

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 245/AT/2022

**Coram:
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri P.K. Singh, Member**

Date of order: 8th March, 2023

In the matter of:

Petition under section 63 of the Electricity Act, 2003 for adoption of tariff for the Solar Power Projects (Tranche-IX) connected to the Inter-State Transmission System (ISTS) and selected through competitive bidding process as per the guidelines of Government of India.

**And
In the matter of:**

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

..... **Petitioner**

Vs

- 1) AMP Energy Green Private Limited
309, Rectangle One, Behind Sheraton Hotel,
Saket, New Delhi,
Delhi-110017
- 2) Eden Renewable Bercy Private Limited
Unit No 236 B & 236C, 1st Floor,
DLF South Court, Saket
New Delhi-110017
- 3) IB Vogt Singapore Pte Ltd
80 Robinson Road, #02-00
Singapore 068898
- 4) Ayana Renewable Power Private Limited
3rd Floor, Sheraton Grand Hotel,

Brigade Gateway, 26/1,
Dr. Rajkumar Road Malleswaram (West),
Bangalore, Karnataka- 560055

- 5) ReNew Solar Power Private Limited
ReNew Hub, Commercial Block-1,
Zone 6, Golf Course Road, DLF City
Phase V, Gurugram, Haryana- 122009
- 6) Solarpack Corporacion Tecnologica SA
Avenida de Algorta 16, 3
48992 Getxo-Vizcaya
Espana, Spain
- 7) AMP Energy Green Five Private Limited
[Project Company of AMP Energy Green Private Limited]
309, 3rd Floor, Rectangle One,
Behind Sheraton Hotel, Saket
Delhi-110017
- 8) IB Vogt Solar Seven Private Limited
[Project Company of IB Vogt Singapore Pte Ltd]
Unit No.225-229, 2nd Floor, JMD Empire
Golf Course Extension Road,
Sector-62, Gurugram
Haryana-122101
- 9) Ayana Renewable Power Three Private Limited
[Project Company of Ayana Renewable Power Private Limited]
S 2904, 29th Floor, World Trade Centre.
Brigade Gateway Campus, #26/1,
Dr. Rajkumar Road, Rajajinagar
Bangalore, Karnataka- 560055
- 10) Renew Surya Aayan Private Limited
[Project Company of ReNew Solar Power Private Limited]
138, Ansal Chambers-II, Bhikaji Cama Place,
Delhi-110066
- 11) Renew Surya Vihaan Private Limited
[Project Company of ReNew Solar Power Private Limited]
138, Ansal Chambers-II, Bhikaji Cama Place,
Delhi-110066
- 12) Kerala State Electricity Board
Vydyuthi Bhavanam, Pattom

Thiruvananthapuram
Kerala- 695004

- 13) Southern Power Distribution Company of Telangana Limited
Corporate Office, Mint Compound, Hyderabad,
Telangana – 500 063
- 14) Northern Power Distribution Company of Telangana Limited
Opp. NIT Petrol Pump, Chaitanyapuri, Kazipet,
Warangal, Telangana-506004
- 15) Uttarakhand Power Corporation Limited
Victoria Cross Vijeyta Gabar Singh Urja Bhawan,
Kanwali Road, Balliwala Chowk,
Delhradun, Uttarakhand- 248001
- 16) Jammu Kashmir Power Corporation Limited
SLDC Building, Gladni Grid Complex, Narwal,
Jammu-180006

... Respondents

The following were present:

- 1) Shri M. G. Ramachandran, Sr. Advocate, SECI
- 2) Ms. Tanya Sareen, Advocate, SECI
- 3) Shri Aneesh Bajaj, Advocate, SECI
- 4) Ms. Mannat Waraich, Advocate, IB Vogt & ReNew
- 5) Shri Mohmd. Siddique, Advocate, IB Vogt & ReNew
- 6) Shri Gopal Jain, Sr. Advocate, Ayana Renewable
- 7) Ms. Priya Dhankher, Advocate, Ayana Renewable
- 8) Shri Nikhil Bhatia, Advocate, Ayana Renewable
- 9) Shri Aniket Prasoon, Advocate, Ayana Renewable
- 10) Shri Amit Kapur, Advocate, AMP Energy
- 11) Ms. Jyotsna Khatri, AMP Energy
- 12) Shri Ankur Sharma, AMP Energy
- 13) Shri Abhilash Yadav, AMP Energy

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 the Solar Power Projects (Tranche IX) connected

to the 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 for the individual power projects on the terms and conditions contained in the Power Purchase Agreements as per Table-3 read with the Power Sale Agreements executed with the Buying Entities/Distribution Licensees as per Table-4 as may be amended as on the date of reserving the decision in the present Petition after hearing the parties;

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

(c) Recognize, in terms of Article 12.1.3 of the PPAs and Article 8.1.3 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 fulfilment of the conditions contained therein; and

(d) Pass any other or further order which this Commission may deem fit and proper in the facts and circumstances of this case.”

Submissions of the Petitioner

2. The Petitioner, SECI has submitted that in the capacity of intermediary agency, 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 Awards. It is submitted that SECI had earlier filed a Petition bearing No. 211/AT/2021 under Section 63 of the Act before the Commission for adoption of above 2000 MW Solar Power Projects. In the said matter, the Commission vide order dated 8.3.2022 held that the selection of bidders and the tariff has been discovered through a transparent process of competitive bidding in the present scheme (i.e. Tranche IX) in accordance with the Guidelines. However, the Commission restricted the adoption of tariff only with respect to the quantum of 300 MW for which PPA was signed with the Solar Power Developers for supply of identified distribution licensees under the PSA and the Commission further granted liberty to SECI to approach the Commission for adoption of tariff in respect of balance capacity (1700 MW) after such capacity is tied up under the PPAs and PSAs.

3. SECI has submitted that subsequent to the order dated 8.3.2021 in Petition No. 211/AT/2021, as on date, SECI has signed the PPAs for the tune of 1400 MW (out of balance 1700 MW) capacity with the successful bidders/their project companies following the PSAs signed between the SECI and the Buying Utilities/Distribution licensees. It is submitted that with respect of balance 300 MW capacity awarded to one M/s Solarpack Corporacion Tecnologica SA, so far SECI has been able to identify and sign the PSA with Jammu & Kashmir Power Corporation Ltd. for 100 MW but the balance capacity for 200 MW has not been tied up with any Buying Utility/Distribution licensee and since the aforesaid bidder has not signed the PPA for the part-capacity corresponding to the PSA signed, SECI is in process of the identifying the Buying Utilities/Distribution licensees for balance 200 MW capacity. In view of the above, SECI has prayed for adoption of tariff for 1400 MW capacity while

craving leave of the Commission to place on record the remaining capacity for adoption of tariff upon finalisation of the PSAs and PPA.

Hearing dated 20.10.2022

4. The matter was heard on 20.10.2022 and notice was issued permitting the Respondents and the Petitioner to file their reply and rejoinder respectively. The Petitioner, vide Record of Proceedings for the hearing dated 20.10.2022, was directed to file a brief note explaining the methodology adopted and/or to be adopted in future cases to deal with/address the aspect of substantial delays in signing of PSAs & PPAs after issuance of Letter of Awards.

5. In response, SECI vide its affidavit dated 28.11.2022 has submitted as under:

(a) There is various process being followed before signing PSAs and PPAs which includes issuance of Request for Selection (RfS) document for selection of power developers for setting up the solar/wind/hybrid/RTC power projects, issuance of Letter of Award to the selected Bidders in pursuance of the Competitive Bidding Process, subsequent to the above, power is offered to prospective Buying Entities at the price discovered in the e-reverse auction with applicable trading margin. Based on the consent received from Buying Entities, the PSAs are signed with them. After signing of PSAs, the PPAs are signed with selected Power Developers. The endeavour of SECI is always to finalize the PSAs for entire capacity for which the letters of awards have been issued to selected bidders and thereafter sign the PPAs with the selected bidders and file the Petition before the Commission for adoption of tariff. The above process, may delay the execution of the PPAs and filing of Petition before the Commission.

(b) In the past, SECI was able to sign PSAs with Buying Entities for substantial capacity including for wind and hybrid tenders. Only in the recent concluded tenders for wind and hybrid schemes i.e. ISTS Hybrid Tranche V and ISTS Wind

Tranche XII scheme (wherein the Letter of Awards were issued in July 2022), the PSA for the awarded capacity is under various stage of discussion with procurer/distribution licensees. In many cases, the distribution licensees are insisting on the prior approval of the State Commission based on the offer from SECI and draft PSA before formally entering into binding and enforceable PSA. This has resulted in SECI's inability to enter into PPAs with developer to whom letters of award has been issued. Similarly, though, SECI was able to sign the PSAs for substantial quantum in case of solar tenders, but still the PSAs for 5600 MW solar capacity is yet to be signed under various schemes due to lukewarm response received from Buying Entities. This balance capacity has been offered to various Buying Entities and significant quantum is under discussion with various Buying Entities.

(c) With reference to ISTS Solar Tranche IX Scheme (relevant for the present case), SECI has signed PSAs for 1800 MW capacity and PPAs for 1700 MW capacity (out of 2000 MW aggregate capacity under the scheme) till date. Out of remaining 200 MW, PSA capacity to be signed under the scheme, the capacity of 100 MW has been tied up with NDMC, New Delhi and remaining 100 MW is offered to other Buying Entities. SECI will proceed to finalize the remaining PPA capacity under the scheme after finalization of above PSA capacity.

6. Pursuant to the notice, replies to the Petition have been filed by Respondents. The Respondent No. 1, AMP Energy Green Private Limited and Respondent No. 7, AMP Energy Green Five Pvt. Ltd. (collectively, "AMP Energy") have filed their common reply to Petition. Moreover, Respondent No.10, ReNew Surya Aayan Pvt. Ltd., Respondent No.11, ReNew Surya Vihaan Pvt. Ltd. and Respondent No.8, IB Vogt Solar Seven Pvt. Ltd. have also filed similar replies to the Petition which have been dealt with in succeeding paragraphs. Respondent No.4, Ayana Renewable Power Private Limited and Respondent No. 9, Ayana Renewable Power Three Pvt.

Ltd. (Project Company of Respondent No.4) have also filed a common reply to the Petition. Subsequently, SECI has also filed its rejoinders to the above replies.

Reply & Rejoinders of parties:

7. The Respondents 1, AMP Energy Green Private Limited and Respondent No. 7, AMP Energy Green Five Pvt. Ltd. (“AMP Energy”) vide their reply dated 22.11.2022 have mainly submitted as under:

(a) While AMP Energy is not challenging the adoption of tariff being sought by SECI, the present reply is being filed to the limited extent of bring to the notice of the Commission (i) events that have/will result in increase in the cost of 100 MW solar power project being developed by AMP Energy in the State of Rajasthan and qualify as Change in Law under Article 12 of the PPA dated 12.4.2022, and (ii) the methodology of compensation for claiming relief towards such Change in Law events under Article 12.2.3 of the PPA.

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

- i) On 1.2.2021, Ministry of Finance (Department of Revenue) issued Notification being No. 3/2021- Customs and Notification No. 7 of 2021- Customs dated 1.2.2021 pursuant to which the exemptions granted by MoF to the extent of 5% (ad valorem) by its earlier notification was reversed and the Basic Custom Duty (BCD) on import of solar inverters was increased 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. The Basic Customs Duty on solar modules with HSN Code 85414012 and solar cells (85414011) is 40% and 25% respectively.
- iii) On 19.4.2021, the Hon'ble Supreme Court passed an 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) On 30.9.2021, the Ministry of Finance has notified 12% rate of Goods & Services Tax (GST) on solar photo-voltaic (PV) module and other renewal energy equipment with effect from 1.10.2021

(c) Tariff rate of Rs. 2.37/kWh was quoted by AMP Energy considering the events and circumstances prevalent at the time of submission of the bid. The aforesaid events have occurred subsequent to 7.12.2020 and AMP Energy 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 qualify as Change in Law events.

(d) With regard the issuance of BCD Notification dated 9.3.2021, AMP Energy vide its letters dated 9.9.2021, 29.10.2021, 31.12.2021 and 31.3.2022 ('BCD Waiver letters') provided waiver to SECI in relation to claiming the compensation for the impact on the Project cost in pursuance to aforesaid BCD Notification subject to the PPA being executed within a prescribed timeline. As per the last communication, the said timeline for execution of the PPA was extended to 30.6.2022.

(e) MNRE has also acknowledged the financial burden that may be caused on the renewable energy developers on account of imposition of BCD and GST and therefore, on 27.9.2022, MNRE requested the Renewable Energy Implementing Agencies (SECI/NTPC/ NHPC) to consider hike in BCD and GST rates as Change in Law.

(f) The aforesaid undertaking was given by AMP Energy vide BCD Waiver letters considering that AMP Energy will avail the benefit of concessional rate of 5% of Custom Duty as permitted under Project Imports Regulations, 1986. Under Project Imports, goods imported for the purpose of setting up of power projects is subjected to single rate of duty instead of merit assessment of imported goods. Accordingly, as per the provisions of Custom Notification No.

50/2017 Cus. dated 30.6.2017 as amended from time to time, as per Custom Tariff Heading No. 9801, goods required for setting up of any solar power project are eligible for concessional rate of 5%.

(g) While AMP Energy was in the process of applying for the concessional rate benefit for its solar power project, Ministry of Finance, Department of Revenue issued Project Imports (Amendment) Regulations, 2022 dated 19.10.2022 amending the principal regulations whereby solar power plants/solar power projects were excluded from availing concessional custom duty rate. Therefore, AMP Energy is now constrained to bear BCD at the rate of 40% of solar modules and 25% of solar cells. Such steep increase in capex has changed the financial dynamics of the project which will have cascading effect on the servicing of debt leading to increase in cost and making the project financial unviable.

(h) It cannot be denied that the AMP Energy has furnished undertaking for waiver of BCD under Article 12.2.6 of the PPA, however, it is imperative to interpret the contractual provisions in a manner to give effect to the intent of the parties and not to frustrate it which is known as the purposive interpretation. The purpose of PPA is to develop project and supply electricity at a fixed tariff rate, a factor of capital cost. Since, the process of bidding is based on the known capital cost, while submitting the bid, developer takes risk to manage and mitigate capital cost as it is under control of the developer. However, if the capital cost increases for the reasons beyond the control of the developer such as an increase in the imposition of tax, then the developer cannot be held accountable to bear the risk as the same was not foreseeable at the time of computing the capital cost. It is only proper and justifiable that AMP Energy cannot be subjected to risks unknown/untaken and hence it is essential that while interpreting the PPA, a common sense and business efficacy test is applied.

(i) Despite imposing the pre-condition of submission of BCD Waiver letters for execution of PPA, SECI in the present Petition has itself prayed before this

Commission for recognition/approval that the change in rates of Safeguard Duty, GST and BCD after 22.6.2020, be considered as Change in Law events in terms of Article 12.1.3 of the PPA. In light of the same, imposition of BCD vide BCD Notification dated 9.3.2021 is an event of Change in Law under Article 12 of the PPA and it will result in additional expenditure which are beyond the control of the developer. Accordingly, AMP Energy is entitled to recover such additional expenditure in terms of the methodology provided under Article 12.2.3 of the PPA at the appropriate stage of execution of the Project.

(j) AMP Energy has established a 100 MW solar power project by deploying significant capital via debt and equity. Considering the significant amount invested by AMP Energy while developing the Project, in case the compensation to the Petitioner is denied on account of the aforementioned Change in Law event, it will have a cascading effect on the servicing of debt which can potentially lead to increase in the cost, making the project financially unviable. The principle of 'business efficacy' and 'officious bystander test' has been discussed in detail by the Hon'ble Supreme Court in Nabha Power Ltd. Vs. Punjab State Power Corporation Ltd. and Ors. [(2018)11SCC 508]. Business efficacy means that the courts are required to make the contract efficacious and practicable and Officious bystander test is applied by the courts to determine whether a term should be implied into a contract for it being so obvious, even though that term was not written into the contract expressly.

(k) The purpose of PPA is to develop project and supply electricity to the procurer at the tariff agreed upon in the PPA read with the terms and conditions of PPA. However, if the cost of generation of electricity increases for the reasons beyond the control of the developer such as an imposition of BCD, then the developer cannot be held accountable to bear the risk as the same was not foreseeable at the time of bid submission. It is in this regard only proper and justifiable to submit that AMP Energy cannot be subjected to risks unknown/untaken and hence it is only essential that while interpreting APP, a common sense and business efficacy test is applied. This broad principle is

captured in the judgment of the Hon'ble Supreme Court passed in Union of India v. D N Revri & Co. and Ors., [(1976) 4 SCC 147] which explains two concepts of the interpretation of contract i.e., business efficacy and adoption of common-sense approach. The Hon'ble Supreme Court observed that while interpreting the provisions of contract, it is important to apply law and economics as the same are intertwined and are integral part to apply in case of any contractual arrangement.

(l) Thus, AMP Energy cannot be made to absorb risk which is beyond its control. This is the basic economic principle of project development. Accordingly, the event of imposition of BCD vide Notification dated 9.3.2021 qualifies as an event of Change in Law in terms of PPA and applicable laws.

(m) Hon'ble Supreme Court vide its order dated 19.4.2021 in I.A. No. 85618 of 2020 in Writ Petition (Civil) No. 838 of 2019 ("GIB Order"), has issued certain 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"). As per the said Order, the overhead transmission lines in the GIB area(s), shall be converted into underground powerlines. By virtue of the Order, the Hon'ble Supreme Court *inter alia* has held that in cases where the power generators are required to bear the additional amount adding to the cost of production, it would be open to regulate the manner in which the cost would be mitigated in accordance with contractual terms.

(n) MNRE vide its Office Memorandum dated 3.2.2022, acknowledged that the issuance of the GIB Order has caused uncertainty among renewable energy developers with regard to the action they are required to take for complying with the GIB Order. Accordingly, MNRE directed that for all the renewable energy projects under implementation for which the transmission infrastructure lies wholly or partly in the priority or potential area of GIB, the scheduled date of commissioning will be extended to a date which is 30 days

after the date of judgment passed by the Hon'ble Supreme Court in the IA filed by MNRE.

(o) The Project is being developed in the State of Rajasthan which forms a part of the potential habitats of GIB as demarcated and specified in the GIB Order. AMP Energy placed the bid considering the feasibility of installing overhead transmission lines and accordingly determined the capital expenditure of the Project. However, with the Hon'ble Supreme Court's directions dated 19.4.2021, AMP Energy would be compelled to lay underground transmission cables which is commercially unviable at the present tariff as supply and service cost of underground cables 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 instant project. Any deviation in the Project infrastructure, approach, method arising out of extraneous circumstances being beyond the reasonable control and not being attributable to AMP Energy qualifies within the definition of Change in Law provisions as provided under Article 12 of the PPA.

(p) Appellate Tribunal for Electricity ("APTEL") vide its judgment dated 12.10.2021 passed in Appeal No. 251 of 2021 [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. Notably, the APTEL acknowledged the imposition of Basic Custom Duty Notification dated 1.2.2021, 9.3.2021 and Hon'ble Supreme Court order dated 19.4.2021 as Change in Law events for the said events had occurred post the date of bid submission in the Green Infra Case.

(q) AMP Energy in the instant project has been similarly placed as that of Green Infra in the aforesaid case as Custom Notifications, BCD Notification dated 9.3.2021, GIB Order and GST Notification have been issued post 22.6.2020 and in terms of the Change in Law clause of the PPA, the said

events clearly qualify as Change in Law events. Since such steep increase in capex on account of the occurrence of said events can change the financial dynamics of the Project, it is pertinent to take into account the impact on the cost of the development of the Project of such Change in Law events so that suitable adjustment in tariff can be made at the stage of tariff adoption. Moreover, Article 12.1.3 of the PPA itself allows the parties to seek declaration of Change in Law events and quantum of compensation payment on account of change in rates and duties at the time of adoption of tariff by this Commission.

(r) 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 tariff adoption petition. Accordingly, AMP Energy seeks the Commission's indulgence to recognize the aforesaid methodology of claiming Change in Law compensation and record Article 12.2 of the PPA in the order to be passed in the present Petition and affirm that the compensation for Change in Law is to be paid as per the mechanism stipulated in Article 12.2 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.

8. SECI, vide its rejoinder to the reply filed by AMP Energy, has mainly submitted as under:

(a) The PPA provides in Article 12.1.3, three identified categories of law to be recognised by the Commission at the time of adoption of tariff, namely, any changes in rate of safeguard duty, GST and BCD after 22.6.2020. Thus, the events (i) (Custom Notification) & (iv) (GST Notification) being change in the rates of BCD and GST respectively have been provided in Article 12.1.3 of the PPA for recognition by the Commission at the time of adoption of tariff as Change in Law event and the Commission may pass appropriate orders as prayed by SECI in the Petition with regard to change in rates in BCD and GST

Notification after 22.6.2020 holding that the same fall within the scope of Article 12 of the PPA. The actual impact to be allowed need to be considered at the appropriate stage.

(b) With regard to AMP Energy under (iii) (GIB Order), the same is law laid down by the Hon'ble Supreme Court but the developer is required to establish the actual impact of Change in Law on account of the above to the satisfaction of the Commission. MNRE vide its OM dated 3.2.2022 has dealt with the decision dated 19.4.2021 of the Hon'ble Supreme Court

(c) Accordingly, the Change in Law aspect of decision dated 19.4.2021 of the Hon'ble Supreme Court on the project to be established by the AMP Energy is to be considered as per the terms of the OM dated 3.2.2022 of MNRE and the outcome of decision of the Hon'ble Supreme Court on the IA as specified in the said OM by this Commission. The actual impact to be allowed need to be considered at the appropriate stage.

(d) As to the event of imposition of BCD imposed on solar PV cells and modules mentioned in (ii) above, the PPA executed between SECI and AMP is dated 12.4.2022 which was after 31.3.2022 when the BCD had become 40% on Solar Modules and 25% on Solar Cells. Article 12.2.6 of the PPA specifically provides that "If there is any further revision/modification to the said BCD notification or any new notification on the BCD matter, resulting in any further increase of BCD, developers shall remain entitled to exercise rights for any claim under Change in Law of the PPAs, viz, such revision/modification (any incremental impact over prescribed rates of BCD as above) or any new notification. Further, No Change in Law on account of BCD will be claimed by either party, as per the MNRE OM dated 9.3.2021."

(e) In terms of the above, AMP Energy with due reference to the increased BCD from 0% to 40% with respect to solar modules and from 0% to 25% with respect to solar cells and without any reservation or qualification, unconditionally and in the absolute manner committed that AMP duly waive the

claim for Custom Duty at the said rates of 40% and 25%. This waiver was with reference to OM dated 9.3.2021 of MNRE which clearly stipulated that if import of modules and cells is done beyond 31.3.2022, the BCD will not be 0% but 25% for solar cells and 40% for solar modules. AMP signed the PPA on 12.4.2022 after the above date of 31.3.2022 and when the applicable BCD had already become 40% and 25% and even then, had proceeded to accept that no Change in Law on account of BCD will be claimed as per MNRE OM dated 9.3.2021 (which provided for the rate of BCD vis-à-vis solar modules at 40% and for solar cells @ 25%). At the relevant time, AMP did not claim that the same will be subject to it availing the concession under the Project Import Regulations, 1986 or in any other manner.

(f) As per Article 12.2.6 of the PPA, the waiver on Change in Law claim of Basic Custom Duty as per Office Memorandum dated 9.3.2021 of MNRE on import of solar modules and cells by AMP was therefore not conditional upon the benefit of concessional rate of 5% of Custom Duty as per Project Import Regulations 1986 being available and in case the same is not available notwithstanding the waiver AMP will claim any Change in Law events. The waiver is specific and unequivocal, namely that AMP will not claim the benefit of Change in Law events qua BCD till 40% for solar modules and till 25% for solar cells. AMP is bound by the waiver subject to which the PPA was signed. The claim for BCD by AMP can be only for '*any further increase of BCD,any incremental impact over prescribed rates of BCD as above*'. Any increase in BCD upto 40% or 25% by reason of any other notification will not affect the waiver.

(g) Notification of Project Import (Amendment) Regulations, 2022 dated 19.10.2022 issued by Ministry of Finance as referred to by AMP in its reply has not affected in any manner the rate of BCD as per MNRE Office Memorandum dated 9.3.2021, namely the BCD vis-à-vis the solar modules continues to be 40% and Basic Custom Duty vis-à-vis the solar cells continues to be 25%. As there is no change in rate of the Basic Custom Duty vis-à-vis the solar modules

(40%) and solar cells (25%) on account of the above notification dated 19.10.2022 in comparison to what AMP has already considered and given a waiver for in the PPA as quoted above, there is no impact of the same on AMP and therefore, AMP cannot claim any relief on account of the same. Both AMP and SECI have agreed to the stipulation that 'No Change in Law on account of BCD will be claimed by either party, as per the MNRE OM dated 9.3.2021' as incorporated in Article 12.2.6 of the PPA and the same is binding on parties.

(h) AMP after having given unconditional waiver on Change in Law claim of BCD as per OM dated 9.3.2021 of MNRE in the PPA executed between SECI and AMP (and based on the same, similar provision providing for the above waiver having been incorporated in the PSA signed with Telangana Discoms), is not entitled to raise the claim for Change in Law compensation on account of change in rate of Basic Custom Duty as per the OM dated 9.3.2021 of MNRE. AMP cannot today say that there is a change in rate from 5% to 40% or 25% on account of the notification dated 19.10.2022 and therefore is liable for relief.

(i) Reliance placed by AMP on letter dated 27.9.2022 of MNRE to claim that MNRE has requested to Renewable Implementing Agencies (including SECI) to consider the increase in BCD rate as Change in Law event is erroneous as the same is based on incomplete reading of the letter of MNRE. In the said letter, MNRE has subjected 'REIAs may consider imposition of BCD on import of solar PV cells and modules with effect from April 1, 2022 under Change in Law' with the qualification 'unless the same is disallowed by specific provisions in the tender documents/ contracts.' Article 12.2.6 of the PPA signed between AMP and SECI specifically provides for the waiver given by AMP on any Change in Law claim of Basic Custom Duty as per the Office Memorandum dated 9.3.2021 of MNRE.

(j) Claim of AMP that despite of specific provision in the PPA providing for waiver given by AMP on Change in Law claim of Basic Custom Duty as per OM dated 9.3.2021 of MNRE, AMP should be compensated for the said Change in Law event as per the principle of "business efficacy" is without any

merit. In this regard, reliance has been made by AMP on the judgment dated 5.10.2017 of the Hon'ble Supreme Court in Civil Appeal No. 179 of 2017 in the case of Nabha Power Limited -v- Punjab State Power Corporation Limited and Anr. The above decision is not applicable in view of the facts and circumstances of the present case.

(k) Similarly, reliance placed by AMP on decision in Union of India v DN Revri & Co., [1976 4 SCC 147] is misplaced as the same is distinguishable on facts of the case. The interpretation of a clause in the contract was in dispute and an efficacious interpretation was given to the clause to make it workable, however the entire clause was not rendered meaningless and the unequivocal terms were not re-written. Business efficacy principle cannot render the term of the contract ineffective. Further, in the present case, the waiver in Article 12.2.6 is clear and unambiguous.

(l) Article 12.2.3 of the PPA provides for a formula for determination of the relief with reference to every net increase/decrease of Rs.1 lakh per MW in the project cost (i.e. the cost incurred by the Project Developer towards supply and services of the project concerned, upto the Scheduled Commissioning Date or Extended Scheduled Commissioning Date as the case maybe as a result of Change in Law events set out in Article 12.1.3 of the PPA. For the application of the formula provided in Article 12.2.3 of the PPA for relief of Change in Law, the amount constituting the project cost cannot be considered on estimated basis. The project cost will be available only upon the capital expenditure being incurred.

(m) In regard to Change in Law events other than those identified and covered in Article 12.1.3 of the PPAs, namely, the implication of the Order dated 19.4.2021 passed by the Hon'ble Supreme Court relating to Great Indian Bustard, the same has to be considered as per Articles 12.1.1, 12.1.2, 12.2.1, 12.2.2, 12.2.3, 12.3 of the PPA. Therefore, Article 12.2.3 of the PPAs [providing formula for determination of relief for Change in Law] applies to all

Change in Law events i.e. those events covered under Article 12.1.3 as well as events covered under Article 12.1.1 of the PPA.

9. The Respondent No.8, IB Vogt Solar Seven Pvt. Ltd., Respondent No.10, ReNew Surya Aayan Pvt. Ltd. and Respondent No.11, ReNew Surya Vihaan Pvt. Ltd. vide their reply dated 4.12.2022 have mainly submitted as under:

(a) The Respondents are not disputing/challenging the tariff adoption Petition filed by SECI. However, at this stage of tariff adoption, there are certain provisions in the PPA which essentially require the specific approvals/recognition of this Commission and henceforth the Respondents seeks to plead the same before this Commission and the indulgence of the Commission to approve and recognize the specific provisions as mandated by the terms of the PPA, as also the aspect of Change in Law.

(b) Ministry of Finance ("MoF") vide its Notification Nos 8/2021 – Integrated Tax (Rate) dated 30.9.2021 and Notification No. 8/2021 – Central Tax (Rate) ("2021 GST Notifications") has increased the rate of GST applicable on the Renewable Energy Devices from 5 % (at the time of bid submission) to 12%. The issuance of the 2021 GST Notifications, which result in an increase in the rate of GST, has already been declared as a Change in Law event under Article 12.1.3 of the PPA. PPAs executed between the Petitioner and the Respondents specifically treat change in rates of safeguard duty, GST and basic customs duty after 22.6.2020 as 'Change in Law' and provides for a relief of Rs. 0.005/ kWh for every increase/ decrease of Rs. 1,00,000/- per MW in the project cost.

(c) The Central Commission has the power to grant in-principle approval for an event as Change in Law under the PPA at the first available instance. In the present case, the GST on renewable energy devices and parts has increased from 5% (at the time of bid submission) to 12% vide Ministry of Finance ("MoF") Notification No. 8 of 2021 dated 30.9.2021. The present PPA is a case

wherein, upon a bare reading of Article 12.1.3, it is unambiguously clear that the changes in the rates of the GST after 22.6.2020 are to be considered as a Change in Law event. The compensation to the affected party is payable as per the computation stated in Article 12.2.3. However, the pre-requisite for enforcement of such provision is that the Appropriate Commission i.e., this Commission recognized Article 12.1.3 and Article 12.2.3 at the stage of tariff adoption itself.

(d) The Commission has the powers to recognise the provisions dealing with the Change in Law events at the stage of tariff adoption itself. In this regard, the reliance has been placed on judgement dated 12.10.2021 passed by Hon'ble Appellate Tribunal for Electricity ("APTEL") passed in Appeal No. 251 of 2021 titled Green Infra Renewable Energy Limited v. Rajasthan Electricity Regulatory Commission and Ors. ("Green Infra case").

(e) In a similar case, Rajasthan Electricity Regulatory Commission, in its orders dated 31.8.2022 in Petition No. 1905 of 2021 and 27.9.2022 in Petition No. 2023 of 2022 has duly recognised the provisions of the PPA dealing with Change in Law events (and consequently increase in GST by 2021 GST Notification as Change in Law event) at the stage of adoption of tariff and the quantum of compensation payable on account of the above Change in Law event shall be provided to the affected party by the other party at the appropriate stage in terms of the formula provided in Article 12.2.2 of the respective PPAs. The provisions of the PPA as were considered by the Rajasthan Commission are *pari materia* to the provisions of the present PPA. As the increase in rate of GST for renewable energy devices and its parts falls under the four corners of the Change in Law provision which has already been declared as a Change in Law event under Article 12.1.3, this Commission is bound to approve and recognize Article 12.1.3 and Article 12.2.3 at the stage of tariff adoption itself.

(f) The PPAs executed between SECI and the Respondents appear to be in contravention of the principles laid down under the Bidding Guidelines dated

3.8.2017. The PPAs contain a restrictive Change in Law clause where the ultimate impact may not lead to restitution to the same economic position whereas the Bidding Guidelines explicitly indicate that Change in Law clause under the PPA must lead to restitution of the developer to the same economic position.

(g) Change in Law clause prescribed under the Bidding Guidelines unequivocally states that it shall include any of the events that occur after the last date of submission of bid. Whereas, the Change in Law clause under the PPA, does not restore the Respondents to the same economic position as it would have been, had the Change in Law event not occurred. Also, introduction of cut-off date in order to restrict the compensation on account of Change in Law as also restriction of claims in cases of extension where LD is payable amounts to deviation from the Bidding Guidelines. Therefore, the same tantamount to being illegal and in the teeth of the Bidding Guidelines.

(h) Clause 2.1.2 of the Bidding Guidelines specifically states that in case of any deviation from the Bidding Guidelines, the procedure as stated in clause 18 shall be applicable. Clause 18 expressly states that in case of any deviation, the same shall be subject to the approval of the Appropriate Commission (this Commission in the present case). However, in the case at hand, no approval for deviation has been sought by the Petitioner and the Petitioner has instead proceeded to introduce a cut-of date for the Change in Law claim as also restricted the claims in cases where LDs are payable, which is in direct conflict with the Bidding Guidelines.

(i) The Bidding Guidelines are legally binding on the Petitioner and the Respondents. Clause 2.1.2 of the Bidding Guidelines explicitly states “Unless explicitly specified in these Guidelines, the provisions of these Guidelines shall be binding on the Procurer/ Intermediary Procurer/ End Procurer and the Authorised Representative of the Procurer.” However, the Petitioner has proceeded to issue the tender in conflict with the Bidding Guidelines and as such this Commission cannot allow such illegality in the bid process and the

Respondents are entitled to be restored to the same financial position on account of occurrence of Change in Law Event. The Bidding Guidelines are issued by the Ministry of Power under Section 63 of the Act and have the force of 'law'. Thus, any deviation from the Bidding Guidelines without the approval of this Commission is unlawful and the provisions of the PPA to the extent being in deviation from the Bidding Guidelines are illegal.

(j) The entire purpose of having a Change in Law provision stands frustrated once the Change in Law provision fails to reconstitute the developer to the same economic position as it would have been, had the Change in Law event not occurred. In this regard, reliance has also been placed on the judgement dated 15.9.2022 passed by APTEL in Appeal No. 256 of 2019 titled "Parampujya Solar Energy Pvt. Ltd. & Ors. versus Central Electricity Regulatory Commission & Ors." dealing with the ambit and scope of the Change in Law provision.

(k) It is settled and no longer *res integra* that the Change in Law provision in the PPA is based upon the principle of restitution, a principle of equity which is generally invoked by the adjudicatory authorities – Courts and Tribunals – to render substantial justice. This Commission may consider the restrictive nature of the Change in Law provision under the PPA and hold the cut-off date as untenable and that Respondents are entitled to be reconstituted to the same financial position upon the occurrence of the Change in Law event.

(l) Article 12.1.3 of the PPA unequivocally states that the quantum of compensation payment on account of Change in Law shall be in accordance with Article 12.2.3 of the PPA, subject to the condition that this Commission recognizes such provisions at the time of adoption of tariff. The quantum of compensation as payable to the SPD shall be as per the mechanism stipulated under 12.2.3 of the PPA. However, for such compensation to be payable to the Respondents, the only precondition as stipulated under the PPA is that the provision i.e., Article 12.1.3 and Article 12.2.3 are recognized by this Commission at the time of adoption of tariff. Accordingly, the Commission may

recognize the said Articles 12.1.3 & 12.2.3 at the stage of adoption of tariff itself and thereby, providing regulatory certainty to the power developers that the increase in rate of GST will be treated as a Change in Law.

(m) In terms of Article 2.1, the effective date of the PPA shall be 11.4.2022. Furthermore, the Petitioner or the Respondent Discoms were duty bound to obtain adoption of tariff from the Appropriate Commission within 120 days from the effective date. In terms of Article 2.1.3, the Petitioner was obligated to have the tariff adopted by this Commission by 9.8.2022. Since, the tariff adoption proceedings have been delayed for a considerable period, the Petitioner is entitled to consequential relief on account of delay in tariff adoption in terms of Article 2.1.3 and 2.1.4 of the PPA. This Commission may consider the delay in tariff adoption, and hold that the Respondents are entitled to corresponding extension of timeline to achieve financial closure and scheduled commissioning date equivalent to the delay from 26.8.2022 till the date of order.

(n) It is imperative from the forgoing that the principle of regulatory certainty is a statutorily recognized concept and has been reiterated by the APTEL from time to time. In view of the same, the Respondents urge that the Commission may recognize Article 12.1.3 and Article 12.2.3 of the PPA in order to ensure regulatory certainty for the Power Developers and other stakeholders.

10. SECI vide its rejoinders to the above replies has mainly submitted as under:

(a) The event claimed by the Respondents being change in rates of GST (on renewable energy equipment as specified in the Notification) has been provided in Article 12.1.3 of the PPA to be recognized by the Commission at the time of adoption of tariff as Change in Law events. The Commission may accordingly pass an appropriate order as prayed for by SECI in the Petition including with regard to the change in rates of GST after 22.6.2020 holding that the same fall within the scope of Article 12 of the PPA dealing with Change in Law. However, the actual impact and extent of relief admissible to be

determined to be allowed need to be considered at the appropriate stage. This is consistent with the judgment of APTEL in Green Infra Case.

(b) Article 12.2.3 of the PPA provides for a formula for determination of the relief with reference to every net increase/decrease of Rs.1 lakh per MW in the project cost {i.e. the cost incurred by the Project Developer towards supply and services of the project concerned, upto the Scheduled Commissioning Date or Extended Scheduled 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 maybe} as a result of Change in Law events i.e. those events covered under Article 12.1.3 as well as events covered under Article 12.1.1 of the PPA.

(c) For the application of the formula provided in Article 12.2.3 of the PPA for relief of Change in Law, the amount constituting the project cost cannot be considered on an estimate basis. The project cost will be available only upon the capital expenditure being incurred and such capital cost has been subjected to appropriate prudent check by this Commission based on all relevant factors as is considered in prudent check for tariff determination.

(d) As to the contention that Article 12 of the PPA dealing with Change in Law does not contain restitution provision i.e. restoring the developer to the same economic position as it would have been had the Change in Law event not occurred whereas Guidelines provide for restitution, the Commission vide Order dated 8.3.2022 in Petition No.211/AT/2021 filed by SECI for adoption of tariff under Section 63 of the Act in respect of present scheme (ISTS Tranche-IX Solar Scheme) had considered the aspect of restitution.

(e) Further, pursuant to the Commission's order dated 8.3.2022, SECI vide its letter to the Procurer has, *inter-alia*, communicated that "In terms of the Guidelines, Rule 3 (1) of the Change in Law Rules, 2021 as well as in terms of order dated 8.3.2022 in Petition No.211/AT/2021 in regard to Change in Law impact, the restitution provision in regard to carrying cost as provided in the

Guidelines and/or in Rules shall be applicable to all the PPAs and PSAs executed under the ISTS Tranche-IX Solar Scheme.”

(f) In view of the above, SECI has clarified the position that in terms of the Guidelines, Rule 3 (1) of the Change in Law Rules, 2021 as well as in terms of order dated 8.3.2022 of the Commission in Petition No.211/AT/2021, in regard to Change in Law impact, the restitution provision in regard to carrying cost as provided in the Guidelines and/or in Rules shall be applicable to all the PPAs and PSAs executed under the ISTS Tranche-IX Solar Scheme (present scheme).

(g) As to the cut-off date to restrict the compensation on account of the Change in Law, the said aspect has also been considered by the Commission in its order dated 8.3.2022 in Petition No. 211/AT/2021. In the 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 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) Article 12 of the PPA signed between Respondents and SECI expressly provide that impact of Change in Law on the project cost is to be considered only for the cost incurred by the SPD towards supply of goods and services for 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.

(i) Article 2.1.3 of the PPA provides for adoption of tariff by the Commission within 120 days of the effective date. Article 2.1.4 of the PPA provides that if the tariff adoption order is issued by the Commission after the period specified in Article 2.1.3, there shall be a corresponding extension in

Scheduled Financial Closure and Scheduled Commissioning Date for equal number of days for which the Commission's order has been delayed beyond the period specified in Article 2.1.3.

11. The Respondent No. 4, Ayana Renewable Power Private Limited and Respondent No. 9, Ayana Renewable Power Three Private Limited vide their written submission dated 2.1.2023 have submitted as under:

(a) Change in Law claim qua increase in GST: Govt. of India had issued Notification No. 1/2017-Integrated Tax (Rate) dated 28.6.2017 ("2017 IGST Notification") of Section 5 of the Integrated Goods and Service Tax Act, 2017 ("IGST Act") whereby the Central Govt., notifies the rate of the integrated tax of 5% in respect of goods specified in schedule I. Hence the said notice stipulated that 5% IGST would be applicable on import of solar power-based devices, including solar PV modules. The Respondents have factored the same while submitting its bid. However, Department of Revenue, Ministry of Finance, Government of India issued the notification No. 08/2021-Integrated Tax (Rate) dated 30.9.2021 ("2021 IGST Notification") w.e.f. 1.10.2021, whereby the Central Government amended the 2017 IGST Notification and enhances the applicable rate of IGST on import of solar based power devices including solar PV modules from 5% to 12%.

(b) Meaning thereby, after the issuance of the 2021 IGST Notification, the Respondents are required to incur additional expenditure in the form of an increase of 7% in IGST (i.e., $12\% - 5\% = 7\%$) payable on import of solar power-based devices, including solar PV modules. From a bare perusal of Article 12.1.3 of the PPA, it is abundantly clear that change in rates of GST after 22.6.2020 resulting in change in project cost, will be treated as 'Change in Law'. However, the said provision also stipulates that the quantum of compensation payment on account of change in rates of such duties shall be provided to the affected party by the other party as per Article 12.2.3, subject to the provision that Appropriate Commission recognizes such provisions at

the time of adoption of tariff by the Appropriate Commission. Accordingly, the Commission may recognize Article 12.2.3 of the PPA in the present proceedings for adoption of tariff in order to enable the Respondents to claim compensation payment on account of change in rates of IGST. Further, as per Article 12.1(v) of the PPA, any change in the rates of any taxes pertaining to this project only after 22.6.2020 which has a direct effect on the Project is a Change in Law event.

(c) The Competitive Bidding Guidelines, which are statutory in nature and applicable to all projects the tariff for which is determined under Section 63 of the Act, also provides under Clause 5.7 thereof that any change in the rates of any taxes which have a direct effect on the Project shall be considered a Change in Law event. Accordingly, even in terms of the Competitive Bidding Guidelines, the 2021 IGST Notification is a Change in Law event.

(d) Change in Law claim qua increase in BCD on import of Solar Inverters: Department of Revenue, Ministry of Finance, Government of India in exercise of its powers under Section 25(1) of the Customs Act, 1962 issued Notification No. 1/2011-Customs dated 6.1.2011 ("2011 SGD Notification"), whereby all items of machinery, control gear, transmission equipment and auxiliary equipment and components required for the initial setting up of a solar power generation project or facility, when imported into India, were exempted from so much of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 as is in excess of 5% ad valorem, subject to certain conditions stipulated therein. However, the Department of Revenue, Ministry of Finance, Government of India on 01.02.2021 issued Notification No. 07/2021-Customs dated 1.2.2021 ("2021 BCD Notification") inter alia rescinding the 2011 BCD Notification. Meaning thereby, the exemption from payment of customs duty in excess of 5% as granted by the 2011 BCD Notification, was withdrawn by way of the 2021 BCD Notification. As such, the customs duty payable on import of inverters required for setting up solar projects into India was increased to 20%.

(e) As per Article 12.1.3 of the PPA, change in rates of BCD after 22.6.2020 resulting in change in Project cost, will be treated as 'Change in Law'. Further, a bare perusal of the 2011 BCD Notification (applicable on the last date of bid submission, i.e., 22.6.2020) and the 2021 BCD Notification, makes it abundantly clear that the BCD as applicable on the import of solar inverters increased from 5% to 20% vide rescinding of the 2011 BCD Notification by way of the 2021 BCD Notification. As such, the issuance of the 2021 BCD Notification imposing additional BCD to the tune of 15% on import of solar inverters qualifies as a Change in Law event as per Article 12 of the PPA. As per Article 12.1(v) of the PPA, any change in the rates of any taxes (including any duties and cess) pertaining to this project only after 22.6.2020 which has a direct effect on the Project is a Change in Law event.

(f) Change in Law claim qua increase in BCD on import of solar cells/modules: Under the Project Imports Regulations, 1986, goods imported for the purpose of setting up of power projects were subjected to single rate of duty instead of merit assessment of imported goods. Accordingly, as per the provision of Custom Notification No. 50/2017 Cus. dated 30.6.2017 as per Custom Tariff Heading No. 9801, goods required for setting up of any solar power project were eligible for concessional rate of BCD at 5%. Accordingly, at the time of submission of the bid, concessional rate of BCD at 5% was prevailing for import of goods required for setting up of any solar power project.

(g) While the Respondents were in the process of applying for the concessional rate benefit for the instant Project, the Ministry of Finance, Department of Revenue issued Project Imports (Amendment) Regulations, 2022 dated 19.10.2022 amending the principal regulations, i.e., Project Import Regulations, 1986, whereby solar power plants/solar power projects were excluded from availing concessional custom duty rate. Meaning thereby, the exemption from payment of customs duty in excess of 5% as granted by the Notification dated 30.6.2017, was withdrawn by way of the Project Imports (Amendment) Regulations, 2022. As such, the customs duty payable on import

of goods required for setting up of any solar power project, particularly solar PV modules, has been increased from 5% to 40%.

(h) As per Article 12.1.3 of the PPA, change in rates of BCD after 22.6.2020 resulting in change in Project cost, will be treated as 'Change in Law'. In this regard, it is pertinent to highlight that a bare perusal of Custom Notification No. 50/2017 Cus. dated 30.6.2017 (applicable on the last date of bid submission) and the Project Imports (Amendment) Regulations, 2022, makes it abundantly clear that the BCD as applicable on the import of solar PV modules increased from 5% to 40% vide amendment of the Project Imports Regulations, 1986. As such, the issuance of the Project Imports (Amendment) Regulations, 2022 imposing additional BCD to the tune of 35% on import of solar PV modules qualifies as a Change in Law event as per Article 12 of the PPA. As per Article 12.1.1 of the PPA, an amendment, modification or repeal of an existing law and any change in the rates of any taxes (including any duties and cess) pertaining to this project only after 22.6.2020 which has a direct effect on the Project is a Change in Law event.

(i) Project Imports (Amendment) Regulations, 2022 amends an existing law, i.e., the Project Imports Regulations, 1986 and this results in increase the rate of BCD payable on the import of solar PV modules from 5% to 40%. Further, the issuance of the Project Imports (Amendment) Regulations, 2022 results in change of the rate of Basic Customs Duty payable on the import of solar PV modules. It is a matter of record that the Project Imports (Amendment) Regulations, 2022 has been issued after 22.6.2020 and has a direct effect on the Project insofar as it results in the Respondent No. 9 incurring additional BCD to the extent of 35%. Accordingly, the Commission may be pleased to recognize the issuance of the Project Imports (Amendment) Regulations, 2022 as a Change in Law in terms of Article 12 of the PPA.

(j) The above Change in Law claims are not barred by Respondent No. 9's undertakings read with Article 12.2.6 of the PPA. The waiver granted by the Respondent No. 9 vide its letters dated 23.8.2021, 1.9.2021 and 9.2.2022 as

recorded in Article 12.1.6 of the PPA is only limited to the claim for Change in Law on account of issuance of MNRE's office memorandum dated 9.3.2021 and does not in any manner restrict the Respondent No. 9 from claiming compensation on account of occurrence of other Change in Law events detailed hereinabove, including specifically the issuance of Project Imports (Amendment) Regulations, 2022. It is pertinent to highlight that the aforesaid undertakings were issued by the Respondent No. 9 in light of the then existing laws which allowed the option to avail concessional rate of BCD at 5% for import of goods required for setting up the solar power projects under the Project Imports Regulations, 1986, which has now been removed by way of the amendment dated 19.10.2022.

(k) Respondents rely upon the principle of 'business efficacy' and 'officious bystander test' has been discussed in detail by the Hon'ble Supreme Court in the case of Nabha Power Ltd. Vs. Punjab State Power Corporation Ltd. and Ors., [reported as (2018) 11 SCC 508]. Business efficacy means that the courts are required to make the contract efficacious and practicable and officious bystander test is applied by the courts to determine whether a term should be implied into a contract for it being so obvious, even though that term was not written into the contract expressly. The purpose of PPA is to develop project and supply electricity to the procurer at the tariff agreed upon in the PPA read with the terms and conditions of PPA. However, if the cost of generation of electricity increases for the reasons beyond the control of the developer such as an imposition of BCD, then the developer cannot be held accountable to bear the risk as the same was not foreseeable at the time of submission of bid. Therefore, the Respondent No. 9 cannot be subjected to risks unknown/untaken and hence it is only essential that while interpreting the PPA, a common sense and business efficacy test is applied. This broad principle is captured in the judgment of the Hon'ble Supreme Court passed in Union of India v. D N Revri & Co. and Ors., [reported as (1976) 4 SCC 147] which explains two concepts of the interpretation of contract i.e., business efficacy and adoption of common-sense approach. The Hon'ble Supreme

Court observed that while interpreting the provisions of contract, it is important to apply law and economics as the same are intertwined and are integral part to apply in case of any contractual arrangement. It is settled law that the courts ought not to imply terms into a contract, particularly when the language of such contract is unambiguous. The Respondent has placed reliance on the judgment of the Hon`ble Supreme Court in the case of *Nabha Power Limited v. Punjab State Power Corporation Limited and Anr.* and judgment of APTEL in the case of *Coastal Gujarat Power Limited v. Central Electricity Regulatory Commission & Ors.* ("*Coastal Gujarat Judgement*"). *Applying the aforesaid principles of law to the facts of the present case, and* considering the submissions made hereinabove, it is apparent that the Respondent No. 9 has a right to claim compensation for the Change in Law events detailed hereinabove, as the same fit squarely within the definition of Change in Law event in the unambiguous terms of the PPA.

(l) This Commission has the power to grant in-principle approval at the first instance for Change in Law claim(s) under the PPA: The Commission is unequivocally vested with the power to grant in-principle approval for a Change in Law event under the PPA at the first instance. In this regard, the Respondents have placed reliance on the APTEL's order dated 12.10.2021 in Appeal No. 251 of 2021 titled *Green Infra Renewable Energy Limited vs. RERC & Ors.* Thus, the issue in regard to the grant of in-principle approval to Change in Law claim(s) at the stage of adoption of tariff is no longer *res integra* as the same has been settled by the APTEL.

12. SECI, vide its rejoinder to the above common reply filed by the Respondent Nos. 4 and 9, has mainly submitted as under:

(a) With Regard to Change in Law: The Respondent, Ayana with due reference to the increased Basic Custom Duty from 0% to 40% with respect to solar modules and from 0% to 25% with respect to solar cells had without any reservation or qualification, unconditionally and in an absolute manner

committed that it will duly waive the claim for such increase in rate of Basic Custom Duty to 40% and 25%. The same has been duly incorporated in Article 12.2.6 of the PPA signed between SECI and Ayana. Accordingly, reference to communications written by Ayana prior to signing of PPA between parties cannot be read contrary to the final provision of the PPA (Article 12.2.6) subsequently executed between the parties. It is a well-settled principle that 'once PPA has been entered into between the parties pursuant to the competitive bidding, the rights and obligations of the parties are to be seen in terms of the agreed PPA. Hence, all allegations to the contrary are wrong and are denied.

(b) The event claimed by Ayana being change in rates of GST (on renewable energy equipment's as specified in the Notification) and Custom Duty on solar inverters has been provided in Article 12.1.3 of the PPA (quoted above) to be recognized by the Commission at the time of adoption of tariff as Change in Law event. This Commission may pass appropriate orders as prayed by SECI in the Petition including with regard to change in rates of GST, Custom Duty on solar inverters after 22.6.2020, holding that the same fall within the scope of Article 12 of the PPA dealing with Change in Law. However, the actual impact and extent of relief admissible to be determined to be allowed need to be considered at the appropriate stage. Further, Article 12.2.3 of the PPA provides for a formula for determination of the relief with reference to every net increase/decrease of Rs.1 lakh per MW in the project cost {i.e. the cost incurred by the Project Developer towards supply and services of the project concerned, upto the Scheduled Commissioning Date or Extended Scheduled 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 maybe} as a result of Change in Law events i.e. those events covered under Article 12.1.3 as well as events covered under Article 12.1.1 of the PPA. For the application of the formula provided in Article 12.2.3 of the PPA for relief of Change in Law, the amount constituting the project cost cannot be considered on estimated basis. The project cost will

be available only upon the capital expenditure being incurred and such capital cost has been subjected to appropriate prudent check by this Commission based on all relevant factors as is considered in prudent check for tariff determination. All allegations to the contrary are wrong and are denied.

(c) With Regard to imposition of Basic Custom Duty on Solar PV Cells and Modules, MNRE vide Office Memorandum dated 9.3.2021 imposed BCD on solar cells and modules. Ministry of Finance, Government of India is the competent authority to issue appropriate notification in exercise of powers under the Customs Tariff Act, 1975 and Customs Act 1962 in regard to levy of Basic Custom Duty on solar modules and cells. The Respondent, Ayana has not placed on record the appropriate notifications issued by Ministry of Finance as per the above proposal of MNRE in the Office Memorandum dated 9.3.2021. The PPA executed between SECI and Ayana dated 19.4.2022, was after 31.3.2022 when the BCD had become 40% on solar modules and 25% on solar cells. In terms of the above, Ayana with due reference to the increased Basic Custom Duty (BCD) from 0% to 40% with respect to solar modules and from 0% to 25% with respect to solar cells had without any reservation or qualification, unconditionally and in an absolute manner committed that it will duly waive the claim for such increase in rate of Basic Custom Duty to 40% and 25%. This waiver was with reference to increase in rates of BCD as provided in Office Memorandum dated 9.3.2021 of MNRE which clearly stipulated that if the import of modules and cells is done beyond 31.3.2022, the BCD will not be 0% but 25% for solar cells and 40% for solar modules.

(d) The Respondent, Ayana signed the PPA on 19.4.2022 after the above date of 31.3.2022 and when the applicable BCD had already become 40% and 25% and even then, had proceeded to accept that no Change in Law on account of BCD will be claimed as per MNRE Office Memorandum dated 9.3.2021 (which provided for the rate of BCD vis a vis Solar Modules at 40% and for Solar Cells at 25%). At the relevant time, Ayana did not claim that the same will be subject to it availing the concession (if any) under Project Import

Regulations, 1986 or in any other manner. As per Article 12.2.6 of the PPA, the waiver on Change in Law claim of BCD as per Office Memorandum dated 9.3.2021 of MNRE on import of solar modules and cells by Ayana was therefore not conditional upon the benefit of concessional rate of 5% of Custom Duty as per Project Import Regulations 1986 being available and in case the same is not available notwithstanding the waiver, Ayana will claim any Change in Law events. The waiver is specific and unequivocal, namely that Ayana will not claim the benefit of Change in Law events qua BCD till 40% for solar modules and till 25% for solar cells. Ayana is bound by the waiver subject to which the PPA was signed. The claim for BCD by Ayana can be only for '*any further increase of BCD, Any incremental impact over prescribed rates of BCD as above*'. It is, therefore, abundantly clear that any increase in BCD upto 40% or 25% by reason of any other notification will not affect the waiver. Notification of Project Import (Amendment) Regulations 2022 on 19.10.2022 by Ministry of Finance as referred to by Ayana in its reply has not affected in any manner the rate of BCD as per MNRE Office Memorandum dated 9.3.2021 namely the BCD vis a vis the solar modules continue to be 40% and Basic Custom Duty vis a vis the solar cells continues to be 25% with effect from 1.4.2022. As there is no change in rate of the BCD vis a vis the solar modules (40%) and solar cells (25%) on account of the above notification dated 19.10.2022 in comparison to what Ayana has already considered and given a waiver for in the PPA as quoted above, there is no impact of the same on Ayana. Therefore, Ayana cannot claim any relief on account of the same. In view of the above, Ayana cannot today say that there is a change in rate from 5% to 40% or 25% on account of the notification dated 19.10.2022 and therefore is liable for relief.

(e) Article 12.1.3 of the PPA is a general provision providing for certain events, namely change in rates of safeguard duty, GST and basic customs duty after 22.6.2020 and resulting in change in Project cost to be treated as Change in Law subject to recognition of Article 12.1.3 of the PPA by this Commission at the time of adoption of tariff. The same has to be read along

with the specific provision in Article 12.2.6 of the PPA which provides for unconditional waiver given by Ayana on Change in Law claim of Basic Custom Duty on account of change in rate of Basic Custom Duty from 0 to 40%/25% with effect from 1.4.2022.

(f) Reliance placed by Ayana on the judgment dated 5.10.2017 of the Hon'ble Supreme Court in Civil Appeal No. 179 of 2017 in the case of Nabha Power Limited -v- Punjab State Power Corporation Limited and Anr is not applicable in view of the facts and circumstances of the present case. Similarly, the reliance placed by Ayana on decision in Union of India vs DN Revri & Co.,1976 4 SCC 147 is misplaced as the same is distinguishable on facts of the case.

Hearing dated 15.12.2022

13. During the course of hearing on 15.12.2022, learned senior counsel for the Petitioner and the learned counsel for the Respondents 1 & 7 – AMP Energy, Respondents 4 & 9 Ayana Renewable made their respective submissions. The Petitioner and the Respondents were also permitted to file their respective note of arguments, which they have mainly reiterating the submissions made in their respective pleadings and the same are not reproduced hereunder for the sake of brevity.

Analysis and Decision

14. Considering the submissions made by the parties, 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.

15. It is noted that in respect of the same bid process-RfS dated 20.3.2020 for Tranche IX, the Petitioner had earlier approached this Commission under Section 63 of the Act for adoption of tariff for the individual Solar Power Projects for the entire 2000 MW. In the said case, the Commission vide order dated 8.3.2022 has already examined as to whether the process as per the provisions of the Guidelines had been followed by SECI in respect of the said RfS/bid and the tariff has been determined through a transparent process. and accordingly, the order concluded as under:

“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.”

Thus, in the aforesaid order, the Commission has already observed that the selection of the successful bidders had been done and the tariff of the Solar Power Projects had been discovered by SECI (for Tranche IX) 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. However, keeping in view that at that point of time, SECI had executed the PPA only for 300 MW and the balance capacity were not tied-up for the want of identification of the distribution licensees/buying utilities, the Commission adopted the tariff for the above 300 MW with liberty to SECI to approach the Commission for adoption of tariff in respect of the balance capacity once such capacity is tied up and the PPAs and PSAs for such capacity having executed. Accordingly, SECI has now approached the Commission seeking adoption of tariff for the individual power projects for the capacity of 1400 MW (out of balance 1700 MW) upon SECI having executed the PPAs with the successful bidders/their project company and corresponding PSAs with the buying utilities/distribution licensees. The details of PPAs signed by SECI subsequent to order dated 8.3.2022 as submitted by SECI are as under:

S. No.	Name of Successful Bidder	Project Company formed by the successful bidder for executing the PPA	Date of PPA signing	Capacity of Project (MW)	Applicable Tariff (Rs./kWh)
1.	AMP Energy Green Private Limited	AMP Energy Green Five Private Limited	12.04.2022	100	2.37
2.	Eden Renewable Bercy Private Limited	N.A.	28.04.2022	300	2.37
3.	IB Vogt Singapore Pte Ltd	IB Vogt Solar Seven Private Limited	19.04.2022	300	2.37
4.	Ayana Renewable Power Private Limited	Ayana Renewable Power Three Private Limited	19.04.2022	300	2.38
5.	ReNew Solar Power Private Limited	Renew Surya Vihaan Private Limited	07.04.2022	100	2.37
6.	ReNew Solar Power Private Limited	Renew Surya Aayan Private Limited	14.06.2022	300	2.37
Total				1400 MW	

16. Similarly, the details of the PSAs signed by SECI subsequent to order dated 8.3.2022 are as under:

S. No.	Buying Utilities	Date of PSA signing	Capacity under the PSA (MW)	Applicable Tariff to Buying Utility (Rs./kWh) [Ref: Article 5 of PSA]
1.	Kerala State Electricity Board	21.04.2022	300	Rs.2.37/kWh [Tariff payable in respect of 300 MW of Renew] + Rs.0.07/kWh [Trading Margin]
2.	Southern Power Distribution Company of Telangana Limited And Northern Power Distribution Company of Telangana Limited	17.02.2022	1000	Rs.2.37/kWh [Tariff payable in respect of 100 MW of AMP Energy; 300 MW of Eden; 300 MW of IB Vogt] + Rs.0.07/kWh [Trading Margin]
				Rs.2.38/kWh [Tariff payable in respect of 300 MW of Ayana] + Rs.0.07/kWh [Trading Margin]
3.	Uttarakhand Power Corporation Limited	12.10.2021	100	Rs.2.37/kWh [Tariff payable in respect of 100 MW of ReNew] + Rs.0.07/kWh [Trading Margin]
Total			1400	

17. SECI has also requested the Commission to take into the notice that ReNew Surya Aayan Pvt. Ltd. and ReNew Surya Vihaan Pvt. Ltd. – SPVs of successful bidder – ReNew Solar Power Pvt. Ltd. had suo-motu reduced the tariff from Rs. 2.38/kWh (as discovered in the e-RA) to Rs. 2.37/kWh for 300 MW and 100 MW solar project capacities respectively by their undertakings dated 15.9.2021. Further, as regards the balance capacity of 300 MW awarded to one M/s Solarpack Corporation Technologica SA, SECI has submitted that so far it has only been able to identify and

tie-up the 200 MW capacity with J & K Power Corporation Limited and NDMC, New Delhi and the balance 100 MW capacity, the distribution licensee/buying utility is yet to be identified and as a result, the PPA is yet to be executed for this balance capacity of 300 MW.

18. We have noted the above submissions of SECI. Keeping in view that the Commission in order dated 8.3.2022 has already observed that the selection of successful bidders and that tariffs for the Solar Power Projects (under Tranche IX) have been discovered through transparent process of competitive bidding in accordance with the Guidelines read with letter of MNRE dated 1.3.2021, there is no need to again examine this aspect in the present case. It is also noted that SECI craved leave of the Commission to place on record the PPA and PSAs for this remaining 300 MW upon their finalisation till the date of reserving of the decision in the present case as it was in the process of identifying the buying utility/distribution licensee for the balance capacity. However, till date, SECI has not placed the PPA and PSAs for this balance capacity of 300 MW and accordingly, we restrict the adoption of individual tariff for the Solar Power Projects to tune of 1400 MW, as prayed for by SECI, for which PPAs have been entered into by SECI on the basis of PSAs with the distribution licensees, which shall remain valid throughout the period covered in the PPAs and PSAs as noted in paragraph 16 above. In so far as the balance capacity of 300 MW is concerned, the Petitioner is granted liberty to approach the Commission for adoption of tariff once such capacity is tied up under PPA and PSAs and the same shall be considered by the Commission in accordance with the law.

19. It is, however, noted that the Respondents 8, 10 & 11 have raised the certain objections with regard to the provisions of the PPAs, namely, Change in Law clause, being in deviation from the provisions of the Guidelines. The Respondents have submitted that the Change in Law clause incorporated in the PPAs as such does not restore the Solar Power Developers/Respondents to the same economic position as it would have been had the Change in Law event not occurred and introduce a cut-off date in order to restrict the compensation on account of Change in Law, which are not as per the provisions of the Guidelines. The Respondents have also submitted that as per the Guidelines, in case of any deviation from the Guidelines such deviations are subject to the approval of the Appropriate Commission and in the present case, SECI has not sought any approval of such deviations. In response, SECI has submitted that both the above aspects have already been considered by the Commission vide order dated 8.3.2022 in Petition No. 211/AT/2021. It is also submitted that SECI has already clarified the position that in regard to the Change in Law impact, the restitution provision in regard to the carrying cost as provided in the Guidelines and/or Change in Law Rules shall be applicable to all the PPAs and PSAs executed under Tranche IX scheme. However, insofar as introduction of cut-off for Change in Law compensation is concerned, SECI relies upon its submission made in Petition No. 211/AT/2021, which have also been considered by the Commission in order dated 8.3.2022. SECI has further submitted that in the standard PPA itself, 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 developer. The SPDs having submitted the bid accepting the terms and conditions of the bidding documents are bound by the said provisions.

20. We have considered the submissions made by the parties. Insofar as the concerns of the Respondents regarding the absence of restitution provision is concerned, SECI having already clarified its position that restitution provision in regard to carrying cost as provided in the Guidelines and/or Change in Law Rules shall be applicable to all the PPAs and PSAs executed under the Tranche IX Projects, we do not find any further need to delve into this aspect at this stage. As far as the aspect of the introduction of cut-off date for the Change in Law compensation is concerned, the Commission, as rightly pointed out by SECI, has already considered this aspect in its order dated 8.3.2022 in Petition No. 211/AT/2021. Relevant extract of the said order reads as under:

“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:

.....

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

.....

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.

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.”

21. In our view, the concern(s) raised by the Respondents 8, 10 & 11 with regard to the introduction of cut-off date have squarely been addressed by the Commission in the aforesaid order and which equally applies to the present case as the both the cases emanates from the same tender/bid process. Accordingly, we do not find any

need to deliberate this aspect any further than what had already been considered by the Commission in the aforesaid order.

22. Prayer (a) of the Petitioner is answered in terms of paragraph 20 and paragraph 21 above.

23. It is noticed that the Article 10.3 of the PPAs 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.”

24. Further, 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 the 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 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;

25. Whereas, 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.”

26. The above provisions provide for payment security mechanism and the same is required to be complied with by the parties to the present Petition. Accordingly, the provisions of Articles 10.3 and 10.4 of the PPAs and Clause 10 of Regulation 9 of the Trading Licence Regulations shall be abided by all the concerned parties to the present Petition.

27. The Petitioner has also prayed to approve the trading margin of Rs. 0.07/kWh as agreed to by the Distribution Licensees in terms of the PSAs with the Distribution Licensees. In this regard, Regulation 8(1)(d) of the Trading Licence Regulations dealing with trading margin provides as under:

“For transactions under long term contracts, the trading margin shall be as mutually decided between the Trading licensee and the seller:...”

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

29. 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.”

30. 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.”

31. 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 PSA, which is in consonance with Regulation 8(1)(d) of the Trading Licence Regulations. Therefore, in case of failure by SECI to provide escrow arrangement or irrevocable, unconditional and revolving letter of credit to the wind generators, the trading margin shall be limited to Rs. 0.02/kWh as specified in the Regulation 8(1)(d) and Regulation 8(1)(f) of the Trading Licence Regulations.

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

33. Additionally, the Petitioner has also prayed to recognize, in terms of Article 12.1.3 of the PPAs and Article 8.1.3 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 fulfilment 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.

12.2 Relief for Change in Law

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.

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....”

34. 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. Further, the PPAs and PSAs also provide 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.

35. On the basis of the above provisions of the PPA and relying upon the order of APTEL in Green Infra Case, the Respondents/Solar Power Developers have also sought the recognition of the following Change in Law events, which have occurred after 22.6.2020:

(a) Notification No. 3 of 2021-Customs and Notification No.7 of 2021-Customs dated 1.2.2021 issued by the Department of Revenue, Ministry of Finance, Government of India pursuant to which exemption as granted by Ministry of Finance to the extent of 5% (ad valorem) by its earlier Notification was reserved and the Basic Custom Duty (BCD) on import of solar inverters was increased from 5% to 20% as provided under First Scheduled to the Customs Tariff Act, 1975.

(b) The order of Hon'ble Supreme Court dated 19.4.2021 in Writ Petition (Civil) No. 838 of 2019 titled M. K. Ranjitsinh & Ors. v. Uol 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 habitat of Great Indian Bustard (GIB).

(c) Ministry of Finance's Notification dated 30.9.2021 by which the applicable Goods & Services Tax on the Solar PV Modules and other renewable energy equipment has been notified @ 12% w.e.f. 1.10.2021.

(d) Office Memorandum dated 9.3.2021 issued by Ministry of New and Renewable Energy regarding imposition of BCD on the solar cells and modules (without grandfathering of bid-out Projects) w.e.f 1.4.2022 whereby BCD on the solar modules and solar cells has been levied at the rate of 40% and 25% respectively.

(e) Issuance of Project Imports (Amendment) Regulations, 2022 dated 19.10.2022 resulting in increase in the rates of Basic Custom Duty on import of solar modules and cells.

36. Keeping in view that as held by the APTEL by judgment dated 5.4.2022 in OP No.1 of 2022 and Ors. that Change in Law Rules as notified by the Ministry of Power, Government of India shall only apply prospectively and barring the (e) above, all other Change in Law events for which the recognition have been sought by the Petitioner and the Respondents predate the notification of the Change in Law Rules on 22.10.2021, we proceed to examine the aforesaid Change in Law claims of the parties at this stage of adoption of tariff itself in view of the such provision of PPAs as

well the order of the APTEL in Green Infra Case wherein the APTEL observed as under:

“16. During the hearing, we pointedly asked but no regulation or contractual clause or, for that matter, any other provision was shown as could reflect an inhibition or prohibition against consideration of claim of change in law compensation at the stage of adoption of the tariff discovered by the bid process under Section 63 of the Electricity Act, 2003. We agree with the appellant that deferring such claim for later date creates a whole lot of confusion and, what is of utmost concern to the project developers, regulatory uncertainty and consequent difficulties in attaining financial closure. It cannot be ignored that the impact on the cost of the development of the project of such change in law events that have occurred after the submission of the bid and closure of the bid process but before the adoption of the bid discovered price renders the bid price unrealistic and in terms of Section 86 (1) (b) of the Electricity Act, it is the duty of the State Commission to inquire into such claim at the first opportune time and bring in suitable corrections, may be first by declaration and followed up by detailed tariff orders. If the event referred to actually constitutes change in law within the four corners of its definition under the PPA, there is no reason why it cannot be duly recognized as a change in law at the stage of tariff adoption, the actual impact and extent of the relief admissible to be determined at the appropriate stage.”

37. Insofar as the increase in the rate of Basic Custom Duty on the import of the solar inverter is concerned, the Respondents have submitted that at the time of bid submissions the Customs Duty on the import of Solar Inverter was at the rate of 5%. However, on 1.2.2021, the Ministry of Finance, Government of India vide Notification No.3 of 2021- Customs and Notification No. 7 of 2021- Customs reversed the earlier notification granting the exemptions to the extent of 5% (ad valorem) and by virtue of these notifications the BCD on the import of solar inverters increased to 20% from 5%. The Respondents have submitted the aforesaid increase in the applicable rate of BCD on the import of Solar Inverter by the Notifications of the Ministry of Finance, Government of India qualifies as Change in Law event and in terms of Article 12.1.3, the parties have also agreed that change in rates of Safeguard Duty, GST and BCD after 22.6.2020 resulting in change in project cost will be treated as Change in Law provided the Commission recognises as Change in Law event. SECI, in its response,

has also not opposed the recognition of the above increase in the applicable rate of BCD on the import of Solar Inverter in terms of the Notifications of the Ministry of Finance as Change in Law event and has submitted that the Commission may pass an appropriate order as also prayed for by SECI recognizing the same as Change in Law event within the scope of Article 12 of the PPAs and the actual impact may be considered at the appropriate stage.

38. We have considered the submissions of the parties. It is beyond dispute that the increase in the applicable rate of BCD on import of the solar inverter has been by the Notifications bearing No. 3/2021 and 7/2021 dated 1.2.2021 as issued by the Department of Revenue, Ministry of Finance, Government of India – Indian Government Instrumentality as defined in the PPAs – and the parties, at Article 12.1.3 of the PPAs, have also agreed that change in the rates of BCD after 22.6.2020 resulting into the change in the Project cost will be treated as Change in Law event and accordingly, the Commission recognizes the said increase in the applicable rate of BCD on the import of solar inverter in terms of the Notifications of the Ministry of Finance, Government of India post 22.6.2020 as Change in Law event. The Solar Developers shall be entitled to the applicable reliefs on account of the Change in Law event as per the provisions of the PPAs after they having incurred the additional expenditure on account of the aforesaid Change in Law event.

39. The Respondents have further sought the recognition of the increase in the applicable GST rates on the solar modules and solar cell along with other solar power generator equipment from 5 % to 12% by virtue of the Notification No. 8 of 2021 – Integrated Tax (Rate) & Notification No.8 of 2021- Central Tax (Rate) dated

30.9.2021 (collectively, 'GST Notifications') issued by Ministry of Finance, Government of India. It is submitted that as on the date of submission bid, the applicable rate of GST on the solar modules, cells and other solar power generator equipment was 5% in terms of the Notification No.1 of 2017 - Integrated Tax dated 28.6.2017 and subsequently, vide Notification No. 8 of 2021 dated 30.9.2021, Ministry of Finance, Government of India amended the earlier Notification No.1 of 2017 - Integrated Tax and thereby increased the applicable GST rate to 12% from earlier 5%. The Respondents have submitted that at Article 12.1.3 of the PPAs, the parties have also agreed that change in rates of GST after 22.6.2020 resulting in change in project cost will be treated as Change in Law provided the Commission recognises it as Change in Law event and thus, the Commission may recognize the increase in the applicable rate of GST on solar modules, cells and other equipment by virtue of GST Notifications issued by the Ministry of Finance, Government of India as Change in Law event at the stage of adoption of tariff itself. SECI, in its response, has again not opposed the recognition of the above increase in the applicable rate of GST on the solar modules, cells and other renewable energy equipment in terms of the Notifications of the Ministry of Finance as Change in Law event and has further submitted that the Commission may pass an appropriate order as prayed for by SECI recognizing the same as Change in Law event within the scope of Article 12 of the PPAs and the actual impact may be considered at the appropriate stage.

40. We have considered the submissions made by the parties. The increase in the applicable rate of GST on solar modules, cells and other solar power generation equipment from 5% to 12% has been as a result of the Notification No. 8/2021-

Intergrated Tax dated 30.9.2021 issued by the Department of Revenue, Ministry of Finance, Government of India – Indian Government Instrumentality as defined in the PPAs – and the parties, at Article 12.1.3 of the PPAs, have also agreed that change in the rates of GST after the 22.6.2020 resulting into the change in the project cost will be treated as Change in Law event and accordingly, the Commission recognizes the said increase in the rate of GST on the solar modules, cells and other solar power generation equipment in terms of the Notification of the Ministry of Finance, Government of India, post 22.6.2020, as Change in Law event. The solar developers shall be entitled to the applicable reliefs on the account of the Change in Law event as per the provisions of the PPAs after they having incurred the additional expenditure on account of the aforesaid Change in Law event.

41. The Respondents, in particular AMP Energy, have also prayed to recognize the order of the Hon'ble Supreme Court dated 19.4.2021 in IA No. 85618 of 2020 in Writ Petition 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 overhead transmission lines in the priority and potential habitat of GIB as Change in Law event. It has been submitted that as per the said order, the overhead transmission lines in GIB areas shall be converted into the underground power lines and the Hon'ble Supreme Court has, *inter-alia*, also held that in cases where the power generators are required to bear the additional amount to the cost of production, it would be open to regulate the manner in which the cost would be mitigated in accordance with the contractual terms. AMP Energy has submitted that the Project being developed by it is located in the State of Rajasthan which forms a part of the

potential habitat of GIB as demarcated and specified in the GIB order. It is also submitted that it had placed the bid considering the feasibility of installing overhead transmission lines. However, in terms of the aforesaid judgment, it would require to lay underground transmission cable which is commercially unviable at the tariff quoted as the cost of underground cable is much higher than that of overhead line of equivalent voltage. SECI, in its response, has submitted that while the order dated 19.4.2021 of the Hon'ble Supreme Court is a law laid down by the Hon'ble Supreme Court, the developer, however, is required to establish the actual impact of Change in Law on account of the above to the satisfaction of the Commission. SECI has placed reliance on the Office Memorandum of MNRE dated 3.2.2022 which dealt with the above order and has submitted that Change in Law aspect on account of the said order on the Project to be established by AMP Energy has to be considered as per the terms of MNRE's OM dated 3.2.2022 and the outcome of the decision of the Hon'ble Supreme Court on the IAs as specified in the said OM.

42. We have considered the submissions made by the parties. It is beyond dispute that the order of the Hon'ble Supreme Court dated 19.4.2021 in IA No. 85618 of 2020 in WP (Civil) No. 838 of 2019 requiring the additional actions/measures to be adopted by the developers located in the potential and priority habitat of GIB, after the cut-off date, would certainly qualify as the Change in Law under Article 12 of the PPAs. As on date of submission bid, the developers would not have been in position to anticipate or factor into the additional expenditure required to be incurred in the adopting the measures/actions in terms the Hon'ble Supreme Court's GIB Order which came to be issued subsequently. However, at the same time, it has to be noted

that for examining the claim of the Change in Law relief/compensation on account of the aforesaid GIB Order, the developer has to be satisfactory demonstrate that its bid/tariff was based upon the project being located in the GIB potential and/or priority habitat areas. Moreover, MNRE vide its Office Memorandum dated 3.2.2022 has also observed as under:

“Reference is invited to issues arising out of Hon'ble Supreme Court's Order dated 19.04.2021 (in I.A. No. 85618/2020 in W. P. No. 838 of 2019) regarding undergrounding of transmission lines in habitats of Great Indian Bustard (GIB) in Rajasthan and Gujarat, and the relief sought by Industry in this regard.

2. This Ministry has filed an I.A. in the Hon'ble Supreme Court, jointly on behalf of MNRE, M/o Power and M/o Environment, Forest & Climate Change (MoEF&CC) on 17.11.2021 contesting the aforesaid order dated 19.04.2021. It has been inter-alia prayed that Hon'ble Supreme Court may allow high voltage and extra high voltage lines i.e. 66 kV and above power lines in Priority GIB Habitat to be laid as overhead power lines with installation of appropriate mitigation measures like bird diverters and laying of overhead transmission lines in future outside the Priority area with installation of appropriate bird diverters. The matter is yet to be decided by Hon'ble Supreme Court. This situation has caused uncertainty among RE developers with regard to the action they are required to take.

3. In view of above, the undersigned is directed to inform MNRE's RE Implementing Agencies (REIAs), that for all under implementation RE projects where REIA is the intermediary procurer and for which the transmission infrastructure lies wholly or partly in the priority or potential area; the project land has been procured and the project commissioning is delayed due to non-completion of project transmission infrastructure on account 'of the aforesaid order of the Hon'ble Supreme Court, the Scheduled Date of Commissioning is hereby extended to a date which is 30 days after the date of judgment by Hon'ble Supreme Court in the IA filed by MNRE.

4. The above relief is for facilitating RE project development and shall not be taken for any other purpose, including for claiming IDC or for termination of PPA. REIAs are requested to accord requisite extension of Scheduled Date of Commissioning keeping in view the above...”

In view of the above, while the Commission recognizes the GIB Order of the Hon'ble Supreme Court, post the bid submission date, as to be covered under the

Change in Law event under Article 12 of the PPAs, the entitlement of the Developers to claim the Change in Law relief thereunder and the extent of the available reliefs has to be demonstrated on case to case basis based on the supporting documents in this regard, which shall be considered by the Commission at the appropriate stage.

43. The next events as sought to be recognized as Change in Law events by the Respondents/Developers are (i) MNRE's Notification dated 9.3.2021 regarding imposition of BCD on solar modules and cells (without grandfathering of bid-out Projects) at the rate of 40% and 25 % respectively w.e.f. 1.4.2022 ("BCD Notification"); and (ii) issuance of the Project Imports (Amendment) Regulations, 2022 dated 19.10.2022 resulting in increase in the rates of Basic Custom Duty on import of solar modules and cells. Since both these claims by the Respondents/Developers are closely related, we shall be dealing with them together.

44. The Respondents have submitted that while they have provided waiver to SECI in relation to the claiming of compensation for the impact on the project cost in pursuance to the BCD Notification, the said undertakings were given considering that the Respondents will avail the benefit of the concessional rate of 5% Customs Duty as permitted under the Project Import Regulations, 1986. It is submitted that under the Project Imports, goods imported for the purpose of setting up of power project is subjected to single rate of duty instead of merit assessment of imported goods and accordingly, as per the provisions of Custom Notification No. 50/2017-Custom dated 30.6.2017 as amended from time to time, as per the Custom Tariff Heading No. 9801, goods required for setting up of any solar power project are eligible for concessional rate of 5%, which was factored into by the developers. However, while they were in

process for applying the concessional rate benefit for the Project to be set-up, the Ministry of Finance, Department of Revenue, Government of India issued the Project Imports (Amendment) Regulations, 2022 dated 19.10.2022 amending the principal regulations whereby the solar power plants/projects were excluded from availing the concessional Custom Duty rate. As a result, the Developer is not constrained to bear the BCD at the rate of 40% for solar module and 25% for solar cells making the project financially unviable.

45. It has also been submitted by the Respondents that waiver given by the Respondents as recorded in the Article 12.1.6 of the PPAs is limited to the claim for Change in Law on account of issuance of MNRE's OM dated 9.3.2021 and does not in any manner restrict them from claiming compensation on account of occurrence of other Change in Law, specifically the issuance of Project Import (Amendment) Regulations, 2022. The Respondents have sought to rely upon the judgment of Hon'ble Supreme Court in the case of Nabha Power Ltd. v. PSPCL and Ors, [(2018) 11 SCC 508] for invoking the principle of 'business efficacy' and 'officious bystander test' in the present context. It has also been submitted that the Respondents cannot be subjected to risks unknown/ untaken and hence it is only essential that while interpreting the PPA, a common sense and business efficacy test is applied. In this regard, reliance has also been placed on the judgment of Hon'ble Supreme Court in the case of Union of India v. D. N Revri & Co and Ors., [(1976) 4 SCC 147]. In view of the above, the Respondents/Developers have prayed to recognize the MNRE's BCD Notification and the Project Imports (Amendment) Regulations, 2022 as Change in Law events under the PPAs.

46. In response, SECI has contended that the PPAs entered into with the Respondents/developers have been signed in April and June, 2022 which was after the 31.3.2022 when the BCD had become 40% on solar modules and 25% on solar cells. It is submitted that in terms of Article 12.2.6 of the PPAs, the developers with due reference to the increased BCD from 0 % to 40% on solar modules and from 0% to 25% on solar cells and without any reservation or qualification, unconditionally and in absolute manner committed that they duly waive the claims of Customs Duty on the said rates of 40% and 25%. The developers signed the PPAs in April and June, 2022 when the applicable BCD had already become 40% and 25% and even then they proceeded to accept that no Change in Law on account of BCD will be claimed as per the MNRE OM dated 9.3.2021. At the relevant time, the developers did not claim that the same will be subject to it availing the concession (if any) under the Project Import Regulations, 1986 or in any other manner. As per Article 12.2.6 of the PPAs, the waiver on Change in Law claim of BCD was not conditional upon the benefit of concessional rate of 5% of Custom Duty as per the Project Import Regulations, 1986 being available and in case the same is not available notwithstanding the waiver, they will claim any Change in Law event. The waiver given by the developers is specific and unequivocal that they will not claim the benefit of Change in Law events qua BCD till 40% for solar modules and till 25% for solar cell and they are bound by such waiver subject to which the PPA was signed. The claim of BCD by them can only for *“any further increase of BCD,..... any incremental impact over prescribed rates of BCD as above”*.

47. SECI has further submitted that notification of Project Import (Amendment) Regulations, 2022 on 19.10.2022 by Ministry of Finance, Government of India has not affected in any manner the rate of BCD as per MNRE OM dated 9.3.2021, namely, BCD vis-à-vis solar modules continues to be 40% and BCD vis-à-vis solar cell continues to be 25%. The reliance placed by the Respondents on the judgments of Hon'ble Supreme Court in Nabha Power Ltd. v. PSPCL and Ors, [(2018) 11 SCC 508] and Union of India v. D. N Revri & Co and Ors., [(1976) 4 SCC 147] is misplaced. It is submitted that in the said decisions, the interpretation of a clause in the contract was in dispute and efficacious interpretation was given to clause to make it workable. However, the entire clause was not rendered meaningless and the unequivocal terms were not re-written. In the present case, the waiver in Article 12.2.6 is clear and unambiguous.

48. We have considered the submissions made by the parties. Since the controversy stems from the Article 12.2.6 of the PPAs, it is pertinent to refer to the said Article which reproduced hereunder:

"12.2 Relief for 'Change in Law

.....

12.2.6 The following proposal of MNRE to impose Basic Custom Duty (BCD) on Solar cells and modules (without grandfathering of bid out projects) has been agreed to by the Ministry of Finance:

<i>Item</i>	<i>CTH</i>	<i>Upto 31.03.2022</i>	<i>w.e.f. 01.04.2022</i>
<i>Solar Module</i>	<i>85414012</i>	<i>0%</i>	<i>40%</i>
<i>Solar Cells</i>	<i>85414011</i>	<i>0%</i>	<i>25%</i>

As per commitment from SPD, the SPD will provide the waiver on claim of Basic Custom Duty mentioned above in this PPA. If there is any further revision/modification

to the said BCD notification or any new notification on the BCD matter, resulting in any further increase of BCD, Developers shall remain entitled to exercise rights for any claim under Change in Law of the PPAs, viz, such revision/modification (any incremental impact over prescribed rates of BCD as above) or any new notification. Further, No Change in Law on account of BCD will be claimed by either party, as per the MNRE OM dated 09.03.2021.

Perusal of the above article reveals that the developers had, despite being completely aware of levy of BCD on the solar modules and cells w.e.f. 1.4.2022, proceeded to give waiver on the claim of BCD as mentioned in the MNRE OM dated 9.3.2021. Hence, so far as the requests of the Respondents/developers to recognize and said MNRE OM dated 9.3.2021 as Change in Law event is concerned, it cannot be allowed in view of the above provision of the PPAs. However, this issue involves certain additional aspects as the developers have submitted that when the above waiver was given, they were entitled to avail the benefit of concessional rate of 5% Customs Duty as permitted under the Project Imports Regulations, 1986 and the said option came to be removed by virtue of Project Imports (Amendment) Regulations, 2022 dated 19.10.2022. As a result, the concessional rate benefit for the Project as available to the Respondents/ developers, basis which the aforesaid waiver was given by them, is no longer available to them and as a result, they are constrained to bear the BCD rate as notified in the MNRE OM dated 9.3.2021. It has also been contended that waiver as captured in the Article 12.2.6 of the PPAs is only with respect to the MNRE OM dated 9.3.2021 and not for the Project Imports (Amendment) Regulations, 2022.

49. We have considered the submissions made by the Respondents in this regard. Firstly, it would be pertinent to examine as to whether the waiver given under Article

12.2.6 of the PPAs is restricted to the MNRE's OM dated 9.3.2021 itself or operates to the extent of rates BCD as indicated therein. From the perusal of the said provision, it is clear that the SPD will provide the waiver on claim of BCD as mentioned above (rates as mentioned in MNRE OM) in the PPA. It has also been agreed upon by the parties that if there is any further revision/modification to the said BCD Notification or new notification on the BCD matter, resulting into further increase of BCD, the developer shall remain entitled to exercise its rights for Change in Law claim viz. such revision /modification (any incremental impact over prescribed rates of BCD as above) or any new notification. Thus, it is apparent that the developer has given the waiver on claim of BCD not only in the context of MNRE's OM dated 9.3.2021 but in terms of the BCD rates specified therein thereby waiving its right to claim the Change in Law event(s)/relief until "*any further increase of BCD*" than that prescribed in the said OM. It is equally pertinent to note that the above waiver neither speaks of the developer having the other avenues for importing the solar cells/modules nor it appears to be conditional upon the developer being able to avail such avenues.

50. Once having been held that in terms of Article 12.2.6 of the PPAs the developer having given the waiver on the claim of BCD on the solar cells and modules till the rates specified in the MNRE's OM dated 9.3.2021 i.e. 40% on the solar modules and 25% on the solar cells, the recognition of Project Imports (Amendment) Regulations, 2022 as Change in Law event under the PPAs loses its significance as by virtue of the said regulations, the applicable rates of BCD on the solar cells and modules do not affect or exceeds the rates as specified in the MNRE's

OM dated 9.3.2021. Hence, even assuming that the said amendment, which restricts the solar power projects/plants, from availing the concessional rate of duty, constitutes Change in Law event under Article 12 of the PPAs, the developers, in our view, cannot claim any relief on account of such event in view of the specific waiver given under Article 12.2.6 of the PPAs as the amendment, as rightly pointed out by SECI, does not affect the rates as specified in the MNRE's OM dated 9.3.2021. The reliance placed by the Respondents on the various authorities of the Hon'ble Supreme Court invoking the principles of Business efficacy and Officious Bystander cannot apply to the present case as the Article 12.2.6 of the PPAs is quite clear and unambiguous and the developers having given unequivocal waiver and by entering into the PPAs, cannot now resile from the said article citing the unfavourable circumstances or the commercial hardships. In view of the above, we hereby reject the request of the Respondents/developers to recognize the increase in the rate of BCD on the solar cells and modules in terms of MNRE's OM dated 9.3.2021 and Project Imports (Amendment) Regulations, 2022 as Change in Law events in terms of the specific provisions of the Article 12.2.6 of the PPAs as executed between the developers and SECI.

51. The Respondents 8, 10 & 11 have also requested the Commission to take into account the delay in tariff adoption and hold that the Respondents are entitled to corresponding extension of timelines to achieve the financial closure and scheduled commissioning date in terms of the Article 2.1.3 read with Article 2.1.4 of the PPAs. We have considered the said submissions of the Respondents. Article 2.1.3 and 2.1.4. provides as under:

“2.1.3 Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligation of wither party against the other under this Agreement shall be that, within 120 days after Effective Date of the PPA, SECI and/or the Buying Entity (ies) shall obtain adoption of tariff from its Sate Electricity Regulatory Commission and/or CERC (as applicable_, on the terms and conditions contained in this Agreement read with the terms and conditions contained in the Power Sale Agreement entered into between SECI and the Buying Entity(ies). The Parties agree that in the event, the order of adoption of tariff as mentioned above is not issued by the SERC and/or CERC (as applicable) within the time specified above, the provisions of Article 2.1.4 shall apply.

2.1.4. If Parties have mutually extended the time period as stipulated under Article 2.1.3 and the order from the SERC and/or CERC (as applicable) is issued within the timeline as per Article 2.1.3, no extension for Financial Closure or Scheduled Commissioning Date shall be given. However, if the requisite SERC and/or CERC (as applicable) order is issued after the timeline as per Article 2.1.3, this shall entail a corresponding extension in Scheduled Financial Closure and the Scheduled Commissioning Date for equal number of days for which the SERC and/or CERC order has been delayed beyond such period as specified in Article 2.1.3”

52. We observe that Article 2.1.3 read with Article 2.1.4 of the PPAs quoted above, in line with the provisions of the Guidelines, already provide for the extension in scheduled financial closure and scheduled commissioning date for equal number of days for which the order for adoption of tariff by the Appropriate Commission has been delayed beyond 120 days. Hence, we do not find any need to issue a separate direction on the subject matter as the contractual provisions already deal with and provide the course of action in such event(s).

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

54. The Petition No. 245/AT/2022 is disposed of in terms of the above.

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

**sd/-
(Arun Goyal)
Member**

**sd/-
(I.S. Jha)
Member**