HEMANT SAHAI ASSOCIATES

PROJECTS, ENERGY & INFRASTRUCTURE

MONTHLY NEWSLETTER

JULY 2020

LEGAL & POLICY UPDATES

In this Issue

CERC determines Forbearance and Floor Price for REC Framework

- Central Electricity Regulatory Commission (**CERC**) passed an order dated June 17, 2020, in suo moto petition for determining forbearance and floor prices for Renewable Energy Certificates (**RECs**), which will be valid from July 1, 2020 and shall remain in force till June 30, 2021 or until further orders of the Commission. Regulation 9 of CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 (**REC Regulations, 2010**) empowers CERC to determine floor price and forbearance price separately for Solar and Non-solar RECs in consultation with Central Agency (Power System Operation Corp Ltd) and Forum of Regulators.
- Considering submissions made by various stakeholders, CERC held that floor price and forbearance price separately for Solar and Non-solar RECs will be:

	SOLAR RECs (INR/MwH)	NON-SOLAR RECs (INR/MwH)
Floor Price	0	0
Forbearance Price	1000	1000

- The new price will be applicable to Non-Solar RECs issued after April 01, 2017. For Non-Solar RECs issued prior to April 01, 2017, the trading shall take place in accordance with the Commission's letter dated April 28, 2018 and shall be subject to the final decision of Supreme Court (**SC**) in Civil Appeal No. 4801/2018.

Draft CERC (Regulation of Power Supply) (First Amendment) Regulations, 2020

- CERC on July 16, 2020, published the draft CERC (Regulations of Power Supply) (First Amendment) Regulations, 2020 to amend the CERC (Regulation of Power Supply) Regulations, 2010. These Regulations will be applicable to generating station, transmission system and beneficiary, where the Agreement between the concerned parties specifically provides for regulation of power supply in case of non-payment of outstanding dues or non-maintenance of Letter of Credit or any other agreed upon Payment Security Mechanism.
- CERC has invited comments/objections/suggestions from interested persons and stakeholders in this regard latest by August 16, 2020.

CERC (Terms and Conditions for Tariff Determination from Renewable Sources) Regulations 2020

- CERC on June 23, 2020 notified CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2020 (**RE Tariff Regulations**). RE Tariff Regulations will come into force from July 01, 2020 and will be valid until March 31, 2023. (**Control Period**). Prior to enactment of RE Tariff Regulations, CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 (**2017 Regulations**) were the prevailing regulations for determination of tariff from renewable energy sources.
- New technologies such as floating solar power projects, RE hybrid projects and RE projects with energy storage have been included by CERC. The project-specific tariff will apply to solar projects, floating solar projects, solar thermal, wind, and biogas power projects. It will also apply to municipal solid waste projects, renewable hybrid, and renewable projects with storage.
- RE Tariff Regulations envisage useful life of a project, including dedicated evacuation system from date of commercial operations, as follows:

TYPE OF PROJECT	USEFUL LIFE
Wind power projects, biomass projects with Rankine cycle Technology, solar projects, floating solar and solar thermal projects	25 years
Municipal solid waste-based projects, biomass gasifier-based projects and renewable hybrid energy projects	20 years
Small hydro projects	40 years

- The Commission has also done away with provision requiring all RE power plants to be treated as Must Run[1] along with bar on such projects being subjected to principles of Merit Order Despatch.
- Financial and Operational norms specified in RE Tariff Regulations 2020, except for capital cost, shall be the ceiling norms while determining project specific tariff. Further, for RE projects with a fuel cost component[2], single part tariff with two components viz. Fixed Cost and Fuel Cost shall be determined.
- Commission has considered a debt and equity ratio of 70:30 and return on equity will be 14%. Further, project specific tariff has been provided if actual equity infused is more than 30% and the excess amount will be considered as normative loan. If actual equity is less than 30% of capital cost, same will be considered for tariff purposes.
- Loan tenure of 15 years has been considered by CERC. The normative loan outstanding on April 01 of every year shall be worked out by deducting the cumulative repayment up to March 31 of previous year from gross normative loan.[3] Further, repayment of loan shall be considered from first year of commercial operation of the project irrespective of any moratorium period availed by project developer and shall be equal to annual depreciation allowed.
- The Commission has considered depreciation rate of 4.67% per annum for first 15 years and remaining depreciation shall be spread out evenly during the useful life of the project. Depreciation is allowed up to 90% of the capital cost of the project; however, in cases where capital subsidy is availed, then to that extent no depreciation shall be allowed.
- As per the order, Operation and Maintenance (**O&M**) expenses for a month, receivables equivalent to 45 days of tariff for sale calculated on normative Capacity Utilization Factor (**CUF**) or Plant Load Factor (**PLF**), and the maintenance spare equivalent to 15% of O&M expenses will be used for computing the interest on Working Capital.
- Central Commission has determined that for FY 2020-21, normative O&M expenses (based on RE technology) will be increased at the rate of 3.84% per year for the control period. A late payment surcharge of 1.50% per month will be leviable on project developer if payment is delayed beyond 45 days from date of presentation of invoice.
- In addition to the above, RE Tariff Regulations 2020 provide for technology specific norms for the different types of RE power projects.

[1] Except for biomass power plants with installed capacity of 10 MW and above and non-fossil fuel-based cogeneration plants.
[2] Biomass power projects with Rankine cycle technology, biomass gasifier-based power projects, biogas power projects, non-fossil fuel-based co-generation projects and refuse derived fuel-based projects
[3] The normative interest rate of 200 basis points above the average SBI MCLR prevalent during last available 6 months shall be considered.

MNRE issues clarification with respect to the period of extension granted to RE Projects on account of Covid

- Ministry of New and Renewable Energy (**MNRE**) on June 30, 2020 issued an Office Memorandum (**OM**) in continuation of its previously issued Office Memorandum dated April 17, 2020 granting time extension to Renewable Energy Projects (**RE Projects**) on account of Covid-19.
- Through OM dated April 17, 2020, MNRE had directed all its Renewable Energy (**RE**) implementing agencies to treat lockdown due to Covid-19 as a Force Majeure event and grant an extension of time for RE projects equivalent to period of lockdown and additional thirty days for normalization after end of said lockdown.
- Through the present OM, MNRE has clarified that period of lockdown is to be treated from March 25, 2020 to May 31, 2020. Further, timeline for intermediate milestones of a project may also be extended within extended time provided for commissioning.
- This OM is applicable on all projects being set up through RE implementing agencies designated by MNRE and other projects under various schemes of MNRE.
- The developer of Projects covered under the OM have also been directed to pass the benefit of time-extension to other stakeholders down the value chain, for instance the EPC contractors, material/equipment suppliers, OEMs, etc.

MNRE announces modifications in Development of Solar Parks and Ultra Mega Solar Power Projects Scheme

- MNRE vide an Office Memorandum dated June 15, 2020 (**OM**) introduced a new mode (Mode 8) for development of Ultra Mega Renewable Energy Power Projects (**UMREPPs**) under the 'Development of Solar Parks and Ultra Mega Solar Power Projects' scheme. Salient features of Mode 8 are as follows:
  - Solar Power Park Developer (**SPPD**) under UMREPP may be CPSU/State PSU/State Government organization or their subsidiaries or JVC between two or more of the aforesaid entities.
  - State governments will provide necessary assistance to the SPPDs in identification and acquisition of land for setting up of UMREPPs and also to facilitate all required statutory clearances. The State government may designate any state government organization for this purpose.
  - Land for UMREPP will be allotted with a condition that development must be completed within 2 years (with a provision of extension for one year under extreme cases) failing which the State government may take back the allotted land in consultation with MNRE.
  - Committee will be set up under Chairmanship of Principal Secretary/Secretary (power/energy/renewable energy) of concerned State government and will have CEO of SPPD, head of State nodal agency and 3 experts in field of RE and Power Systems as members of the committee. The committee will also facilitate setting up of UMREPP, monitor progress and also fix one-time upfront charges and annual O&M charges to be charged from solar power developers. UMREPPs are not to be taken as profit-making activities and maximum 16% return on equity may be allowed.
  - For aforesaid activities, State government or any organization designated by State government will be paid a facilitation charge of INR 0.05/unit of power being generated from the projects in UMREPPs for entire PPA period of project. This facilitation charge may be paid to State governments only on quantum of power that is exported outside State from that UMREPP and only if no facilitation charge or similar charge is levied under State government policy.
  - SPPD will be entitled to compensation for development and management of UMREPPs under Central Financial Assistance (**CFA**). For development of internal infrastructure including cost of transmission to the State Transmission Utility (**STU**)/Central Transmission Utility (**CTU**) point, CFA of INR 20 Lakh/MW or 30% of cost of development of UMREPPs, whichever is lower, will be provided. Augmentation or creation of external power evacuation infrastructure may be done by CTU.
  - SPPD or its individual promoter having a trading license may act as a trader of power produced in the park @ trading margin of INR 0.07/unit. This, however, may not be provided to RE Projects developed under EPC mode where cost of power would already have a factor of Return on Equity.
  - Standard bidding guidelines issued by the Government will be followed while calling for bids for power projects in UMREPPs.
  - Power projects inside UMREPPs may be developed either under developer mode via tariff-based competitive bidding (**TBCB**) process or under EPC mode or any combination of both. However, SPPD or any of its individual promoters cannot take part in TBCB process.
  - Bids for selection of RE Project developer under UMREPPs will state that a facilitation charge of INR 0.05/unit and trading margin of INR 0.07/unit to SPPD, if applicable, will be paid by RE Power developers.

MNRE issues Guidelines for Wind Power Procurement from 2.5 GW ISTS Projects

- MNRE on June 25, 2020 issued guidelines for implementation of 'Scheme for Tariff-Based Competitive Bidding Process' (**Guidelines**) for procurement of renewable energy power from 2.5 GW ISTS connected Blended Wind Power Projects at a tariff discovered through a transparent process of bidding through Solar Energy Corporation of India (**SECI**). Under the scheme, the nodal agency for implementation of the scheme will be SECI and selection of blended wind power projects will be via a transparent e-bidding process followed by e-reverse auction.
- These Guidelines are coherent with the bidding guidelines announced by MNRE previously for renewable power projects. The salient features of these Guidelines are:

GUIDELINES	DETAILS
Capacity and applicability	▪ Individual minimum size of project allowed is 50 MW at one site and a single bidder cannot bid for less than 50 MW. Besides, solar and wind power projects may be located at same, different or nearby locations. However, individual wind and solar component constituting blended wind power project will inject power into the grid via a single point. ▪ The provisions of these Guidelines will be binding on procurer, project developer and SECI. SECI will enter into a Power Purchase Agreement (**PPA**) with generator and enter into a Power Sale Agreement (**PSA**) with distribution licensee or bulk consumers.
Extent of blending	Guidelines prescribe blending of up to 20% of total project capacity with solar power and therefore at least 80% of project capacity will be from wind power.
Site-related project preparatory activities including clearances	The bidder would be required to submit documents in respect of matters as mentioned below, as per time schedule specified in bidding documents: ▪ Submission of documents and Lease Agreement to establish possession and right to use 100% of required land in the name of power generator for a period not less than the complete term of PPA on or before Scheduled Commissioning Date (**SCD**) ▪ Wherever leasing of private land is involved, lease should allow transfer of land lease rights to lenders or Procurer, in case of default of generator ▪ No objection certificate, clearances (if applicable) for the project ▪ A letter from STU/CTU confirming technical feasibility of connectivity of plant to substation
PPA Period	▪ MNRE has determined period of PPA as 25 years from SCD and SECI will charge a trading margin of INR 0.07/kWh from procurer for sale of blended power. There will be no central financial assistance available for development of projects under this program. PPA may be further extended on mutually agreed terms and conditions between parties of PPA and approved by Commission. ▪ Further, in case PPA is not mutually extended, generator is free to operate their plants after expiry of PPA period provided that relevant arrangements with land and infrastructure owning agencies, transmission utilities and system operators permit operation beyond initial PPA period.
Financial closure	According to the guidelines, generator should attain financial closure within 12 months from date of execution of PPA. The document further states that projects should be commissioned within 24 months from date of execution of PPA or PSA. Delay in commissioning beyond SCD will result in penalties on generator.
Bank guarantees	▪ Generator must provide bank guarantees to procurer in form of Earnest Money Deposit (**EMD**) i.e. not more than 1% of Estimated Capital Cost for project for year 2020- 21 and PBG of not more than 2% of Estimated Capital Cost for the project for year 2020-21, which can be encashed to recover any damages of generator in terms of PPA. ▪ As an alternative mechanism, generator may submit Letter of Undertaking to pay in case situation of default of generator in terms of PPA arises, from Indian Renewable Energy Development Agency Ltd (**IREDA**) or Power Finance Corporation Ltd (**PFC**) or REC Ltd (**REC**) in place of PBG.

Capacity Utilization Factor (CUF)	▪ According to the guidelines, developers of these projects will be required to declare annual CUF of project at time of bid submission. Calculation of CUF will be on a yearly basis and declared annual CUF should not be less than 30%. ▪ Generator will maintain generation to achieve annual CUF not less than 90% of declared value (**Minimum CUF**) and not more than 120% of declared CUF value (**Maximum CUF**). Lower limit will be relaxed to extent of non-availability of grid for evacuation of power, which is beyond control of generator. ▪ In case project supplies energy less than minimum CUF, generator will be liable to pay to procurer compensation for shortfall in availability of energy. However, this will be relaxable to extent of grid non-availability for evacuation. Amount of such compensation will be calculated @50% of PPA tariff for shortfall in energy terms. Such compensation as recovered from generator will be passed on by SECI to End Procurer. ▪ In case of availability of energy more than maximum annual CUF specified, generator will be free to sell it to any other entity provided first right of refusal will vest with procurer. In case procurer purchases excess generation, same may be done at PPA tariff.
Payment Security	The procurer will provide adequate payment security measures, as specified below: ▪ SECI shall provide payment security to generator through: – Revolving Letter of Credit (**LC**) of an amount not less than one months' average billing from project under consideration – Payment Security Fund, which shall be suitable to support payment of at least three months' billing of all projects tied up with such fund ▪ Payment Security by distribution licensee shall be provided to SECI through: – Revolving LC of an amount not less than one months' average billing from project under consideration – State Government Guarantee – for this clause, Tri-Partite Agreement (**TPA**) signed between Reserve Bank of India, Central Government and State Government shall qualify as State Government Guarantee covering security for payment of energy charges – with SECI required to ensure that upon invoking this guarantee, it shall at once pass on same to generator to the extent the payments are due to generator ▪ Distribution licensee is free to provide Payment Security Fund, which must be suitable to support payment of at least three months' billing of all projects tied up with such fund
Generation Compensation for Off-take constraint	Procurer may be constrained not to off-take power scheduled by generator on account of grid unavailability or in eventuality of a back-down. ▪ Generation compensation in offtake constraints due to grid unavailability – Where plant can generate power but due to temporary transmission unavailability power is not evacuated for reasons not attributable to generator, generation compensation shall be calculated corresponding to average generation loss, beyond limit of grid unavailability on a monthly basis. ▪ Offtake constraints due to Back down – In event of any backing down, except in cases where back down is due to grid security or safety of any equipment or personnel or such other conditions, generator shall be eligible for a generation compensation from procurer, with the compensation limited to extent of shortfall in annual generation corresponding to declared CUF permitted and no trading margin applicable on this generation compensation.
Event of Default and the consequences thereof	<u>Generator's event of default and consequences thereof</u> ▪ For failure to supply power in terms of PPA and for failure to commission within stipulated time, generator will be liable to pay to procurer, damages as provided in guidelines and for other cases, generator will pay to procurer, damages equivalent to six months or balance PPA period whichever is less, of charges for its contracted capacity ▪ In addition to levy of damages, lenders can also exercise their rights of substitution; however, in event lenders are unable to substitute defaulting generator within stipulated period, procurer may terminate PPA and acquire project assets for an amount equivalent to 90% of debt due, failing which, lenders may exercise their mortgage rights and liquidate project assets

	Procurer's event of default and consequences thereof ▪ If procurer is in default on account of reasons including failure to pay the monthly and/or supplementary bills within stipulated time period or repudiation of PPA, defaulting procurer shall, subject to prior consent of generator, novate its part of PPA to any third party, including its Affiliates within stipulated period ▪ If novation is not acceptable to generator, generator may terminate PPA and at its discretion require defaulting procurer to either takeover project assets by making a payment of 'termination compensation' which will be equivalent to amount of debt due and 110% of adjusted equity ▪ An amount equal to Adjusted Equity as on Commercial operation date (**COD**) shall be deemed to be the base (**'Base Adjusted Equity'**) After COD, Adjusted Equity shall be a sum equal to Base Adjusted Equity, reduced by 0.333% thereof at commencement of each month following COD and amount so arrived at shall be revised to the extent of variation in WPI occurring between COD and Reference Date
Minimum paid up share capital to be held by Promoter	▪ For single company, successful bidder will ensure that its shareholding in SPV/project company executing PPA will not fall below 51% at any time prior to one year from COD. ▪ For consortium, combined shareholding of consortium members in SPV/project company executing PPA will not fall below 51% at any time prior to one year from COD; however, in case successful bidder will be itself executing PPA, then it will ensure that its promoters will not cede control till one year from COD.
Transmission Connectivity	▪ Project must be designed for inter-connection with CTU substation either directly or from pooling station where other projects also connect through a transmission network. ▪ Responsibility of getting Transmission Connectivity and Long-Term Access to transmission system owned by CTU will lie entirely with generator and shall be at the cost of the generator. ▪ Inter-connection metering point shall be bus bar of CTU substation pooling station at which power is injected in transmission system of CTU. ▪ For interconnection with grid and metering, generators shall abide by applicable Grid Code, Grid Connectivity Standards, Regulations on Communication System for transmission of electricity and other applicable Regulations issued by Appropriate Commission and CEA. Transmission of power up to the point of interconnection where metering is done for energy accounting shall be the responsibility of generator and is to be done at his own cost. All expenses including transmission charges (if any) and losses in relation to transmission beyond Metering Point shall be borne by procurer. ▪ Generator must comply with CERC/SERC Regulations on Forecasting, Scheduling and Deviation Settlement and are responsible for all liabilities related to LTA and Connectivity. Generator and procurer shall follow forecasting and scheduling process as per relevant regulations. ▪ Transmission connectivity to generator may be provided by CTU, prior to commissioning of project on request of project developer, to facilitate testing and allow flow of infirm power generated into grid to avoid wastage of power. ▪ Government of India orders regarding waiver of inter-state transmission system charges and losses on transmission of wind and solar power will be applicable. However, in case commissioning of project gets delayed beyond applicable date of ISTS waiver due to reasons attributable to generator, liability of transmission charges and losses would be of generator.
Deviation from the Guidelines	Any deviation from these Guidelines must be approved by the Commission within a reasonable time not exceeding 60 days from application.

Andhra Pradesh Government (AP Government) notifies new Renewable Export Policy

- On July 17, 2020 the Andhra Pradesh (**AP**) Government, introduced Andhra Pradesh Renewable Energy Export Policy, 2020 (**Policy**) to facilitate the setting up of 120 GW renewable energy projects (**Projects**).
- Upon taking cognizance of vast available land and high potential, AP Government has notified this Policy which allows export of power outside the State without any obligation for DISOMS to procure power.
- In order to be able to set up Projects, AP Government has set out 4 prime objectives:
  - To facilitate lease of 5 lakh acres of potential land to renewable energy export project developers
  - To attract private investments to the State and improve local economy
  - To promote setting up of renewable energy equipment manufacturing facilities in AP
  - To generate additional revenue to the State Government
- This Policy shall be in effect for five years from the date of issuance.
- The Policy states that resource allocation would be done on first come first serve basis. However, priority would be given to developers intending to set up the energy export projects along with manufacturing facilities in AP itself.
- New and Renewable Energy Development Corp of Andhra Pradesh Ltd (**NREDCAP**) or any other land aggregating agency (**Agency**) would be arranged to procure and aggregate government and private lands in potential locations. The land lease facilitation to the permitted developers would be done by NREDCAP, being the NODAL Agency. The lands will be leased for 30 years for Variable Renewable Energy (**VRE**) projects.
- Annual lease rental of INR 31,000 per acre would be charged by the Agency to the project developer with an escalation of 5% every 2 years. Green Energy Development Charge would be levied upon the project developer @ INR 1,00,000/MW of installed capacity on an annual basis for entire life of the project starting from the date of commissioning of first phase of the project.
- The Agency shall pay the private landowners a sum of INR 25,000 per acre, annually, till the completion of lease period with an escalation of 5% every 2 years.
- The Agency shall remit the entire amount of lease rentals to the exchequer in case of government lands and shall remit INR 6,000 per acre per year with 5% escalation every 2 years in case of private lands.
- Local Area Development Fund at INR 0.5 lakh/ acre and Park Development Charges will be payable by project developer to the park developer. A one-time processing fee shall also be collected by NREDCAP.
- Incentives offered to power generation units would include:
  - Projects will be exempted from obtaining NOC for establishment under pollution control laws from AP Pollution Control Board
  - Land use conversion from ‘Agriculture’ use to ‘Non-Agriculture’ use being accorded by AP Government
- Priority allotment of land on a long-term lease, exemption from payment of electricity duty for a period of 10 years from date of commencement of manufacturing activities as well as extending incentives as per the prevailing Industrial Promotion Policies of the state, would be the additional incentives given to new renewable energy related manufacturing units to be set up in AP.

RECENT JUDGMENTS

In this Issue

Renew Vayu Urja Pvt Ltd v. Maharashtra State Electricity Distribution Co Ltd & Ors

Case No. 102 of 2020 dated July 14, 2020 passed by Maharashtra Electricity Regulatory Commission

Background facts

- Renew Vayu Urja Pvt Ltd (**Renew**) was a successful bidder for 76 MW for bid carried out by MSEDCL for 500 MW grid-connected wind power projects. MSEDCL issued a Letter of Award (**LoA**) to ReNew and subsequently, Power Purchase Agreement (**PPA**) dated July 17, 2018 was executed between Renew and Maharashtra State Electricity Distribution Company Ltd (**MSEDCL**) with discovered tariff at INR 2.85/kWh for 25 years.
- As per the RfS, Financial Closure (**FC**) and Scheduled Commercial Operation Date (**SCOD**) was to be achieved within 7 months and 18 months from the date of signing of PPA, respectively.
- Renew requested MSEDCL to allow it to use the power evacuation in the name of Siemens or waive off the requirement of the evacuation arrangement being in the successful bidder's name. Further, Renew sought extension of FC on account of a delay in the signing of the PPA. MSEDCL accepted the extension request and the FC date was revised.
- On March 07, 2019, MSETCL granted the grid connectivity approval for 50 MW capacity wind power project. Renew sought extension of 30 to 45 days towards FC on account of delay in grant of grid connectivity approval for 50 MW by MSETCL and grid connectivity for Phase-II was still awaited.
- Thereafter, Renew served a notice to MSEDCL towards the Force Majeure and requested MSEDCL to extend SCOD up to December 31, 2019. MSEDCL rejected it and invoked Article 3.3 of PPA whereby MSEDCL is contractually entitled to forfeit bank guarantees and/or levy liquidated damages in case there is delay in achieving SCOD.

Issues at hand

- Whether the delay in grid connectivity and acceptance of the grid connectivity in the name of Developer by MSEDCL, delay in Project registration by MEDA, delay in providing start-up power can be considered as Force Majeure events?
- Whether Renew is liable to pay liquidated damages under Article 3.3 of the PPA?

Decision of the Commission

- The Commission noted that one of the primary reasons for the delayed commissioning was the issue of allowing grid connectivity in the name of the developer. The Commission added that this issue was not limited to Renew but equally affected all successful bidders. Placing reliance on the order passed by the Commission on January 20, 2020 in Case No. 286 of 2019, the Commission allowed extension of SCOD from July 31, 2019, to January 04, 2020, on account of Force Majeure event.
- The Commission noted that Renew's 76 MW wind project had been commissioned on December 26, 2019, which was before the extended SCOD. So, it should not be subjected to any penalty on account of delay in the commissioning of the project.
- Regarding MSEDCL's submission to compensate it for any penalty for the shortfall in the renewable purchase obligation (**RPO**), the Commission held that such a situation was never part of the RfS or PPA. Therefore, MSEDCL cannot impose such conditions at such a delayed stage.

Our viewpoint

Through this Order, the Commission has provided major relief to Renew and other bidders given that project timelines are often adversely impacted due to delay in grid connectivity. The Order clearly depicts the ground reality of the issues faced by the developers after the projects are allotted to them.

AERA Order in the matter of Provision for FTC at Jay Prakash Narayan International Airport, Patna

Order No. 29 of 2020

Background facts

- Airport Economic Regulatory Authority of India (**AERA**) had determined INR 368.15 crore as total discontinued Aggregate Revenue Requirement (**ARR**) in its aeronautical tariff for PAT for its first Control Period – April 01, 2018 to March 31, 2023 – wherein Fuel Throughput Charge (**FTC**) was one of the components to recover the cost as approved by AERA.
- Ministry of Civil Aviation (**MoCA**) vide letter dated January 08, 2020 decided to discontinue levy of FTC in any manifestation at all airports and therefore AERA advised all airport operators at major airports to comply with such directions. For the purpose of compensation, AERC sought suggestions from the airport operators.
- Airport Authority of India (**AAI**), complying with MoCA directions, highlighted that as a direct consequence of discontinuance of levy of FTC at Jay Prakash Narayan International Airport, Patna (**PAT**), a revenue loss of INR 2.69 crore (**at NPV**) has been suffered and suggested that the same be recovered by increasing User Development Fee (**UDF**).

Issues at hand

- Whether PAT is entitled for compensation on account of non-levy of FTC Charges in compliance of directions issued by MoCA?
- Whether PAT is entitled for recovery by increased UDF that are recoverable from passengers?

Decision of the Authority

- AERA, after prudence check, noted that the expected shortfall in revenue due to FTC is INR 3.50 crore for the period January 15, 2020 to March 31, 2020, which is 3% of expected revenue from Landing Charges.
- It was observed that FTC was one of the components of operational expenses for airlines, charged to them by oil suppliers as a pass through by adding the same to ATF. Therefore, abolition of FTC may result in reduction of ATF being borne by airlines. Considering the same, AERA observed that abolition of FTC is expected to reduce cost of ATF for airlines and thereby benefit airlines monetarily. In view thereof, AERA held that burden cannot be passed on to passengers in form of increased UDF.
- AERA in order to compensate AAI for loss in revenue due to abolition of FTC, revised the Landing Charges by increasing them by 3% applicable from July 01, 2020 to March 31, 2023 which shall be trued up while determining tariff of PAT for second control period.

Our viewpoint

This is a positive decision, more so in light of the financial stress in aviation sector. AERA as a regulator has taken a balanced decision and provided instant relaxation to airlines by abolishing FTC and simultaneously coming up with a recovery mechanism (by increasing Landing Charges) for neutralizing revenue loss due to FTC exemption without putting any burden on passengers.

Parampujya Solar Energy Pvt Ltd v. Gulbarga Electricity Supply Company Ltd & Ors

Order dated July 10, 2020 in OP No. 204/2017 passed by KERC

Background facts

- Karnataka Renewable Energy Development Ltd (**KREDL**) had called for Request for Proposal (**RfP**) for development of 1,200 MW solar power projects to be implemented in 60 taluks. Parampujya Solar Energy Pvt Ltd (**Petitioner**) was the successful bidder for development of 10 MW capacity of Solar PV Ground Mount Project in Shorapur taluk of Yadgir district.
- Accordingly, Petitioner and Gulbarga Electricity Supply Company Ltd (**GESCOM**) entered into the Power Purchase Agreement (**PPA**) dated May 28, 2016, in which tariff discovered was INR 5.35/unit. PPA was approved by Karnataka Electricity Regulatory Commission (**KERC**) and the approval was communicated vide letter dated October 06, 2016.
- The approval of PPA was subject to certain corrections/modifications to be incorporated in the PPA by entering into a suitable Supplemental Power Purchase Agreement (**SPPA**) between the parties. Accordingly, parties executed SPPA dated December 26, 2016.
- PPA provided that 'Effective Date' shall be the date of approval of the PPA by KERC. The timeline fixed for achieving the Conditions Precedent was 8 months and for achieving the commissioning of the project was twelve months from the 'Effective Date'.
- However, the solar power project in question was commissioned on October 05, 2017, as per the commissioning certificate dated October 09, 2017. The Petitioner could not achieve the timeline fixed for fulfilling one of the Conditions Precedent but achieved the timeline fixed for fulfilling the others.
- Petitioner intimated GESCOM about its application seeking conversion of land being pending before the government departments and how the same remained pending beyond reasonable time. Considering the same, Petitioner issued Force Majeure notice to GESCOM and requested for an extension of 266 days to fulfil Condition Precedent under the PPA.

Issues at hand

- Whether SPPA dated December 26, 2016 requires any approval by Commission and whether such approval date should be considered as 'Effective Date' under Article 3.1 of PPA?
- Whether Petitioner was prevented from performing its obligations under PPA due to Force Majeure events in achieving Conditions Precedent or unable to produce documentary evidence of having clear title and possession of lands in its favor, required for establishment of solar power project, due to any Force Majeure event alleged by it?
- Whether the Petitioner is liable to pay damages for non-fulfilment of the Condition Precedent of producing the documentary evidence of clear title and possession of the land required for the establishment of solar power project?
- Whether there is any delay in achieving the Scheduled Commissioning Date (**SCD**)? And, if so, whether the solar power project of the Petitioner is liable for reduced tariff?

Decision of the Commission

- The Commission noted that the corrections or modifications in PPA by way of by execution of SPPA between the parties did not materially alter any clause of PPA in so far as implementation of the project was concerned. Therefore, date on which the PPA stands approved by the Commission will be considered as Effective Date under PPA.
- Regarding delay in identifying the lands required for the solar power project, the Commission relied on Government of Karnataka's Circular dated February 22, 2016 and Government Order dated October 05, 2016 which provided that in case project developer had applied to KREDL at least sixty days before the date on which Conditions Precedent had to be achieved and there was a delay by concerned authorities in processing the same or granting the approval beyond sixty days, date of filing of an application to KREDL by the developer could be considered as date of fulfilment of production of documentary evidence of having clear title and possession of the lands required for the project. The Commission stated that the Petitioner has filed such application on December 14, 2016 itself much earlier to sixty days. Hence, the Petitioner is not liable to pay any damages under Article 4.3 of PPA.
- Placing reliance on Appellate Tribunal's judgement in *S Solar Pvt Ltd & Anr v. Bangalore Electricity Supply Co Ltd & Ors* whereby it was observed that while computing the period of twelve months, the date of event is to be excluded. In the present case, the date of event is October 06, 2016; hence, SCD would fall on October 06, 2017. Therefore, GESCOM must pay the Petitioner for energy delivered from date of commissioning of said project @ INR 5.35 per kWh as agreed in PPA.

Our viewpoint

This Order is consistent with the previous Orders passed by the Commission. Renewable power generation is witnessing significant investor interest and regulatory certainty will go long way in enhancing investor interest in this sector.

Renew Solar Power Pvt Ltd v. Maharashtra State Electricity Distribution Co Ltd

Order dated 22.06.2020 in Case No. 08 of 2020 passed by MERC

Background facts

- Matter pertains to a Petition filed by Renew Solar Power Pvt Ltd (**Renew**) before Maharashtra Electricity Regulatory Commission (**MERC**), whereby Renew had sought for approval of Change in Law and consequential reliefs in terms of PPA on account of imposition of Safeguard Duty (**SGD**) on solar cells/modules.
- Renew had executed a PPA with MSEDCL on July 27, 2018, read with amended PPA dated November 27, 2018 (**PPA**), for development of solar power plant of 250 MW capacity at Bikaner, Rajasthan (**Project**).
- On July 30, 2018, Government of India issued a notification imposing SGD on import of solar cells/modules.
- As per relevant terms of PPA, cut-off date for an event to be considered as a Change in Law having an impact on the Project is last date of bid submission i.e. May 14, 2018.
- Therefore, in light of the above, Renew sought that MERC:
  - Declares that imposition of SGD is a Change in Law in terms of PPA and has a direct effect on Project
  - Devises a suitable mechanism for compensation on account of adverse financial impact borne by Renew on account of said Change in Law by way of lumpsum payment
  - Grants carrying cost from date of incurring cost by Renew till date of disbursal of compensation considering that increase in cost has been financed by both debt and equity

Issues at hand

- Whether the imposition of SGD constitutes a Change in Law under the PPA?
- Whether required documents for scrutiny of Change in Law claim have been filed?
- What is the capacity of Solar Modules eligible for compensation under Change in Law?
- What should be the rate of interest for Carrying Cost?
- What is the methodology for awarding the compensation?

Decision of the Commission

- MERC vide its Order dated June 22, 2020 partly allowed the claims made by Renew. MERC held that imposition of SGD was a Change in Law event in terms of PPA, and thus Renew shall be eligible for compensation on account of the same.
- On issue pertaining to submission of requisite documents, MERC observed that verification of solar panel for its country of origin and one to one tagging of SGD payment is an essential requirement for verification of Change in Law claim. MERC thereafter directed Renew to submit the details of RFID tags for all modules on priority to MSEDCL. Renew has also been directed to provide an undertaking stating that all the modules installed at the Project site have been imported from the countries which are subject to SGD.
- On the issue of eligibility of capacity of Solar Modules for Change in Law, MERC has held that for fulfilment of contractual obligations of supplying 250 MW (AC) capacity, Renew is entitled to be compensated on account of Change in Law for a maximum of 368.42 MW (DC) capacity. Since Renew's installed capacity is only 362.50 MW (DC), it is within the maximum limit as specified and the entire quantum is eligible for compensation on account of Change in Law.
- MERC has approved the carrying cost at 1.25% in excess of one-year MCLR of State Bank of India.
- MERC has held that MSEDCL will compute compensation amount based on methodology illustrated in the Order. Further, MERC has granted MSEDCL with option to decide whether it will pay compensation amount in lumpsum and avoid future carrying costs, or whether it will make payment over the tenure of PPA with additional carrying cost.

Our viewpoint

MERC's decision takes into account the requirement of verification of the solar modules in order to ascertain SGD payable on said modules. The decision will act as a precedent for future claims pertaining to Change in Law on account of SGD. However, the issue concerning the rate of carrying cost allowed by MERC may be amenable to challenge.

RECENT DEVELOPMENTS

In this Issue

India discourages import of power equipment from China and Pakistan

- In a pivotal reaction to recent transgression in border areas and cyber security threats from China and Pakistan, India has decided to discourage import of power equipment from these countries.
- The budget 2020-2021 had proposed that a 20% Basic Customs Duty (**BCD**) may be imposed on import of solar equipment from China. Subsequently, MNRE have held multiple discussions over past months and are expected to issue a notification in this regard soon. However, India shall persist with safeguard duty on solar cells imported from China, Thailand and Vietnam for one-year period effective from July 31, 2020. Interestingly, other developing countries including Malaysia and Indonesia are exempt from said safeguard duty.
- In addition to the above, GoI in month of April 2020 revised FDI policy which now requires prior approval of GoI in case of any investment being made by a neighboring country including China. In view of the above, central government has sought support from state governments in discouraging imports of tower elements, conductors, transformers and meter parts which are available indigenously.
- According to the new policy dated July 03, 2020, any individual importing power equipment to India will be required to seek permission from GoI and no permission will be granted in cases of import from China and Pakistan.

750 MW solar power plant inaugurated at Rewa

- 750 MW solar project set up at Rewa, Madhya Pradesh was inaugurated on July 10, 2020. The project comprises of three solar generating units of 250 MW each and is located on a 500-hectare plot inside a designated solar park.
- The mega solar plant has been developed by Rewa Ultra Mega Solar Ltd, a JV of Madhya Pradesh Urja Vikas Nigam Ltd (MPUVN) and SECI. The project was awarded in 2017 at INR 2.97/kWh which caught global attention as it was a record low-winning bid with intelligent risk distribution.
- While solar plant will cater to needs of state Discoms, it will also provide 24% of energy Delhi Metro Rail Corporation.

500 MW floating solar power plants proposed in Telengana

- Singareni Collieries Co Ltd (**SCCL**) is planning to set up floating solar power plants with a combined capacity of 500 MW on water bodies in Telangana. The proposed plants would be set up along with the Telangana State Renewable Energy Development Corporation (**TSREDC**).
- TSREDC has already taken up feasibility study for erecting floating solar power plants on large water bodies focusing on opportunities available on water bodies situated at Karimnagar and Warangal. SCCL is willing to undertake construction of floating solar power plants with advanced discussions being taken place whether everything should be at one place or in 5 phases of 100 MW each.

US-based Cargill to expand renewable energy portfolio in India with CleanMax JV

- Cargill, a US-based corporation is willing to expand its global footprint in renewable energy portfolio. In this regard, one of its new facilities would be developed in Davangere, Karnataka as a JV with renewable energy provider CleanMax. This JV would supply 70-80% of facility electricity needs through wind and solar hybrid power park in Karnataka.
- The project is expected to eliminate 29,865 metric tonnes of carbon dioxide emissions per year enabling India to get closer to its clean energy goal as well as raise positive investor sentiment towards its domestic renewable energy market.

New low for solar power tariff in India

- India's solar power tariffs hit a record low of INR 2.36 per unit during a bid conducted by state run SECI. The auction was conducted for 2 GW of ISTS connected solar projects - Tranche IX.
- The lowest bid was placed by Spain's Solarpack Corporación Tecnológica, S.A with other bidders quoting tariff bids of INR 2.37/kWh. Recently, Indian Banks have shown their unwillingness to fund projects which commit to sell power at less than INR 3 per unit as it affects the viability and bankability of such projects. This has reduced the scope of raising debt for such project developers.
- Although India plans to impose more tariff and non-tariff barriers to promote domestic manufacturing, GoI plans to allow a pass-through in power tariffs for projects awarded before BCD was imposed.

1.2 GW solar tender by NTPC oversubscribed

- NTPC Ltd's tender for setting up 1.2 GW of ISTS connected solar projects has been met with an enthusiastic response from developers. The tender has been oversubscribed by 500 MW and continues to demonstrate investor interest in Indian renewable energy sector despite adverse effects of current pandemic.
- Six companies – Renew Power, Tata Power, O2 Power, Sungrow, Azure Power and AMP solar – have reportedly placed bids amounting to 1.7 GW of projects. NTPC floated an invitation for bids for selection of solar power developers to set up 1.2 GW of ISTS connected solar projects in February 2020. The tender was announced with a ceiling tariff set at INR 2.78/kWh.
- According to the tender documents issued earlier, minimum capacity that a bidder could develop was 50 MW and in multiples of 10 MW from there, up to a maximum quotable capacity of 600 MW. Bidders were allowed to develop projects at multiple locations as long as each project was at least 50 MW.
- Notwithstanding the above, bidders were allowed to quote single tariff for entire capacity. The developer would be required to achieve financial closure for the project within 12 months from effective date of PPA. The tender also stated that CUF of solar projects selected must not be less than 19%.

Ministry of Railways invites proposals from private entities to run passenger trains

- Ministry of Railways, GoI invited request for qualifications from private entities on July 01, 2020 for 109 pairs of routes by introducing 151 modern trains on PPP basis.
- GoI plans to promote 'Make in India' initiative by manufacturing these trains in India. Under the project, private entities will be responsible for financing, procuring, operation and maintenance of these trains.
- The concession period for this project is 35 years and private entities will have to pay the Indian Railways fixed haulage charges and energy charges as per their consumption. Additionally, private entities shall also pay a share in Gross Revenue determined through a transparent bidding process.
- This is India's first-ever PPP scheme in passenger rail operations. It will entail over INR 30,000 crore of private sector investment.

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