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PROJECTS, ENERGY & INFRASTRUCTURE

Monthly update | June 2020

Statutory Updates

- Draft CERC (Terms and Conditions of Tariff) (Second Amendment) Regulations, 2020
- Ministry of mines issued guidelines for auction of mineral blocks with pre-embedded clearances for mining projects
- MERC extends deadline for implementation of commercial arrangements under MERC (Deviation Settlement Mechanism and related matters), Regulations, 2019
- Central Electricity Regulatory Commission suo-moto order for implementation of Real Time Market for Electricity in India
- MoEFCC notifies the Environment (Protection) Amendment Rules, 2020

Draft CERC (Terms and Conditions of Tariff) (Second Amendment) Regulations, 2020

- Central Electricity Regulatory Commission (**CERC**) on June 1, 2020, published the draft CERC (Terms and Conditions of Tariff) (Second Amendment) Regulations, 2020 to further amend the CERC (Terms and Conditions of Tariff) Regulations, 2019.
- The proposed amendments will be applicable to all cases where a generating company has arrangement for supply of coal or lignite from the integrated mines allocated to it for one or more of its specified end-use generating stations, whose tariff is required to be determined by the CERC.

Ministry of mines issued guidelines for auction of mineral blocks with pre-embedded clearances for mining projects

- The Ministry of Mines by way of an order dated June 3, 2020 has issued guidelines for auction of mineral blocks with pre-embedded clearances for mining projects to expedite sale process as well as operationalization of mineral's blocks.
- According to the guidelines:
  - Each state having mineral resources will require to identify at least five new mining projects for auction with pre-embedded clearance
  - States will have to set up Project Monitoring Unit (**PMU**) which shall be responsible for completing the preparatory work for obtaining requisite statutory clearances/approvals
  - PMU will be responsible for obtaining all the clearances for starting a mining project which may be transferred to successful bidder seamlessly so that mining operations start without any delay

Maharashtra Electricity Regulatory Commission (MERC) extends deadline for implementation of commercial arrangements under MERC (Deviation Settlement Mechanism and related matters), Regulations, 2019

- MERC on June 5, 2020 passed an order to extend the deadline for implementation of Commercial Arrangements specified under Clauses 9 and 10 of MERC (Deviation Settlement Mechanism and Related Matters), Regulations, 2019 (**DSM Regulations**), which came into effect on March 1, 2019.
- As per the said provisions, the entities were required to establish and implement scheduling meter data management system along with DSM settlement accounting system. Initially, these Commercial Arrangements were required to be implemented by April 1, 2020, however considering the outbreak of Covid-19, MERC extended the implementation timelines till June 1, 2020.
- Further assessment and review indicated that the various elements are yet to be developed and progress has been impacted due to outbreak of Covid-19. Accordingly, MERC has extended implementation timelines from June 1, 2020 to October 5, 2020.

Central Electricity Regulatory Commission suo-moto order for implementation of Real Time Market for Electricity in India

- CERC passed a suo-moto order dated May 28, 2020 for 'Implementation of Real-Time Market (**RTM**) for electricity in India'. The order provides the methodology of allocation of transmission corridor to the power exchanges in the RTM.
- National Load Despatch Centre (**NLDC**) has been entrusted with the responsibility to announce the Available Transfer Capacity (**ATC**) for RTM transactions. Both the power exchanges, therefore, will have to allow trading of electricity considering notified ATC.
- Initial market clearing volume derived in this process shall be submitted to NLDC which will verify combined volume cleared in both exchanges against the ATC for RTM. If the combined cleared volume of both the power exchanges is within the ATC for RTM, transaction will be allowed.
- In an event combined volume exceeds the ATC for RTM, allocation of available corridor margin between the two power exchanges shall be in the ratio of the initial market clearing volume of RTM in respective power exchanges. The power exchanges shall thereafter submit the final trades in conformity with the available corridor margin provided by NLDC.
- It is intended that entire process will be completed within a single time block of 15 minutes. Initially, this arrangement and process was applicable from June 1, 2020 till June 14, 2020. However, by way of the suo-moto order, CERC has announced that the same will be applicable beyond June 14,2020.

Ministry of Environment, Forest and Climate Change (MoEFCC) notifies the Environment (Protection) Amendment Rules, 2020 (EPA Rules)

- The MoEFCC notified EPA Rules seeking to specifically amend Rule 3 of Environment (Protection) Rules, 1986 (**EP Rules**) that deals with standards for emissions or discharge of environmental pollutants. This has been done in view of the recommendation of NITI Aayog that it may be prudent to determine and enforce the environmental and pollution norms, to be complied with by thermal power generators, rather than restricting the ash content in coal, based on distance of transportation.
- Rule 3 Sub-rule 8 of the EP Rules now governs the use of coal by thermal power plants, without stipulations as regards to ash content or distance, and entails numerous conditions that would need to be satisfied prior to such use. These conditions range from setting up of a technological solution for emission norms, transportation to management of ash ponds.
- It is significant to note that compliance with the above-mentioned Rule 3 Sub-rule 8 of the EP Rules will be deemed to be additional conditions of the relevant environmental clearances for respective projects for financial year 2020-21 and onwards.
- The existing environmental clearances will stand modified so as to make the above conditions operative for relevant sectors. The Consent to Operate would be issued by respective State Pollution Control Boards accordingly.

RECENT JUDGEMENTS

- Century Rayon v. MERC & Anr
- ACME Chittorgarh Solar Energy Pvt Ltd v. Maharashtra State Electricity Distribution Company Ltd
- Bhushan Power and Steel Ltd v. GRID Corporation of Odisha Ltd & Ors
- Tata Power Company Ltd v. Maharashtra Regulatory Commission & Ors
- Kanika Steel Alloy Pvt Ltd & Ors v. MSEDCL
- NLC India v. CERC & Ors
- PEL Power Ltd v. Central Electricity Regulatory Commission & Anr
- Telengana State Southern Power Distribution Company Ltd & Anr v. Srigdhaa Beverages

Century Rayon v. MERC & Anr.

APPEAL 380 of 2019

Background facts

- Appellate Tribunal for Electricity (**APTEL**) on May 19, 2020 passed judgement wherein Century Rayon had sought for declaration that it should be entitled to levy wheeling charges as per 33kV level from date of Multi-Year Tariff Order dated November 3, 2016 (**MYT Order-1**). Simultaneously, Century Rayon also sought modification of three orders (Order dated April 25, 2018, Order dated September 09, 2018 and Order dated December 24, 2018) passed by MERC to allow levy of lower wheeling charges at 33kV.
- Century Rayon, a HT consumer under Maharashtra State Electricity Distribution Company (**MSEDCL**), having contract demand and sanctioned load of 27,750kVA and 60,627kW respectively, had been receiving power supply on express feeder at voltage level of 22kV. This arrangement was on account of lack of 33kV infrastructure in the area that was required to be implemented by MSEDCL.
- MYT Order-1 provided for supply of electricity to various classes of consumers. Through this order MERC for the first-time determined energy component and wheeling component separately and decided that wheeling charges will be payable by the consumers depending upon voltage level to which they are connected.
- This unbundling was done based on the principle that consumer tariff should also reflect underlying difference in cost of supply at different voltage levels. As a result, due to lack of required infrastructure, Century Rayon was forced to pay wheeling charges applicable to consumers receiving power supply at voltage level of 22/11kV, which was substantially higher than wheeling charges applicable to consumers connected to 33kV voltage level.
- Therefore, Century Rayon approached MERC (Application no 18 of 2017) seeking direction to be treated as connected to the power supply at 33kV voltage level, seeking direction against MSEDCL to recover the wheeling charges under MYT Order-1 applicable to 33kV voltage level consumers and for refund of its excess charges paid. Thereafter, MERC passed its order dated April 25, 2018 wherein it acknowledged fault of MSEDCL and granted the relief, that such consumers shall be levied wheeling charges applicable to the 33kV level only in the months in which their billing demand is within the load limit eligible for connecting at 33kV level from prospective date i.e. from April 25, 2018 onwards. This order was challenged by Century Rayon in a review petition which was dismissed by MERC vide its order dated December 24, 2018.

- MERC in its Multi- Year Tariff Order dated September 09, 2018 (**MYT Order-2**) then provided for dispensation for levy of wheeling charges. As per this dispensation, Century Rayon, which was connected to a lower voltage level of 22kV for the fault of MSEDCL instead of 33kV, was again made to pay at the rates applicable to 22kV consumers.

Issues at hand

- Whether the orders dated April 25, 2018, September 9, 2018 and December 24, 2018 require any interference of APTEL to allow levy of lower wheeling charges at 33kV to Century Rayon?
- Whether the relief should be granted to Century Rayon from the date of MYT Order-1 i.e. November 3, 2016 or from the date of filing of the Miscellaneous Application No. 18 of 2017?

Order of the Commission

- As regards the first issue, APTEL observed that it was on account of deficit attributable to MSEDCL that the required infrastructure for installation of 33kV voltage level was not provided to Century Rayon and other similarly placed consumers. Considering the existing SOP Regulations, MSEDCL was required to provide 33kV infrastructure to Century Rayon since its contract demand was more than 10,000kVA. Therefore, Century Rayon should be allowed lower wheeling charges at 33kV as provided in the order dated April 25, 2018 i.e. only for the months wherein the billing demand is within the load limit eligible for connecting at 33kV level.
- Further, APTEL observed that when MYT Order-1 was passed on November 3, 2016 wherein for the first time unbundling of the tariff dividing the components of tariff came to be made, no one including Century Rayon approached the MERC seeking extension of such benefit after unbundling of tariff by the Commission in the MYT Order-1. Therefore, the plea that Century Rayon is entitled to such benefit with effect from November 3, 2016 was not allowed.
- Since it was only on September 18, 2017 that Century Rayon filed the Miscellaneous Application No. 18 of 2017 seeking refund of the excess Wheeling Charges paid to MSEDCL and seeking directions to MSEDCL for recovery under MYT Order-1 dated November 3, 2016 as applicable to 33kV voltage level consumers, the benefit should be granted to it from September 18, 2017 onwards.
- APTEL directed that the wheeling charges which were paid by Century Rayon have to be adjusted from the future wheeling charges which has to be paid by it to MSEDCL.

Our viewpoint

APTEL has once again upheld the principle that no party can take advantage of its own wrong. Lack of transmission network/evacuation system is causing great hardship to the consumers/generators in many states. There have been instances where the evacuation system remains "under development" for years, rendering generating stations stranded. This must act as a wake-up call to the state utilities and governments to re-focus private participation in state transmission networks.

ACME Chittorgarh Solar Energy Pvt Ltd v. Maharashtra State Electricity Distribution Company Ltd[1]

CASE NO 7 OF 2020

Background facts

- Maharashtra Electricity Regulatory Commission (**MERC**) on June 15, 2020 passed its order (**Order**) in Case No. 07 of 2020 titled as ACME Chittorgarh Solar Energy Pvt Ltd v. Maharashtra State Electricity Distribution Company Ltd, allowing the increase in the cost of the Project due to imposition of Safeguard Duty by the Central Government. The Petitioner – ACME – sought reimbursement of the cost incurred as a result of the imposition of Safeguard Duty by the Central Government, which qualified as a Change in Law Event under the Power Purchase Agreement executed between ACME and MSEDCL (**PPA**).
- ACME had sought direction for MSEDCL to pay the claimed amount by way of incremental tariff to be determined by MERC in terms of its tariff regulations.

[1] HSA represented ACME in this matter

Issues at hand

- Whether all required documents for verification of Change in Law claim have been submitted?
- Whether interest cost on Custom Bonds are to be included in computation of Change in Law?
- What is the Capacity of Solar Modules eligible for compensation under Change in Law?
- What should be rate of interest for Carrying Cost?
- What is the Methodology for awarding compensation?

Order of the Commission

- MERC in its order has allowed ACME's claim for compensation on account of additional cost incurred due to imposition of Safeguard Duty (including additional GST) under Change in Law provisions of PPA and has directed ACME to provide undertaking that all modules installed at project site for supplying power to MSEDCL have been imported from the Country which is subjected to Safeguard Duty.
- However, MERC rejected ACME's request for the reimbursement of interest accrued on the Bonds submitted with the Customs department for the import of solar modules and observed that the decision for the cost of financing the purchase needs to be borne by the developers.
- Further, MERC has prescribed a methodology for calculation of compensation for the Carrying Cost incurred on the claimed amount (as a consequence to imposition of Safeguard Duty). As per the MERC Order, Carrying Cost is required to be calculated on the deferred recovery part (average of opening and closing balance) of total compensation at the simple interest rate of 1.25% in excess of one-year MCLR of the State bank of India, which is also the prescribed rate for late payment surcharges under the PPA.
- MERC has also directed MSEDCL to ascertain the compensation amount based on the submission made by ACME and to complete the process within 15 days from the date of this Order.

Our viewpoint

The decision of MERC in this case is significant because it is for the first time when a Commission has accepted the payments made through Customs Bonds and allowed reimbursement of the amount claimed under the bonds, including the Carrying Cost on the additional capital cost incurred due to the imposition of Safeguard Duty. The Commission has also provided a separate methodology for calculation of the compensation amount. This Order sets a precedent for Developers who seek to make payments through executing Custom Bonds to cover the increase in financing cost and liabilities.

Bhushan Power and Steel Ltd v. GRID Corporation of Odisha Ltd & Ors

APPEAL NO 226 OF 2015

Background facts

- Bhushan Power and Steel Ltd (**BPSL**) maintains and operates a 100 MW Captive Generation Plant (**CGP**) alongside its Integrated Steel Plant located in Sambalpur, Odisha. BSPL claimed that it has supplied power to GRIDCO, distribution licensee in State of Odisha pursuant to direction by State Government under Section 11 of Electricity Act, 2003 (**EA, 2003**) during the period in dispute i.e. March to December, 2009 and billings for the said period of supply of electricity having resulted in payments being made treating it as 'firm power'. GRIDCO made the payment on provisional basis.
- However, subsequently GRIDCO revised its position and decided to treat the said supply as 'inadvertent' or 'intermittent power' as same was not made on 'scheduled day ahead', thereby claiming refund/adjustment for earlier payment on the ground of excess payment made on provisional basis.

Issues at hand

- Whether such supply as aforesaid is in terms of the directives under Section 11(1) of the Electricity Act, 2003 and can the same be treated as 'inadvertent power' so as to reduce the price already paid?
- Whether the rule of estoppel applies in the present case and restrains GRIDCO from revising its earlier position?
- Whether the Grid Code permits deviation from scheduling norms to an extent of zero scheduling in case of deficit conditions?

Order of the Commission

- APTEL held that BSPL injected electricity from its CGP into the State Grid during the period in question without scheduling. BSPL pressed for compensatory relief in terms of Section 11(2) of EA, 2003 before OERC submitting that the electricity supply under the mandate issued by the State Government cannot result in adverse financial position for the generator. It is also an admitted case that BSPL, at the stage of raising the energy bills on month to month basis, did not claim any adverse financial impact to be off-set and, rather, unilaterally treated the supply under the category of 'firm power', in terms of the classification made by OERC by way of orders dated March 14, 2008 and February 28, 2009.
- APTEL also observed that principle of estoppel does not apply in the present case as there is no estoppel against law. The tariff determination is an exercise undertaken by the Electricity Regulatory Commission under Section 62 of the EA, 2003 and is guided by Tariff Regulations framed under Section 61, which includes factors such as safeguarding interest of consumers at large and ensuring recovery of cost of electricity in a reasonable manner for generator.
- APTEL further observed that even after the directives under Section 11 of the EA, 2003 becomes applicable, the directives of injection of power must adhere to the Grid Code and the same cannot be compromised.

Our viewpoint

This judgement has reinstated that supply of electricity cannot be undertaken without following the procedure provided under the Grid Code and relevant regulations and form of commercial arrangement may be allowed to substitute the same.

Tata Power Company Ltd v. Maharashtra Electricity Regulatory Commission & Ors.

Appeal No. 35 of 2020

Background

- The dispute relates to distribution network in Mumbai, where MERC had approved a rollout plan covering distribution license area common to three distribution entities – Tata Power Company Ltd (**TPCL**), Brihanmumbai Electric Supply and Transport Undertaking (**BEST**) and Adani Electricity Mumbai Ltd (Distribution) (**AEML**), previously known as Reliance Infrastructure Ltd.
- While approving the rollout plan, MERC observed that since consumer choice is a primary consideration, therefore, mode of supply opted for should be most cost effective and also avoid duplicating or wasting of national resources. Accordingly, MERC decided that the 'existing network' should be used to its maximum potential and new lines should be laid only when reliability, adequacy and economic viability along with consumer demand requires it to be done.
- While deciding operational specifics of rollout plan, MERC by its interim order dated April 9, 2015 decided to seek advice and accordingly constituted a committee of experts. Committee of experts submitted report regarding protocol for consumer migration in Mumbai parallel licensing area. Further, for the purpose of resolving the dispute arising from competing claims, which would invariably require evaluation of cost effectiveness of proposals, MERC also introduced an institutional mechanism in the form of a Mumbai Distribution Network Assessment Committee (**M-DNAC**).
- On July 17, 2019, a new customer approached AEML with a request for supply of electricity of 145 kW-LT-II commercial category for his premises. Thereafter, by way of a letter dated July 30, 2019, AEML approached M-DNAC requesting M-DNAC for verification of the scenario categorization, and contended that in view of Scenario 53(a) and consumer's location and its requirement, it fell into AEML's distribution area. AEML further requested that to cater the requirement of customer, AEML required 850 meter extension of 11kV Cable from nearest substation.
- TPCL, by way of an objection submitted before M -DNAC, contested request of AEML and submitted that TPCL's Distribution Network is also in the vicinity, and since TPCL and AEML both require to install a new substation or augment of existing substation, consumer falls under scenario 53(d) and is not under AEML's distribution area.
- On September 5, 2019 M-DNAC observed that although TPCL stated that its network is also in vicinity, it did not deny AEML's submission that TPCL's network is 6 to 9 km away from the consumer and allowed request of AEML.
- The said proceedings dated September 5, 2019 before M-DNAC were assailed by TPCL before MERC (registered as Case no. 283 of 2019) contesting that distance cannot be a criteria for scenario classification and consumer herein can be supplied electricity only after extending the distribution mains and not by merely laying a service line.

- MERC by way of an Order dated December 3, 2019, upheld and adopted the view taken by M-DNAC, holding that there was no infirmity therein and dismissed petition of TPCL. Appeal was filed against this order.

Issues at hand

- Whether adopting the test of 'network spread' approach by Regulatory Commission leans in favor of creating or perpetuating monopoly, thereby reducing possibility of competition between two distribution licensees?
- Whether authority exercised by M-DNAC is ultra-vires?

Order of the Commission

- APTEL held that the test of 'network spread' has been properly explained by MERC in the impugned order. It confirms to tests of proximity and contiguity of consumer to existing distribution mains of distribution licensee, which also apply. The words 'network spread' do not necessarily mean that licensee must have its supply cables reaching out to every nook, corner or inch of the area. Whereas, it should suffice that its connectivity can be arranged by augmenting the system within the meaning of works envisaged in levels of extension.
- Further, APTEL also observed that MERC by adopting the test of 'network spread' does not lean in favor of creating or perpetuating monopoly, as the consumer (new or existing) always holds its right to switch over from one distribution licensee to the another.

Our viewpoint

The judgement once again brings clarity to the ongoing dispute in relation to network roll-out in Mumbai. APTEL has clarified that 'network spread' cannot create monopolies (of infrastructure and service), which seems to be a welcome direction in the interest of the consumers of Mumbai.

Kanika Steel Alloy Pvt Ltd & Ors. v. MSEDCL

CASE NO. 82 OF 2020

Background facts

- MERC on May 21, 2020 passed an Order, allowing the revision of Contract Demand in a billing cycle, in terms of the MERC (Electricity Supply Code and Other Conditions) Regulations, 2005 (**Supply Code**) and SOP Regulations.
- The decision was taken by MERC in a Petition filed by various industrial establishments involved in the business of manufacture of steel and iron (**Petitioners**). These establishments are High Tension (**HT**) consumers of power, availing supply from MSEDCL.

Issue at hand

- The issue pertains to modification of SOP Regulations sought by Petitioners in order to facilitate revision of Contract Demand multiple times during one Billing Cycle, by providing a 24-hour advance notice to MSEDCL. This is on account of the ongoing pandemic, resulting in uncertain demand for manufactured goods. Petitioners' 60% cost of production is that of electricity. Therefore, in absence of prudent planning of electricity demand, the existence of Petitioners' establishments is claimed to be under threat.

Order of the Commission

- MERC opined that since plea of Petitioners is only on account of prevailing circumstances due to Covid-19, there is no requirement to amend the regulations for such transitory relief. However, case is fit for exercising its powers to 'remove difficulties' and to issue 'practice directions'.
- Although, no relief was sought by Low Tension (**LT**) consumers on prevailing issues, MERC, considering entire issue suo-motu, deemed it fit to enable similar option for revision of Contract Demand for LT consumers.
- HT Industrial and HT Commercial consumers were allowed to revise their Contract Demand up to 3 times in a Billing Cycle. After 3rd revision in Billing Cycle, maximum Load Factor Incentive shall be restricted to 10% of energy charges. For subsequent Billing Cycle, maximum limit of Load Factor Incentive will be 15% till time revision of Contract Demand is not sought.
- LT Industrial and LT Commercial consumers who have demand-based tariff shall be allowed to revise their Contract Demand up to 2 times in a Billing Cycle.
- Application of revision in Contract Demand will be made 3 days in advance by the consumer. Only on submission of completed application form, request for revision will be granted by the distribution licensee.

- Computation of the components of the bill pertaining to Demand viz. Demand Charges, Penalty for exceeding Contract Demand and Load Factor Incentive will be based on the corresponding revision in Contract Demand. All other components will be computed for the period of Billing Cycle based on existing methodology.
- Consumers who opt for revision in Contract Demand, will facilitate the distribution licensee in taking the Meter Reading Instrument (**MRI**) data. In absence of MRI/AMR (Average Meter Reading) data, the distribution licensee will resort to average billing by reconciling with last/available meter data collected upon lifting of lockdown and restoration of normalcy. This interim practice will continue till July, 31, 2020.

Our viewpoint

MERC in its recent tariff orders issued on March 30, 2020 has considered the strenuous circumstances and granted relief to various stakeholders on the aspects of metering and billing. The revision in contract demand will reduce the burden on industrial and commercial consumers of power who have been struggling for sustenance due to imposition of lockdown on account of Covid-19. Since directions issued by MERC are interim in nature, even distribution licensees of State of Maharashtra will not face any long term, irreparable losses.

NLC India v. CERC & Ors

APPEAL 291 OF 2016 & APPEAL 344 OF 2016

Background facts

- APTEL on May 28, 2020 passed an order in *NLC India v. CERC & Ors.* wherein NLC India had sought for treatment of Cost of Secondary Fuel Oil (**SFC**) on actuals rather than on normative basis for purposes of calculation of ECR under Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2009 (**2009 Tariff Regulations**). NLC India, while placing its reliance on CERC order dated July 10, 2015 passed in Petition 285 of 2013, further sought that the same methodology should be adopted for calculation of its ECR.
- NLC India is a generator of electricity controlled by a Government of India Enterprise and governed by regulatory regime of CERC. Tariff for supply of electricity from a thermal generating station includes 'capacity charge' and 'energy charge'. As per 2009 Tariff Regulations, which were in force from April 1, 2009 to March 31, 2014, capacity charge, part of which is annual fixed cost included SFC for coal based and lignite fired stations while energy charge included primary fuel cost only.
- Energy Charge Rate (**ECR**) is calculated on monthly basis under Regulation 21 - 'Computation and Payment of Capacity Charge and Energy Charge for Thermal Generating Stations'. However, reduction in SFC consumption is carried out on an annual basis under Regulation 25 - 'Norms of operation'. Regulation 25 also provides that savings on account of SFC have to be shared with beneficiaries in the ratio of 50:50 at the end of the year as per the given formula.
- The dispute arose when Electricity Regulatory Commission denied the benefit due to increased consumption of primary fuel on account of savings achieved in use of secondary fuel in power generation in respect of NLC India's two units, at the stage of truing-up of actual capital expenditure and tariff for period 2009-2014.
- NLC India approached CERC and questioned denial of benefit in respect of its two units due to computation of 'energy charge' on normative parameters pertaining to secondary fuel oil consumption, instead of factoring in reduced cost of the same. CERC vide its order dated July 21, 2016 (being the subject matter of one of the captioned appeals) (**Impugned Order**) referred to its order dated July 10, 2015 passed in *Kerala State Electricity Board v. NTPC* wherein CERC had interpreted Regulation 21(6) of the 2009 Tariff Regulations for purposes of treatment of SFC in calculation of ECR. CERC held that methodology adopted by NTPC for adjustment of ECR at the end of a year by taking average of (normative SFC + actual SFC)/2 of a year should be used, even though it is in deviation to Regulation 21(6) of the 2009 Tariff Regulations. It further observed that NTPC is charging less by applying this methodology as compared to energy charge considering normative specific fuel oil consumption 1ml/kWh. It held that decision in this case shall not be used to open settled cases.
- Impugned Order dismissed the petition of NLC India seeking ECR determination based on actual SFC in lieu of normative SFC, thereby denying the methodology as adopted and accepted in its own order dated July 10, 2015.

Issues at hand

- Whether Regulation 21 (6) of 2009 Tariff Regulations can be interpreted to mean that ECR determination has to be based on actual SFC instead of normative SFC?
- Whether the methodology adopted by NTPC for calculation of ECR in order dated July 10, 2015 can be adopted for NLC India?

Order of the Commission

- While endorsing the view in CERC's order dated July 10, 2015 on interpretation of Regulation 21 (6), APTEL held that the element of SFC appearing in formula for calculation of ECR in Regulation 21 (6) implies that it has to be 'on actual basis'. It further held that in explanatory notes below clause (6) of Regulation 21, the qualifying word 'normative' has been added wherever required (i.e. in relation to auxiliary energy consumption and limestone consumption). On the other hand, the explanatory note of SFC begins with the expression 'specific', which means it is clearly indicative of actual secondary fuel oil consumption being factored in rather than normative SFC. Additionally, it observed that additional expenditure incurred on primary fuel (lignite) on account of SFC cannot be left unrecovered.
- On the other issue, APTEL noted that the observation of CERC that this Order cannot be used to reopen settled cases is inappropriate. It explained that if a formula had been accepted as sound in a case, it has to be applied universally. The matters before the CERC in which Impugned Orders were passed relate to truing-up and, therefore, these cannot be termed as cases settled earlier. APTEL observed that CERC committed an error by declining to follow methodology for calculation of ECR accepted by CERC in its order dated July 10, 2015 thereby rendering the Impugned Order inconsistent and arbitrary.
- APTEL directed that subject to scrutiny, claim for savings actually made by reduction in secondary fuel oil consumption, CERC must follow its decision dated July 10, 2015 for the purposes of the claims of NLC India.

Our viewpoint

This judgment holds that if a methodology is adopted for certain calculation by the Commission, the same cannot be applied to parties on arbitrary basis and must be applicable universally. The judgment opens the opportunity for the thermal power generating companies to claim the benefit of treatment of SCF in calculation of ECR under the 2009 Regulations only.

PEL Power Ltd v. Central Electricity Regulatory Commission & Anr

APPEAL NO. 266 OF 2016

Background facts

- PEL Power Limited (**PEL**) filed an appeal before APTEL challenging CERC's order dated July 12, 2016 wherein CERC rejected PEL's plea of return of Bank Guarantee (**BG**) on account of temporary Force Majeure event as per provisions of Bulk Power Transmission Agreement (**BPTA**) dated December 24, 2010 executed between PEL and Power Grid Corporation of India (**PGCIL**). CERC further refused to grant any directions on consequent event pertaining to levy of relinquishment charges due to abandonment of project and held that the same may be decided in separate petition.
- PEL issued Force Majeure notice in December 2011 to PGCIL under BPTA as it was unable to procure requisite approval from statutory authority for developing the project and eventually leading to abandonment of the project. However, PGCIL proceeded with establishment of transmission system and invested significant amount on the transmission lines after 2 years of issuance of Force Majeure Notice. PGCIL sought to recover the security amount furnished by way of BG of Rs. 49.35 crores from PEL due to which PEL filed petition for declaration of change in law and sought consequential reliefs from CERC.

Issues at hand

- Whether CERC is justified in declaring the non-availability of statutory approval as a temporary Force Majeure event under the BPTA?
- Whether CERC is justified in holding that the liability of PEL to pay relinquishment charges may be decided in a separate petition?

Order of the Commission

- APTEL has observed that non availability of requisite approval from statutory authority constitutes a Force Majeure event as its occurrence was beyond reasonable control of PEL. CERC further condemned CTU for not carrying out its functions as it is required under Section 38(2)(b) of Electricity Act, 2003 which, inter alia, includes taking necessary corrective/remedial measures for system planning, coordination and implementation of same.
- BPTA is a contractual arrangement between parties which includes other generators, as in the present case, who have suffered due to Force Majeure conditions leading to cancellation/abandonment of the project. In such circumstance, bank guarantee of INR 49.35 crore furnished to PGCIL is required to be returned to PEL.

- Regarding second issue, APTEL has observed that if the project is abandoned, the generating company has to bear relinquishment charges as computed by CERC for relinquishing LTA. However, in the instant case, besides execution of BPTA, transmission project was not completed and LTA was not operationalized at the time of issuance of Force Majeure notice. Still, PGCIL proceeded with development of transmission system. As LTA was never operationalized for PEL, PEL is not liable to pay any relinquishment charges.

Our viewpoint

APTEL by way of above directions has identified the functions of CTU under Section 38 of the Electricity Act, 2003 in line with CTU's requirement to exercise remedial measures for the planning, coordination and implementation of the transmission system. The order has also provided relief to the generators by exempting them from payment of relinquishment charges in a case wherein the generator is unable to complete the project due to existence of Force Majeure event. However, APTEL has clarified that such exemption is only applicable when the transmission system has not been operationalized.

Telangana State Southern Power Distribution Company Ltd & Anr v. Srigdhaa Beverages

2020 SCC OnLine SC 478

Background facts

- Srigdhaa Beverages (**Appellant**) purchased a Unit owned by SB Beverages Pvt Ltd (**Debtor**) by participating in an auction. As per Auction notice, unit was being sold on 'as is where is, what is there is and without any recourse basis' in all respects and subject to statutory dues.
- The issue emerged when Appellant applied for an approval of a 500 kVA connection required for running Unit from Telangana State Southern Power Distribution Company Ltd (**Telangana DISCOM**). However, Telangana DISCOM rejected request of Appellant and asserted its right to recover electricity dues from Appellant which are pending from the previous owner (**Debtor**). As per Clauses 5.9.6 and 8.4 of the General Terms and Conditions of Supply of Distribution & Retail Supply Licensees in AP (**General Terms and Conditions of Supply**), the distribution company may refuse to supply electricity to the premises until outstanding dues are not cleared.
- Aggrieved by directions of Telangana DISCOM, Appellant filed a writ petition before the High Court of Telangana and Andhra Pradesh on the ground that the subsequent purchaser will not be responsible for the dues of the previous owner. High Court passed an order quashing demand notice of Telangana DISCOM pursuant to which present appeal was filed before the Supreme Court of India.

Issue at hand

- Whether liability towards electricity dues of the previous owner can be transferred to the new owner?

Decision of the Court

- Supreme Court set aside High Court's order and observed that Electricity dues which are statutory in character under Electricity Act, 2003 (**Act**) and as per terms and conditions of supply, cannot be waived even under Section 56 of Act (in pari materia with Section 24 of the Electricity Act). Such statutory dues cannot partake character of dues which are contractual in nature.
- Court observed that since sale of premises was on 'as is where is, whatever there is and without recourse basis', it is implied Appellant inspected the property before making purchase and inquired about outstanding dues. E-auction notice had quantified all the outstanding dues, which included electricity dues, and notice had clarified that these dues would be above sale price paid.
- Further, the present case is clearly covered under Clause 8.4 of the General Terms and Conditions of Supply. Therefore, Telangana DISCOM are well within its rights to recover Electricity Dues from the Appellant.

Our viewpoint

Supreme Court has reaffirmed and reiterated that liability to pay outstanding 'statutory' dues which includes electricity dues as characterized under the Act, cannot be waived and will fall on the purchaser of the premises. Further, this order relates to Caveat Emptor principle that places the onus on to the buyer to perform due diligence before making a purchase.

Recent Developments

- Amendment in methodology for allocation of coal for short-term linkage under the SHAKTI Policy – Ministry of Power
- Second Addendum on Protocol on Inland Water Transit and Trade between India and Bangladesh, 2020
- Adani leads the renewable energy push for India
- Indian powerhouses NTPC Ltd and ONGC form renewable energy JV
- NITI Aayog proposes privatization plan for Delhi metro
- Civil Construction Company bags the bid for package 4 of the Delhi-Meerut RRTS corridor
- Welspun Enterprises takes over 8 laning of Haryana road project by way of Harmonious Substitution
- India considers levying Basic Customs Duty (BCD) on solar equipment from August 2020

Amendment in methodology for allocation of coal for short-term linkage under the SHAKTI Policy – Ministry of Power

- Ministry of Power by virtue of its notification dated May 12, 2020 has amended methodology for allocation of coal as per provisions of Para B (viii) (a) covering Para B (iii) under SHAKTI Policy. SHAKTI Policy aims to centralize process of allocating coal to thermal power plants in a transparent and accountable manner.
- Under the policy, short-term linkage is provided to thermal power plants. Prior to the amendment, all the power plants, except captive power plants, with untied capacity of more than 50% (generation capacity without power purchase agreements) were eligible to participate in short-term coal linkage auctions. However, after the amendment, all power plants not having power purchase agreements are eligible to participate in coal linkage auctions.
- The duration of coal linkage provided to these power plants will be up to one year.

Second Addendum on Protocol on Inland Water Transit and Trade between India and Bangladesh, 2020

- People's Republic of Bangladesh and India signed the first protocol on Transit and Trade through inland waterways in 1972. It was last renewed in 2015 for 5 (five) years with a provision for its automatic renewal for a further period of 5 (five) years to give long term assurance to various stakeholders. Recently, the second addendum to the Protocol on Inland Water Transit and Trade was signed between the two countries.
- The second addendum includes new Indo-Bangladesh Protocol (IBP) routes and declaration of new 'Ports of Call' to facilitate trade. A Port of Call is an intermediate port where ships customarily stop for supplies, repairs, or transshipment of cargo. Earlier, there were 6 (six) Ports of Call each in India and Bangladesh under the Protocol. As per the second addendum, 5 (five) more Ports of Call and 2 (two) more extended Ports of Call have been added, increasing the number to 11 (eleven) and 2 (two) extended Ports of Call in each country.
  - **Five new Ports of Call**: Dhulian, Maia, Kolaghat, Sonamura and Jogigopha are on the Indian side while Rajshahi, Sultanganj, Chilmari, Daudkandi and Bahadurabad are on the Bangladesh side.
  - **Two extended Ports of Call** i.e. Tribeni (Bandel), West Bengal and Badarpur, Assam on Indian side and Ghorasal and Muktarpur on the Bangladesh side.
  - Inclusion of Jogigopha in India and Bahadurabad in Bangladesh as new Ports of Call will provide connectivity to Meghalaya, Assam and Bhutan. A Multimodal Logistics Park has also been proposed to be established at Jogigopha.
  - Inclusion of Sonamura-Daudkandi stretch of Gumti river in the Protocol will improve the connectivity of Tripura and adjoining States with Indian and Bangladesh's economic centers.
  - The operationalization of Rajshahi-Dhulian-Rajshahi Route and its extension up to Aricha, Bangladesh will help augment the existing infrastructure in Bangladesh. It will also decongest the Land Custom Stations on both sides.
- Trade between Chilmari (Bangladesh) and Dhubri (India) through use of shallow draft mechanized vessels is expected to be introduced. This would allow export of stone chips and other Bhutanese and North East cargo to Bangladesh and would provide easy access for the traders to the hinterland of Bangladesh, enhancing the local economy in Bangladesh and the lower Assam region of India.
- Under this Protocol, there will be new opportunities in cargo movement. The Indian transit cargo is mainly coal, fly-ash, over dimensional cargo (**ODC**) for power projects in North-East region. The other potential cargo for movement is fertilizers, cement, food grains, agricultural products, containerized cargo, etc.

Adani leads the renewable energy push for India

- In a massive move within Indian renewable energy sector, Adani Green Energy Limited (**AGEL**) has won a contract with the Solar Energy Corporation of India (**SECI**) that will entail AGEL developing 8 GW of solar power over the next decade. This manufacturing-linked agreement, valued at approximately 6 billion USD, will see AGEL set up 2 GW of what is described as 'solar cell and module manufacturing capacity'.
- Under the agreement AGEL, which is part of the Adani Group, will develop 2 GW of solar capacity by the year 2022, with the remaining capacity of 6 GW being commissioned in a staggered manner of 2 GW each. These projects will include a large-scale 'single-site generation project' of 2 GW. They will supplement a current production capacity of 1.3 GW and represent the latest example of India attempting to boost its domestic manufacturing capabilities.
- The efficient execution and implementation of this contract will be a huge step forward to achieve the ambitious renewable-energy target set by the Government of India.

Indian powerhouses NTPC Ltd. and Oil and Natural Gas Corp Ltd (ONGC) form renewable energy JV

- Symbolizing the increasing significance of renewable energy, NTPC Ltd. and ONGC have signed a pact to set up a JV that will be operating solely in the renewable energy space. The parties have signed a Memorandum of Understanding (**MoU**) giving effect to this understanding.
- The MoU, executed through a virtual conference, encourages both parties to explore opportunities in the renewable energy sector having a keen focus on the potential that offshore wind projects present both in India as well as internationally. While the opportunity exploration will be crucial, the new entity will also focus on sustainability, storage, e-mobility and environmental, social and governance compliant projects.
- This JV will also enable both parties to achieve their ambitious energy targets.

NITI Aayog proposes privatization plan for Delhi metro

- The annual audit reports published by the Delhi Metro Rail Corporation Ltd (**DMRC**) suggest that the Delhi metro has been running in loss. In this regard, Government of Delhi is planning to privatize Delhi metro and has proposed a plan to undertake the said privatization.
- NITI Aayog has proposed three PPP models to be adopted by the DMRC for a lease of 20 years, 50 years and 99 years each:
  - **Model I** – Under this model, the private entity shall undertake metro operation and maintenance along with other ancillary services. The proposed concession period is 20 years. The source of revenue for the private entity will be via user fare, parking and advertisement fee, etc.
  - **Model II** – Under this model, in addition to metro operation and maintenance and other ancillary services, the private entity will procure/maintain existing/new rolling stock, lease commercial space at the station and develop and sell commercial property in other areas. The proposed concession period is 50 years. In addition to user fare, parking and advertisement fee, sources of revenue for the private entity will include any revenue from license or lease rental at station for commercial development.
  - **Model III** – Under this model, in addition to the functions under Model I and Model II, the private entity will develop and sell residential projects at permitted areas. The proposed concession period is 99 years. The source of revenue for the private entity in addition to those in Model I and Model II would also be any revenue from sale of residential areas.
- The three PPP models, if implemented, can earn DMRC monetary benefits from INR 39,000 crore to INR 80,000 crore.
- It is pertinent to note that if this proposal is approved and private entities are able to exercise certain rights over the Delhi metro, the Metro Rail Policy 2017 and the Metro Railway (Operation & Maintenance) Act, 2002 may need to be suitably amended.

Civil Construction Company bags the bid for package 4 of the Delhi-Meerut RRTS corridor

- National Capital Region Transport Corporation (**NCRTC**) invited bids for the construction of the 5.6 km underground section of the Delhi-Meerut RRTS corridor in November 2019.
- Technical bids for this project were opened in March 2020 and financial bids were opened on June 12, 2020.
- Chinese civil construction company, Shanghai Tunnel Engineering Co. Ltd. (**STEC**), has emerged as the lowest bidder among the five bidders.
- The scope of work under this package includes design and construction of tunnels from New Ashok Nagar DN Ramp to Sahibabad UP Ramp and design and construction of an underground station at Anand Vihar.
- While STEC has emerged as the lowest bidder, it is apprehended whether STEC’s bid may have to undergo a review considering the revised FDI norms as announced by the Government of India in the month of April 2020 vide Press Note 3. As per the revised FDI norms, any investment being made by a neighboring country, including China, would require prior approval of the Government of India regardless of the sector.

Welspun Enterprises takes over 8 laning of Haryana road project by way of Harmonious Substitution

- Welspun Infrafacility Private Limited (**WIPL**), a wholly owned subsidiary of Welspun Enterprises, has executed an endorsement agreement with National Highway Authority of India (NHAI). The endorsement agreement has been signed by NHAI to substitute WIPL and allow WIPL to take over 8 laning of Mukarba Chowk Panipat Section of National Highway-1 (**New NH-44**) in the State of Haryana.
- The 8 laning project is to be undertaken on Design, Build, Finance, Operate and Transfer (**DBFOT**) basis. It is pertinent to note that the abovementioned takeover has been undertaken through harmonious substitution route. This provision is often seen in NHAI concession agreements and allows the NHAI or the project lenders to substitute the existing concessionaire with a new concessionaire. Under the said provision, the NHAI signs an endorsement agreement with the new concessionaire and the new concessionaire assumes responsibility of the project in accordance with the terms of the original concession agreement.

India considers levying Basic Customs Duty (BCD) on solar equipment from August 2020

- Further to the 'Aatmanirbhar Bharat Abhiyan' and the 'Make in India' programme, Government of India (**GoI**) has proposed to levy BCD beginning August 2020 on solar modules, solar cells and solar inverters in an attempt to promote manufacturing of domestic goods, create jobs and services in India. Currently, there is no BCD payable on import of equipment for solar power projects, which attract SGD (due to end in July 2020). Additionally, GoI also proposes to declare a clear trajectory of BCD so as to remove any uncertainty about policy.
- The move is expected to curb imports from China, which overwhelmingly dominates India's renewable energy market, although the Government did not name any country in its statement instead choosing to cite national security as their key consideration. Numerous stakeholders in the industry view this as an important step towards increasing manufacturing of solar equipment in India as it provides much needed impetus to our stuttering domestic economy.

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