deviations from the Guidelines, as per SECI's proposal vide its letter dated 26.11.2020 and e-mail dated 13.1.2021, which *inter-alia* included the changes/ deviations to the provisions of the Change in Law, both in (i) the bids that have been issued but not closed and (ii) the bids that have been issued and closed.

40. The bid covered under the present petition falls under the second set of bids (where bids have been issued and closed), as the last date of submission of bid was 22.6.2020 and even the Lol was issued on 15.7.2020, whereas the deviations were approved by MNRE vide its letter dated 1.3.2021. Further, in the said letter dated 1.3.2021, MNRE directed SECI as under:

*“...However, where the bids have been closed, SECI should be very carefully ensure that no additional benefit accrues to the successful bidder and there is no impact on the discovered tariff;...”*

41. Given the fact that the bidding in the present case was already closed at the time of issuance of the aforesaid approval of deviations by MNRE, the question that arises before the Commission is whether such approval of deviations from the bidding guidelines after the closure of bids violates the sanctity of bidding process and whether the Petitioner has complied with direction of the letter dated 1.3.2021 of MNRE requiring it to ensure that no additional benefit accrues to the successful bidder and that there is no impact on the discovered tariff.

42. We observe that the modified Change in Law provisions appear to have been already incorporated in the Bid documents at the time of issuance of the same. Therefore, it does not appear to be a case that such provisions have been introduced after the closure of the bid and thus, bidder(s) participating in the bid were made aware about the said provisions. At the same time, the fact remains that the said deviations were not approved by the competent authority at the time of their incorporation in the bid documents prior to closure of bids and the approval granted for the same was only on ex-post facto basis. We are of the view that the Petitioner should have waited for the approval of its proposal from MNRE before proceeding with the bidding process. The Commission views the approach of the Petitioner not only unprofessional but also non-adherence to laid down procedures, which is not expected from a Government of India Public Sector Undertaking like SECI. In fact, issues are being raised by some Respondents that the bid process is not as per the



Guidelines. We would like to advise SECI that it must invariably always comply with the procedural and legal requirements in letter and spirit.

43. As per the Guidelines, Evaluation Committee is required to certify that the bidding process and the evaluation have been conducted in conformity with the provisions of the RfS. We observe that the Petitioner has made submissions that the bid documents are in line with the provisions of the Guidelines and the approvals of MNRE vide letter dated 1.3.2021. This has been certified by the Petitioner through the conformity certificate dated 18.2.2021 as furnished by the Petitioner. The relevant extract of the said conformity certificate dated 18.2.2021 is re-produced as under:

*“With respect to the RfS no. SECI/C&P/SPD/ISTS-IX/RfS/2000MW/03/2020 dated 20.3.2020, it is hereby declared as follows:*

*....*

*2. Applicable guidelines and amendments/clarifications thereof, if any, issued by Government of India for the bidding process were followed in the above tender and no deviation was taken from the Guidelines in the RfS documents for the above tender. .”*

44. We observe that MNRE, in exercise of its powers to issue clarifications/modifications under the Guidelines, gave ex-post facto approval for changes in respect of certain provisions in the Guidelines only vide letter 1.3.2021. However, the conformity certificate furnished by the Petitioner is dated 18.2.2021, which is prior to 1.3.2021. This clearly implies that on the date the conformity certificate was issued, there was no approval from MNRE. Therefore, the conformity certificate submitted by SECI is false and misleading and SECI and concerned officials of SECI are liable for proceedings under appropriate provisions of the Code of Civil Procedure 1908 and the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for submitting false statement on affidavit.



45. We further observe that the Petitioner vide the aforesaid conformity certificate dated 18.2.2021 has also stated that the Evaluation Committee constituted for evaluation of bids has conducted the techno-commercial and financial bid evaluation in conformity with the provisions of the RfS. The relevant extract of the aforesaid conformity certificate dated 18.2.2021 is extracted as under:

*“1. After the conclusion of bid submission, the Evaluation Committee constituted for evaluation of bids has conducted the tech-commercial as well as financial bid evaluation in conformity to the provisions of the RfS.....”*

46. The Respondent No. 4, ERBPL has submitted that there are two deviations made by the Petitioner in the standard PPA from the provisions of the Guidelines, namely, (a) as against the Clause 5.7 of the Guidelines, which covers the Change in Law events for the entire terms of the PPA, the Article 12 of the PPA only covers the Change in Law events resulting in increase/ decrease in Project cost up to SCD and impact of events post the SCD have not been covered thereunder; and (b) principle of restitution as envisaged in Change in Law clause in the Guidelines has not been enshrined in Article 12 of the PPA. *Per contra*, SECI has submitted that there are no deviations in the PPA from the provisions of the Guidelines read with the letter of MNRE dated 1.3.2021 as contended by ERBPL. SECI has further submitted that the Respondent, ERBPL was fully aware about the provisions of the PPA when it participated in the bid process and submitted its bid. Therefore, having accepted the terms and conditions and having submitted the bid on said basis, it is not open to the selected bidder to raise any issue on the same after the LoA has been issued or for signing the contract documents.

47. We have considered the submissions made by the Respondent, ERBPL and the Petitioner SECI on the above aspects. Taking up the second deviation first, the Respondent, ERBPL has contended that Article 12 of the PPA does not contain the provisions regarding restitution of the affected party to the same economic position as enshrined in the Clause 5.7 of the Guidelines. The Respondent, ERBPL has also submitted that the letter dated 26.11.2020 and e-mail dated 13.1.2021 issued by the Petitioner to MNRE vide which ex-post fact approval of deviations is being claimed by the Petitioner itself shows that the MNRE's approval was sought for a Change in Law clause having restitution provisions.

48. In this regard, the Petitioner, during the course of hearing on 21.1.2022 and vide its written submissions, has fairly submitted that the entitlement of affected party to the carrying cost is squarely covered under Rule 3(1) of the Change in Law Rules issued by the Ministry of Power, Government of India. We have perused the Rule 3(1) of the Change in Law Rules, which reads as under:

*“3. Adjustment in tariff on change in law.- (1) On the occurrence of a change in law, the monthly tariff or charges shall be adjusted and recovered in accordance with these rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred....”*

49. We note that the Petitioner, SECI has justified its actions on the Change in Law Rules that have been notified (in October 2021) much after LoA was issued to successful bidders by the Petitioner (in July 2020). Therefore, justification of the Petitioner for this deviation based on provisions of the Change in Law Rules does not hold ground. The Respondent ERBPL has contended that restitution provision not being in the PPA, it is likely that the Respondents may be adversely impacted if at

some point of time in future the Change in Law Rules gets amended and such provision as Rule 3(1) is deleted. The Respondent has referred to judgement of Hon'ble Supreme Court wherein it has been held that an affected party can be restituted through carrying cost only when there are such provisions in the PPA. The Respondent, ERBPL has also argued that the definition of 'Change in Law' in Rule 2(1)(c) of the Change in Law Rules specifically excludes cases where 'Change in Law' is already defined in the PPA executed between the parties and has requested that it is imperative that the principle of restitution be enshrined in clear terms in Article 12 of the PPA itself. Though apprehension of ERBPL that the Change in Law Rules may be amended cannot be a ground, we tend to agree with contention of the Respondent ERBPL that there is need for clear provisions in PPA for claim of carrying cost in view of judgement of the Hon'ble Supreme Court. For better clarity for the bidders such as the Respondent ERBPL, the Petitioner should have adhered to the provisions of the Guidelines and ensured that relevant provisions related to Change in Law are there in draft PPA floated by it with RfS.

50. We next consider the submission of the Respondent, ERBPL that Article 12 of the PPA i.e. Change in Law clause only covers the Change in Law events resulting in increase/ decrease in the project cost up to SCD and that any impact of events post SCD have not been covered thereunder. In our view, the Change in Law event can broadly be divided into two categories on basis of its occurrence: (i) Change in Law event during the construction period of the project, and (ii) Change in Law event during the operation period.

51. For Change in Law events occurring during the construction period of the project which have an impact on the project cost, defining outer limit for consideration of the impact on the project cost till the SCD/ extended SCD of the project cannot be construed as deviation from the Guidelines. It is pertinent to note that such provision also finds place in the Petitioner's proposal to MNRE vide letter dated 26.11.2020 and e-mail dated 13.1.2021 whereby it had sought approval in respect of changes made to the certain provisions of the Guidelines including Change in Law provision.

52. Occurrence of Change in Law events which have an impact on the project post SCD or extended SCD appears to be an issue between the parties. We observe that the Article 12.1.1 of the PPA defines Change in Law as under:

*"12.1.1 In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after [Insert last date of bid submission] 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 an 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 the 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 (ii) any change in any withholding tax on income or dividends distributed to the shareholders of the SPD."*

53. Clause 5.7.2 of the Guidelines defines Change in Law as under:

*"5.7.2 In these Guidelines, the term Change in Law shall refer to the occurrence of any of the following events after the last date of bid submission, including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining a new consent, permit or license, not owing to any default of the Solar Power Generator; or (v) any change in the rates of any Taxes which have a direct effect on the Project. However, Change in Law shall not include any change in taxes on corporate income or any change in any withholding tax on income or dividends."*

54. Thus, it appears that the definition of Change in Law incorporated in the PPA is identical to the definition provided under Clause 5.7.2 of the Guidelines. The definition of the Change in Law as such does not distinguish between the Change in Law event prior to SCD/ extended SCD or post SCD/ extended SCD. Admittedly, according to the Respondent, ERBPL, the said deviation that Article 12 of the PPA restricts the impact of Change in Law events only up to SCD/ extended SCD of the project has crystalized/ arose in view of the certain subsequent sub-Articles of the PPA coupled with the specific submissions made by the Petitioner in its rejoinder and during the hearing. We have perused the provisions of Article 12 (supra) of the PPA and the submissions put forth by the parties. In our view, the aforesaid is more of an issue relating to examination of the scope of provisions contained in Article 12 of the PPA and we do not find any need to undertake the said exercise at this stage leaving the contentions of both the parties open. Admittedly, the generating projects are yet to achieve commercial operation and no such instance has been brought on record whereby the relief has been denied to the affected party by the other party to the agreement warranting intervention of this Commission.

55. However, the Respondent, ERBPL has vehemently argued that the Commission is required to provide such clarity at this stage itself and that the provisions of the PPA itself enable the generating companies to seek such clarity and reliance has also been placed on the decision of APTEL dated 12.10.2021 in Green Infra Case. However, we are not in agreement with the aforesaid contentions of the Respondent, ERBPL inasmuch as the provisions of the PPA only provide for recognition by the Commission, at the stage of adoption, that in case of Change in

rates of Safeguard Duty, GST and Basic Custom Duty after 22.6.2020 that results in change in project cost, then such change will be treated as Change in Law and that the quantum of compensation payment on account of change in rates of such duties shall be provided to the affected party as per Article 12.2.3 of the PPA. The said provisions do not require the Commission to examine the scope of Change in Law provisions in entirety or to adjudicate upon the correct interpretation/ scope of such provisions at the stage of adoption of tariff itself. In the Green Infra case also, the directions of the APTEL relate to the consideration of Change in Law claims that have occurred after the date of submission of bid and impact on the cost of the project development at the stage of tariff adoption with the actual impact and extent of relief admissible to be determined at the appropriate stage. However, as noted above, in the present case, no such instances of Change in Law which have an impact beyond the SCD/ extended SCD of the projects and for which the appropriate relief(s) have been denied to the affected party, have been brought on record.

56. In the earlier paragraph, we have pointed out several lapses in the approach of the Petitioner relating to deviations. We reiterate that the approach and action of the Petitioner was unprofessional, was non-adherence to laid down procedures and amounted to submitting false statement on affidavit. Taking a serious view of such conduct, we warn that the Commission would be constrained to initiate action for submitting false statement on affidavit if such lapse is found again.

57. However, as deviations in clauses of PPAs (for which *post facto* approval of MNRE was obtained) were part of the bid document, we accept the contentions of the Petitioner that the bidders were aware of them at the time of submission of bids.

58. In view of the aforesaid discussions, it emerges that the selection of the successful bidders has been done and the tariff of the solar power projects has been discovered by the Petitioner, SECI through a transparent process of competitive bidding in accordance with Guidelines (read with ex post facto approval vide letter dated 1.3.2021 of MNRE) issued by Ministry of Power, Government of India under Section 63 of the Act. Therefore, in terms of Section 63 of the Act, the Commission adopts the individual tariff for the solar power project, as agreed to by the successful bidder(s), and for which PPA has been entered into by SECI on the basis of the PSAs with the distribution licensees, which shall remain valid throughout the period covered in the PPA and PSAs as under:

| Sr. No. | Name of the Successful Bidder        | Project Company formed for executing PPA | Date of signing of PPA | Capacity of Project (MW) | Applicable Tariff (Rs./kWh) |
|---------|--------------------------------------|--|------------------------|--------------------------|-----------------------------|
| 1       | Avikiran Surya India Private Limited | Thar Surya 1 Private Limited             | 20.8.2021              | 300                      | 2.37                        |

59. However, the Petitioner is granted liberty to approach the Commission for adoption of tariff in respect of the balance capacity once such capacity is tied up and PPAs and PSAs for such capacity are executed and the same shall be considered by the Commission in accordance with the law.

60. Prayer (a) of the Petitioner is answered in terms of paragraph 34, paragraph 58 and paragraph 59 above.

61. Article 10.3 of the PPA provides as under:

*“10.3 Payment of Monthly Bills*

*10.3.1 SECI shall pay the amount payable under the Monthly Bill/Supplementary*

*Bill by the Due Date to such account of the SPD, as shall have been previously notified by the SPD as below.*

*10.3.2 All payments required to be made under this Agreement shall also include any deduction or set off for:*

- (i) deductions required by the Law; and*
- (ii) amount claimed by SECI, if any, from the SPD, will be adjusted from the monthly energy payment. In case of any excess payment adjustment, 1.25% surcharge will be applicable on day to day basis.*

*The SPD shall open a bank account (the “SPD`s Designated Account”) for all Tariff Payments (including Supplementary Bills) to be made by SECI to the SPD, and notify SECI of the details of such account at least ninety (90) Days before the dispatch of the first Monthly Bill. SECI shall also designate a bank account at New Delhi (“SECI Designated Account”) for payments to be made by the SPD to SECI, if any, and notify the SPD of the details of such account ninety (90) Days before the Scheduled Commissioning Date. SECI and the SPD shall instruct their respective bankers to make all payments under this Agreement to the SPD`s Designated Account or SECI`s Designated Account, as the case may be, and shall notify either Party of such instructions on the same day.”*

62. Article 10.4 of the PPA provides as under:

*“10.4 Payment Security Mechanism*

*Letter of Credit (LC):*

*10.4.1 SECI shall provide to the SPD, in respect of payment of its Monthly Bills and/or Supplementary Bills, a monthly unconditional, revolving and irrevocable letter of credit (“Letter of Credit”), opened and maintained which may be drawn upon by the SPD in accordance with this Article.*

*10.4.2 Before the start of supply, SECI through a scheduled bank open a Letter of Credit in favour of the SPD, to be made operative from a date prior to the Due Date of its first Monthly Bill under this Agreement. The Letter of Credit shall have a term of twelve (12) Months and shall be renewed annually, for an amount equal to:*

*i) for the first Contract Year, equal to the estimated average monthly billing; ii) for each subsequent Contract Year, equal to the average of the monthly billing of the previous Contract Year.*

*10.4.3 Provided that the SPD shall not draw upon such Letter of Credit prior to 30 days beyond the Due Date of the relevant Monthly Bill and/or Supplementary Bill, and shall not make more than one drawal in a Month.*

*10.4.4 Provided further that if at any time, such Letter of Credit amount falls short of the amount specified in Article 10.4.2 due to any reason whatsoever, SECI shall restore such shortfall before next drawl.*

*10.4.5 SECI shall cause the scheduled bank issuing the Letter of Credit to intimate the SPD, in writing regarding establishing of such irrevocable Letter of Credit.*



10.4.6 SECI shall ensure that the Letter of Credit shall be renewed not later than its expiry.

10.4.7 All costs relating to opening, maintenance of the Letter of Credit shall be borne by SECI.

10.4.8 If SECI fails to pay undisputed Monthly Bill or Supplementary Bill or a part thereof within and including date as on 30 days beyond the Due Date, then, subject to Article 10.4.6 & 10.5.2, the SPD may draw upon the Letter of Credit, and accordingly the bank shall pay, an amount equal to such Monthly Bill or Supplementary Bill or part thereof, in accordance with Article 10.4.3 above, by presenting to the scheduled bank issuing the Letter of Credit, the following documents:

- i) a copy of the Monthly Bill or Supplementary Bill (only for energy related bills) which has remained unpaid to SPD and;
- ii) a certificate from the SPD to the effect that the bill at item (i) above, or specified part thereof, is in accordance with the Agreement and has remained unpaid beyond the Due Date;”

63. Clause (10) of Regulation 9 of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020 (hereinafter referred to as “the Trading Licence Regulations”) provides as under:

*“9. (10) The Trading Licensee shall make payment of dues by the agreed due date to the seller for purchase of the agreed quantum of electricity through an escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller. Such escrow arrangement or irrevocable, unconditional and revolving letter of credit in favour of the seller shall be equivalent to:*

*(a) one point one (1.1) times the average monthly bill amount (estimated average of monthly billing amounts for three months or actual monthly billing amount for preceding three months as the case may be) with a validity of one year for long term contracts;*

*(b) one point zero five (1.05) times of contract value for short term contracts.”*

64. The above provisions provide for payment security mechanism to be complied with by the parties to the present Petition. Accordingly, the provisions of Article 10.3

and Article 10.4 of the PPAs and Clause (10) of Regulation 9 of the Trading Licence Regulations shall be abided by the concerned parties to the present Petition.

65. The Petitioner, SECI has also prayed to approve trading margin of Rs.0.07/kWh agreed to by the distribution companies in the signed PSAs in terms of Regulation 8(1)(d) of the Trading Licence Regulations. In this regard, Clause (1)(d) of Regulation 8 of the Trading Licence Regulations provides as under:

*“For transaction under long term contracts, the trading margin shall be decided mutually between the Trading Licensee and the seller:”*

66. The above provision gives choice to the contracting parties to mutually agree on trading margin for long-term transaction.

67. However, proviso to Regulation 8(1)(d) of the Trading Licence Regulations provides as under:

*“8(1) (d) \* \* \* \* \**

*Provided that in contracts where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh.”*

68. Regulation 8(1)(f) of the Trading Licence Regulations provides as under:

*“For transactions under Back to Back contracts, where escrow arrangement or irrevocable, unconditional and revolving letter of credit as specified in clause (10) of Regulation 9 is not provided by the Trading Licensee in favour of the seller, the Trading Licensee shall not charge trading margin exceeding two (2.0) paise/kWh.”*

69. The above two provisions are exceptions to the main provision as regards trading margin. Distribution licensees have agreed to a trading margin of Rs.0.07/kWh as agreed in the PSAs, which is in consonance with Regulation 8(1)(d) of the Trading Licence Regulations. However, in case of failure by SECI to provide

escrow arrangement or irrevocable, unconditional and revolving letter of credit to the solar generators, trading margin shall be limited to Rs.0.02/kWh specified in Regulation 8(1)(d) and Regulation 8(1)(f) of the Trading Licence Regulations.

70. Prayer (b) of the Petitioner is answered accordingly.

71. Additionally, the Petitioner has also prayed to recognize, in terms of Article 12.2 of the PPAs and Article 8.2 of the PSAs, that the changes in the rates of Safeguard Duty, GST and Basic Customs Duty after 22.6.2020, if any, will be considered as Change in Law subject to the fulfillment of the conditions contained therein. The Article 12.1.3 of the PPAs and Article 8.1.3 of the PSAs read as under:

*PPAs:*

*ARTICLE 12: CHANGE IN LAW*

.....  
*12.1.3 However, in case of change in rates of safeguard duty, GST and basic customs duty after 22.6.2020 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 WPD and Buying Entity.*

*PSAs:*

*ARTICLE 8: CHANGE IN LAW*

.....  
*8.1.3 However, in case of change in rates of safeguard duty, GST and basic customs duty after 22.6.2020 (last date of bid submission) 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 8.2.3, 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 WPD and Buying Entity.*

72. Perusal of the above Articles of the PPAs/PSAs reveals that the parties have agreed that in case of changes in rates of Safeguard Duty, GST and Basic Customs Duty after 22.6.2020 and resulting in Change in project cost, such change will be treated as 'Change in Law' and the quantum of compensation payment on account of change in rates of such duties shall be provided to the affected party as per Article 12.2.3 subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff and any decision in this regard shall be governing on SPD and buying entity.

73. The Respondent No.3, AEGPL has contended that after 22.6.2020, there have already been increases in the rate of Basic Custom Duty and GST, which have an effect of increase in project cost. The Respondent has placed on record (a) Ministry of Finance (Department of Revenue) Notification No. 2/2021 – Customs dated 1.2.2021, whereby rates of Basic Custom Duty on import of solar inverters has been increased to 20% from applicable rate of 5%, (b) Ministry of Finance Notification No.8/2021 – Central Tax dated 30.9.2021, whereby GST @ 12% (in place of applicable rate of 5%) on the solar PV modules and other renewable energy equipment have been notified w.e.f. 1.10.2021, and (c) Office Memorandum of MNRE dated 9.3.2021 regarding imposition of Basic Customs Duty on solar cells and modules at 25% and 40% respectively w.e.f. 1.4.2022. Accordingly, the Respondent has sought declaration that the aforesaid Notifications/ Office Memorandum, which led to the increase in the rates/ imposition of Basic Customs Duty and GST, constitute Change in Law events in terms of Article 12 of the PPA. The Respondent has also sought declaration that the order of the Hon'ble Supreme Court dated

19.4.2021 in the Writ Petition (Civil) No. 838 of 2019 in the matter of M. K. Ranjitsinh & Ors. v. Union of India and Ors. issuing directions/ measures to be adopted, *inter alia*, towards existing and future laying of over-head transmission lines in the priority and potential habitats of GIB constitutes a Change in Law event. In support of the above, the Respondent has relied upon the decision of APTEL dated 12.10.2021 in Appeal No. 251/2021 in Green Infra case.

74. However, with regard to prayer of the Petitioner to recognize the Change in Law provisions of the PPAs/ PSAs, we note that Ministry of Power, Government of India has notified the Change in Law Rules, which provide as under:

*“2(c) “change in law”, in relation to tariff, unless otherwise defined in the agreement, means any enactment or amendment or repeal of any law, made after the determination of tariff under section 62 or section 63 of the Act, leading to corresponding changes in the cost requiring change in tariff, and includes —*

- (i) -----*
- (ii) -----*
- (iii) -----*

*3. Adjustment in tariff on change in law— (1) On the occurrence of a change in law, the monthly tariff or charges shall be adjusted and be recovered in accordance with these rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred.*

*(2) For the purposes of sub-rule (1), the generating company or transmission licensee, being the affected party, which intends to adjust and recover the costs due to change in law, shall give a three weeks prior notice to the other party about the proposed impact in the tariff or charges, positive or negative, to be recovered from such other party.*

*(3) The affected party shall furnish to the other party, the computation of impact in tariff or charges to be adjusted and recovered, within thirty days of the occurrence of the change in law or on the expiry of three weeks from the date of the notice referred to in sub-rule (2), whichever is later, and the recovery of the proposed impact in tariff or charges shall start from the next billing cycle of the tariff.*

*(4) The impact of change in law to be adjusted and recovered may be computed as one time or monthly charges or per unit basis or a combination thereof and shall be recovered in the monthly bill as the part of tariff.*

*(5) The amount of the impact of change in law to be adjusted and recovered, shall be*

calculated -

(a) where the agreement lays down any formula, in accordance with such formula; or

(b) where the agreement does not lay down any formula, in accordance with the formula given in the Schedule to these rules;

(6) The recovery of the impacted amount, in case of the fixed amount shall be —

(a) in case of generation project, within a period of one-hundred eighty months; or

(b) in case of recurring impact, until the impact persists.

(7) The generating company or transmission licensee shall, within thirty days of the coming into effect of the recovery of impact of change in law, furnish all relevant documents along with the details of calculation to the Appropriate Commission for adjustment of the amount of the impact in the monthly tariff or charges.

(8) The Appropriate Commission shall verify the calculation and adjust the amount of the impact in the monthly tariff or charges within sixty days from the date of receipt of the relevant documents under sub-rule (7).

(9) After the adjustment of the amount of the impact in the monthly tariff or charges under sub-rule (8), the generating company or transmission licensee, as the case may be, shall adjust the monthly tariff or charges annually based on actual amount recovered, to ensure that the payment to the affected party is not more than the yearly annuity amount.”

75. The Change in Law Rules have been framed to facilitate timely recovery of costs due to Change in Law events and to provide a process and methodology to be followed. As per the provisions of the Change in Law Rules, on occurrence of a Change in Law, the affected party (generator) and other parties (procurers) are to settle the Change in Law claims among themselves and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

76. Prayer (c) of the Petitioner is answered accordingly.

77. Petition No. 211/AT/2021 is disposed of in terms of the above.

Sd/  
**(P.K. Singh)**  
Member

Sd/  
**(Arun Goyal)**  
Member

Sd/  
**(I.S.Jha)**  
Member