

# PROJECTS, ENERGY & INFRASTRUCTURE

Monthly update | May 2020



# STATUTORY UPDATES

- Central Electricity Regulatory Commission (Sharing of Inter-state Transmission Charges and Losses) Regulations, 2020
- Draft Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020

## Central Electricity Regulatory Commission (Sharing of Inter-state Transmission Charges and Losses) Regulations, 2020

- Central Electricity Regulatory Commission (**CERC**) has notified Sharing of Inter-State Transmission Charges and Losses Regulations, 2020 (**Sharing Regulations**). Sharing Regulations are applicable to all Designated ISTS Customers (**DICs**), Inter-State Transmission Licensees, National Load Despatch Centre (**NLDC**), Regional Load Despatch Centers (**RLDCs**), State Load Despatch Centers (**SLDCs**) and Regional Power Committees (**RPCs**).
- For calculation of Transmission Charges, four components would be considered i.e. transmission assets belonging to:
  - National System including the Yearly Transmission Charges (**YTC**) for all the renewable energy projects.
  - Regional System
  - Transformers Component (state wise)
  - AC System and the usage therein
- Under said regulations, a mechanism has been devised by way of which Short-term Open Access (**STOA**) charges will be calculated at state level and the manner in which same will be levied and recovered from users. However, STOA Charges will be payable by a distribution licensee with Long Term Access (**LTA**) and/or Medium-Term Access (**MTOA**), or by trading licensees acting on behalf of such distribution licensees.
- Concept of penalty of Transmission Deviation and the way same shall be computed has also been provided under these regulations. Transmission Deviation is over injection of power by a generating station or over injection/drawal by a state or any other DICs (excluding a distribution licensee) contrary to its LTA/MTOA.
- No Transmission Charges by Wind and Solar Power Generators will be payable as they are exempted as per Ministry of Power Notification allowing exemption from payment of Transmission Charges by a Renewable Generator if power has been tied on a long term basis and plant is commissioned within stipulated timeline i.e. March 2020.
- Cases where Commercial Operation Date (COD) of a Generating Station has been delayed while associated transmission system has achieved COD, Generating Station/LTA customer/MTOA customer will continue to bear transmission charges. Part operationalization of LTA appears to have been allowed on payment of associated transmission charges.
- Even when a transmission system is not complete while some elements thereof are being utilized payment of transmission charges will be levied.



- Under these regulations, penalties will be levied in cases of delay in utilization of LTA/MTOA and in cases of delay where LTA/MTOA has been granted on margins of transmission corridor capacity percentage of transmission charges will be payable instead of entire amount.
- Reverse transmission charges will also be payable, if Generating Station achieves its COD in time however, associated Transmission System is delayed.
- It appears that earlier timeline of 60 days to make payments of monthly invoices to CTU has been reduced to 45 days. A rebate of 1.5% will be allowed for payments of bills within five days of presentation of the bill, and a rebate of 1% will be allowed when payments are made on any day after five days and within 30 days.
- CTU has been granted power to regulate in instances of
  - Failure of LTA/MTOA customer
  - DICs furnishing or replenishing Letter of Credit
  - Establish payment security mechanism
  - Issues related to delay in payment of monthly invoices

## **Draft Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2020**

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- CERC has issued draft regulation on terms and conditions for determination of tariff from renewable energy sources (**Draft Regulations**) which is proposed to come into force from July 01, 2020 and will remain in force until March 31, 2023.
- Draft Regulations provide for parameters for new renewable energy technologies and will be applicable to various categories of renewable technologies, subject to these renewable technologies meeting the criteria specified in draft.<sup>1</sup>
- CERC has been provided with discretion for determination of tariff for renewable generating sources either by way of a generic tariff order on annual basis or project specific tariff considering parameters laid down under draft.
- Accordingly, draft regulations also specify components for determination of tariff for renewable energy sources such as Return on equity, Interest on loan, Depreciation, Interest on working capital and O&M expenses.
- For determination of generic tariff and project-specific tariff loan tenure of 15 years shall be considered. Total capital cost of renewable energy projects will be inclusive of all capital work including plant and machinery, civil work, erection and commissioning, financing, and interest during construction and setting up of infrastructure up to inter-connection point.
- Debt-equity ratio continues to be 70:30 for determination of generic tariff. However, in case of determination of a project specific tariff, in cases where equity employed is more than 30%, it will be treated as normative loan as in case of thermal/hydro projects.
- Depreciation rate of 4.67% per annum will be considered for first 15 years, and remaining depreciation will be evenly spread during the remaining useful life of project.
- Late payment surcharge at rate of 1.50% per month will also be levied by generating company if payment is delayed beyond a period of 45 days from date of the presentation of bills.

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<sup>1</sup> Applicable to renewable technologies such as wind power projects, small hydro projects, biomass power project with rankine cycle technology, non-fossil fuel based co-generation projects, solar PV power projects, floating solar projects, solar thermal power projects, renewable hybrid energy projects, renewable energy with storage projects, biomass gasifier based projects, biogas based power projects, municipal solid waste based power projects and refuse derived fuel based power projects



# RECENT JUDGEMENTS

- Suo-moto order by Delhi Electricity Regulatory Commission
- Gujarat Urja Vikas Nigam Ltd v. Essar Power Gujarat Ltd & Ors.
- Sembcorp Energy India Ltd v. Southern Power Distribution Company of Telangana Ltd
- CERC provides financial relief to power generators by exempting submission of construction phase bank guarantee

## DELHI ELECTRICITY REGULATORY COMMISSION (DERC)

DERC SUO MOTO ORDER DATED APRIL 07, 2020

### Background facts

- DERC passed a suo-moto order on April 07, 2020 for the “Mitigation of impact on electricity distribution licensees and consumers of Delhi”, whereby it provided certain relaxations to the electricity consumers by reducing the LPSC payment norms and, inter alia, issued directions to Discoms regarding raising of electricity bills on provisional basis for the period March 24, 2020 to June 30, 2020 from consumers which are not covered under smart meters and automatic meter reading.
- In furtherance of the said order dated April 07, 2020, DERC in exercise of its powers conferred under Regulation 85 (Power of Relaxation and power to remove difficulties) of the DERC (Supply Code and Performance Standards) Regulations, 2017 (**Regulations**) has further issued the Delhi Electricity Supply Code and Performance Standards (Relaxation) Third Order, 2020 (**Order**) on May 04, 2020.
- The said Order is concurrent to the earlier Order dated April 07, 2020, and, therefore, is applicable from March 24, 2020. This Order has been issued pursuant to the difficulties pointed out by the consumers of industrial and non-domestic category that the provisional bills raised by the distribution licensee are on higher side and are based on the readings of corresponding period of previous year, whereas the actual consumption of such units/establishments is almost negligible because of closure of units due to the prevailing COVID-19 pandemic and direction of the Government in this regard.

### Findings of the Commission

- The Order contains following directions for provisional billing for industrial and non-domestic category of electricity consumers:
  - The provisional billing shall be resorted to only in those cases where the meter of the consumer could not be read/recorded by the distribution licensee during the billing cycle, otherwise the distribution licensee is required to raise the bill on actual consumption of electricity.



- Such provisional bill is to contain the fixed charges and associated applicable charges only, considering the consumption as nil.
- Where the provisional bill for such category of electricity consumers has not been raised since March 24, 2020 by the distribution licensee, the distribution licensee shall revise the bill in accordance with this Order.
- In case the consumer furnishes the meter reading(s) itself along with picture of the meter reading indicating the exact reading and the date of meter reading through registered mobile number or through e-mail, the billing for that billing cycle(s) shall be done based on these reading(s), subject to adjustment when meter is actually read/recorded by the distribution licensee.

#### Our viewpoint

This Order will provide significant relief to the industrial and non-domestic category of electricity consumers. The provisional bill will not be raised basis the readings of corresponding period of previous year and would only contain the fixed charges and associated applicable charges considering the consumption as nil.

## GUJARAT URJA VIKAS NIGAM LTD V. ESSAR POWER GUJARAT LTD & ORS.<sup>2</sup>

PETITION No. 1807 OF 2019

### Background facts

- Gujarat Electricity Regulatory Commission (**Gujarat Commission**) on April 27, 2020 passed its Order (**Order**) in *Gujarat Urja Vikas Nigam Ltd v. Essar Power Gujarat Ltd & Ors.* whereby Gujarat Urja Vikas Nigam Ltd (**GUVNL**) sought amendments to Power Purchase Agreement (**PPA**) executed with Essar Power Gujarat Ltd (**EPGL**) on account of increase in cost of imported coal due to change in pricing of coal by Indonesian Government Regulations.
- Supreme Court of India (**SC**) in its landmark decision in the case of *Energy Watchdog v. CERC & Ors*<sup>3</sup>, had held that unprecedented and significant increase in coal sourced from Indonesia neither constituted a Force Majeure event nor a Change in Law, and rejected compensatory tariff extended to thermal power generators by Central Electricity Regulatory Commission (**CERC**). As a result, power generators in State of Gujarat expressed their inability for continued sustenance on account of severe cash flow constraints.
- Thereafter, the Government of Gujarat issued a policy direction on July 03, 2018 whereby a High-Power Committee (**HPC**) was constituted in order to prepare a report for rehabilitation of such stressed projects. HPC in its report (**HPC Report**) recognized that it is in interest of all stakeholders, including Consumers and lenders, that these projects continue to supply power and recommended terms and conditions for modification in PPA.
- State Government of Gujarat through Government Resolution dated December 01, 2018 (**Government Resolution**) decided to implement HPC Report with certain modification and directed GUVNL to approach GERC for approval of mutually agreed amendments to PPA with EPGL. Following recommendations made by HPC in its Report and Government Resolution dated December 01, 2018, GUVNL approached GERC seeking amendments to PPA by way of present petition.

### Issues at hand

- Whether GUVNL has the locus standi to file the present petition?
- Whether GERC is the appropriate Commission as per SC judgment dated October 29, 2018<sup>4</sup>? Whether GERC is competent to adjudicate and decide the present petition in absence of judicial member in view of the said decision of the SC?
- Whether the present petition is a review petition seeking review of GERC's Order approving the original PPA dated July 26, 2007? If so, whether it is permissible to admit such review after a lapse of 10 years?
- Whether the amendments to the PPA are permissible under Section 63 of the Electricity Act, 2003 and the Bidding Guidelines, 2005? If yes, whether GERC has the power to approve such amendments in the approved PPAs?
- Whether GERC is empowered to convert tariff adopted under Section 63 to that determined under Section 62 of the Electricity Act, 2003 on cost plus basis and determine fixed and variable cost?
- Whether Fuel Supply Agreement is compulsory and necessary prior to approving the PPA dated March 01, 2019

<sup>2</sup> HSA represented GUVNL in this matter.

<sup>3</sup> (2017) 14 SCC 80

<sup>4</sup> (2018) 6 SCC 21

executed between the parties?

- Whether action of Government of Gujarat intervening in the matter and setting up High Power Committee and its recommendations is in public interest? Whether recommendations of HPC issued vide Government Regulations dated December 01, 2018 leading to change in terms and conditions of PPA executed between parties by way of supplemental PPA are binding to GUVNL and to GERC?
- Whether it is mandatory for GUVNL to allow those bidders, who had participated in bidding process of Bid No. 3 of 03/LTPP/2006 for giving an equal treatment?
- Whether Government of Gujarat and lenders of EPGL and distribution licensees are not essential and necessary party to petition?

### Observations of the Commission

- GERC relied on SC order dated October 29, 2018 and PPA dated February 26, 2007 to hold that it is the appropriate commission and has necessary powers to adjudicate the matter. Further, absence of a judicial member does not rob GERC of its powers and functions. The decision of the SC specifies that next vacancy arising in every State Commission shall be filled in by a judicial member. In GERC, quorum for proceedings shall be 'two' as per Regulation 16 to 19 of Conduct of Business Regulations – considering there are two members including Chairperson already, they can decide instant petition as well.
- GERC stated that HPC has studied the issues involved in stressed power projects using imported coal as fuel, including the assets of these projects, while giving its recommendations. Upon verification of same along with consequent Government Resolution it is clear that GUVNL was directed to ensure adequate and efficient supply of energy at economical tariff and maintain its energy basket with a mix of power sources. Under Section 86(1)(b) of Electricity Act, 2003, State Commission is required to regulate power procurement of distribution licensee, which includes quantum of power, its price and period. Therefore, GERC has jurisdiction to decide present Petition.
- GERC held that present petition is not a review in disguise. Order dated December 20, 2007 was for adoption of tariff in a bid by GUVNL under competitive bidding process while present petition raised entirely different issues. The petition is for approval of amendments to PPA in light of a policy decision and is not a case of Section 62 or Section 63. The PPA tenure can be extended for further period of 10 years based on mutual acceptance, which will help in ensuring availability of cheaper power in future at competitive rates.
- Similarly, the petition is not a re-bidding where the original bid has been scrapped. There is no cancellation or re-invitation of tenders. Once the PPA has been executed between the parties, other bidders have no privity of contract. Further, while exercising judicial review in the matter of government contracts, the primary concern of the court is to see whether there is any infirmity in the decision-making process or whether it is vitiated by mala fides, unreasonableness or arbitrariness. The policy decision of Government of Gujarat cannot be interfered with since it aims to rehabilitate the stressed imported coal-based power plants and is in public interest, and it cannot be said that there are any mala fides or want of bona fides in the decision to amend the PPA.
- The lenders were part of discussion with the Govt. of India in the meeting held on June 20, 2017, and of working group formed for resolution of issue. Further, the Government of Gujarat has taken a policy decision through a package deal to rehabilitate the imported coal based stressed power projects located in the State in larger public interest. The Government in its policy direction to GUVNL also required them to approach GERC for its approval. Now, GERC's role is to see that the amendments in the PPA are in accordance with law, and also protect the interest of all stakeholders including the interest of consumers.
- On issue of pendency of review against Order dated April 12, 2019 before CERC which deals with a similar issue between a different generator and distribution licensee, GERC has opined that outcome of CERC order in above said matter may affect present petition. Therefore, GUVNL has been directed to approach GERC after an order is passed by CERC, for review of the present Order.
- Since the fuel cost is pass through under the amended agreement (unlike the original PPA), it is the duty of the procurer/GUVNL to verify fuel availability and quality. Hence, while approving the monthly energy bills of EPGL, GUVNL shall verify the pertinent points as per details/documents listed in Annexure-5 of the Order.

### Order of the Commission

On various components to be amended in PPA as per HPC Report, GERC held that:

- Capacity charges of the generator have been reduced by 20 Paisa per unit on the yearly quoted capacity charges.
- With regard to the ceiling limit of the HBA index, which was USD 110/MT, GERC has observed that the same is quite high in the present global market. Therefore, GERC has allowed the HBA index at USD 90/MT and has directed the parties to amend and modify the PPA to the said extent. GERC has disallowed deviation of 10 per cent over the ceiling limit of the HBA index as recommended under the HPC Report and sought by the parties.
- Revised Energy Charges shall be applicable from the date when the generator shall start directly importing coal from Indonesia. Prior to this, the energy charges shall be as per the original PPA with applicable adjustment for

change in law allowed, if any.

- Ocean freight and fuel handling charges as given in the Original PPA shall act as ceiling and these charges will be further reduced as per the formula as agreed in CGPL case.
- On the aspect of port handling charges and transit losses, GERC disallowed the proposed amendments and stated that the provisions of the PPA dated 26.02.2007 will act as the ceiling limit. Thus, GERC disallowed other port handling charges @ 3% of FOB including transit losses.
- Station Heat Rate has been reduced from 2333 Kcal/kWh to 2262 Kcal/kWh so as to reduce consumption of coal.
- Incentive to Generator shall now be allowed over 90% availability instead of 85% as per the Original PPA.
- PPA can be extended for a term of further 10 years with mutual agreement in 5-year terms, with the approval of the Commission.

### Our viewpoint

Decision of GERC in this matter is significant and a positive step towards rehabilitating/salvaging stressed generators in larger public interest, including interests of project developers as well as consumers. The order sets a precedent for instances where generators/project developers have been compelled to declare the projects as NPAs on account of Change in Law concerns. However, the fact that implementation of diverse components of rehabilitation plan recommended by HPC and accepted by Government of Gujarat included making certain amendments to PPAs, should not have been lost sight of and should have been tested on pedestals of fairness, lack of arbitrariness and public interest involved in salvaging power projects. All said, this order is in conformity with National Tariff Policy, 2016 which recognizes fact that consumer interest is best served in ensuring viability and sustainability of entire value chain viz., generation, transmission and distribution of electricity, while at same time facilitating power supply at reasonable rate to the consumers.

## Sembcorp Energy India Ltd v. Southern Power Distribution Company of Telangana Ltd<sup>5</sup>

PETITION NO. 209/MP/2019

### Background

- Central Electricity Regulatory Commission (**CERC**) on May 06, 2020 has passed its Order (**Order**) in *Sembcorp Energy India Ltd v. Southern Power Distribution Company of Telangana Ltd* (**Petition**) and allowed the claims of Sembcorp Energy India Ltd (**Petitioner/Sembcorp**) as well as granted relief on account of Change in Law events.
- In the present petition, Sembcorp had sought relief on account of Change in Law pursuant to the Notification dated December 07, 2015 issued by the Ministry of Environment Forest and Climate Change (**MOEF Notification**), amending the Environment Protection Rules, 1986. Vide the said amendment, the emission norms w.r.t Sulphur Dioxide (SO<sub>2</sub>), Nitrogen Oxide (NO<sub>x</sub>) and Mercury (Hg) for thermal power plants were revised by the MOEF. In order to meet the said revised norms, the thermal power generators, including the Petitioner, were required to install a Flu Gas Desulphurization and SNCR System (**FGD and SNCR**) for meeting the emission standards for SO<sub>2</sub> and NO<sub>x</sub> respectively.

### Issues at hand

- Whether the MOEF Notification qualifies to be considered as an event of Change in Law in terms of the PPA dated April 01, 2013 entered between the Petitioner and Respondents?
- If so, whether the requirement of notice as per the provisions of Article 10 of PPA have been complied with by Petitioner?
- Whether provisional approval of capital expenditure can be granted for incurring proposed expenditure towards installation of FGD system?
- Whether additional capital expenditure can be granted for incurring proposed expenditure towards installation of FGD system?
- What shall be the norms and mechanism for computing the adjustment in tariff corresponding to additional investment and increase in operational costs due to MOEF Notification, so as to restore Petitioner to same economic position as if Change in Law event had not occurred?

<sup>5</sup> HSA represented Sembcorp Energy India Ltd. in this matter.



## Findings of the Commission

- CERC observed that the project of Petitioner was impacted by MOEF Notification, and therefore Petitioner is required to undertake activities to comply with the revised norms for SO<sub>2</sub> and NO<sub>x</sub> through installation of FGD and SNCR system respectively.
- Also, CERC has observed that as per the Change in Law provision of the PPA, if the Seller is affected by Change in Law under Article 10.1, in order to claim Change in Law under the said Article, it is required to give a notice to the Procurers about occurrence of Change in Law as soon as reasonably practicable after becoming aware of the same. The Petitioner notified the Respondents of the said Change in Law event vide letter dated July 17, 2017 and June 03, 2019. CERC has therefore observed that the Petitioner has complied with the requirement under the PPA.
- On the aspect of provisional approval of capital cost, CERC has stated that the cost recommended by CEA is an indicative cost that is primarily based upon rates of installation by Central/State PSUs. While approving costs of installation of FGD, the recommendations of CEA and discovered cost through international competitive bidding process needs to be taken into account and then CERC will take a view as to reasonableness of costs.
- With respect to the installation of SNCR system, CERC has held that the Petitioner should not initiate installation of SNCR or modification of combustion control system, as the case may be, without specific recommendations of CEA. The cost of such NO<sub>x</sub> control system may be allowed based on CEA guidelines and recommendations, if any, and based on prudence check of the details furnished by the Petitioner after installing the equipment on basis of competitive bidding and on incurring the expenditure based on such bidding.
- On the additional capital and operational costs, CERC has provisionally allowed 2% of the capital cost of FGD system at this stage and has directed the Petitioner to furnish expenses in this regard on actual basis at the time of determination of tariff on commissioning of the FGD system.
- On Operational Norms, CERC has allowed increased Auxiliary consumption of 1% as recommended by CEA in other similar plants, subject to revision based on norms if notified by CERC. This 1% increase allows for modification in formulae for Availability, Capacity Charge, Energy Charge, and PLF on account of increased Auxiliary Consumption.
- CERC has further stated that the beneficiaries and the Petitioner shall plan the interconnection of FGD system with main plant by synchronizing it with annual overhaul. Thus, CERC has not considered the opportunity cost at this stage. However, the same would be considered on actual number of days of shutdown after prudence check to the effect that the Petitioner has tried to synchronize the interconnection of FGD system with annual overhaul and has consulted the beneficiaries in this respect.
- For the norms and mechanism for computing the adjustment in tariff corresponding to the additional investments and increase in operating costs, CERC has held that as per the Change in Law provision of the PPA, compensation methodology is to be applied to the non-Escalable capacity charges if a Change in Law event results in increase in capital cost during the construction period. However, for Change in Law events which occur during the operation period (instant case), Articles 10.3.2, 10.3.3 and 10.3.4 of the PPA leave it to CERC to arrive at a compensation for any increase/decrease in revenues or cost. Since, presently there is no methodology for determination of the compensation for Change in Law events which occur during the operation period, CERC vide its Order dated April 23, 2020 in Petition No. 446/MP/2019 has directed its staff to float a Staff Paper at the earliest on the issue of compensation mechanism and tariff implications on account of the said MOEF Notification in case of those thermal power plants where the PPA does not have explicit provision for compensation mechanism during the operation period and the PPA requires CERC to devise such mechanism. Comments from all stakeholders have been invited for this by CERC.

### Our viewpoint

Considering the approaching deadline for the implementation of the FGD and SNCR system, the Order of CERC sets a precedent where for the first-time provisional costs have been allowed in the first round of litigation itself. Generating companies now do not need to first seek for a mere declaration of Change in Law, and then approach CERC for the approval of cost through separate proceedings.

We believe that this approach taken by CERC is going to benefit the generators and they will be able to obtain financing from the lenders for installation of the FGD and SNCR system with greater ease, since the allowance of provisional costs provides a degree of certainty.



## CERC PROVIDES FINANCIAL RELIEF TO POWER GENERATORS BY EXEMPTING SUBMISSION OF CONSTRUCTION PHASE BANK GUARANTEE (BG)<sup>6</sup>

IA No. 91/2019 IN PETITION No. 108/MP/2019 & I.A. No. 92/2019 IN PETITION No.109/MP/2019

### Background facts

- ACME Solar Holdings Ltd and its 4 SPVs (**ACME**) approached CERC seeking extension of timelines of various milestones for commissioning of a project where ACME entered into a Power Purchase Agreement (**PPA**) with Solar Energy Corporation of India (**SECI**), who in turn executed Power Sale Agreement (**PSA**) with its beneficiaries. Post filing of application for grant of Long-Term Access (**LTA**) to firm up the beneficiaries, ACME submitted the copies of PPAs and PSA to Power Grid Corporation of India Ltd (**PGCIL**) and sought exemption from submission of construction phase BG.
- ACME contended that as per Clause 24b.ii(vi) of Detailed Procedure notified under Regulation 27 of Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium term Open Access in inter-State Transmission and related matters) Regulations, 2009 (**Connectivity Regulations, 2009**), it is exempted from furnishing construction phase BG. ACME further contended that PPAs were submitted to PGCIL/CTU prior to grant of LTA approval and still PGCIL failed to consider said PPAs to be a part of LTA Application.
- Subsequently, PGCIL filed an application seeking clarification on conditions to be fulfilled by LTA Applicant for claiming exemption from submission of construction phase BG where LTA Applicant has already submitted requisite documents (PPA/PSA) post filing of the application.

### Issue at hand

- Whether submission of Application BG or Construction Phase BG can be exempted where LTA Applicant signs PPA/PSA post submission of LTA Application along with interplay of Connectivity Regulations, 2009 read with Detailed Procedure?

### Findings of the Commission

- CERC observed that Application BG/Construction Phase BG is not required subject to following:
  - Augmentation of transmission system as identified for grant of LTA shall be undertaken only after agreement of beneficiaries in Standing Committee on Power System Planning/Regional Power Committee for bearing the transmission charges.
  - LTA has to be directly signed by beneficiaries with Central Transmission Utility (**CTU**) or tripartite agreement with CTU and inter-State transmission licensee
  - PPAs are necessarily required to be signed between beneficiary and LTA applicant
  - If PPAs are signed with intermediary agency (SECI/NTPC), it should be supported by back to back PSA
- PPA between LTA Applicant/Generator and Beneficiary is not at the same footing as a PPA between LTA Applicant/Generator and SECI/NTPC.
- Since there may be times in competitively bid projects through SECI/NTPC where fulfilling conditions of an agreement between beneficiaries and CTU to bear the transmission charges towards augmentation of transmission system may not be possible or there can be time lag between execution of PPA and PSA due to inherent process of bidding and approval from state commissions, in such cases BG can be exempted where PPA is executed between LTA applicant and beneficiaries or where PPA is executed between LTA applicant and intermediary agency which is supported by back to back PSA with the beneficiaries for the equal quantum.
- Hence, any Application BG or Construction phase BG furnished by the LTA applicant, which has corresponding quantum through PPA or PSA with beneficiaries, shall be returned to such LTA applicant.

#### Our viewpoint

Interpreting Detailed Procedure of the Connectivity Regulations, 2009 with respect to exemptions from submission of Application BG and Construction phase BG, CERC has provided immense relief to power generators/LTA applicants. CERC order gains significance as several power generators/LTA applicants who fall into this category can now approach CTU for return of BG's resulting in much-needed financial relief.

<sup>6</sup> HSA Advocates Partner Shreshth Sharma along with Associate Jyotsna Khatri successfully represented ACME.

# RECENT DEVELOPMENTS

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- Highlights of sectoral reforms and stimulus package
    - Government to end monopoly on the coal sector
    - Liberalizing minerals sector
    - Government encourages airport accessibility
    - Localizing aircraft maintenance, repair and overhaul
    - Government reforms n atomic energy
    - Government to enhance quantum of VGF
    - Relief measures to uplift the ailing Discoms in India and privatization of Discoms in Union Territories
    - Tariff policy to undergo reforms
    - Structural reforms in the Defence sector to give boost to Self-Reliant India Mission
  - Tender for 1 GW of solar projects on railway land across India released by RITES Ltd
  - Force Majeure in government contracts and PPPs
  - RLDA conducts online pre-bid meeting for re-development of various stations across India
  - ReNew Solar Power emerges lowest bidder for 400 MW of projects
  - Global investment powerhouse, KKR acquires 317 MW of Shapoorji Pallonjis solar energy assets
  - GMR to develop Bhogapuram Airport in Andhra Pradesh
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## Highlights of sectoral reforms and the Stimulus Package

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- The Government of India has announced a stimulus package of INR 20.97 lakh crore towards relief and reformatory measures to be taken to revive our nation from the effects of Covid-19 pandemic. In this regard, the Ministry of Finance (**MoF**) over a period of five days (i.e. May 13, 2020 to May 17, 2020) announced reforms and allocated amounts to various sectors from the stimulus package, including for the infrastructure sector.

### Government to end monopoly on the coal sector

- The MoF has announced an end to the monopoly on coal sector by allowing commercial mining, in order to introduce competition, transparency, and private sector participation.
- Commercial mining in the coal sector will be permissible under regulation on revenue sharing basis instead of the regime of fixed rupee/tonne. Earlier, only captive consumers with end-use ownership could bid for coal blocks. Now, any party can bid for coal blocks and sell in the open market, with liberalization of entry norms. Nearly fifty blocks will be offered for bidding.
- Further, investment of INR 50,000 crores has been announced. The investment is for the evacuation of enhanced Coal India Limited's target of one billion tonnes of coal production by 2023-24 plus coal production from private blocks. This will help in reducing the import of substitutable coal and increase self-reliance in coal production.
- Among other major announcements, incentives will be given to convert coal into gas and auction of coal bed methane (**CBM**) extraction, which is a natural gas found in coal deposits or un-mined coal sites. CBM extraction rights will be auctioned from Coal India Limited's coal mines.

### Liberalizing minerals sector

- In order to improve efficiency in mining sector and its production, the MoF pointed out the need for structural reforms to boost growth, employment, and bring state-of-the-art technology in mineral exploration.
- Introduction of a seamless exploration-cum-mining-cum-production regime was stressed upon. It was announced that there will be removal of the distinction between captive and non-captive mines to allow the transfer of mining leases and sale of surplus unused minerals, leading to better efficiency and production. Amendments will be made in the Mines and Minerals (Development and Regulation) Act, 1957 in this regard.
- There will be rationalizing of stamp duty in the mining sector, which is payable at the time of award of mining leases. The blocks with potential for mineral production will be auctioned for composite licence wherein the successful bidder will complete the exploration and start production seamlessly. The earlier regime had two different types of licences – mining licence and composite licence. The mining lease was for areas with proven reserve of minerals, while the composite licence (prospective-cum-mining) was for areas where preliminary exploration has been done by the Government, but further exploration is required by mining companies.
- As part of incentivization mechanism, five hundred new mineral blocks will be opened to explore the untapped mining opportunity by allowing new commercial miners. A joint auction of bauxite and coal mineral blocks will be introduced to enhance aluminum industry's competitiveness. Aluminum production is highly energy-intensive, with electricity making up a large share of the energy consumed. This will help the aluminum industry to reduce electricity costs.

### Government encourages airport accessibility

- The MoF announced that restrictions on utilization of the Indian airspace will be eased so that civilian flying becomes more efficient.
- Three rounds have been proposed by MoF for development of the aviation sector in the country. Last year, the government bid out six airports -- Lucknow, Ahmedabad, Jaipur, Mangaluru, Thiruvananthapuram and Guwahati, as a part of the first round.
- For the second round, 6 more airports have been identified for privatization. These are located at Amritsar, Varanasi, Bhubaneswar, Indore, Raipur and Trichy. The bid process for these airports will commence immediately. The investment by private players in the 12 airports in the first and second rounds is expected to be approx. INR 13,000 crores.

- Lastly, another 6 airports will be identified and put for bidding in the third round, details of which have not been announced.

### Localizing aircraft maintenance, repair and overhaul

- The MoF announced that tax regime for aircraft maintenance, repair and overhaul (MRO) has been rationalized and that steps will be taken to make India a hub for MRO of aircrafts.
- Additionally, it was announced that a convergence between the defence sector and civilian MROs will be established. Such a move by the Government helps retain foreign exchange within the country and provides employment to defence personnel in civil MROs post retirement.
- Currently, most of the MRO work is done overseas. This step towards setting up of MRO facilities in India will prove to be a cheaper alternative to taking MRO business overseas and will subsequently encourage a competitive MRO industry in India. Additionally, another favorable outcome of this step will be that the maintenance cost expended by local airlines will reduce, which will ultimately benefit passengers and consumers of the airline services.

### Government reforms in atomic energy

- The MoF announced that Government will establish a research reactor on PPP basis for production of medical isotopes to promote welfare of humanity through affordable treatment for cancer and other diseases.
- The Government will also establish facilities to use irradiation technology for food preservations in PPP mode. This technology will compliment agricultural reforms and assist farmers.
- Additionally, the Government will link India's start-up ecosystem to the nuclear sector to foster a synergy between research facilities and tech-entrepreneurs.

### Government to enhance quantum of VGF

- The MoF stated that social infrastructure projects currently suffer from poor viability and thus, the Government will enhance the quantum of Viability Gap Funding (VGF) by Centre and State governments/statutory authorities up to 30% of total project cost. The social infrastructure sectors covered under this announcement are healthcare, education and sanitation.
- As per the MoF, the total outlay for this incentive is INR 8100 crore and projects eligible for this incentive are to be proposed by central ministries/state government/statutory entities. For sectors other than the abovementioned, the existing VGF support of 20% of total project cost from each Centre and State government will continue, as provided under the VGF Scheme, 2006.
- The amendment to VGF scheme on the enhancement of grant assistance is pending; however, the announcement will see development of more projects on account of fiscal support from the Government.

### Relief measures to uplift the ailing power distribution companies (Discoms) in India and privatization of Discoms in UTs

- In what can turn out to be a major boost to revive the financial health of the failing Discoms in India, the MoF has announced a move to infuse a one-time relief of INR 90,000 crore through the Power Finance Corporation (PFC) and Rural Electrification Corporation (REC).
- The relief also includes grant of loan against state guarantees for the exclusive purpose of discharging liabilities of Discoms to generation companies. Additionally, the central public sector generation companies will provide appropriate rebate to the Discoms thereby benefitting the large industrial consumers in these turbulent times.
- In addition to the above, it was announced that Discoms in Union Territories will be privatized to improve functional and operational efficiency and provide better services to customers.



## Tariff Policy to undergo reforms

- The MoF has announced that tariff policy will soon be revised keeping the focus on consumer rights, promotion of industry and sustainability of the power sector.
- Under the revised policy Discoms will not be allowed to pass on its inefficiencies to consumers. Discoms will be required to maintain certain service standards and would be penalized for load shedding, except in circumstances like natural calamities or technical failures.

## Structural reforms in the Defence sector to give boost to Self-Reliant India Mission

- Unveiling the reforms with regards to the Defence sector as part of 'Atmanirbhar Bharat Abhiyan' (Self-reliant India Mission), the MoF announced that the Defence FDI limits, under automatic route, will be raised from 49% to 74%. Although, the FDI Policy shall now allow up to 74% foreign investments, the Defence Procurement Procedure, 2016 (DPP) still limits FDI upto 49%.
- The MoF has also proposed that ban may be imposed on import of certain weapons/platforms thus, encouraging development of indigenous weapons/platforms. It is also expected to reduce the import expense incurred by the Ministry of Defence (MoD).
- It was further announced that a Project Management Unit (PMU) shall be set up with the primary responsibility of overseeing contract management. However, it has not been clarified whether PMU will consist of industry experts and/or defence personnel or it will also include foreign investors.
- The MoF also announced that MoD in its procurement process shall set realistic General Staff Qualitative Requirements (GSQRs) to improve competition amongst suppliers and avoid bid procedure being nullified due to non-availability of more than one supplier.
- Another highlight was the announcement pertaining to corporatization of Ordnance Factory Boards, which will be considered and a separate budget for procurement of indigenized defence items will be proposed.

## **Tender for 1 GW of solar projects on railway land across India released by RITES Ltd**

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- The plan of utilizing railway land to set up solar power plants was formally discussed by MoF in Budget, 2020. Shortly after this announcement, the Ministry of Railways in early February of 2020 declared that 51,000 hectares of its unused land was available for installing solar plants which can potentially have a production capacity of at least 10 GW.
- In what can be seen as a concrete step to achieve this goal, RITES Ltd issued a tender on April 29, 2020 for setting up 1 GW of land-based solar photovoltaic power projects on various zonal railways land across India. Railway Energy Management Company Limited, a joint venture company of Ministry of Railways Limited with equity participation in the ratio of Indian Railways (49%) & RITES Ltd (51%), will be executing the project. The last date of submission of bids is set for 29 June 2020 with a pre bid meeting scheduled for 28 May 2020 in relation to this respective tender.

## **Force Majeure in government contracts and Public Private Partnerships**

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- The Government of India, through the Procurement Policy Division, Department of Expenditure at MoF, issued an office memorandum on May 13, 2020 pertaining to Force Majeure (MoF Memorandum).
- The MoF Memorandum seeks to provide relief to parties who have contracted with the Government under and in accordance with PPP contracts and various other legislations pertaining to goods, services and manual labour. Acknowledging that it is not possible for parties under PPP contracts to meet their contractual obligations in view of the restrictions placed on movement of goods, services and manpower, the MoF Memorandum provides for the following:
  - For PPP contracts, obligations which were required to be fulfilled on or after February 20, 2020, would be extended for a minimum period of three months and not exceeding six months, without any cost or penalty on the contractors or concessionaires. The term of concession agreements for PPP projects shall be extended similarly, depending on specific circumstances of the case and for the period affected by the force majeure event.
  - Parties can invoke the Force Majeure clause only if they were not in default as on February 19, 2020.
  - Invoking Force Majeure would only apply in respect of non-performance attributable to the lockdown situation or restrictions imposed by legislation or executive orders of Government on account of COVID-19.

## RLDA conducts online pre-bid meeting for re-development of various stations across India

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- Rail Land Development Authority (**RLDA**) of Ministry of Railways conducted an online pre-bid meeting for the re-development of the New Delhi railway station through a video conference on 30 April 2020. Additionally, RLDA has conducted online pre-bid meetings for the re-development of railway station of Tirupati and Nellore located in Andhra Pradesh.
- These re-development projects are in line with 'Smart Cities Mission' and aim at making Delhi, Tirupati and Nellore multi-modal transit hubs endowed with state-of-the-art amenities, including differently-abled-friendly access ramps and elevators. The stations will also include green building features such as rainwater harvesting and solar energy generation.
- RLDA has floated RFPs inviting bids for selection of a suitable public or private entity for re-development of these railway stations on PPP mode on Design, Build, Finance, Operate, Transfer (DBFOT) model. Bidders are to be chosen in a two-stage process and the selected bidder will have to upgrade and re-develop stations in line with recommendations of various stakeholders, operate and maintain them.

## ReNew Solar Power emerges lowest bidder for 400 MW projects

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- The Solar Energy Corporation of India (**SECI**) on behalf of Ministry of New and Renewable Energy (MNRE) issued and closed a tender in relation to 400 MW of renewable energy capacity recently. ReNew Solar Power emerged as the lowest bidder at a tariff of INR 2.90 per unit wherein they are permitted to develop solar, wind as well as hybrid projects under this respective tender.
- The developers, ReNew Solar Power, will be awarded a 25-year power purchase agreement and would be liable to supply power to the New Delhi Municipal Corporation and Dadra and Nagar Haveli, in accordance with the tender regulations. It is significant to note that these are round the clock power supply projects which means these could be augmented by energy storage systems.

## Global investment powerhouse, KKR, acquires 317 MW of Shapoorji Pallonji's solar energy assets

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- In what seems like an attempt to infuse liquidity within the Shapoorji Pallonji (**SP**) group, Shapoorji Pallonji Infra has sold its 317 MW portfolio of five operational solar energy assets to the global investment firm KKR for an estimated INR 1,554 crores.
- This transaction seems to showcase an upside for both parties as the SP group obtains an injection of liquidity and KKR establishes itself further in the growing renewable energy market of India.

## GMR to develop Bhogapuram Airport in Andhra Pradesh

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- GMR Airports Ltd (**GAL**), a subsidiary of GMR Infrastructure Ltd, announced that it has received the Letter of Award for the development and operations of a greenfield international airport at Bhogapuram in Andhra Pradesh from the State government.
- The project involves design, build, finance, construction, development, up-gradation, modernization, operation and maintenance of the airport at Bhogapuram for a period of 40 years.
- The project is extendable by additional 20 years through an international competitive bidding process. GMR Airports Limited has a RoFR of 10% for such extension.

## Contributions by

### Projects, Energy & Infrastructure team

**Aakash Sharma** | Associate

**Esha Nair** | Associate

**Akshay Malhotra** | Partner

**Ishita Gupta** | Associate

**Anviti Bhadouria** | Associate

### Regulatory & Policy team

**Anukriti Jain** | Associate

**Parichita Chaudhary** | Associate

**Soumya Prakash** | Associate

**Jyotsna Khatri** | Associate

**Shefali Tripathi** | Associate

**Molshree Bhatnagar** | Associate Partner

**Shreshth Sharma** | Partner

## Global recognition



## Pan-India presence

### New Delhi

81/1 Adchini  
Sri Aurobindo Marg  
New Delhi – 110 017

**Phone:** (+91) (11) 6638 7000

**Email:** [newdelhi@hsalegal.com](mailto:newdelhi@hsalegal.com)

### Bengaluru

Aswan, Ground Floor, 15/6  
Primrose Road  
Bengaluru – 560 001

**Phone:** (+91) (80) 4631 7000

**Email:** [bengaluru@hsalegal.com](mailto:bengaluru@hsalegal.com)

### Mumbai

Construction House, 5th Floor  
Ballard Estate  
Mumbai – 400 001

**Phone:** (+91) (22) 4340 0400

**Email:** [mumbai@hsalegal.com](mailto:mumbai@hsalegal.com)

### Kolkata

No. 14 S/P, Block C,  
Chowringhee Mansions  
Kolkata – 700 016

**Phone:** (+91) (33) 4035 0000

**Email:** [kolkata@hsalegal.com](mailto:kolkata@hsalegal.com)

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[www.hsalegal.com](http://www.hsalegal.com)



[mail@hsalegal.com](mailto:mail@hsalegal.com)



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