

Rajasthan Electricity Regulatory Commission

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

In the matter of Petition filed under Section 63 of the Act for adoption of tariff for 1070 MW Solar PV Power and

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

Coram:

Dr. B.N. Sharma, Chairman

Shri Hemant Kumar Jain, Member

Dr. Rajesh Sharma, Member

- Petitioner : Rajasthan Urja Vikas Nigam Limited.
AEW India North One Private Limited (1933/21)
- Respondent(s) : 1. Solar Energy Corporation of India (in 1905/21 and 1933/21)
2. Green Infra Wind Energy Ltd. (in 1905/21)
3. AEW India North One Private Limited (in 1905/21)
4. NTPC Renewable Energy Ltd. (in 1905/21)
5. Rajasthan Urja Vikas Nigam Ltd. (in 1933/21)
- Date(s) of hearing** : **22.07.2021 and 02.08.2022**
- Present** : Sh. Rajesh Kumar Verma, Representative for Petitioner.
Sh.M.G.Ramachandran, Sr.Advocate for Respondent Solar Energy Corporation of India Ltd. ('SECI').
Sh. Sanjay Sen, Sr. Advocate for Respondent, M/s Green Infra Renewable Projects Limited ('GIRPL').
Sh. Nihal Bhardwaj, Advocate for Respondent, NTPC Renewable Energy Pvt Limited ('NTPC REL').

Sh. Sujit Ghosh, Advocate for Respondent, AEW India North One Private Limited ('AEW India').

Date of Order:

31.08.2022

Order

Brief Background:

1. Rajasthan Urja Vikas Nigam Ltd. (RUVNL) had filed this Petition on 24.03.2021 under Section 63 of the Electricity Act, 2003 for the adoption of tariff for 1070 MW Solar PV power to be purchased by three Discoms for which bidding was conducted by SECI.
2. In the matter of this Petition, two rounds of litigations are involved.
3. The Orders in the matter of this Petition were issued by the Commission on 23.07.2021 and 13.12.2021, whereas Hon'ble APTEL had passed judgment in respect of these orders on 12.10.2021 and 28.01.2022 respectively.

Commission Order dated 23.7.2021:

4. During the proceedings of this Order, M/s Green Infra filed an IA to implead it as a Respondent in the matter on which the Commission directed to implead all the successful Generators in the bid as Respondents.
5. Respondent Generators prayed that at the time of adoption of the tariff itself Commission should declare some events, as mentioned in their replies, as Change in Law/Force Majeure events in terms of the PPA. They also prayed for the extension of timelines for the period of pendency of the present Petition.
6. The Commission issued the Order on 23.7.2021 in terms of Section 63 of the Electricity Act, 2003, for the adoption of tariff. Further, in the said Order, Commission deemed it appropriate not to look into the merits of the issues raised by the Respondent Generators regarding the declaration of Change in Law and Force Majeure events. However, parties were given the liberty to file fresh petitions to raise such issues at the appropriate time

APTEL order dated 12.10.21 in Appeal No.251 of 2021:

7. The above order dt. 23.7.21 was challenged before Hon'ble APTEL by Green Infra Renewable Projects Ltd. bearing Appeal No. 251 of 2021 & IA No. 1223 of 2021. Hon'ble APTEL on 12.10.2021 passed the Order in the matter and directed the Commission to hear the parties further in the light of the observations made by the Tribunal and pass further orders specifically with respect to the three change in law event claims presented by the appellant, preferably within two months. The relevant paras of the APTEL's Order are extracted below:

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

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

Commission order dated 13.12.2021:

8. In light of the above Order dated 12.10.2021 passed by the Hon'ble APTEL in Appeal No. 251 of 2021, the matter was remanded to the Commission for the consideration of the change in law events raised by the developers. Accordingly, the Petition was listed for hearing on 28.10.2021, where Respondents were directed for filing their consolidated submissions.
9. AEW India North One Pvt Ltd., (hereinafter 'AEW India'), Green Renewable Projects Ltd., (hereinafter 'GIRPL' or 'Green Infra'), Solar Energy Corporation of India Ltd.,(hereinafter 'SECI')filed their written

submission, and Rajasthan Urja Vikas Nigam Ltd. (hereinafter 'RUVNL') filed their reply on the submission filed by the Respondent. M/s AEW India also filed a petition bearing no. 1933/21 for approval and recognition of Change in Law. As the issues that had arisen in both the petitions for consideration and decision of the Commission were similar, these petitions referred to in the cause title were clubbed.

10. While analysing the petitions, the Commission noted that the Solar Power Developers (SPDs) Respondents, in their written submissions, had mainly raised the following issues:
- (a) Hold and declare that the increase in rates of Basic Customs Duty ('BCD') on the import of Solar Inverters pursuant to the Ministry of Finance ('MoF') Notification dated 01.02.2021, whereby the Exemption Notification dated 06.01.2011 has been rescinded, is a change in law event under the PPA;
 - (b) Hold and declare that the levy of BCD on the import of Solar Cells and Modules/Panels pursuant to the MNRE OM dated 09.03.2021 with effect from 01.04.2022 is a change in law event under the PPA;
 - (c) Hold and declare that the MoF GST Notification is a change in law event under the PPA;
 - (d) Hold and declare that the SC GIB Order qualifies as a change in law event under the PPA, and consequently, SPDs are entitled to compensation and extension of time accordingly;
 - (e) Since the Project has already been delayed due to SC GIB Order as well as delay in tariff adoption proceedings, the SCD and other timelines under the PPA be extended to account for the time spent in the legal proceedings before the Hon'ble Tribunal and the Commission;
 - (f) RUVNL be directed to place on record the impact of the SC GIB Order on the downstream transmission line/system;
 - (g) Declaration of increase in Grid Connectivity Charges from Rs 2 lakh per MW to Rs 2.5 lakh per MW to be payable by Renewable Energy Projects, as per Regulation 89 of the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources), Regulations, 2020 (hereinafter referred to as the "RE Tariff Regulations, 2020")

issued by the Commission vide Notification No. RERC/Secy/Regulation 138, dated 02.11.2020 as an event of change in law in terms of Article 12.1.1 of the Power Purchase Agreement dated 04.03.2021 executed between AEW India and SECI read with Article 12.1.2 and Article 12.2.4 of the PPA.

- (h) Approval and Recognition of Article 12.1.3 and Article 12.2.3 of the Power Purchase Agreement, which specifically provides that change in the rate of safeguard duty, GST, and basic customs duty after 28.10.2020 will be treated as change in law, and every net increase/decrease of 1 lakh per MW in Project cost will be liable for corresponding increase or decrease of an amount equal to Rs. 0.005/kWh;

11. During the hearing SECI submitted that in terms of the APTEL order, the Commission may recognize the three events as constituting the change in law events under Article 12 of the respective Power Purchase Agreements (hereinafter "PPAs"). The Commission observed that proceeding in pursuance to the APTEL order dated 12.10.2021 were restricted to the following change in law events:

- (i) Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to the MoF Notification No. 07 dated 01.02.2021, whereby Customs duty exemption notification No. 01 dated 06.01.2011 has been rescinded.
- (ii) Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to MNRE Office Memorandum dated 09.03.2021.
- (iii) The direction issued by Hon'ble Supreme Court of India by its Order dated 19.04.2021 in Writ Petition (Civil) No. 838 of 2019 titled *M.K. Ranjitsinh & Ors. vs. Union of India & Ors.* in terms of which all existing and future overhead low and high voltage power lines in the Priority and Potential habitats of Great- Indian Bustard are necessarily required to be laid under- ground.

12. The Commission issued its Order dated 13.12.2021 in the matter wherein it noted that though some of the generators have also claimed relief on other change of law events. In the said order Commission was of the view that in terms of the decision of the Hon'ble Tribunal, only the recognition of the change in law events in respect of the above three events was required.

13. In the aforesaid order Commission, accordingly, considered events (i) and (ii) as the change in law events, and regarding the event (iii) held that the prayer of SPDs to recognize directions issued by the Hon'ble Supreme Court of India by its Order dated 19.04.2021 as Change in law event was not justified as that bid for procurement of solar power was not location specific, and therefore, their prayer was disallowed.

APTEL Judgment dated 28.01.2022 (Appeal No. 344 of 2021 & IA No. 2065 of 2021) (Appeal No. 9 of 2022 & IA No. 69 of 2022):

14. Aggrieved by order of the Commission on GIB and non -consideration of other issues, the generators approached APTEL, which vide its judgment dt. 28.01.2022 held as under:

"In this view, we only reiterate what we said in the previous Judgment. The adoption proceedings before the State Commission will be treated as incomplete and inchoate. It shall pass further order on the remaining claims for declaration of change in law events having a bearing on the tariff to be adopted, as expeditiously as possible, not later than one month hereof after hearing the parties and in accordance with law. We are conscious that the Appellants are also aggrieved upon denial of the relief vis-à-vis the judgment of Hon'ble Supreme Court in Great Indian Bustard case. The right of the Appellants and such other parties as may be thereby affected, to pursue the remedy of appeal, is hereby reserved to be brought after the further Order is passed."

15. However, due to the vacancy of Post of Hon'ble Member (Legal) in the Commission, Hon'ble APTEL, in its Order dated 25.02.2022, directed that the time for fresh decision in terms of the remit-by judgment dated 28.01.2022 would come into force on the date Member (Legal) joins the Commission.
16. Subsequently, on the appointment of the Member (Legal) in the Commission, the matter was listed for hearing on 22.07.2022 wherein the Commission directed all the parties to file their written submissions within a week's time.
17. Accordingly, NTPC Renewable Energy Ltd. (hereinafter 'NTPC Renewable'), AEW India Limited, and SECI submitted their respective written submissions on 28.07.2022. while Green Infra Renewable Ltd.

and RUVNL submitted their respective written submissions on 29.07.2022.

18. The matter was finally heard on 02.08.2022, wherein, Sh. Rajesh Kumar Verma, Representative for Petitioner, appeared on behalf of the Petitioner. Sh. M.G. Ramachandran, Advocate, appeared for SECI. Sh. Sanjay Sen, Sr. Advocate appeared for M/s Green Infra, Sh. Nihal Bhardwaj, Advocate appeared for NTPC Renewable, Sh. Sujit Ghosh, Advocate appeared for AEW India. The Commission directed the parties to file their brief written arguments within three days. The Order was reserved in the matter.
19. Subsequent to the above, GIRPL also filed an I.A. on 12.08.2022 requesting for declaring the increase in Grid Connectivity Charges vide RERC RE Tariff Regulations 2020 issued on 02.11.2020 as a change in law event under the PPA. GIRPL in their I.A. have also submitted that since the issue of grid connectivity has also been raised by AEW India, which is pending for consideration before the Commission, a fresh hearing for consideration of this change in law claim may not be required. Accordingly, this issue has been considered along with the issue raised by AEW India.
20. **M/s SECI, during the hearing and in its written submissions has submitted as under:**
 - 20.1. Commission may recognize and declare the following events as constituting the Change in Law events under Article 12 of the respective Power Purchase Agreements (hereinafter 'PPAs'):
 - 20.1.1. Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification No. 07 /2021- Customs dated 01.02.2021 whereby custom duty exemption notification no. 1/2011, dated 06.01.2011, has been rescinded.
 - 20.1.2. Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021.
 - 20.1.3. Levy of GST vide Notification dated 30.09.2021 of Ministry of Finance.
 - 20.2. Ministry of New and Renewable Energy vide Office Memorandum dated 03.02.2022 has dealt with the decision dated 19.04.2021 of the

Hon'ble Supreme Court in the GIB matter and has provided for the following:

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.

20.3. The change in law aspect of the decision mentioned above dated 19.04.2021 of the Hon'ble Supreme Court on the projects to be established by the Respondents- Solar Power Developers is to be

considered as per the terms of the Office Memorandum dated 03.02.2022 of MNRE and the outcome of the decision of the Hon'ble Supreme Court on the I.A. as specified in the said Office Memorandum.

- 20.4. The nature and extent to which the above events will have an impact are to be considered based on the factual details and circumstances having implications of the above laws on the implementation of the project by the Respondents-Solar Power Developers (SPDs). The impact of the change in law is to be considered at the appropriate stage in terms of the formula provided in Article 12.2.3 of the respective PPAs and in terms of the decision dated 12.10.2021 of the Hon'ble APTEL in Appeal No. 251 of 2021.
- 20.5. For the application of the formula provided in Article 12.2.3 of the PPAs for relief of Change in Law, the amount constituting the project cost cannot be considered on an estimated basis. The project cost will be available only upon the capital expenditure being incurred as on the actual commissioning date of the last part capacity or Scheduled Commissioning Date /Extended Scheduled Commissioning Date.
- 20.6. The claim made by AEW India for declaring increase in Grid Connectivity Charges as per Regulation 89 of Rajasthan Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2021 as Change in Law under Article 12 of PPA is disputed by SECI. The said claim was raised by AEW India in the proceedings before the Hon'ble Appellate Tribunal in Appeal No.07 of 2022, which was also disposed of by the Hon'ble Appellate Tribunal vide Order dated 09.05.2021. SECI had disputed the claim of AEW in its reply filed in Appeal No.07 of 2022 before the Hon'ble Appellate Tribunal as follows:
- 20.6.1. The Rajasthan Tariff Regulations are not applicable to the transaction of purchase and sale of electricity under the present PPA and PSA executed in pursuance of Competitive Bidding in terms of Section 63 of the Electricity Act. In this regard, Regulation 3 dealing with the scope of Regulations provides as under:

3. Scope of Regulation and extent of application

3.1 These Regulations shall apply to those new generating station(s) or unit based on renewable energy sources, which fulfil the following criteria:

- (a) are commissioned in the State of Rajasthan for generation and sale of electricity to Distribution Licensee(s) in the State during the Control Period;
- (b) are Eligible projects as per eligibility criteria specified in Regulation 4 of these Regulations;
- (c) **whose tariff is to be determined by the Commission under Section 62 read with Section 86 of the Act:**

3.2 Notwithstanding anything contained in these Regulations, the Commission shall adopt the tariff, if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government, as envisaged under Section 63 of the Act

[Emphasis Supplied]

20.6.2. Accordingly, independent of the above Regulations, the Renewable Power Developer has to arrange for connectivity and pay the charges as may be applicable from time to time as per the orders and directions of the Rajasthan Commission. Such charges are not incidence of change in law.

20.6.3. In terms of the bidding documents and the PPA, the responsibility of getting connectivity with the transmission system owned by the STU or any other transmission utility, as may be required, is entirely of the Solar Power Developer and the same was at the cost and risk of the SPD. The entire cost of Transmission including cost of the arrangement of connectivity is to be borne by the SPD. In this regard, the following provisions are relevant :

“Article 4.1.1 (e) and 4. 2.2 of the PPA

4.1 SPD Obligations

The SPD undertakes to be responsible at SPD's own cost and risk, for the following:

e) Connecting the Power Project switchyard with the Interconnection Facilities at the Delivery Point. The SPD shall made adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at Interconnection / Metering/Delivery Point ; and

4.2 Information regarding Interconnection Facilities

.....

4.2.3 The responsibility of getting connectivity with the transmission system up to the Interconnection Point, will lie with the SPD. The transmission of power up to the point of

interconnection where the metering is done for energy accounting shall be the responsibility of the SPD at his own cost. The maintenance of Transmission system up to the designated point as per the applicable terms and conditions shall be the responsibility of the SPD. All costs and charges including but not limited to the wheeling charges and losses up to and including at the interconnection Point associated with this arrangement will also be borne by the SPD.

4.2.4 In case of Pooling substation, losses in the transmission line shall be apportioned among the SPDs who share such a Pooling arrangement and duly signed by all SPDs, based on their monthly generation.

4.2.5 The arrangement of connectivity shall be made by the SPD through a dedicated transmission line. The entire cost of transmission including cost of construction of line, any other charges, losses etc. from the Project up to the Interconnection Point will be borne by the SPD. In case of non-availability of Grid and Transmission System during Term of this Agreement, for reasons not attributable to the SPD, provisions of Article 4. 10 shall be applicable."

20.6.4. Without prejudice to the above, the Petitioner has also not given Legal Notice regarding Change in Law as per Article 12.3 of the PPA. Article 12.3 of the PPA provides as under:

"12.3 Notification of Change in Law

12.3.1 If the SPD is affected by Change in Law in accordance with Article 12 and wishes to claim a Change in Law under this Article, it shall give notice to the SEC/ and Buying Utility(s) of such Change in Law as soon as reasonably practicable (but no later than 60 days from the date of occurrence of such Change in Law).

12.3.2 Any notice service pursuant to this Article 12.3.1 and 12.1.3, shall provide, amongst other things , precise details of the Change in Law and its effect on the Project Cost, supported by documentary evidences including Statutory Auditor Certificate to this effect so as to establish one to one correlation and its impact on the Project Cost".

20.7. Article 2.1.3 of the PPA provides for the Adoption of Tariff by the Commission within 120 days of the effective date 27.01.2021 as per

Article 2.1.1 of the PPA). Article 2.1.4 provides that if the tariff adoption order is issued by the Commission after 120 days specified in Article 2.1.3, there shall be a corresponding extension in Scheduled Financial Closure ('FC') and Scheduled Commissioning Date ('SCOD') for equal number of days for which the State Commission's Order has been delayed.

21. **M/s Green Infra during the hearing and in its written submissions has submitted as under:**

21.1. Pursuant to remand by the Hon'ble Tribunal, the issues for consideration before the Commission are limited to the following:

- A. Whether increase in rate of GST from 5% to 12% on renewable energy devices and parts for manufacture pursuant to GST Notification dated 30.09.2021 qualifies as Change in Law under the PPA? If so, then what relief is GIRPL entitled to claim in terms of the PPA?
- B. Whether this Hon'ble Commission in addition to recognizing Article 12.1.3 of the PPA, ought to grant in-principle approval of Change in Law on account of increase in BCD on import of Solar Cells and Modules/Panels pursuant to MoF Notification dated 01.02.2021 whereby Exemption Notification has been rescinded?
- C. Whether this Hon'ble Commission in addition to recognizing Article 12.1.3 of the PPA, ought to grant in-principle approval of Change in Law on account of levy of BCD pursuant to MNRE OM dated 09.03.2021?

A. Increase in rate of GST from 5% to 12% on renewable energy devices and parts for manufacture pursuant to Ministry of Finance Notification No. 8/2021- Integrated Tax (Rate) dated 30.09.2021 constituted as Change in Law in terms of the PPA:

21.2. It is submitted that as on the cut-off date i.e., 28.10.2020, GST on renewable energy devices and parts for their manufacture was 5%. However, the same was increased from 5% to 12% by the Ministry of Finance vide GST Notification dated 30.09.2021, which qualifies as Change in Law under the PPA as:

- (i) Vide GST Notification dated 30.09.2021, GST on renewable energy devices and parts for their manufacture has increased from 5% to 12%.
 - (ii) GST Notification dated 30.09.2021 was issued by the Ministry of Finance and falls within the definition of 'Law' under the PPA.
 - (iii) GST Notification dated 30.09.2021 was issued after 28.10.2020 which is the cutoff date for consideration of change in law.
 - (iv) GST Notification dated 30.09.2021 has been issued by the Ministry of Finance which qualifies as an Indian Governmental Instrumentality under the PPA.
 - (v) Increase of GST from 5% to 12% will have an impact on the Project cost.
- 21.3. Further, Article 12.1.3 of the PPA recognises any increase in GST after 28.10.2020 i.e., cut-off date, having impact on Project cost as a Change in Law event subject to this Hon'ble Commission recognising Article 12.1.3 of the PPA. It is the duty of this Hon'ble Commission to consider and allow the Change in Law pursuant to the provisions of the PPA and Judgments of the Hon'ble Tribunal dated 12.10.2021 in Appeal No. 251 of 2021 and Order dated 28.01.2022 in Appeal No. 344 of 2021.
- 21.4. On 16.11.2021, Green Infra issued Change in Law Notice under Article 12.3 of the PPA notifying SECI that the GST Notification dated 30.09.2021 qualifies as Change in Law in terms of Article 12.1.3 of the PPA. Further, SECI was informed that GIRPL is assessing the impact on the Project cost and will provide requisite documents in due course.
- 21.5. Pertinently, enactment and/or increase in GST has been recognized by the Hon'ble Tribunal and Hon'ble Central Electricity Regulatory Commission as a change in law event in terms of the following:
- 21.5.1. Judgment dated 03.10.2019 in Appeal No. 131 of 2019 titled *DNH Power Distribution Company Limited v. CERC & Ors.*
 - 21.5.2. Order dated 12.11.2021 in Petition No. 468/MP/2019 titled *Mahindra Renewable Private Limited v. MPPMCL & Ors.*

- 21.5.3. Order dated 10.08.2021 in Petition No. 45/MP/2019 titled Talettutayi Solar Projects One Private Limited v. SECI & Ors.
- 21.5.4. Order dated 25.01.2021 in Petition No. 211/MP/2019 titled *RattanIndia Solar 2 Private Limited v. SECI & Anr.*
- 21.6. In view of the foregoing, the criteria set out under Article 12 of the PPA qua Change in Law stands satisfied, and GST Notification dated 30.09.2021 qualifies as a Change in Law event under the PPA. Accordingly, this Commission ought to recognize Article 12.1.3 of the PPA and grant in-principle approval for the increase in GST pursuant to GST Notification dated 30.09.2021 as a Change in Law event under the PPA.
- B. This Hon'ble Commission ought to grant in principle approval for levy and increase of BCD as change in Law Events under the PPA:**
- 21.7. Green Infra before the Hon'ble Tribunal in Appeal No. 251 of 2021 had sought in-principle approval of the following:
- (i) Levy of BCD on import of Solar Cells, Modules /Panels pursuant to MNRE Office Memorandum dated 09.03.2021.
 - (ii) Increase in rates of BCD on import of Solar Inverters pursuant to MoF Notification dated 01.02.2021 withdrawing the Exemption Notification which resulted in the increase of 15% in the BCD on Solar Inverters.
- 21.8. The Hon'ble Tribunal vide the remand Judgment, remanded the matter back to the Commission and held that:
- (i) The impact on Project cost due to Change in Law events that have occurred after the submission of the bid but before the adoption of the tariff, render the bid price unrealistic. In terms of Section 86(1)(b) of the Act, it is the duty of the State Commission to inquire into such claim at the first opportune time.
 - (ii) If the event constitutes change in law within the four corners of its definition under the PPA, the event should be duly recognized as a change in law at the stage of tariff adoption.
- 21.9. However, the Commission vide Order dated 13,12,2021 in Petition 1905 has held as under:

“31. It is noted that there is clear provision in the PPA that if there are changes in the rates of Basic Custom Duty(BCD)after 28.10.2020 and resulting in change in Project Cost, then such change will be treated as 'change in law' subject to the provision that Appropriate Commission recognizes such provisions.

32. Therefore it is clear that in terms of the above-cited Article 12.1.3, although it is agreed that these events are to be treated as change in law events, it is necessary for the same to be acknowledged and recognized by the appropriate Commission. The Commission, after considering all the submissions, deems it appropriate to recognise the clause 12.1.3 of the PPA which treats change in rates of basic customs duty after 28.10.2020 as 'change in law'.

[-]

38. It is further clarified that the nature and extent to which the events of levy of basic custom duty and increase in basic custom duty will have an impact will be considered separately by the procurer based on the factual details and circumstances.”

- 21.10. Commission has merely recognized Article 12.1.3 of the PPA and has failed to grant in-principle approval for Change in Law on account of the increase and levy of BCD pursuant to the MoF Notification dated 01.02.2021 and MNRE OM dated 09.03.2021, respectively. In this regard, it is submitted that in terms of the Remand Judgment, an express finding of in-principle approval ought to have been granted. However, by combining the issue of recognizing Article 12.1.3 of the PPA which treats change in rates of BCD after 28.10.2020 as 'change in law' and leaving the nature and extent of the issue open despite of the directions of the Hon'ble Tribunal.
- 21.11. It is submitted that the Order dated 13.12.2021 creates ambiguity in terms of the scope of the approval. Thus, an express finding of in-principle approval ought to have been granted by this Commission as directed by the Hon'ble Tribunal in Judgment dated 12.10.2021 in Appeal No. 251 of 2021.
- 21.12. The importance of in-principle approval was also highlighted by the Hon'ble Tribunal in Judgment dated 13.11.2020 in Appeal 101 of 2020 titled *Lalitpur Power Generation v. Uttar Pradesh Electricity Regulatory Commission* wherein the importance of granting in-principle approval for change in law events has been recognized. Further, the Hon'ble

Tribunal also gave importance to the commercial implication of change in law events on the power sector as a whole. Relevant paras are reproduced below:

“136. The Appellant has referred to the National Electricity Policy, 2005 and Tariff Policy, 2016 issued by MOP, under section 3 of the Electricity Act, 2003 which provides that steps should be taken to ensure regulatory certainty so as to minimise perception of regulatory risk, ensure financial viability of the sector and generate investor's confidence to attract investment.

137. The Commission has disposed of this Petition simply on the grounds that under the state tariff regulation 2019, there is no provision for granting in-principle approval and therefore the same cannot be granted by the Commission.

138. There is no discussion in the impugned Order regarding special circumstances as submitted by the Appellant requiring the in-principle approval/ regulatory certainty. The last sentence of the impugned Order which reads as- “It is the petitioner's obligation to comply with the prevalent laws and ensure that all the consent and approval is required for the project are obtained by it” gives an impression that the Commission has nothing to do with the issues raised by the appellant and it is for the appellant to sort them out at his level.

139. In view of the above we are of the opinion that the State Commission has shown complete insensitivity to an important issue of National Importance having commercial implications on the Appellant, the consumers and the power sector at large. We disapprove this type of lackluster approach of the State Commission in dealing with such an important issue of environmental compliance with commercial implications on the operation of the Appellant”.

[...]

“145. The State Electricity Regulatory Commission has been created under the Electricity Act, 2003 and have been conferred powers to Legislate, Adjudicate and Administer. It is a unique statutory body of its kind and have been assigned roles and responsibilities to oversee the operation and development of power sector in the State on commercial principals as per the provisions of law. The reading of the impugned Order dated 07.02.2020 passed by the State Commission gives an impression

that the State Commission declined the in-principle approval to the Appellant because it was constraint by the absence of the specific regulation in this regard. A statutory body like the State Electricity Regulatory Commission having all the powers under the law to adjudicate on matters of importance regarding the functioning of power sector cannot decline to consider a request like the one in question i.e. in-principle approval for additional capitalization on account of change in law sought by the Appellant in spite of the fact that there is abundant clarity on the subject of the regulatory powers conferred on the State Electricity Regulatory Commission under the Act. Inherent powers of the State Commission are saved to make such orders as may be necessary: (i) to secure the ends of justice; and (ii) to prevent abuse of process of the Commission.

146. We are of the opinion that the State Electricity Regulatory Commission has powers under the Act to fill up the gaps in supplementing the rules/regulations by issuing instructions if the same are silent on certain aspects provided that such instructions are consistent with the Act"

[...]

"181. It appears from the reading of the impugned Order that though the Commission preferred to deal with the issue of change in law to meet the ends of justice however the same spirit is not visible from the impugned Order. It is a very sketchy order and lacks sincerity and seriousness in dealing with such a sensitive issue of national importance having significant commercial implication on the plant and the power sector as a whole."

- 21.13. In view of the foregoing, it is submitted that the Commission ought to grant in-principle approval for levy of BCD on import of Solar Cells, Modules /Panels pursuant to MNRE Office Memorandum dated 09.03.2021 and increase the in rate of BCD on import of Solar Inverters pursuant to MoF Notification dated 01.02.2021 as Change in Law under the PPA.
- 21.14. It is further submitted that since the Project has been delayed due to delay in adoption of tariff, in terms of Articles 2.1.3 and 2.1.4 of the PPA, the SCD and other timelines under the PPA ought to be extended to account for the time spent in legal proceedings before the Hon'ble Tribunal and the Hon'ble Commission.

21.15. Green Infra prays for the following reliefs:

- (a) Hold and declare that GST Notification dated 30.09.2021 is a Change in Law Event under the PPA and that Green Infra is entitled to compensation on account of the same;
- (b) Grant in-principle approval for levy of BCD on import of Solar Cells (25%), Modules /Panels (40%) pursuant to MNRE Office Memorandum dated 09.03.2021 and increase in the rate of BCD on import of Solar Inverters pursuant to MoF Notification dated 01.02.2021 as Change in Law under the PPA and that Green Infra is entitled to compensation on account of the same.
- (c) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in nature and circumstances of the present case.

I.A. of Green Infra

21.15.1. Green Infra has filed IA wherein it has submitted that the Issue of grid connectivity charges has been raised by AEW India which is pending for consideration before the Commission. It is further stated that Green Infra and AEW India have executed similar PPAs, any relief based on the claim ought to be granted to GIRPL as well.

21.15.2. On 28.01.2022, Hon'ble APTEL passed Order in Appeal No. 344 of 2021 remanding matter to this Commission. In terms of the findings of the Order dated 28.01.2022 read with recent Judgment, this Commission ought to consider all claims that have occurred after the Bid Deadline/ Cut-off Date and will impact tariff for the Project.

21.16. Green Infra has filed I.A. stating that RERC RE Tariff Regulations constitute as Change in Law in the PPA as :

- (i) Vide RERC RE Tariff Regulations, grid connectivity charges have been increased from Rs 2 Lakhs to Rs 2.5 Lakhs per MW.
- (ii) RERC RE Tariff Regulations fall within the definition of 'Law' under PPA.
- (iii) RERC RE Tariff Regulations were issued by this Commission which qualifies as an Indian Governmental Instrumentality under the PPA.

- (iv) RERC RE Tariff Regulations were issued after 28.10.2020 which is the cut-off date for consideration of Change in Law.
- (v) Increase in grid connectivity charges will have an impact on the Project cost.
- 21.17. On 12.08.2022, Green Infra has issued the Change in Law Notice under Article 12.3 of the PPA notifying SECI that increase in grid connectivity charges will have an impact on the Project cost and qualifies as Change in Law in terms of PPA.
- 21.18. In compliance with the RERC RE Tariff Regulation they have already paid an amount of Rs. 10 Crore to RVPNL on 31.03.2022 as grid connectivity charges for 400 MW Solar Power Plant.
- 21.19. Green Infra in their I.A. prayed as under:
- (i) Hold and Declare that RERC RE Tariff Regulations is a Change in Law Event under the PPA and Green Infra is entitled to compensation on account of the same.
- (ii) Grant in-principal approval for increase in grid connectivity charges from Rs. 2 Lakhs to Rs. 2.5 Lakhs per MW pursuant to RERC RE Tariff Regulations as Change in Law event under the PPA.
22. **M/s AEW during the hearing and in its written submissions has submitted as under:**
- 22.1. In light of the Order dated 12.10.2021 passed by Hon'ble APTEL in Appeal No.251 of 2021 this Commission passed the common Order disposing of Petition Nos. 1905 of 2021 (Tariff Petition) and 1933 of 2021 (filed by AEW India) on 13.12.2021. The relevant portion of the Order dated 13.12.2021 is reproduced as under:

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

.....

27. From the perusal of the aforesaid Article of the PPA, it is clear that as per Article 12.1.3 of the PPA any change in rates qua Safeguard Duty, GST and BCD after the last date of bid submission, i.e. 28.10.2020 which resulted in change in overall cost of the project, then in that case such change will be treated as change in law.

.....

31. It is noted that there is clear provision in the PPA that if there are changes in the rates of Basic Custom Duty (BCD) after 28.10.2020 and resulting in change in Project Cost, then such change will be treated as 'change in law' subject to the provision that Appropriate Commission recognizes such provisions.

32. Therefore it is clear that in terms of the above-cited Article 12.1.3, although it is agreed that these events are to be treated as change in law events, it is necessary for the same to be acknowledged and recognized by the appropriate Commission. The Commission, after considering all the submissions, deems it appropriate to recognise the clause 12.1.3 of the PPA which treats change in rates of basic customs duty after 28. 10.2020 as 'change in law'.

.....

39. In view of above, the Petitions bearing no. 1905/21 and 1933/21 are disposed of, accordingly."

22.2. Basis the aforementioned, the relevant findings of this Hon'ble Commission have been summarized hereunder:

- (i) As per Article 12.1.3 of the PPA any change in rates qua Safeguard Duty, GST and BCD after the last date of bid submission, i.e., 28.10.2020 which resulted in change in overall cost of the project, then in that case such change will be treated as change in law (Para 27 of Order).
- (ii) Commission recognizes clause 12.1.3 of the PPA which treats change in rates of basic customs duty after 28.10.2020 as 'change in law' (Para 32 of Order)

22.3. Being aggrieved by the Order dated 13.12.2021 passed by this Hon'ble Commission to the extent that this Hon'ble Commission had failed to

approve and recognize Article 12.1.3 of the PPA and proceeded to restrict the approval and recognition of Article 12.1.3 to be applicable only to the change in rates of the Basic Customs Duty, AEW India preferred an Appeal bearing Appeal No. 7 of 2022 challenging the Order passed by this Hon'ble Commission in Petition 1933 of 2021 and Appeal 8 of 2022 challenging the Order passed by this Hon'ble Commission in Petition No. 1905 of 2021 before the Hon'ble APTEL.

22.4. While this appeal was pending, APTEL passed its Order dated 28.01.2022 in Appeal no. 344 of 2022 filed by Green Infra.

22.5. In light of the above Order of APTEL dated 28.01.2022, AEW India withdrew its Appeal to pursue its grievances before this Commission and submitted as under:

A. Change in rates of Safeguard duty, GST and BCD after the last date of bid submission are treated as change in law under article 12.1.3 of the PPA subject to article 12.1.3 and article 12.2.3 being recognized by the Hon'ble Commission:

22.6. It is submitted that vide Order dated 13.12.2021, the Commission has specifically acknowledged that as per Article 12.1.3 of the PPA, any change in rates qua safeguard duty, GST and BCD after the last date of bid submission, i.e., 28.10.2020 which results in change in overall cost of the project, would be treated as Change in Law. Accordingly, on the basis of the aforementioned findings of the Commission, it is clear that all three events i.e., change in rates of SGD, GST and BCD would be treated as Change in Law as per Article 12.1.3. Furthermore, the very same clause also lays down the condition that the said events would be treated as Change in Law only if Article 12.1.3 of the PPA is recognized by the Appropriate Commission i.e. The Commission in the present case. However, Commission proceeded to recognize Article 12.1.3 of the PPA only to the extent of change in rate of Basic Custom duty.

22.7. Commission is bound to recognize Article 12.1.3 in its entirety, such that any change in rate of GST and SGD (if levied) at a subsequent stage would be treated as a Change in Law event. This is also pertinent there has indeed been an increase in rate of GST on renewable energy devices and parts for manufacture with effect from 01.10.2021, pursuant to the Notification no. 8/2021-Integrated Tax (Rate) dated 30.09.2021, which would qualify as a change in law event. Thus, if

- Article 12.1.3 is recognized in its entirety, then such increase in GST would qualify as change in law and the Developers would be liable to compensation in terms of Article 12.2.3 of the PPA.
- 22.8. A limited recognition of Article 12.1.3 as accorded by this Commission vide its Order dated 13.12.2021 defeats the very intent of inserting such a provision in the PPA to ensure ease of business, reduce regulatory litigation by ensuring that certain aspects are treated as Change in Law without making the Developers approach the Regulatory Commissions from time to time seeking approval of such Change in Law Events. A limited recognition of the Article 12.1.3 would result in multiplicity of proceedings, as each time there is a levy or increase in the rates of GST or SGD, the Developers would be constrained to approach the Commissions to seek approval and recognition of Article 12.1.3, thereby defeating the very purpose of inserting the said provision.
- 22.9. Commission in terms of article 12.1.3 is duty bound to recognize Article 12.1.3 and Article 12.2.3 in its entirety such that all the three events covered under Article 12.1.3 are treated as Change in Law and compensation thereon is provided in terms of Article 12.2.3.
- 22.10. Commission is duty bound to take into account the specific directions of the Hon' ble APTEL that if the event referred to actually constitutes a 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 itself and that the actual impact and extent of the relief admissible be determined at the appropriate stage.
- 22.11. The intent of the Hon'ble Tribunal is clear that all the events which qualify as a Change in Law must be declared and approved by the Commission at the earliest possible time without waiting for the exact impact which could be considered at a later stage.
- B. Recognition to Article 12.2.3 of the PPA:**
- 22.12. It is submitted that Article 12.2.3 of the PPA lays down the mechanism for claiming relief in relation to the events treated as change in law under Article 12.1.3 of the PPA.
- 22.13. It is prayed that Article 12.1.3 of the PPA as well as Article 12.2.3 of the PPA which lays down the relief available to the Developer in case of

occurrence of a Change in Law event specified under Article 12.1.3 of the PPA may be recognized as Change in Law. AEW India vide Petition No. 1933 of 2021, had specifically prayed for acknowledgment and recognition of Article 12.1.3 read with Article 12.2.3 of the PPA. The same was also carried by way of Appeal before the Hon'ble Tribunal which was subsequently withdrawn vide Order dated 09.05.2022 on account of the remand Order dated 28.01.2022.

- 22.14. Commission vide its Order dated 13.12.2021 has granted a partial recognition to Article 12.1.3 only to the extent of Basic Customs Duty, whereas it has not accorded its approval and recognition to Article 12.2.3 which lays down the relief applicable for such Change in Law Events.
- 22.15. In the absence of recognition of Article 12.2.3 which lays down the compensation and relief as payable, the entire change in law provision would be rendered otiose and AEW India seeking to claim relief on account of change in law would be remediless.
- 22.16. It is humbly prayed that the Commission may duly recognize both Article 12.1.3 and Article 12.2.3 of the PPA, where Article 12.1.3 deals with the change in law events and Article 12.2.3 deal with the compensation payable pursuant the change in law.

C. Declaration of change in Grid Connectivity charges by this Commission as an event of change in law according to article 12.1.1 of the PPA:

- 22.17. Commission vide its Notification dated 02.11.2020 has issued the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2021 whereby the Grid Connectivity Charges payable by the Renewable Energy Projects were increased from Rs. 2 Lakhs to Rs. 2.5 Lakhs per MW as per the Regulation 89 of the said Regulations.
- 22.18. The increase in the Grid Connectivity charges from Rs. 2 Lakh/MW to Rs. 2.5 Lakh/MW be treated as a Change in Law and the additional expense incurred by AEW India be compensated in terms of the Change in Law of the PPA.

D. Consequential relief on account of delay in tariff adoption by this Hon'ble Commission:

- 22.19. In terms of Article 2 of the PPA, the Petitioner was obligated to obtain the Tariff Adoption Order from this Hon'ble Commission within 120 days from the effective date of the PPA.
- 22.20. PPA clearly envisages that the condition precedent for enforcing the obligations under the PPA shall be that the Buying Entity (Petitioner) or the Intermediary (SECI) obtains the Tariff Adoption Order from this Commission within 120 days from the Effective Date.
- 22.21. In case of delay in obtaining such Order, Article 2.1.4 applies which states that the delay shall entail a corresponding extension in the Financial Closure and Scheduled Commissioning Date for equal number of days for which the Tariff Adoption Order has been delayed. As per the terms of the PPA, the Petitioner was duty bound to obtain the Tariff Adoption Order from this Hon'ble Commission on or before 27.05.2021 (120 days from the effective date i.e., 27.01.2021). However, since there has been a delay in obtaining the Tariff Adoption Order, the Petitioner is entitled towards extension of time equal to the delay caused from 27.05.2021 till the date of Tariff Adoption Order. Hence, Commission may clarify the same in its Order and grant an extension of timeline in achieving financial closure and subsequent extension in the Scheduled Commissioning Date.
- 22.22. In light of the above submissions, it is prayed:
- (i) To recognize and approve Article 12.1.3 and Article 12.2.3 of the PPA in its entirety and totality such that the Imposition of GST is also approved and recognized as a change in law;
 - (ii) Declare and hold Grid Connectivity charges as an event of change in law as per 12.1.1 of the PPA;
 - (iii) Grant an extension of timeline in achieving Financial closure and subsequent extension in scheduled Commissioning date on account of delay in Tariff Adoption as a consequential relief.

23. **M/s NTPC Renewable Energy Ltd., during the hearing and in its written submissions submitted as under:**

23.1. In the present remand back proceedings NTPC is seeking declaration of and relief for the following change in law events pursuant to the Order dated 28.01.2022 passed by the Hon'ble APTEL:

A. Change in Law:

23.2. The definition of law under the PPA is an exhaustive definition which considers all laws issued by an Indian Government Instrumentality. However, for an event to be considered a 'Change in Law' event, the same ought to be caused by the operation of law or by an Indian Governmental Instrumentality.

23.3. The term Government Instrumentality covers Government of India, Government of Rajasthan, New Delhi and any Ministry, Department, Board, Authority, Agency, Corporation, Commission under direct or indirect control of the Government of India.

23.4. Change in Law encompasses introduction, increase or modification of any law after last date of Bid submission which have a direct bearing on the Project.

23.5. The object of the 'Change in Law' provision is to compensate the Party affected by such an event which was beyond its control so as to restore it, to the same financial position as if such Change in Law event had not occurred.

23.6. The event being claimed as Change in Law should have occurred after the last date of bid submission, i.e., 28.10.2020.

23.7. Article 12.1.3 of the PPA categorically envisages that any change in rates qua Safeguard Duty, GST and BCD after the last date of bid submission, i.e., 28.10.2020 which results in a change in overall cost of the project, will be treated as Change in Law and shall be decided at the time of adoption of Tariff under Section 63 of the i.e., the current proceedings.

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

B. Ministry of Finance Notification dated 30.09.2021 qualifies as a Change in Law event:

23.9. As a result of the Amendment notified by Ministry of Finance (MoF), Gol, GST at the rate of 12% became applicable upon renewable energy devices and parts for their manufacture instead of 5% which was initially applicable upon Solar power Generator. It is submitted that the amendment under question would have a direct impact upon the cost to be paid towards development of Solar Power Project, which is evident from the table provided hereunder:

Particular	Goods (70%gross consideration)	Services (30% consideration)	Composite GST to be paid
GST Applicable Prior Amendment	5%	18%	8.9%
GST Applicable Post Amendment	12%	18%	13.8%
Additional GST to be paid by Solar Power Generators			4.9%

23.10. In this backdrop, on 03.11.2021, M/s NTPC Renewable issued a change in law notice under Article 12.3.1 of the PPA to SECI, thereby notifying increase in levy of GST on solar PV Cells and modules from 5% to 12%. Thus, the aforesaid amendment in GST rate leads to a direct increase in the EPC cost of solar PV Project by 4.9%.

23.11. It is a well-settled position of law that the change in taxes and duties which result in additional expenses must be allowed as change in law events. In this respect, the following judgments may be referred:

23.11.1. In the Judgment dated 13.11.2019 passed by the Hon'ble Tribunal in Appeal No. 77 of 2016 titled as *Sasan Power Limited vs CERC & Ors.*, it was held that compensation ought to be meted out for a Change in Law event despite the bidder having quoted an all- inclusive tariff, as denial of compensation will render the change in law clause otiose.

23.11.2. In the judgment dated 14.08.2018 passed by the Hon'ble Tribunal in Appeal No. 111 of 2017 titled as *GMR Warora Energy Limited vs CERC*, wherein the Hon'ble Tribunal held imposition/change in taxes/duty/cess qualify for Change in Law event and Power Producer is required to be compensated for same.

- 23.11.3. In terms of Article 12.2 of the PPA, Respondent is bound to be placed in the same financial position as it would have been had the Amended GST Notifications not been notified by MoF, Gol. In this regard, reliance is placed upon the Judgment has been passed by the Hon'ble Supreme Court of India in *Uttar Haryana Biji Vitran Nigam Limited v. Adani Power Limited & Ors.* (2019) 5 SCC 325.
- 23.12. In view of the law settled by the respective Court of Law and submissions made above, it is evident that:
- (i) The relief sought by Respondent squarely qualifies as a Change in Law event in terms of Article 12 of the PPA.
 - (ii) The GST Notification has a direct bearing on the financial cost of the Project under question, therefore, Respondent No. 4 is entitled to be placed in the same financial position as on the bid submission date.
- 23.13. Commission by way of its Order dated 13.12.2021 at para 27 had held that as per Article 12.1.3 of the PPA any change in rate qua Safeguard Duty, GST and BCD after the last date of submission i.e. 28.10.2020 which resulted in change in overall cost of Project will be treated as a Change in Law event.
- 23.14. Therefore, on this ground alone, the claim of Respondent to declare GST Notification as a Change in Law event is ought to be allowed by the Commission.

C. Clarification for extension of timelines under the PPA:

- 23.15. In terms of Article 3.1 (a) of the PPA, the Solar Power Developer (SPD) shall make the Project financing arrangements and submit the relevant document within 12 months from the Effective Date.
- 23.16. In terms of Article 5.1.5 of the PPA, the SPD shall commission the Project within 18 months of the Effective Date.
- 23.17. For the purpose of enforcing the obligation of either party under the Agreement, the Petitioner was obligated to obtain the Order approving the tariff from this Commission within 120 days after the effective date of this Agreement.
- 23.18. From a bare perusal of the term of the Agreement, the following issues arise for consideration of the Commission:

- (i) In terms of Article 2.1.3 of the PPA, the obligation of parties under the Agreement shall be enforced subject to Petitioner obtaining adoption of Tariff from the Hon'ble Commission within 120 days after the Effective date of the Agreement.
 - (ii) In the event order of adoption of tariff is not issued by the Hon'ble Commission within 120 days then the provision of Article 2.1.4 shall be applicable.
 - (iii) Article 2.1.4 of the PPA provides that if the requisite Order is not issued within the period of 120 days from the effective date of the Agreement then the same would result in corresponding extension in Scheduled Financial Closure ("FC") and Scheduled Commissioning Date ("SCOD") for equal number of days for which the adoption Order was delayed.
- 23.19. In view of the understanding arrived between the parties under Article 2 of the PPA, M/s NTPC is entitled to an extension of timelines for achieving FC and SCOD of the Project. Therefore, it is prayed that the Commission may clarify in the Adoption Order that the timelines towards FC and SCOD stand extended in terms of Article 2.1.4 of the PPA.
- 23.20. In view of the fact and circumstances explained above, the relief as claimed by the Respondent squarely falls within the definition of Change in Law and in fact it has satisfied all the elements as envisaged under the PPA for the purpose of seeking a declaration from the Commission.
24. **M/s RUVNL during the hearing and in its written submissions has submitted as under:**
- 24.1. The three change in law events presented by the Appellant before the APTEL were mentioned in the Commission's Order dated 12.10.2021.
- 24.2. After remand, the generators have filed a consolidated statement in regard to above-mentioned change in law events for which the Discoms submit their reply as under:-

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

24.3. It is submitted that the basic custom duty on import of solar invertors was existing since 06.01.2011 and was also applicable on the last day of submission of the bid. As per the provisions of the RFS, a generator was supposed to quote its prices based on the existing taxes and levies. It is submitted that vide Notification dated 01.02.2021, there is a withdrawal of the exemption which cannot amount to change in law as per the terms and conditions of the change in law event and therefore, it is submitted that the withdrawal of exemption of a custom duty on invertors vide Notification dated 01.02.2021 cannot amount to change in law as per the provision of RFS as well as the Power Purchase Agreement. Therefore, the generators are not entitled to seek the Notification dated 01.02.2021 as a change in law event and therefore, their claim deserves to be rejected.

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

24.4. It is submitted that the Notification dated 09.03.2021 is issued by Ministry of New and Renewable Energy. For levy of any custom duty, a notification is required to be issued by the Finance Department. Since no such notification has been issued to levy such basic custom duty issued by Finance Department thus, the claim is premature and deserves to be rejected.

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

24.5. It is submitted that Bid was State specific bid, not location specific and Rajasthan is having wide geographical area (342239 Sq. km) Rajasthan has 400 sq. km priority habitat and 19728 sq. km of potential habitat spanning over Jaisalmer, Jodhpur small part of Bikaner. On this

basis, Commission in its Order dated 13.12.2021 has already disallowed this GIB related issue. Hon'ble Supreme Court orders are always a law of land and an order dated 19.04.2021 will certainly amount to change in law. However, it is submitted that before declaring an event as change in law, the generators are required to place on record the documents to show how the generators in present case would be affected by the Order dated 19.04.2021 and in absence of such documents about the effects of the same, the claim is not required to be considered and deserves to be rejected and set aside.

- 24.6. Some of the generators have also claimed other change of law events including GST. It is submitted that Commission has already disallowed the GST related issue vide Order dated 13.12.2021. Generators cannot claim any other change of law except as directed by the Hon'ble APTEL and such other contentions deserves to be rejected.
- 24.7. It is prayed that written submission in regard to change in law events as directed may be taken on record on behalf of the Discoms/ RUVNL and the claims may kindly be rejected.

Commission's view:

25. Commission has considered the submissions of the Petitioner and Respondents in light of the Order dated 28.01.2022 passed by the Hon'ble APTEL and clauses related to the change in law in the PPA.
26. Before going into the merits of the case, it is worthwhile to mention the brief facts of the case.
27. RUVNL filed the Petition No.1905 of 2021 seeking the adoption of tariff u/e 63 of the Electricity Act,2003. the proceedings of the petition, GIRPL filed an Impleadment Application seeking in-principle approval of Change in Law events/Force Majeure events. Along with GIRPL, other successful generators were also made party to the proceedings.
28. Commission passed the order in the matter on 23.07.2021 wherein tariff was adopted and granted liberty to the respondents regarding claims of change in law /Force Majeure events to raise such issues at appropriate time.
29. Aggrieved by the Order, an Appeal came to be filed before the APTEL, where Hon'ble APTEL disposing of the Appeal issued its order on

12.10.2021. The relevant parts of the aboe APTEL judgment are reproduced as under:

“ 8. In the run-up to the impugned decision, certain events had occurred in which regard the appellant had engaged the other relevant parties in exchange of correspondence, the claim being that the events in question qualified as change in law or force majeure on which account the bid discovered price required to be suitably revised such that the appellant was duly compensated on such account. The events which were mentioned in that context included the following:

- (i) Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification No. 07/2021-Customs dated 01.02.2021 whereby custom duty exemption notification no. 1/2011 dated 06.01.2011 has been rescinded;*
- (ii) Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021;*
- (iii) The direction issued by Hon'ble Supreme Court of India by its Order dated 19.04.2021 in Writ Petition (Civil) No. 838 of 2019 titled M.K. Ranjitsinh & Ors. v. Union of India & Ors. in terms of which all existing and future overhead low and high voltage power lines in the Priority and Potential habitats of Great-Indian Bustard are necessarily required to be laid under-ground;*
- (iv) Imposition of lockdown on account of Covid-19 by the Authorities in the Government of Rajasthan; and*
- (v) Strike by Patwaris in Rajasthan from 15.01.2021 it having continued till last week of April, 2021 disrupting ongoing project work.*

.....
9. According to the case of the appellant, the claims of compensation with reference to the imposition of lockdown during pandemic and strike of Patwaris were to be treated as force majeure events, the other three events having been pressed as change in law events.

.....
12. The learned senior counsel for SECI fairly conceded that it was incumbent on the part of the State Commission to consider the claim on account of change in the basic customs duty on inverters in terms of the provision contained in Article 12.1.3 in the very Order whereby the bid discovered price was being considered for adoption. It was, however, submitted that rest of the claims, particularly those claimed under the force majeure clause of the PPA, could not have been pressed at the stage of adoption, it being not yet clear at such stage as to whether such

changes will impact the financial burden of the project developer (the appellant herein).

.....
13. During the course of hearing, the learned senior counsel for the appellant fairly agreed that the two claims on account of force majeure events will have to be pursued, pressed by the project developer and considered by the State Commission at a later stage in as much as that would require presentation of detailed facts and consideration of the relevant data, etc. In this view, he restricted his grievance in this appeal to the non-consideration of the three change in law events, mentioned earlier.

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

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

30. Pursuant to the above order of the Hon'ble APTEL, Commission passed the order in the matte on 13.12.2021. The relevant portion of the Commission's order are as follows:

"7.1 The present proceedings are remand proceedings wherein GIRPL is seeking declaration of and relief for the following change in law events pursuant to the Order dated 12.10.2021 passed by the Hon'ble Tribunal:

- (a) SC GIB Order in terms of which all existing and future overhead low and high voltage powerlines in the Priority and Potential habitats of Great-Indian Bustard shall be undergrounded.
- (b) Levy of BCD on import of Solar Cells, Modules /Panels pursuant to MNRE OM dated 09.03.2021.

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

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

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

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

.....
31. It is noted that there is clear provision in the PPA that if there are changes in the rates of Basic Custom Duty (BCD) after 28.10.2020 and resulting in change in Project Cost, then such change will be treated as 'change in law' subject to the provision that Appropriate Commission recognizes such provisions.

32. Therefore it is clear that in terms of the above-cited Article 12.1.3, although it is agreed that these events are to be treated as change in law events, it is necessary for the same to be acknowledged and recognized by the appropriate Commission. The Commission, after considering all the submissions, deems it appropriate to recognise the clause 12.1.3 of the PPA which treats change in rates of basic customs duty after 28.10.2020 as 'change in law'.

37. *In view of above, the prayer of SPDs to recognize directions issued by Hon'ble Supreme Court of India by its Order dated 19.04.2021 as „change in law" event is not justified as this bid for procurement of solar power was not location specific and therefore this prayer is disallowed.*

38. *It is further clarified that the nature and extent to which the events of levy of basic custom duty and increase in basic custom duty will have an impact will be considered separately by the procurer based on the factual details and circumstances".*

31. M/s Green Infra filed an Appeal No. 344 of 2021 & IA NO. 2065 OF 2021 and Appeal No. 9 of 2022 & IA No. 69 of 2022 before the Hon'ble Appellate Tribunal for Electricity, challenging the Order dated 13.12.2021 passed by the Commission.

32. The Hon'ble APTEL vide its Order dated 28.01.2022 remanded the matter to the Commission for passing further orders on the remaining claims for declaration of change in law events having a bearing on the tariff to be adopted, as expeditiously as possible, not later than one month here of after hearing the parties and in accordance with law. The present proceedings are remand proceedings in pursuance to order passed by Hon'ble APTEL. Aggrieved by the Order on GIB and non -consideration of other issues the generators approached APTEL and Hon'ble APTEL vide judgment dt. 28.01.2022 observed as under:

".....we only reiterate what we said in the previous Judgment. The adoption proceedings before the State Commission will be treated as incomplete and inchoate. It shall pass further order on the remaining claims for declaration of change in law events having a bearing on the tariff to be adopted, as expeditiously as possible, not later than one month hereof after hearing the parties and in accordance with law. We are conscious that the Appellants are also aggrieved upon denial of the relief vis-à-vis the judgment of Hon'ble Supreme Court in Great Indian Bustard case. The right of the Appellants and such other parties as may be thereby affected, to pursue the remedy of appeal, is hereby reserved to be brought after the further Order is passed."

33. Commission observes that it has already passed an order dated 13.12.2021 in respect of the following events:

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

34. In the aforesaid order Commission has considered events (i) and (ii) as the change in law events, and regarding event (iii) Commission has held that the prayer of SPDs to recognize directions issued by the Hon'ble Supreme Court of India in its Order dated 19.04.2021 as the Change in law event is not justified as that bid for procurement of solar power was not location specific, and therefore, their prayer was disallowed.

35. RUVNL has also submitted that orders of Hon'ble Supreme Court are always a law of land, and order dated 19.04.2021 will certainly amount to change in law. However, it is submitted that before declaring an event as change in law, the generators are required to place on record the documents to show how the generators in present case would be affected by the Order dated 19.04.2021 and in absence of such documents about the effects of the same, the claim is not required to be considered and deserves to be rejected and set aside. It observed that except SECI none of the respondents has made submissions regarding the above judgment in the matter of GIB. According to SECI the change in law aspect of the decision dated 19.04.2021 of the Hon'ble Supreme Court on the projects to be established by the Respondents- Solar Power Developers is to be established as per terms of the OM dated 03.02.2022 of MNRE and outcome of decision of the Hon'ble Supreme Court on the I.A. as specified in the said OM. Hon'ble APTEL in its order dated 28.01.2022 regarding this has observed as under:

".....We are conscious that the Appellants are also aggrieved upon denial of the relief vis-a-vis the judgment of Hon'ble Supreme Court in Great Indian Bustard case. The right of the Appellants and such other parties as may be thereby affected, to pursue the remedy of appeal, is hereby reserved to be brought after the further order is passed."

36. The Commission has already passed the order in respect of consideration of judgment of Hon'ble Supreme court in the matter of GIB as change in law. The present proceedings are in pursuance to Hon'ble APTEL order dated 28.01.2022. After going through the submissions made by the parties, the issues for consideration before the Commission now are, therefore, limited to the following claims:
- A. Approval and Recognition of Article 12.1.3 and Article 12.2.3 of the Power Purchase Agreement, which specifically provides that change in rate of safeguard duty, GST, and basic customs duty after 28.10.2020 will be treated as change in law;
 - B. Recognition of Article 12.2.3 of the PPA;
 - C. Declaration of change in Grid Connectivity Charges vide RERC RE Tariff Regulations 2020 as an event of change in law according to Article 12.1.1 of the PPA read with Article 12.1.2 and Article 12.2.4 of the PPA; and
 - D. Consequential relief on account of delay in tariff adoption by the Commission under Article 2.1.4 of the PPA.
37. We now look into each issue in the following paras (A,B,C &D):
- A. Approval and Recognition of Article 12.1.3 and Article 12.2.3 of the Power Purchase Agreement, which specifically provides that change in rate of safeguard duty, GST, and basic customs duty after 28.10.2020 will be treated as change in law:**
 - B. Recognition of Article 12.2.3 of the PPA:**
38. It is the submission of RUVNL that withdrawal of BCD on solar inverters Vide Notification does not amount to change in law, whereas as regards levy of BCD on solar cells, Notification regarding this is yet to be issued by Finance department and thus, claim is premature. As regards increase in rate of GST, it is submission of RUVNL that this claim

- has already been disallowed by the Commission in its order dated 13.12.2021 as being not covered under the APTEL judgement dated 12.10.2021.
39. According to the SPDs, the issues for consideration before the Commission are that in addition to recognizing Article 12.1.3 of the PPA, the following events may be treated as the change in law:
- (i) Change in rates of Safeguard Duty (If levied).
 - (ii) Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification No. 07 /2021- Customs dated 01.02.2021 whereby custom duty exemption notification no. 1/2011, dated 06.01.2011, has been rescinded.
 - (iii) Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021.
 - (iv) Levy of GST vide Notification dated 30.09.2021 of Ministry of Finance.
40. According to one of the SPDs, the Article 12.2.3 of the PPA may also be recognized as in absence of the recognition of this Article which lays down the compensation and relief as payable, the entire change in law provision would be rendered otiose and seeking to claim relief on account of change in law would be remediless.
41. It is further submitted that Articles 12.1.3 and 12.2.3 of PPA may be recognized and approved in entirety and totality such that imposition of GST is also approved and recognized as change in law.
42. SECI have submitted that Commission may recognize and declare the events increase/levy of BCD and Levy of GST as constituting the Change in Law events under Article 12 of the respective PPAs.
43. We have looked into the above events claimed as change in law in terms of relevant provisions of the PPAs.
44. The Article 12 of the PPA pertaining to 'change in law' reads as under:

“ARTICLE 12: CHANGE IN LAW

12.1 Definitions

12.1.1 In this Article 12, the term Change in Law shall refer to the occurrence of any of the following events pertaining to this project only after 28.10.2020 including (i) the enactment of any new law; or (ii) an amendment, modification or repeal of an existing law; or (iii) the requirement to obtain a new consent, permit or license; or (iv) any modification to the prevailing conditions prescribed for obtaining an consent, permit or license, not owing to any default of the Solar Power Developer; or (v) any change in the rates of any Taxes including any duties and cess or introduction of any new tax made applicable for setting up the solar power project and supply of power from the Solar Power project by the SPD which have a direct effect on the Project.

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

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

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

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

It is further clarified that, applicability of Safeguard Duty on "Solar Cells whether or not assembled in modules or panels" which is till 29.07.2021, if gets extended and has a direct effect on the Project, resulting in

change in Project Cost, such extension will also qualify under "Change in Law" as per timeline and procedure indicated under Article 12 of PPA.

12.2 Relief for Change in Law

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

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

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

Every net increase/decrease of Rs 1 lakh per MW in the Project Cost (i.e. the cost incurred by the SPD towards supply and services only for the Project concerned, upto the Actual Commissioning Date of the last part capacity or Scheduled Commissioning Date/extended Scheduled Commissioning Date, whichever is earlier), 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.'

.....

- 45. Commission also notes that para XI of the Power Sale Agreement (PSA) reads as under:

"XI. The parties agree that the various terms contained in the SECI-SPD PPA such as Scope of Project, Terms of the Agreement, Performance Guarantee, Conditions Subsequent, Obligations of the respective Parties, Construction of the Power Generation Capacity. Synchronization, Commissioning and Commercial Operation, Operation and Maintenance, Purchase and Sale of Solar Power, Measuring and Metering and Dispatch of Power, Billing and Power Accounting and payments, Liabilities, Force Majeure, Events of Default, Termination, Transfer. Change in Law, Indemnity, Insurance, Assignment and Changes, Financing and Bankability, Representations and Warranties, Governing Law, Notices and all other Miscellaneous Terms provided in the SECI-SPD PPA shall mutatis mutandis apply to this agreement between SECI and Buying Entity."

46. Commission vide its order dated 13.12.2021 on issues of SGD,GST and BCD has held as under:

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

*.....
31. It is noted that there is clear provision in the PPA that if there are changes in the rates of Basic Custom Duty (BCD) after 28.10.2020 and resulting in change in Project Cost, then such change will be treated as 'change in law' subject to the provision that Appropriate Commission recognizes such provisions.*

32. Therefore it is clear that in terms of the above-cited Article 12.1.3, although it is agreed that these events are to be treated as change in law events, it is necessary for the same to be acknowledged and recognized by the appropriate Commission. The Commission, after considering all the submissions, deems it appropriate to recognise the clause 12.1.3 of the PPA which treats change in rates of basic customs duty after 28.10.2020 as 'change in law'."

47. As regards the prayer of the Respondents for according recognition to Article 12.2.3 of the PPA, SECI has submitted that the impact of the change in law is to be considered at the appropriate stage in terms of formula provided in Article 12.2.3 of the respective PPAs and in terms of decision dated 12.10.2021 of the Hon'ble APTEL in Appeal No.251 of 2021. According to SECI for application of the formula provided in Article 12.2.3 of the PPAs for relief of change in law, the amount constituting the project cost cannot be considered on an estimated basis. The project cost will be available only upon the capital expenditure being incurred as on the actual commissioning date of the last part capacity or Scheduled Commissioning Date/Extended Scheduled Commissioning Date.
48. On perusal of the above Articles of the PPAs/PSA, it is observed that parties have agreed that in case of change in the rate of safeguard duty, GST, and Basic Customs duty after 28.10.2020 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 recognize such provisions at the time of adoption of tariff and any decision in this regard shall be governing on SPD and buying entity. The change in rates of Safeguard Duty, GST and Basic Custom Duty are primarily affected by Notification of Ministry of Finance, Govt of India, which qualifies to be an India Govt Instrumentality under PPAs/PSA.

49. In light of the above, after considering all the submissions, we deem it appropriate to recognise the Article 12.1.3 of the PPAs in its entirety and totality, and in terms of this after 28.10.2020, we hold the following events shall be treated as the 'change in law':

- (i) Change in rates of Safeguard Duty (If levied).
- (ii) Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification No. 07 /2021- Customs dated 01.02.2021 whereby custom duty exemption notification no. 1/2011, dated 06.01.2011, has been rescinded.
- (iii) Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021.
- (iv) Levy of GST vide Notification dated 30.09.2021 of Ministry of Finance.

50. We further hold that the quantum of compensation payable on account of the above change in law events shall be considered at the appropriate stage in terms of the formula provided at Article 12.2.3 of the respective PPAs.

C. Declaration of change in Grid Connectivity Charges vide RERC RE Tariff Regulations 2020 as an event of change in law according to Article 12.1.1 of the PPA read with Article 12.1.2 and Article 12.2.4 of the PPA;

51. It is submitted by AEW India that the increase in the Grid Connectivity charges from Rs 2.0 Lakh/MW to Rs 2.5 Lakh/MW as per regulation 89 of the RERC RE Tariff Regulations,2020 issued on 02.11.2020 after the cut-off date 28.10.2020. Therefore, this increase may be treated as change in law and additional expense incurred by them be compensated. In addition, GIRPL through their IA has also prayed that

they are also entitled to compensation on account of the change in law and prayed to grant in principle approval for increase in grid connectivity charges from Rs 2.0 Lakh to Rs.2.5 Lakh/MW pursuant to RERC RE Tariff Regulations as change in law event under the PPA.

52. Per contra SECI has disputed this claim stating that RERC RE Tariff Regulations are not applicable to purchase and sale of electricity under the present PPA and PSA executed in pursuance of competitive bidding in terms of section 63 of the Electricity Act 2003. Independent of this, the Renewable Power developer has to arrange for connectivity and pay the charges as may be applicable from time to time as per the orders and directions of the Commission. Such charges are not incidence of change in law. Further, is the submission of SECI that in terms of bidding documents and the PPA the responsibility of getting connectivity with the transmission system owned by STU or any other transmission utility as may be required is entirely of the solar power developer and the same was at its cost and risk.
53. We observe that the relevant provisions of PPA in respect of the grid connectivity read as under:

“4.1 SPD Obligations

4.1.1 The SPD undertakes to be responsible at SPD's own cost and risk, for the following:

.....
e) connecting the Power Project switchyard with the Interconnection Facilities at the Delivery Point. The SPD shall made adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at Interconnection/ Metering/Delivery Point ;

.....
4.2 Information regarding Interconnection Facilities

.....
4.2.3 The responsibility of getting connectivity with the transmission system up to the Interconnection Point, will lie with the SPD. The transmission of power up to the point of interconnection where the metering is done for energy accounting shall be the responsibility of the SPD at his own cost. The maintenance of Transmission system up to the designated point as per the applicable terms and conditions shall be the responsibility of the SPD. All costs and charges including but not limited to the wheeling charges and losses up to and including at the interconnection Point associated with this arrangement will also be borne by the SPD.

4.2.4 In case of Pooling substation, losses in the transmission line shall be apportioned among the SPDs who share such a Pooling arrangement and duly signed by all SPDs, based on their monthly generation

4.2.5 The arrangement of connectivity shall be made by the SPD through a dedicated transmission line. The entire cost of transmission including cost of construction of line, any other charges, losses etc. from the Project up to the Interconnection Point will be borne by the SPD. In case of non-availability of Grid and Transmission System during Term of this Agreement, for reasons not attributable to the SPD, provisions of Article 4. 10 shall be applicable."

54. While considering the request of Rajasthan Vidyut Prasaran Nigam(RVPN) for increasing grid connectivity charges at the time of finalising RERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2020, the Commission, at para 68.7 of statement of Objects and Reasons(SOR) recorded as under:

"68.7 The Commission has noted the request of RVPN to increase the Grid Connectivity Charges as the cost involved for the smaller projects are comparatively on the higher side. Further, the Commission has also taken into considerations the variation in the actual bay cost. However, in the absence of actual detailed cost data, and with the view to provide connectivity at lower prices so as to promote RE, the Commission has decided to nominally increase the Grid Connectivity Charges to Rs. 2.5 Lakh per MW".

55. In the above proceedings RVPN has requested to increase the Grid connectivity charges from Rs. 2 Lakh to Rs. 3 Lakhs per MW or actual bay cost, whichever is higher considering the prevailing cost trends. The cost for grid connectivity varies with change in cost of material and equipment used for this purpose. Further, from the provisions of the PPAs, it is evident that the grid connectivity is the responsibility of the SPDs and risks and cost incidental to it have to be borne by them as rightly submitted by SECI.
56. In light of the above , we are of the view that in terms of the PPA and foregoing discussion the increase in Grid connectivity charges have to be borne by the SPDs and their claim for declaration of increase in Grid Connectivity Charges as change in law is not accepted.

D. Consequential relief on account of delay in tariff adoption by the Commission under Article 2.1.4 of the PPA:

57. It is submitted by the SPDs that in terms of Article 2 of the PPA, the Petitioner/SECI was obligated to obtain the Tariff Adoption Order from the Commission within 120 days from the effective date of the PPA. As per Article 2 of the PPA condition precedent for enforcing the obligations under the PPA shall be that the Buying Entity (Petitioner) or the Intermediary (SECI) obtains the tariff Adoption Order from the Commission within 120 days from the Effective Date.
58. In case of delay in obtaining such Order, Article 2.1.4 applies which states that the delay shall entail a corresponding extension in the Financial Closure and Scheduled Commissioning Date for the equal number of days for which the Tariff Adoption Order has been delayed.
59. It is further submitted by the SPDs that as per the terms of the PPA, the Petitioner was duty bound to obtain the Tariff Adoption Order from the Commission on or before 27.05.2021 (120 days from the effective date i.e., 27.01.2021).
60. However, since the project has been delayed due to delay in adoption of tariff in terms of Article 2.1.3 and 2.1.4 of the PPA, the SPDs are entitled towards extension of time lines under PPA equal to the delay caused from 27.05.2021 till the date of Tariff Adoption Order. Hence, Commission may clarify the same in its Order and grant an extension of timelines in achieving Financial Closure and subsequent extension in the Scheduled Commissioning Date.
61. It is observed that SECI has also submitted that Article 2.1.3 of the PPA provides for the Adoption of Tariff by the Commission within 120 days of the effective date (27.01.2021 as per Article 2.1.1 of the PPA). Article 2.1.4 provides that if the tariff adoption order is issued by the Commission after 120 days specified in Article 2.1.3, there shall be a corresponding extension in Scheduled Financial Closure and Scheduled Commissioning Date for the equal number of days for which the State Commission's order has been delayed.
62. We now look into the relevant provisions of PPA which are reproduced as under:

"ARTICLE 2: TERM OF AGREEMENT

2.1 Effective Date

2.1.1 This Agreement shall come into effect from 27th January 2021 and such date shall be referred to as the Effective Date.

2.1.2 The Parties agree that decisions pertaining to adoption of the Tariff and approval of the same, for procurement of contracted capacity, shall be binding on all Parties concerned, as contained in the Electricity Act 2003 and any amendments thereof.

2.1.3 Notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either Party against the other under this Agreement shall be that, within 120 days after the Effective Date of this Agreement, SECI and/or the Buying Entity shall obtain adoption of tariff from its State 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. 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 the Order from the SERC 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 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 the SERC order has been delayed beyond such period as specified in Article 2.1.3.

63. In Commission's view it is clear from the above provisions that in case of delay in adoption of tariff order, such delay will entail a corresponding extension in the Financial Closure and Scheduled Commissioning Date for equal number of days for which the Tariff Adoption Order has been delayed. Thus, in our view SPDs will be entitled to the consequential relief on account of delay in tariff adoption by this Commission under Article 2.1.4 of the PPA.
64. In this regard it is stated that Commission adopted the tariff vide its order dated 23.07.2021. Subsequently vide order dated 13.12.2021 the Commission recognized certain events as change in law. However, Hon'ble APTEL vide its orders dated 12.10.2021 and 28.01.2022 has held the proceedings to be treated as incomplete and inchoate because of non-consideration of all declarations sought by the SPDs for change in law. As we have considered all the claims of the SPDs in this order,

hence the adoption of Tariff proceedings are complete with the issuance of this order. Accordingly, it is clarified that, respondents will be entitled to the consequential relief on account of delay in tariff adoption in terms of the Articles 2.1.3 and 2.1.4 of the PPA.

65. In light of the foregoing, we order as follows:

- (a) The Commission deems it appropriate to recognise the Article 12.1.3 of the PPAs in its entirety and totality, and in terms of this after 28.10.2020, following events shall be treated as the 'change in law':
 - (i) Change in rates of Safeguard Duty (If levied).
 - (ii) Increase in rates of Basic Customs Duty on import of Solar Inverters pursuant to Ministry of Finance Notification No. 07 /2021- Customs dated 01.02.2021 whereby custom duty exemption notification no. 1/2011, dated 06.01.2011, has been rescinded.
 - (iii) Levy of Basic Customs Duty on import of Solar Cells, Modules/Panels pursuant to Ministry of New and Renewable Energy Office Memorandum dated 09.03.2021.
 - (iv) Levy of GST vide Notification dated 30.09.2021 of Ministry of Finance.
- (b) The quantum of compensation payable on account of the above change in law events shall be considered at the appropriate stage in terms of the formula provided at Article 12.2.3 of the respective PPAs.
- (c) The increase in Grid connectivity charges have to be borne by the SPDs and their claim for declaration of increase in Grid Connectivity Charges as change in law is not accepted.
- (d) The Commission adopted the tariff vide its order dated 23.07.2021. Subsequently vide order dated 13.12.2021 the Commission recognized certain events as change in law. However, Hon'ble APTEL vide its orders dated 12.10.2021 and 28.01.2022 has held that the proceedings to be treated as incomplete and inchoate because of non-consideration of all

declarations sought by the SPDs for change in law. As we have considered all the claims of the SPDs in this order, hence the adoption of Tariff proceedings are complete with the issuance of this order. Accordingly, it is clarified that, respondents will be entitled to the consequential relief on account of delay in tariff adoption in terms of the Articles 2.1.3 and 2.1.4 of the PPA.

- (e) As regards the recognition of directions issued by Hon'ble Supreme Court of India vide its order dated 19.04.2021 as change in law event, we reiterate our order dated 13.12.2021 that same is not recognised as change in law for the reasons mentioned in the said order.

66. The Petitions and pending I.A. are disposed of accordingly.

(Dr. Rajesh Sharma)
Member

(Sh. Hemant Kumar Jain)
Member

(Dr. B.N. Sharma)
Chairman