

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 179/AT/2021

Coram:

Shri P. K. Pujari, Chairperson

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of Order: 21st December, 2021

In the matter of

Petition under Section 63 of the Electricity Act, 2003 for adoption of tariff for the 1110 MW Wind-Solar Hybrid Power Projects (Tranche-III) connected to the Inter-State Transmission System (ISTS) and selected through Competitive Bidding Process as per the Guidelines dated 14.10.2020 of Ministry of New and Renewable Energy, Government of India.

And

In the matter of

Solar Energy Corporation of India Limited,
Institutional Area, Lodhi Road,
New Delhi-110 003

...Petitioner

Vs.

1. ABC Renewable Energy Private Limited,
H. No. 6-3-680/8/3, Plot No. 3, PMR Plaza,
Thakur Mansion Lane, Somajiguda
Hyderabad- 500082

2. Adani Renewable Energy Holding Eight Limited,
(Earlier known as Adani Green Energy Twenty Limited)
Adani Corporate House, 4th Floor-South Wing,
Shantigram, Near Vaishno Devi Circle, S.G. Highway, Khodiyar,
Ahmedabad, Gujarat-382421

3. AMP Energy Green Private Limited,
309, Rectangle One,

Behind Sheraton Hotel, Saket,
New Delhi, Delhi-110017

4. ABC Renewable Energy (RJ-03) Private Limited,
[Project Company of ABC Renewable Energy Private Limited]
H. No. 6-3-680/8/3, Plot No. 3, PMR Plaza,
Thakur Mansion Lane, Somajiguda
Hyderabad, Telangana- 500082

5. Adani Hybrid Energy Jaisalmer Five Limited,
[Project Company of Adani Renewable Energy Holding Eight Limited]
Adani Corporate House, Shantigram,
Near Vaishno Devi Circle, S.G. Highway, Khodiyar,
Ahmedabad, Gujarat-382421

6. AMP Energy Green Eight Private Limited,
309, 3rd Floor Rectangle One,
Behind Sheraton Hotel, Saket,
New Delhi, Delhi-110017

7. Brihanmumbai Electric Supply and Transport Undertaking,
BEST Bhawan, BEST Marg, Colaba,
Mumbai-400001

8. West Bengal State Electricity Distribution Company Limited,
Vidyut Bhawan, 8th Floor, Block DJ,
Sector-II, Salt Lake, Kolkata,
West Bengal-700091

9. Chhattisgarh State Power Distribution Company Limited,
4th Floor, Vidyut Seva Bhawan,
Danganiya, Sunder Nagar,
Raipur, Chhattisgarh-492013

10. BSES Yamuna Power Limited,
Shakti Kiran Building, Kakardooma,
Delhi-110092

11. BSES Rajdhani Power Limited,
BSES Bhawan, Nehru Place,
Delhi-110019

...Respondents

The following were present:

Shri M. G. Ramachandran, Sr. Advocate, SECI
Ms. Tanya Sareen, Advocate, SECI
Ms. Poorva Saigal, Advocate, SECI

Shri Shubham Arya, Advocate, SECI
Ms. Rakshita Kaul, Advocate, AMP Green Energy
Ms. Jyotsna Khatri, Advocate, AMP Green Energy
Shri Sourya Choudhary, Advocate, AMP Green Energy
Shri Ankur Sharma, Advocate, AMP Green Energy
Shri Abhilash Yadav, Advocate, AMP Green Energy
Shri Anirban Mondal, Advocate, ABC Renewable
Shri Vivek Hooda, Advocate, ABC Renewable
Shri Atulya Kumar Nain, SECI
Shri Shibasish Das, SECI
Shri Mudit Jain, SECI

ORDER

The Petitioner, Solar Energy Corporation of India Limited ('SECI'), has filed the present Petition under Section 63 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') for adoption of tariff for 1110 MW wind-solar hybrid power projects (Tranche-III) connected to inter-State transmission system ('ISTS') and selected through competitive bidding process as per the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Solar Hybrid Projects" (hereinafter referred to as 'the Guidelines') issued by Ministry of New and Renewable Energy, Government of India dated 14.10.2020 under the Wind-Solar Hybrid Policy dated 14.5.2018. The Petitioner has made the following prayers:

"(a) Adopt the tariff discovered in the tariff based competitive bid process for the individual power projects as stated in Table-2 at Paragraph 8 above on the terms and conditions contained in the Power Purchase Agreements entered into with the Respondent Nos. 4 to 6 read with the Power Sale Agreements executed with Respondent No. 7 to 11;

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

(c) Recognize, in terms of Article 12.2 of the PPAs and Article 8.2 of the PSAs, that the change in rates of Safeguard Duty, GST and Basic Customs Duty after 7.12.2020, if any, will be considered as Change in Law subject to the fulfillment of the conditions contained therein; and

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

Submission of the Petitioner

2. The Petitioner, SECI has submitted that it issued Request for Selection ('RfS') documents along with draft Power Purchase Agreement ('PPA') and Power Sale Agreement ('PSA') for setting up of 1200 MW ISTS-connected Wind-Solar Hybrid Power Projects (Tranche-III) and floated the same on 14.1.2020 on ISN Electronic Tender System (ISN ETS) e-bidding portal. In pursuance to the above, eleven bids were received offering an aggregate capacity of 4210 MW and all the eleven bidders qualified the technical criteria and were found eligible for opening of financial bids. The financial bids were opened on 22.12.2020 on ISN ETS e-bidding portal and as per the criteria mentioned in the RfS documents, ten bidders offering an aggregate capacity of 3310 MW were shortlisted for e-reverse auction. E-reverse auction was conducted on 23.12.2020 on the portal of ISN ETS in the presence of members of Bid Evaluation Committee ('BEC') and pursuant thereto, three bidders, namely, ABC Renewable Energy Private Limited (for 380 MW @ Rs.2.41/kWh), Adani Renewable Energy Holding Eight Limited (for 600 MW @ Rs.2.41/kWh) and AMP Energy Green Private Limited (for 130 MW @ Rs.2.41/kWh) were selected and issued the Letters of Award. The Petitioner has entered into PPAs with aforesaid successful bidder(s) and the PSAs with the Distribution Companies, namely, Respondent No. 7 to Respondent No. 11, based on their requisition. The Petitioner has submitted that the above projects are scheduled to be commissioned in the financial year 2022-23 and will enable the Distribution Companies in meeting their Renewable Purchase Obligations apart from providing power at very economical rates. It has been further submitted that, in addition, there will be the trading margin of Rs.0.07/kWh to be recovered from

the Distribution Companies, which have been duly agreed to by the Distribution Companies in the PSAs. The Petitioner has submitted that Article 12.1.3 of the PPAs entered into between SECI and Hybrid Power Developers ('HPDs') and Article 8.1.3 of the PSAs entered into by SECI with Distribution Companies provide that change in rates of Safeguard Duty, GST and Basic Custom Duty after 7.12.2020, if any, will be considered as Change in Law subject to the provision that the Appropriate Commission recognizes such provisions at the time of adoption of tariff and, accordingly, the Petitioner has prayed for recognition of the above provisions.

3. The matter was heard on 12.10.2021 and notices were issued to the Respondents to file their reply. During the course of hearing, the learned senior counsel for the Petitioner submitted that the 'Change in Law' provision incorporate in the Bid documents are pursuant to the approval of the Central Government and, thus, the departure from the provisions specified in the Guideline may not amount to the deviation in the Bid documents. The learned senior counsel also sought liberty to place on record the letters of Central Government in this regard by way of an additional affidavit. Pursuant to the liberty granted by the Commission, SECI filed its additional affidavit dated 20.10.2021. Further, the Respondent No. 3 and the Respondent No. 6 have filed a combined reply to the Petition to which the Petitioner has filed its rejoinder.

4. The Petitioner vide its affidavit dated 20.10.2021 has placed on record letter dated 26.11.2020 and e-mail dated 13.1.2021 sent by SECI to Ministry of New and Renewable Energy (MNRE), Government of India requesting to modify certain provisions of the Standard Bidding Guidelines and allowing SECI to make changes with respect to certain provisions in the Scheme documents to accommodate the concern of

the various stakeholders, to enable SECI to enter into PSAs and PPAs. The Petitioner has also placed on record the letter dated 1.3.2021 and letter dated 18.12.2020 issued by MNRE granting ex-post facto approval for changes in respect of certain provisions vis-a-vis Standing Bidding Guidelines in respect of (i) bids that have been issued but not closed, and (ii) bids that have been issued and closed by SECI, etc.

5. The Respondent No.3, AMP Energy Green Private Limited and the Respondent No.6, AMP Energy Green Eight Private Limited, vide their reply dated 10.11.2021, have mainly submitted as under:

(a) Pursuant to being selected as successful bidder in the competitive bid process conducted by SECI and issuance of Letter of Award ('LoA') dated 31.12.2020, the Respondent No.3, AMP Energy Green Private Limited incorporated a Special Purpose Vehicle being, AMP Energy Green Eight Private Limited ('AEGEPL') which entered into a PPA with SECI dated 19.7.2021 for development and establishment of 130 MW Hybrid Power Project in the State of Rajasthan at the tariff of Rs.2.41/kWh fixed for the entire term of the PPA.

(b) However, subsequent to submission of bid on 7.12.2020, the following events have occurred which have resulted in an increased additional capital expenditure:

(i) On 1.2.2021, Ministry of Finance issued Notification No. 2/2021- Customs whereby the Government has increased the rates of Basic Customs Duty on import of solar inverters to 20%. The said notification is issued in rescission to the Notification dated 6.1.2011 wherein the Basic Customs Duty at the rate of 5% was imposed on solar invertors.

(ii) On 9.3.2021, MNRE issued Office Memorandum regarding imposition of Basic Customs Duty on solar cell and modules (without grandfathering of bid out Projects) w.e.f. 1.4.2022. The Basic Customs Duty on solar modules with

HSN Code 85414012 and solar cells (85414011) is 40% and 25% respectively.

(iii) On 19.4.2021, the Hon'ble Supreme Court passed an order in Writ Petition (Civil) No. 838 of 2019 titled M. K. Ranjitsinh and Ors. v. UoI and Ors. issuing directions/ measures to be adopted *inter alia* towards existing and future laying of overhead transmission lines in the priority and potential habitats of the Great Indian Bustard ('GIB').

(iv) On 30.9.2021, the Ministry of Finance has notified 12% rate of GST on solar PV module and other renewable energy equipment with effect from 1.10.2021.

(c) Higher rates of Basic Customs Duty on solar inverter from 5% to 20%, modules from 0% to 40% and solar cells from 0% to 25% and GST on solar PV from 5% to 12% have substantially increased the capital cost of the project. Further, the Respondent No. 3 had placed the bid considering the feasibility of installing overhead transmission line. However, with the Hon'ble Supreme Court's directions dated 19.4.2021, the Respondent No.6 would be compelled to lay underground transmission line which is not technically feasible as supply and service cost of underground cables is much higher than that of an equivalent voltage of overhead transmission lines.

(d) The aforesaid events have occurred subsequent to 7.12.2020 and the Respondent No.3 at the time of submitting the bid was in no position to foresee such additional capital expenditure. Accordingly, as per Article 12.2.1 of the PPA, the said events clearly qualify as Change in Law event and accordingly, are required to be considered by the Commission for the purpose of instant tariff adoption Petition.

(e) The Appellate Tribunal for Electricity ('APTEL') vide order dated 12.10.2021 in Appeal No. 251 of 2021 (Green Infra Renewable Energy Ltd. v. RERC and Ors.) has held that if the event referred to actually constitutes Change in Law within the four corners of its definition under the PPA, there is no reason as

to why it cannot be duly recognized as Change in Law at the stage of tariff adoption. APTEL has also acknowledged the imposition of Basic Customs Duty Notification dated 1.2.2021 and 9.3.2021 and Hon'ble Supreme Court's order dated 19.4.2021 as Change in Law events as the said events had occurred post the date of bid submission therein.

(f) The Respondent No. 6 is similarly placed as that of Green Infra Renewable Energy Ltd. in the aforesaid case in Appeal No. 251 of 2021 before APTEL. Since such steep increase in capex on account of occurrence of said events can change the financial dynamics of the project, it is pertinent to take into account the impact on the cost of development of the project of such Change in Law events so that suitable adjustment in tariff can be made at the stage of tariff adoption. Moreover, Article 12.1.3 of the PPA itself allows the parties to seek declaration of Change in Law events and quantum of compensation payment on account of change in rates and duties at the time of adoption of tariff by the Commission.

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

6. SECI vide rejoinder dated 18.11.2021 has submitted as under:

(a) The PPAs, at Article 12.1.3, provide three identified categories of law to be recognized by the Commission at the time of adoption of tariff.

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

(c) The nature and extent to which the above events will have an impact is to be considered based on the factual details and circumstances having implications of the above laws on the implementation of the project by the developers. It is the obligation of the project developer to establish the same as being covered by the Change in Law at the appropriate stage to the satisfaction of the Commission.

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

(e) At this stage, for application of formula provided in Article 12.2.3 of the PPAs for relief of Change in Law, the amount constituting the project cost cannot be considered on estimate basis. The project cost will be available only upon the

capital expenditure being incurred as on the actual commissioning date of the last part capacity or SCOD/ extended SCOD, whichever is earlier.

(f) In the present case, the consideration is to be restricted to the aspect of recognition of the above-mentioned four events as Change in Law within the scope of Article 12 of the PPAs, while adopting the tariff discovered through competitive bidding. However, the recognition of Basic Custom Duty on solar modules and cells as a Change in Law event shall be subject to issuance of appropriate notification by Ministry of Finance, Government of India. The power developers are not entitled to claim consideration of any other aspects. The actual impact and the extent of relief admissible for the above-mentioned Change in Law events is to be determined at the appropriate stage as decided by APTEL in its order dated 12.10.2021 in Appeal No. 251/2021.

7. The matter was called out for virtual hearing on 23.11.2021. During the course of hearing, the learned senior counsel for the Petitioner and the learned counsel for the Respondent No. 3 and Respondent No. 6 mainly reiterated the submissions made in their respective pleadings, which are not repeated here for the sake of brevity. The learned counsel for the Respondent No.4, ABC Renewable Energy (RJ03) Private Limited also submitted that the Respondent had no objection towards the submissions made by SECI and the Commission may, accordingly, adopt the tariff.

Analysis and Decision

8. In the above background, we now proceed to consider the prayer of the Petitioner as regards adoption of tariff in respect of wind-solar hybrid power project(s) discovered pursuant to the competitive bid process carried out in terms of the Guidelines issued by Ministry of New and Renewable Energy, Government of India under Section 63 of the Act.

9. Section 63 of the Act provides as under:

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

10. Thus, in terms of Section 63 of the Act, the Commission is required to adopt the tariff, on being satisfied that transparent process of bidding in accordance with the Guidelines issued by the Ministry of New and Renewable Energy, Government of India under Section 63 of the Act, has been followed in determination of such tariff.

11. The Ministry of New and Renewable Energy, Government of India has issued the Guidelines under Section 63 of the Act vide F.No.238/78/2017-Wind on 14.10.2020.

The salient features of the Guidelines are as under:

(a) The Guidelines are applicable for procurement of power from hybrid power projects having individual size of 50 MW and above at one site with minimum bid capacity of 50 MW through tariff based competitive bidding to be conducted by procurers which includes distribution licensees or intermediary procurers. The rated power capacity of one resource (wind or solar) shall be at least 33% of the total contracted capacity.

(b) The solar and wind power projects may be located at same or different nearby locations. The minimum capacity to be injected at each injection point shall be 50 MW. Storage may be added to the hybrid power project.

(c) The intermediary procurer shall prepare the bid documents in accordance with the Guidelines and shall approach MNRE for deviations (if required) from these Guidelines.

(d) Bids shall be for a minimum 50 MW project at one site. The procurer may also

choose to specify the maximum capacity that can be allotted to a single bidder including its affiliates. The maximum capacity for single bidder or company or group of companies may be fixed by the procurer keeping in mind factors such as economies of scale, land availability, expected competition and need for development of market.

(e) For procurement of wind-solar hybrid power, the tariff quoted by the bidder shall be the bidding parameter. The procurer may select either of the following kinds of tariff based bidding: (a) fixed tariff in Rs./kWh for 25 years or more or (b) escalating tariff in Rs./kWh with pre-defined quantum of annual escalations fixed in Rs./kWh and number of years from which such fixed escalation will be provided.

(f) Draft PPA proposed to be entered into with the successful bidder and draft PSA, if applicable, shall be issued along with the RfS. Standard provisions to be incorporated as part of the PPA shall include, *inter-alia*, PPA period, Capacity Utilization Factor, Repowering, Payment Security, Payment Security by intermediary procurer to the hybrid power generator, revolving Letter of Credit and State Government guarantee, Change in Law, Force Majeure, Off-take constraints due to Back down, Event of Default and consequences thereof.

(g) Intermediary procurer shall provide payment security to hybrid power generator through revolving Letter of Credit of an amount not less than one month average billing and Payment Security Fund for at least three months' billing of all the projects tied up with such fund. For the purpose of this Payment Security Fund, the intermediary procurer may collect Rs. 5 lakh/MW from hybrid power generator(s).

(h) Discoms shall provide payment security to the intermediary procurer through revolving Letter of Credit of an amount not less than one month's average billing from the project(s) under consideration and State Government Guarantee or Tri-Partite Agreement.

(i) SECI shall call the bids adopting a single stage bidding process to be conducted

through electronic mode (e-bidding). SECI may adopt e-reverse auction. For this purpose, e-procurement platforms with a successful track record and with adequate safety, security and confidentiality features will be used.

(j) The bidding documents including RfS, draft PPA shall be prepared by SECI in consonance with these Guidelines. RfS notice shall be published on the Central Public Procurement Portal website and SECI's website to accord wide publicity. Standard documentation to be provided in RfS stage shall include technical criteria, financial criteria, net worth, liquidity, quantum of earnest money deposit and compliance of laws by foreign bidders.

(k) The procurer shall constitute committee for evaluation of the bids (Evaluation Committee) with at least three members, including at least one member with expertise in financial matters/ bid evaluation. The price bid shall be rejected, if it contains any deviation from the bid conditions.

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

(m) The comparison of bids shall be on the basis of the bidding criteria as specified in the RfS, i.e. the fixed tariff or the first year tariff. Ranking of the bidders will start from the bidder quoting the 'lowest tariff (L1)'. The selection of all successful bidders would be on bucket filling approach starting with L1 till entire capacity for which the bid has been called for is full or the capacity corresponding to the upper limit for the band for the L1 tariff is reached, whichever is earlier.

(n) After conclusion of bidding process, the Evaluation Committee constituted for evaluation of RfS bids shall critically evaluate the bids and certify as appropriate that the bidding process and the evaluation has been conducted in conformity to the provisions of the RfS.

(o) The PPA shall be signed with the successful bidder/ project company or an SPV formed by the successful bidder. After execution of the PPA, SECI shall disclose the name(s) of the successful bidder(s) and the tariff quoted by them together with breakup into components, if any.

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

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

14. The Guidelines provide framework for long-term procurement of wind-solar hybrid power at a tariff to be determined through transparent process of bidding by the procurer(s), from ISTS wind-solar hybrid power projects having minimum size at one site of 50 MW. As per the Guidelines, SECI, in the capacity of intermediary procurer, invited proposals for setting-up of ISTS wind-solar power projects on pan-India basis, on “Build, Own and Operate” basis for an aggregate capacity of 1200 MW and for procurement of wind-solar power (hybrid power) from the projects being set-up in

relation thereto. As per the arrangements, SECI is to procure the power by entering into PPAs with the successful bidder with back-to-back PSAs for sale of power to the distribution licensees.

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

Sr. No.	Event/Milestone	Date
1	Issuance of RfS documents	14.1.2020
2	Amendments to RfS documents	25.2.2020 to 28.11.2020
3	Last date for submissions of online bid	7.12.2020 (online) 9.12.2020 (offline)
4	Opening of technical bid	10.12.2020
5	Opening of financial bid	22.12.2020
6	e-Reverse Auction	23.12.2020
7	Issuance of Letter of Award	31.12.2020

16. On 14.1.2020, SECI issued the RfS documents, along with draft PPA and PSA documents for setting up of 1200 MW ISTS-connected wind-solar hybrid power projects. It is observed that initially the RfS documents were floated under the draft Guidelines issued on 11.10.2019 under the Wind-Solar Hybrid Policy dated 14.5.2018. Subsequently, the RfS documents along with draft PPA and PSA were amended on multiple occasions starting from 25.2.2020 to 28.11.2020 and by such amendments, the RfS documents including the draft PPA and PSA were brought under the final Guidelines which were issued on 14.10.2020. As per Clause 9.4 of the Guidelines, RfS notice is required to be published in the Central Public Procurement Portal website and on SECI's website. Accordingly, SECI has placed on record document demonstrating publication of RfS on the e-publishing system, Government of India.

17. The Bid Evaluation Committee (BEC) comprising of the following was constituted for opening and evaluation of bids for RfS dated 14.1.2020:

Tender	Department	Offline and Online Techno- commercial and Financial Bid Opening	Techno-commercial and Financial evaluation and post-e-RA recommendation
Setting up of 1200 MW STS Connected Wind-Solar Hybrid Power Projects (Tranche-III)	Power system	Sh. Arjun Parlikatt, Senior Engineer (PS)	Sh. Ved Prakash Aseri, Deputy Manager (PS)
	Contracts	Sh. Jayansh Gaur, Senior Manager (C & P)	Sh. Biblesh Meena, Dy.Manager
	Finance	Sh. Mohit Singhal, Senior Account Officer (Finance)	Ms. Jasmine Nath, Deputy Manager (Finance)

18. Last date of submission of bid was 7.12.2020 (online) and 9.12.2020 (offline) and technical part of the bid was opened on 10.12.2020. Response to RfS was received from the following eleven bidders:

Sr. No.	Name of Bidders
1.	ACME Solar Holdings Private Limited
2.	AMP Energy Green Private Limited
3.	Adani Renewable Energy Holding Eight Limited
4.	Azure Power India Private Limited
5.	Energiant Power Private Limited
6.	ABC Renewable Energy Private Limited
7.	Green Infra Wind Energy Limited
8.	NLC India Limited
9.	Spring Ujjawala Energy Private Limited
10.	ReNew Solar Power Private Limited
11.	TP Suraya Limited

19. Pursuant to opening and evaluation of technical and financial bids, out of the above eleven bidders, the following ten bidders were found eligible for participating in

the e-reverse auction:

Sr. No.	Name of Bidders
1.	ACME Solar Holdings Private Limited
2.	AMP Energy Green Private Limited
3.	Adani Renewable Energy Holding Eight Limited
4.	Azure Power India Private Limited
5.	Energient Power Private Limited
6.	ABC Renewable Energy Private Limited
7.	Green Infra Wind Energy Limited
8.	NLC India Limited
9.	Spring Ujjawala Energy Private Limited
10.	ReNew Solar Power Private Limited

20. E-reverse auction was carried out on 23.12.2020 in ISN ETS e-bidding portal. The final tariff and selection of the bidders was arrived after completion of e-reverse auction. The result of e-reverse auction is as under:

Sr. No.	Bidders	Bidder's Quantity (MW)	Tariff (Rs./kWh)	Allotted Capacity (MW)
1.	ABC Renewable Energy Private Limited	380	2.41	380
2.	Adani Renewable Energy Holding Eight Limited	600	2.41	600
3.	AMP Energy Green Private Limited	130	2.41	130
4.	ACME Solar Holdings Private Limited	300	2.42	90
Total				1200 MW

21. After conclusion of e-reverse auction and the determination of the tariff, on 31.12.2020, SECI issued the Letter of Awards to the following selected bidders:

Sr. No.	Bidders	Bidder's Quantity (MW)	Tariff (Rs./kWh)	Allotted Capacity (MW)
1.	ABC Renewable Energy Private Limited	380	2.41	380
2.	Adani Renewable Energy Holding Eight Limited	600	2.41	600

3.	AMP Energy Green Private Limited	130	2.41	130
Total				1110 MW

22. Relevant portion of the Letter of Award issued to one of the project developers, namely, ABC Renewable Energy Private Limited is extracted as under:

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

Allotted Project ID	Project Capacity (MW)	Applicable Tariff (INR/kWh) in figure	Applicable Tariff (INR/kWh) in words
HPD-ISTS-T3-ABCREPL-P1-380MW	380 (Solar PV: 254 MW & Wind 126 MW)	2.41/-	Rupees Two and Forty-one Paise only

It is to be noted that as per the provisions of the RfS, the HPD is allowed to change the project location and delivery point for the awarded project subsequent to issuance of LoA.

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

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

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

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

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

applicable.

1.4 In case of companies having multiple promoters (but none of the shareholders having not less than 51% of voting rights and paid up share capital), it shall be considered as a company under joint control. In such cases, the shareholding pattern in the company as submitted at the time of bidding, shall be maintained for a period of 01 (one) year after COD.

1.5 The successful Bidder, if being a single company, shall ensure that its shareholding in the SPV/ project company executing the Power Purchase Agreement (PPA), shall not fall below 51 % at any time prior to 1 (one) year after the COD, except with the prior approval of SECI. In the event, the successful bidder is a consortium, then the combined shareholding of the consortium members in the SPV/project company executing the PPA, shall not fall below 51% at any time prior to 1 (one) year after COD, except with the prior approval of SECI. However, in case the Project is being set up by listed Company, this condition will not be applicable.

1.6 The HPD shall pay to SECI, Success Charges of Rs. 1 lakh/MW/project +18% GST within 30 days of issuance of this Letter of Award (LOA), in line with Clause 3.12 of the RfS, towards administrative overheads, coordination with State Authorities and others, Discom/STU/CTU, pre-commissioning and commissioning expense. Performance Bank Guarantee(s)/Payment of Order Instrument (POI) for a value of @Rs 10 Lakh/MW per Project shall be submitted by the HPD at least 07 working days prior to signing of PPA (PPA signing date to be intimated by SECI) in line with Clause 3.11 of the RfS.

1.7 PPA will be executed between SECI and HPD as per the breakup of the cumulative Project capacity awarded to the Bidder. This LoA is being issued in line with the Project breakup of the cumulative capacity quoted in the Covering Letter as part of your response to RfS and amended subsequently, as applicable.

1.8 The project breakup up for the cumulative capacity quoted in the Covering Letter, may be changed by HPD subsequent to issuance of LOA up to the date as on 30 days from issuance of LOA. For an individual Project, any modification in the rated capacities of wind and solar components in the Project, shall be intimated to SECI within 30 days of issuance of LOA. Both the above parameters will remain changed, thereafter. The PPA will remain in force for a period of 25 years from the SCD.

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

- 1) Copy of the Certificate of Incorporation of the Hybrid Power Developer;
- 2) The details of promoters and their shareholding in the HPD, duly certified by the practicing Chartered Accountant/Company Secretary in original at least 7 (seven) days prior to date of their document submission (certificate date should be after the date of LoA) along with latest documents filed with ROC)
- 3) Copy of the Memorandum of Association (MoA) of the HPD highlighting the object clause related to generation of Power/Energy/Renewable

Energy/Solar/Wind Power plant development.

(4) In case the project being executed by a Special Purpose Vehicle (SPV) incorporated by successful bidder, such SPV shall be atleast 76% shareholding subsidiary, in line with provisions of the RfS. Further, the Successful Bidder shall submit a Board Resolution prior to signing of PPA with SECI, committing total equity infusion in the SPV as per the provisions of RfS.

(5) Copy of Board Resolution for authorization of signing of PPA and subsequent relevant documents

Further, the PPA shall be signed only upon receipt of the Success Charges and total Performance Guarantee/Payment on Order instrument of requisite values.

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

1.11. In case, the SECI offers to execute the PPA with the HPD and the selected Bidder refuses to execute the PPA within the stipulated time period, the selected Project(s) shall stand cancelled and the provisions of Clause 3.11 (i) of the RfS shall be applicable, and the selected Bidder expressly waives off its rights and objections, if any, in that respect.

1.12 The HPD shall meet financial closure requirements for the Project in line with the clause 3.16 of the RfS document, within 12 (twelve) months from the Effective Date of the PPA. Accordingly, the HPD shall furnish the documents pertaining to compliance of financial closure as per the above provisions;

1.13 The HPD/Project Company shall achieve commissioning of full capacity of the Project within 24 months from the Effective Date of the PPA, or from the Effective Date of PPA as per the conditions stipulated in Clause 3.17 of the RfS and relevant articles of PPA. In case of failure to achieve its milestone, liquidated damages not amounting to penalty shall be levied on the HPD as per the above provisions.'

23. Pursuant to issuance of Letter of Award and allocation of capacity, SECI has entered into PPA dated 27.7.2021 with ABC Renewable Energy (RJ-03) Private Limited (SPV of ABC Renewable Energy Private Limited) for 380 MW; PPA dated 27.7.2021 with Adani Hybrid Energy Jaisalmer Five Limited (SPV of Adani Renewable Energy Holding Eight Limited) for 660 MW; and PPA dated 19.7.2021

with AMP Energy Green Eight Private Limited (SPV of AMP Energy Green Private Limited) for 130 MW. Further, pursuant to the allocation of capacity, SECI has entered into a back-to-back PSAs with distribution companies, namely, PSA dated 25.6.2021 with Brihanmumbai Electric Supply & Transport Undertaking (BEST Undertaking) for procurement of 400 MW; PSA dated 30.6.2021 with West Bengal State Electricity Distribution Company Limited for procurement of 100 MW; PSA dated 2.7.2021 with Chhattisgarh State Power Distribution Company Limited for procurement of 400 MW; PSA dated 20.7.2021 with BSES Rajdhani Power Limited for procurement of 110 MW; and PSA dated 20.7.2020 with BSES Yamuna Power Limited for procurement of 100 MW.

24. The Petitioner has submitted that it has taken certain deviations in the bid documents from the provisions of the Guidelines with regard to the Change in Law provisions. However, such changes have been incorporated pursuant to the approval of Ministry of New and Renewable Energy ('MNRE') vide letters dated 18.12.2020 and 1.3.2021, whereby MNRE in exercise of its powers to issue clarification/ modification under the Guidelines, gave ex-post facto approval for changes in respect of certain provisions vis-à-vis Guidelines in respect of (i) bids that have been issued but not closed; and (ii) bids that have been issued and closed by SECI and the aforesaid letters of MNRE have been placed on record by SECI vide its affidavit dated 20.10.2021.

25. We have considered the submissions made by the Petitioner. As regards deviations from the Guidelines, we observe that while the Guidelines provide for formula for compensating the financial impact due to increase/ decrease in the costs on account

of occurrence of Change in Law event, the Petitioner in the PPA and PSA has provided for pre-determined quantum of compensation for Change in Law events, whereby for every net increase/ decrease of Rs.1 lakh per MW in the project cost, there shall be corresponding increase/ decrease of an amount equal to Rs.0.0049/kWh. The Petitioner has submitted that such deviations have been approved by the Ministry of New and Renewable Energy, Government of India and vide affidavit dated 20.10.2021, it has placed on the record the correspondence exchanged with MNRE in this regard. It is also noted that SECI has placed on record its letter dated 26.11.2020 and e-mail dated 13.1.2021 to MNRE requesting for certain modifications to the Bidding Guidelines to accommodate the concerns of various stakeholders, to allow SECI to incorporate changes in the Scheme documents and to enter into PSAs and PPAs, etc. The Petitioner has also placed on record the letter dated 18.12.2020 and letter 1.3.2021 issued by MNRE to SECI, whereby MNRE, in exercise of its powers to issue clarifications/ modifications under the Guidelines, gave ex-post facto approval for changes in respect of certain provisions vis-à-vis the Guidelines in respect of (i) bids that have been issued but not closed; and (ii) bids that have been issued and closed by SECI. The relevant extracts of the MNRE's letter dated 18.12.2020 and letter dated 1.3.2021 are as under:

Letter dated 18.12.2020

“.....Subject : Modification in ‘Change in Law’ provision of ‘Guidelines for Tariff Based Competitive Bidding Process for procurement of power from Grid Connected Wind Solar Hybrid Projects’ issued by MNRE dated 14.10.2020-Reg.

Sir,

I am directed to refer ‘Guidelines for Tariff Based Competitive

Bidding Process for procurement of power from Grid Connected Wind Solar Hybrid Projects' issued by MNRE dated 14.10.2020 and SECI's letter dated 26.11.2020 on the above cited subject.

2. In this regard, the ex-post facto approval of Hon'ble Minister is hereby/conyed for Tranche – III of Wind -Solar Hybrid issued under above guidelines dated 14.10.2020 to the modification in 'Change in Law' clause. The modified clause is enclosed in annex....”

Letter dated 1.3.2021

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

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

Sir,

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

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

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

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

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

26. Thus, as per above letters of the MNRE, SECI has been permitted to make changes/deviations from the Guidelines, as per SECI's proposal vide its letter dated 26.11.2020 and e-mail dated 13.1.2021, both in (i) bids that have been issued but not

closed and (ii) bids that have been issued and closed.

27. The bids covered under the present Petition falls under the second set of bids (where bids have been issued and closed), as the last date of submission of bid was 7.12.2020 (online) and 9.12.2020 (offline), whereas the deviations were approved by MNRE vide its letter dated 18.12.2020 and letter dated 1.3.2021. Further, in the letter dated 1.3.2021, MNRE directed SECI as under:

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

28. Given the fact that the bidding in the present case was already closed at the time of issuance of the aforesaid approval of deviations by the MNRE, the question that arises before the Commission is whether such approval of deviations from the bidding guidelines after the closure of bids violates the sanctity of bidding process rendering the bidding vitiated.

29. We observe that the Change in Law provisions were incorporated to the Bid documents by amendment No.8 dated 28.11.2020, whereas the last date of submissions of bid was 7.12.2020(online) and 9.12.2020 (offline). Therefore, it does not appear to be a case that such provisions have been introduced after the closure of the bid and thus, bidder(s) participating in the bid were made aware about the said provisions. However, at the same time, the fact remains that the said deviations were not approved by the competent authority at the time of their incorporation in the Bid documents prior to the closure of bids and the approval granted for the same was only on ex-post facto basis. The Commission would like to advise the intermediary agencies including SECI that

they must invariably always comply with all the procedural and legal requirements in letter and spirit and not have lapses as in the present case.

30. As per Clause 11.2 of the Guidelines, Evaluation Committee is required to certify that the bidding process and the evaluation have been conducted in conformity with the provisions of the RfS. We observe that the Petitioner has made submissions that the bid documents are in line with the provisions of the Guidelines and the approvals of MNRE vide letter dated 18.12.2020 and letter 1.3.2021. This has been certified by the Petitioner through the conformity certificate dated 18.2.2021 furnished by the Petitioner. The relevant extract of the said conformity certificate dated 18.2.2021 is re-produced as under:

“With respect to the RfS no. SECI/C&P/HPD/T3/1200MW/RfS/012020 dated 14.1.2020, it is hereby declared as follows:

.....

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

31. We observe that though MNRE, in exercise of its powers to issue clarifications/modifications under the Guidelines, gave ex-post facto approval for changes in respect of certain provisions in the Guidelines only vide letter 1.3.2021, the conformity certificate furnished by the Petitioner is dated 18.2.2021, which is prior to 1.3.2021. This clearly implies that on the date the conformity certificate was issued there was no approval from the MNRE. We consider this a serious lapse on the part of the Petitioner. Once again, the Commission would like to advise the intermediary agencies including SECI that they must invariably always comply with all the procedural and legal requirements in letter and spirit and not have lapses as in the present case.

32. We further observe that the Petitioner vide the aforesaid conformity certificate

dated 18.2.2021 has also submitted that the Evaluation Committee constituted for evaluation of bids has conducted the techno-commercial and financial bid evaluation in conformity with the provisions of the RfS. The relevant extract of the aforesaid conformity certificate dated 18.2.2021 is as under:

“With respect to the RfS no. SECI/C&P/HPD/T3/1200MW/RfS/012020 dated 14.1.2020, it is hereby declared as follows:

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

33. As discussed above, it emerges that the selection of the successful bidders has been done and the tariff of the wind-solar hybrid power projects has been discovered by the Petitioner, SECI through a transparent process of competitive bidding in accordance with Guidelines issued by Ministry of New and Renewable Energy, Government of India under Section 63 of the Act. Therefore, in terms of Section 63 of the Act, the Commission adopts the individual tariff for the wind-solar hybrid power project as agreed to by the successful bidders, which shall remain valid throughout the period covered in the PPA and PSAs:

Sr. No.	Bidder(s)	Tariff (INR /kWh)	Allotted Capacity (MW)
1.	ABC Renewable Energy Private Limited	2.41	380
2.	Adani Renewable Energy Holding Eight Limited	2.41	600
3.	AMP Energy Green Private Limited	2.41	130
	Total		1110

34. Article 10.3 of the PPA provides as under:

“10.3 Payment of Monthly Bills

10.3.1 SECI shall pay the amount payable under the Monthly Bill/Supplementary Bill by the Due Date to such account of the WPD, as shall have been previously notified by the WPD as below.

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

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

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

35. Article 10.4 of the PPA provides as under:

“10.4 Payment Security Mechanism

Letter of Credit (LC):

10.4.1 SECI shall provide to the WPD, in respect of payment of its Monthly Bills and/or Supplementary Bills, a monthly unconditional, revolving and irrevocable letter of credit (“Letter of Credit”), opened and maintained which may be drawn upon by the WPD in accordance with this Article. 1

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

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

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

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

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

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

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

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

i) a copy of the Monthly Bill or Supplementary Bill which has remained unpaid to WPD and;

ii) a certificate from the WPD to the effect that the bill at item (i) above, or specified part thereof, is in accordance with the Agreement and has remained unpaid beyond the Due Date;"

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

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

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

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

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

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

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

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

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

*“8(1) (d) * * * * **

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

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

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

42. The above two provisions are exceptions to the main provision as regards trading margin. Distribution licensees have agreed to a trading margin of Rs.0.07/kWh as agreed in the PSAs, which is in consonance with Regulation 8(1)(d) of the Trading Licence Regulations. Therefore, in case of failure by SECI to provide escrow arrangement or irrevocable, unconditional and revolving letter of credit to the solar

generators, trading margin shall be limited to Rs.0.02/kWh as specified in Regulation 8(1)(d) and Regulation 8(1)(f) of the Trading Licence Regulations.

43. In summary, in terms of Section 63 of the Act, the Commission adopts the tariff (as at paragraph 21 of this order) for the wind-solar hybrid projects as the same has been discovered through transparent competitive bidding process in terms of the Guidelines and shall remain valid throughout the period covered in the PSAs and the PPAs.

44. Additionally, the Petitioner has prayed to recognize, in terms of Article 12.2 of the PPAs and Article 8.2 of the PSA, that the changes in the rates of Safeguard Duty, GST and Basic Customs Duty after 7.12.2020, if any, will be considered as Change in Law subject to the fulfillment of the conditions contained therein. The Article 12.1.3 of the PPAs and Article 8.1.3 of the PSAs read as under:

PPA:

ARTICLE 12: CHANGE IN LAW

.....

12.1.3 However, in case of change in rates of safeguard duty, GST and basic customs duty after 07.12.2020 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 HPD and Buying Entity.

PSA:

ARTICLE 8: CHANGE IN LAW

.....

8.1.3 However, in case of change in rates of safeguard duty, GST and basic customs duty after 7.12.2020 (last date of bid submission) and resulting in change in Project Cost, then such change will be treated as 'Change in Law' and the quantum of compensation payment on account of change in rates of such duties and shall be provided to the affected party by the other party as per Article 8.2.3, subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff by the

Appropriate Commission and any decision in this regard shall be governing on HPD and Buying Entity.

45. As per the above Articles of the PPAs/ PSAs, in case of changes in rates of Safeguard Duty, GST and Basic Customs Duty after 7.12.2020 and resulting in Change in project cost, such change will be treated as 'Change in Law' and the quantum of compensation payment on account of change in rates of such duties shall be provided to the affected party as per Article 12.2.3 subject to the provision that Appropriate Commission recognizes such provisions at the time of adoption of tariff and any decision in this regard shall be governing on HPD and buying entity. In fact, after 7.12.2020, there have already been increases in the rate of Basic Customs Duty and GST, which have an effect of increase in the project cost. The Respondent No. 3 and Respondent No. 6 have placed on record (a) Ministry of Finance (Department of Revenue) Notification No. 2/2021- Customs dated 1.2.2021, whereby rates of Basic Customs Duty on import of solar inverters has been raised to 20% from applicable rate of 5%, (b) Ministry of Finance Notification No. 8/2021- Central Tax dated 30.9.2021, whereby GST @ 12% (in place of applicable rate of 5%) on the solar PV modules and other renewable energy equipment have been notified w.e.f. 1.10.2021, and (c) Office Memorandum of MNRE dated 9.3.2021 regarding imposition of Basic Customs Duty on solar cells and modules at 25% and 40% respectively w.e.f. 1.4.2022. Accordingly, the Respondents have sought declaration that the aforesaid Notifications/ Office Memorandum, which led to the increase in the rates/ imposition Basic Customs Duty and GST, constitute Change in Law events in terms of Article 12 of the PPA. The Respondents have also relied upon the decision of APTEL dated 12.10.2021 in Appeal No. 251/2021 in Green Infra case, the relevant extract of which is as under:

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

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.”

46. It is also observed that SECI, in its rejoinder dated 17.11.2021, has agreed to above events constituting Change in Law events within the scope of Article 12 of the PPA *albeit* recognition of change in rates of Basic Customs Duty on solar cells and modules to be subject to the issuance of appropriate Notification by the Ministry of Finance, Government of India and that the actual impact and the extent of relief admissible for the Change in Law are to be determined at the appropriate stage.

47. With regard to prayer of the Petitioner to recognize the Change in Law provisions of the PPAs/ PSAs, we note that Ministry of Power, Government of India has notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (hereinafter

referred to as “the Change in Law Rules”). Relevant portion of Change in Law Rules notified by the Ministry of Power, Government of India, are extracted as under (emphasis by us):

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

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

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

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

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

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

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

- (a) **where the agreement lays down any formula, in accordance with such formula; or**
- (b) where the agreement does not lay down any formula, in accordance with the formula given in the Schedule to these rules;

(6) The recovery of the impacted amount, in case of the fixed amount shall be —
(a) in case of generation project, within a period of one-hundred eighty months; or
(b) in case of recurring impact, until the impact persists.

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

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

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

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

49. The Respondents have also sought declaration that the order of the Hon'ble Supreme Court dated 19.4.2021 in the Writ Petition (Civil) No. 838 of 2019 in the matter of M. K. Ranitsinh & Ors. v. Union of India an Ors. issuing directions/ measures to be adopted, inter alia, towards existing and future laying of over-head transmission lines in the priority and potential habitats of GIB constitutes a Change in Law event. It has been submitted that the Respondents had placed the bid considering the feasibility of installing overhead transmission line and, accordingly, determined the capital expenditure of the project. However, in terms of the said decision of the Hon'ble Supreme Court, the Respondents would be compelled to lay underground transmission lines which is not technically feasible as supply and service cost of underground cable is much higher than that of an equivalent voltage of overhead transmission cables and that such additional cost could not have been envisaged at the time of submission of the

bid.

50. We observe that the claimed Change in Law event (i.e. decision dated 19.4.2021 of the Hon'ble Supreme Court in the Writ Petition (Civil) No. 838 of 2019) is beyond the changes in the rates of Safeguard Duty, GST and Basic Custom Duty for which the Petitioner has categorically prayed to recognize Article 12.2 of the PPAs and Article 8.2 of the PSAs at the time of adoption of tariff by the Appropriate Commission. Further, as we have already observed, as per the provisions of the Change in Law Rules, on occurrence of a Change in Law, the affected party (generator) and other parties (procurers) are to settle the Change in Law claims among themselves and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

51. Petition No. 179/AT/2021 is disposed of in terms of the above.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(P. K. Pujari)
Chairperson