PROJECTS, ENERGY & INFRASTRUCTURE

MONTHLY NEWSLETTER

SEPTEMBER 2020

LEGAL & POLICY UPDATES

In this Issue

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

- Central Electricity Regulatory Commission (**CERC**) on August 25, 2020 notified CERC (Terms and Conditions of Tariff) (First Amendment) Regulations, 2020 (**Amendment Regulations**) to amend the CERC (Terms and Conditions of Tariff) Regulations, 2019 (**Principal Regulations**). These Regulations come into force from the date of their publication in the Official Gazette, except Clause (6) of Regulation 21, which shall be applicable retrospectively from April 01, 2019.
- The amendments are for introducing a separate tariff stream for revised emission standards, which requires determination of separate capital cost, fixation of date of operation of emission control systems, financial parameters and operational parameters. Formulae for computation of supplementary capacity charges, supplementary energy charges and its recovery mechanism have also been introduced.
- Concept of 'Auxiliary energy consumption for emission control system' (**AUX**) is introduced in case of coal or lignite based thermal generating stations, which refers to the quantum of energy consumed by auxiliary equipment of the emission control system in addition to the auxiliary energy consumption of the generating station. Norms of AUX of thermal generating stations:

Name of Technology	AUX (as % of gross generation)
For reduction of emission of Sulphur Dioxide:	
Wet limestone based FGD system (without Gas to Gas heater)	1.0%
b) Lime spray dryer or semi dry FGD system	1.0%
c) Dry sorbent injection system (using Sodium Bicarbonate)	NIL
d) For CFBC power plant (furnace injection)	NIL
e) Sea water based FGD system (without Gas to Gas heater)	0.7%
For reduction of emission of oxide of Nitrogen:	
a) Selective non-catalytic reduction system	NIL
b) Selective catalytic reduction system	0.2%

- **Fixed cost of emission control system:** It shall be computed on annual basis as per the norms specified under these regulations and recovered on monthly basis under supplementary capacity charge. The said charge shall be recovered under two segments of the year, i.e. High Demand Season (period of three months) and Low Demand Season (period of remaining nine months), and within each season in two parts viz., supplementary capacity charge for Peak Hours of the month and supplementary capacity charge for Off-Peak Hours of the month.

- **Depreciation of the emission control system:** If the date of operation of the emission control system is subsequent to the date of commercial operation of the generating station, depreciation of the emission control system shall be computed annually from the date of operation of such emission control system based on straight line method, with salvage value of 10%, over a period of:
  - 25 years, in case the generating station is in operation for 15 years or less as on the date of operation of the emission control system
  - Balance useful life of the generating station or unit thereof plus 15 years, in case the generating station is in operation for more than 15 years as on the date of operation of the emission control system
  - 10 years or a period mutually agreed by the generating company and the beneficiaries, whichever is higher, in case the generating station has completed its useful life

  If the emission control system is implemented within the original scope of the generating station and the date of commercial operation of the generating station and the date of operation of the emission control system are the same, depreciation of the generating station or unit thereof including the emission control system shall be computed in accordance with Clauses (1) to (8) of this Regulation.
- **Operation and maintenance (O&M) expenses of emission control system:** O&M expenses will be 2% of the admitted capital expenditure (excluding IDC and IEDC) as on its date of operation, which will be escalated annually @3.5% during the tariff period ending on March 31, 2024.
- **Rate of interest on loan:** Rate of Interest on loan for installation of emission control system shall be the weighted average rate of interest of actual loan portfolio of the emission control system or in the absence of actual loan portfolio, the weighted average rate of interest of the generating company as a whole shall be considered.
- Generating company shall file an application for determination of supplementary tariff for the emission control system installed in the coal or lignite based thermal generating station in accordance with these regulations not later than 60 days from the date of operation of such emission control system.

Major Port Authorities Bill, 2020 passed by Lok Sabha

- Lok Sabha recently passed Major Port Authorities Bill, 2020 (**Bill**). The Bill will replace Major Port Trusts Act, 1963 and aims to provide greater autonomy by regulating the functioning and planning of major ports in the country.
- Bill proposes to decentralize decision making and infuse professionalism in governance of major ports. It is also expected to benefit the stakeholders and help in better project execution by imparting faster and transparent decision making.
- The Bill will also support development of world class infrastructure and is expected to provide major thrust to the maritime sector. It provides for creation of a Board of Major Port Authority (**Board**) for each major port, which will replace Port Trusts under existing legislation. The Board of each major port will be entitled to create a specific master plan in respect of any development or infrastructure proposed to be established within the port limits and such master plan will be independent of any local or state government regulations of any authority.
- The role of Tariff Authority for Major Ports (**TAMP**) has also been redefined in the Bill, which will enable PPP operators to fix tariffs based on market conditions. The Port Authority will now have the powers to fix tariffs which will act as a reference tariff for the purposes of bidding for PPP projects.

In this Issue

Petition filed by Maharashtra State Electricity Distribution Co Ltd

Case No. 45 of 2020

Background facts

- On August 2, 20202 Maharashtra Electricity Regulatory Commission (**MERC**) issued an order in a matter wherein Maharashtra State Electricity Distribution Company Ltd (**MSEDCL**) had approached MERC seeking approval for recovery of carrying cost/Delayed Payment Charges (**DPC**) on the claims towards Change in Law events such a New Coal Distribution Policy (**NCDP**), Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India (**SHAKTI**) Policy and Cancellation of Lohara Coal Block approved by the appropriate Commission in various petitions.
- MSEDCL had entered into four Power Purchase Agreements (**PPAs**) totaling to 3085 MW contracted capacity with Adani Power Maharashtra Ltd (**APML**) and for 200MW with GMR Warora Energy Ltd (**GMR**).
- Commission in its various orders had allowed relief to APML and GMR on account of various Change in Law events (being NCDP, SHAKTI and Cancellation Lohara Coal Block). MSEDCL challenged these orders before Appellate Tribunal for Electricity (**APTEL**), however APTEL had not granted any stay to the operation of any of the said Change in Law orders at least till the date of the present order. Pertinently, MSEDCL made partial payments i.e. 50% payments to APML and GMR.
- However, for remaining 50% claims, MSEDCL submitted that in case the appeals filed by it before APTEL are decided against it, the principle of passing of benefit to consumers' needs to be equally applied in the matter of passing increased carrying cost/late payment surcharge for the period of pendency of appeal before APTEL and, therefore, carrying cost/DPC should be allowed as a pass through in Fuel Adjustment Cost (**FAC**) or Annual Revenue Requirement (**ARR**).

Issue at hand

- Whether payments of carrying cost/DPC on the Change in Law claims could be allowed as an expense and as a pass through in FAC or ARR?

Decision of the Commission

- Commission noted that since the provisions of MERC (Multi-Year Tariff) Regulations, 2019 prohibit carrying cost/DPC as a passthrough in ARR, MSEDCL has filed the petition under Regulation 102 of MYT Regulations i.e. Power to Remove Difficulty and consequently prayed allowance of carrying cost /DPC on outstanding Change in Law claims. MERC held that such passthrough of carrying cost/DPC on outstanding amount of Change in Law cannot be allowed as a pass-through in ARR or FAC.

- MERC suggested that MSEDCL has option of paying such supplementary bills to generators and recover increased expenses from consumers through FAC mechanism subject to provisions of MYT Regulations. Alternatively, MSEDCL could pay such amount by taking working capital loan from financial institutions and settle the dues of the generator and thereafter, interest on working capital loan could be considered during Multi-Year Tariff process subject to due diligence.
- Considering the fact that impact of Change in Law for about 3-5 years was claimed at the same time by the generators and MSEDCL may face difficulties in raising finance for the same, MERC also suggested another mechanism for payment and settlement whereby MSEDCL and the generators could mutually agree for payment of such accumulated claims through instalments which may be equal to months for which such claim got accumulated, and compensating the generators for such deferred payment. MSEDCL was granted the liberty to discuss this payment plan with the generators and file separate petition for approval of such payment mechanism.

Our viewpoint

The Commission refused to grant relief to MSEDCL since the same was against the existing legal framework. However, considering the quantum of payments to be made by distribution licensee, MERC suggested an alternate payment plan which would protect interest of all stakeholders and could be adopted whenever a situation of accumulated claims of relatively higher amount arises. This mechanism has also been suggested by CERC in its various orders and should be considered as a welcome move by stakeholders including distribution licensees, intermediary procurers, and the generators.

Talwandi Sabo Power Ltd v. Punjab State Electricity Regulatory Commission & Anr | Nabha Power Ltd v. PSERC & Anr

Appeal Nos. 21 & 73 of 2019

Background facts

- Talwandi Sabo Power Ltd (**TSPL**) entered into a Power Purchase Agreement (**PPA**) with Punjab State Electricity Board (**PSEB**) on September 01, 2008 for development of 1980 (3x660) MW Thermal Power Plant (**TPP**). Similarly, Nabha Power Ltd (**NPL**) executed a PPA with PSEB on January 18, 2010 for development of 1400 (2x700) MW TPP.
- On February 07, 2015, Ministry of Environment, Forest and Climate Change (**MoEFCC**) by way of a notification (**MoEFCC Notification**) exercised its power conferred under Sections 6 and 25 of the Environment (Protection) Act, 1986, and amended Environment (Protection) Rules, 1986.
- By way of said Notification, MoEFCC revised emission norms for Sulphur dioxide (**SO_2**), Nitrogen Oxide (**NOx**) and Mercury and same was to be complied by all TPPs within two years from date of Notification i.e. by December 2017.
- However, to comply with revised emission norms introduced by way of MoEFCC Notification, TPPs are required to install Flue Gas Desulphurization equipment (**FGD**), Selective Non-Catalytic Reduction technology (**SNCR**) and water treatment system. Consequently, TPPs had to incur expenditures which were not part of project cost at time of execution of PPA, as revised emission norms were introduced by MoEFCC subsequent to cut-off date provided under PPAs.
- Accordingly, TSPL filed a Petition bearing No. 44 of 2017 and NPL filed a Petition bearing No. 2 of 2018, before Punjab State Electricity Regulatory Commission (**PSERC**), under Section 86(1)(b) of Electricity Act, 2003. By way of said Petitions, TSPL and NPL sought for approval of MoEFCC Notification as a Change in Law event in terms of their respective PPAs, and accordingly sought for an in-principle approval of expenditure to be incurred by TPP generators in compliance of the revised emission norms.
- PSERC by way of an Order dated December 21, 2018 and January 09, 2019 in Petition bearing No. 44 of 2017 and 2 of 2018, respectively, rejected reliefs sought by TSPL and NPL, wherein PSERC while passing Orders, inter alia, held that Environment Clearance (**EC**) granted to TSPL and NPL already envisaged installation of FGD system, and hence MoEFCC Notification does not qualify as an event of Change in Law under PPAs.

Issue at hand

- Whether the MoEFCC Notification qualifies as a 'Change in Law' event in terms of the PPAs?

Decision of the Commission

- Even though EC provided to TPPs does include space clause for FGD system and refers to installation of same if required in future, while interpreting term of PPA in line with principal of business efficacy, Tribunal observed that presentation made by TPPs before issuance of ECs was on basis of prevailing environment norms at that time. Therefore, it cannot be said that installation of FGD was envisaged as a statutory requirement before the issuance of MoEFCC Notification.
- Installation and operation of FGD and associated system to be installed by NPL and TSPL for compliance with MoEFCC Notification are additional capital expenditures incurred by TPP generators and same amounts to a Change in Law event under PPAs.
- In case technology for installing and operating SNCR and/or any other appropriate technology is mandated in future for complying with emission levels of NOx in terms of MoEFCC Notification, the same would also amount to a Change in Law event under PPAs.
- Carrying cost in terms of provisions of the PPAs has been allowed and therefore, TPP generators are to be brought to the same economic position as if such Change in Law event has not occurred.

Our viewpoint

This Judgment is of significant impact for TPPs wherein PPAs have been executed under Section 63 of the Electricity Act, 2003, and the Environmental Clearances envisaged only space provision for the FGD, but the revised emission norms were not Notified by MoEFCC. The Judgment provides regulatory certainty on the much-discussed issue of MoEFCC Notification being a 'Change in Law' event or not. APTEL by way of the present Judgment has provided clarity on pass through of the additional cost to be incurred by the TPPs in implementation of FDG and other equipment. This will undoubtedly help the TPPs in securing sanction of necessary funds from the banks/financial institutions for the present as well as future expenditure in this regard.

WinIndia Ventures Pvt Ltd v. MSEDCL

Case No. 73 of 2020

Background facts

- MERC on August 21, 2020 issued an order wherein WinIndia Ventures Private Ltd (**WinIndia**) had approached the Commission seeking adjudication of disputes with MSEDCL claiming illegal rejection of its online application dated July 14, 2020 for sale of power to MSEDCL at INR 2.52 per unit.
- WinIndia owns and operates a windmill with an installed capacity of 1.5 MW located at District Sangli, Maharashtra.
- WinIndia had initially filed a petition in Case No. 24 of 2020 requesting Commission to direct MSEDCL to sign Energy Purchase Agreement (**EPA**) for its wind project, commissioned on November 11, 2014 at generic tariff.
- However, while the said case was pending adjudication, WinIndia's Wind Turbine Generator (**WTG**) was disconnected by MSEDCL on May 28,2020 without any prior intimation or notice, due to which WinIndia was compelled to file a petition (Case No. 101 of 2020) seeking reconnection/compensation of its wind turbine. This petition was filed on the ground that WinIndia had validly applied for 'Sale of power under competitive bidding to MSEDCL' for FY 2020-21 which was never rejected by MSEDCL. However, the bid was rejected by MSEDCL on account of it being a conditional bid.
- The Commission passed its order in Case No. 24 of 2020 on July 3, 2020 and rejected the claim of WinIndia for entering into an EPA for a period of 13 years. However, it directed MSEDCL to compensate WinIndia at APPC rate along with floor price of non-solar RECs for 3 years i.e. FY 2014-15 to 2016-17.
- MERC passed an order on July 7, 2020 in Case No. 101 of 2020 whereby it held that considering WinIndia submission of a conditional bid for sale of short-term power and the application being incomplete, MSEDCL was appropriate in rejecting the short term bid offered by WinIndia.
- Appeals were filed by WinIndia against both the orders before the APTEL. In an interim order dated July 13, 2020 APTEL held that WinIndia may submit its application to MSEDCL through web portal without prejudice to the outcome of pending appeals.
- Pursuant to the same, WinIndia submitted a 'Without Prejudice' application on the online portal of MSEDCL for sale of short-term power to MSEDCL. The said application was also rejected by MSEDCL on the ground of it being a 'Without Prejudice' application.

Issues at hand

- Whether APTEL has allowed WinIndia to submit application for sale of power to MSEDCL without prejudice to pending appeals?
- Whether MSEDCL is right in rejecting WinIndia's application which has been submitted without prejudice to pending appeals?

Decision of the Commission

- As regards the first issue, MERC held that APTEL had granted liberty to WinIndia to pursue online application with MSEDCL or make any alternate arrangement for sale of power to third party and thereafter get connected to the State Grid. This liberty had been granted without prejudice to appeals pending before the APTEL.
- With respect to second issue, Commission observed that due to WinIndia's application being without prejudice to pending appeals before APTEL, there is a possibility of MSEDCL paying incremental tariff on energy procured on Short Term basis through web portal. As against fixed tariff envisaged in web-portal based procurement, WinIndia's offer is with possibility of revision in tariff with retrospective effect at a later date. Every Distribution Licensee has rights to protect its commercial interest and, ultimately, interest of its consumers. Therefore, Commission did not find anything wrong in MSEDCL's action to reject WinIndia's 'Without Prejudice' online application.

Our viewpoint

MERC in this order declared that online conditional application for sale of short-term power to Distribution Licensee is not feasible and in commercial interest of distribution licensee and its consumers. Commission had earlier also suggested that generator had option to sell its power to Open Access consumer, to other distribution licensee or opt for REC Mechanism. It provides clarity to generators that any conditional application for short term sale of power is not acceptable.

Srijan Energy System Pvt Ltd v. Power Grid Corporation of India Ltd & Ors

Petition No. 529/MP/2020

Background facts

- Srijan Energy System Pvt Ltd (**SESPL**) and its sister company (erstwhile subsidiary company) Continuum Power Trading Pvt Ltd (**CTN**) (collectively referred as 'Petitioners') filed the petition before the Central Electricity Regulatory Commission (**CERC**) seeking relaxation of Regulation 8A of CERC (Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter-State Transmission System and Related Matters) Regulation, 2009 (**Connectivity Regulations, 2009**) to permit SESPL to transfer Stage-II Connectivity and Long Term Open Access granted to it by Power Grid Corporation of India Ltd (PGCIL) to CTN.
- While achieving financial closure for the Project, SESPL transferred the direct control of CTN to its ultimate parent company Continuum Wind Energy Limited, Singapore (**CWEL**) as the lenders were more comfortable in providing financing to CTN if it was directly owned by CWEL, which is a debt-free company.
- Regulation 8A of the Connectivity Regulations, 2009 allows 100% subsidiary companies to transfer their Connectivity and LTA to the parent company and vice versa one year after achieving the commercial operation of the renewable generating station. However, till such transfer, the subsidiary companies are allowed to utilize the Connectivity and LTA granted to the parent company and vice versa.
- It is the case of SESPL and CTN that with the change in ownership of CTN from SESPL to CWEL, SESPL is restricted from transferring the connectivity to its sister concern i.e. CTN as per Regulation 8A of the Connectivity Regulations, 2009.

Issue at hand

- Whether Regulation 8A of Connectivity Regulations, 2009 can be relaxed under Regulation 33A of Connectivity Regulations, 2009 to enable SESPL to transfer Connectivity and LTA to CTN?

Decision of the Commission

- Commission observed that Regulation 33A specifies that 'Power to relax' is to be exercised in order to remove hardships arising out of operation of provisions of Connectivity Regulations, 2009. It is well-settled principle that provision of power to relax must not be used in a manner that would defeat the intent and purpose of any Regulation. There has to be sufficient reason to justify relaxation by establishing conclusively by party that circumstances are not created due to act of omission or attributable to party claiming relaxation. Power of relaxation is exercisable in exceptional circumstances on case to case basis and there cannot be any omnibus relaxation.

- Petitioners have not placed anything on record to show their inability to follow Regulations. Being fully aware of Regulations, Petitioners proceeded to transfer the ownership of CTN to CWEL to achieve financial closure for project.
- Commission held that present situation has been created by Petitioners themselves and provisions of Regulations did not come in way of Petitioners at any point of time. Accordingly, Commission dismissed the Petition.

Our viewpoint

Commission vide instant order reaffirmed the settled principle that 'power of relaxation' cannot be exercised in a routine manner and the party has to prove that it has a special and deserving situation which can only be mitigated by such relaxation.

JSW Steel v. Maharashtra Energy Development Agency

Case No. 335 of 2019

Background facts

- MERC on August 29, 2020 issued an order wherein JSW Steel Ltd (**JSWSL**) had approached MERC seeking exemption from requirement to meet Renewable Purchase Obligation (**RPO**) targets under MERC (Renewable Purchase Obligation, its Compliance and REC Framework Implementation) Regulations, 2010 (**RPO Regulations**) to the extent of its consumption from its cogeneration plants.
- JSWSL owns a steel manufacturing unit located at Dolvi, Maharashtra and established Captive Power Plants at its Dolvi unit – a 14 MW differential pressure-based Gas Expansion Turbine (**GET**) and a waste-gas based co-generation plant of 53.5 MW.
- JSWSL initially approached MERC vide Case No. 134 of 2013 praying that electricity produced and consumed by its cogeneration plants should meet/offset its corresponding RPO targets and its group companies in respect of units located in Maharashtra under then applicable RPO Regulations. Commission vide its order dated April 12, 2018 held that JSWSL is exempted from RPO to extent that it is consuming power from fossil-fuel based Co-Generation CPP. However, as far as issue of considering such power consumption for meeting its RPO against power sourced from Open Access source is concerned, Commission would consider same in proceedings of RPO compliances initiated in Case No. 101 of 2017.
- MERC in its order dated May 4, 2018 directed JSWSL to fulfil its RPO target on Open Access energy cumulatively for period from FY 2010-11 to FY 2013-14 by the end of FY 2018-19.
- Despite repeated representations made by JSWSL citing order of Commission in Case No. 134 of 2013 and subsequent orders of APTEL, Maharashtra Energy Development Agency (**MEDA**) chose not to provide any exemption from RPO to JSWSL from applicable RPO Regulations, 2010. Consequently, JSWSL was compelled to approach MERC.

Issues at hand

- Can applicable Regulations in force be ignored?
- Can electricity produced and consumed from fossil- fuel based co-generation plant meet/offset corresponding RPO targets for Open Access category under RPO Regulations, 2010?
- What shall be the treatment to be meted out to such plants from 2016 onwards?

Decision of the Commission

- As regards first issue, MERC observed that exemption from RPO provided to fossil-fuel based co-generation plants under RPO Regulations, 2010 was subsequently withdrawn under MERC (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2016 (**RPO Regulations 2016**), which were based on Tariff Policy 2016 notified by Central Government. In terms of APTEL's judgement dated January 28, 2020, Commission held that provisions of regulations which are in force, need to be compiled with. Therefore, JSWSL's request to ignore a provision of RPO Regulations which is in force cannot be acceded to.
- As far as second issue is concerned, Commission held that under RPO Regulations 2016, JSWSL cannot be allowed to use its fossil fuel-based co-generation for meeting its RPOs on Open Access energy consumed by its group companies. However, JSWSL can only be granted relief to the extent it has already been granted by this Commission's order dated April 12,2018 whereby exemption from RPO on

energy consumed from co-generation plant is allowed during applicability period of MERC RPO Regulations, 2010.

- With respect to third issue, Commission noted that provision of imposing RPO targets on fossil-fuel based co-generation plants under MERC RPO Regulations 2016 is a subject matter of challenge before Bombay High Court (**HC**) and matter is sub-judice. Therefore, till the time the Writ Petition is decided by HC, as directed by Commission in one of its previous orders dated May 22, 2019, captive users will have option of depositing the amount equivalent to REC Floor Price of shortfall units and further on year to year basis to meet its RPO, with MEDA. Hence, JSWSL could avail option for meeting its RPO for FY 2016-17 onwards till time Writ Petition is decided by HC.

Our viewpoint

The Commission has clarified that a fossil-fuel based co-generation Captive Power Plant is exempted from fulfilling any RPOs only to extent RPO Regulations, 2010 are applicable and not under RPO Regulations, 2016. Therefore, requirement to fulfil RPOs under RPO Regulations, 2016 and regulations thereafter, which are now in force, cannot be done away with. This order re-affirms that statutory requirements cannot be done away with, thereby providing a way ahead to Captive Power Plants to design and implement their financial plans accordingly.

UltraTech Cement Ltd v. Andhra Pradesh State Load Despatch Centre

O.P. 11 of 2020

Background facts

- Andhra Pradesh Electricity Regulatory Commission (**APERC**) on September 11, 2020 issued an order in a case wherein Ultra Tech Cement Ltd (**UltraTech**) had approached the Commission seeking clarification from APERC if the power consumed by it from its Waste Heat Recovery Boiler Power plant shall be considered for setting off its Renewable Purchase Obligation (**RPO**) requirement towards the energy consumed from conventional sources.
- UltraTech owns and operates two cement manufacturing units in Andhra Pradesh, namely Andhra Pradesh Cement Works (**APCW**) and Balaji Cement Works. Both the cement units have captive thermal plants besides producing electricity through co-generation.
- MNRE approved UltraTech's plant as 'Green Energy' under Clean Development Mechanism. UltraTech's 4 MW WHRS plant was synchronized and connected with the grid w.e.f. June 25, 2007.
- UltraTech approached this Commission claiming relief that the energy consumed by it from its WHRS Plant should be considered for setting off its RPO requirement qua its consumption from conventional sources.
- Andhra Pradesh State Load Despatch Centre (**AP SLDC**) claimed that WHRS is not recognized by MNRE or APERC as a renewable energy source and therefore, energy generated from such a source cannot be treated as renewable energy.

Issues at hand

- Whether the cogeneration plant of UltraTech could be considered as a renewable energy source?
- If yes, can UltraTech be exempted from fulfilling its RPO?

Decision of the Commission

- APERC, based on various judgments passed by APTEL, observed that Section 86(1)(e) of Electricity Act, 2003 (**Act**) is interpreted to the effect that irrespective of whether the cogeneration sources are renewable sources or otherwise, under statutory scheme, cogeneration sources shall be treated at par with renewable energy generation sources. RPO cannot be fastened on energy generated through cogeneration sources merely because renewable sources are not utilized in cogeneration process and irrespective of fuel used, cogeneration captive plants are entitled to be exempted from compliance of RPOs.
- APERC further held that power generated by UltraTech's WHRS plant and consumed by UltraTech itself is eligible for set off against its RPO requirements towards energy consumed from conventional sources.

Our viewpoint

Commission has one again reaffirmed the stand taken by APTEL and itself in various other decisions. However, in this order it has gone to the extent of providing relief of set-off against power plant's RPO requirements towards energy consumed from conventional sources.

MSEDCL v. SECI

Case No. 346 of 2019

Background facts

- MERC on September 14, 2020 issued an order wherein MSEDCL approached MERC seeking compensation as per Power Sale Agreement (**PSA**) executed with Solar Energy Corporation of India Ltd (**SECI**) and compensation on account of delay in achieving the Scheduled Commercial Operation Date (**SCOD**) as per Power Purchase Agreement (**PPA**) executed between SECI/Intermediary Procurer and Solar Power Developers (**SPD**).
- GoI/Ministry of New and Renewable Energy (**MNRE**) announced Jawaharlal Nehru National Solar Mission (**JNNSM**) in 2009. Under Phase-II, Batch-III of JNNSM, MNRE announced a Scheme for 'Setting up of 2000 MW Grid-connected Solar PV Power Projects-State Specific Viability Gap Funding Scheme' which was proposed to be implemented by SECI.
- SECI carried out two separate competitive bidding for selection of solar power developers for 500 MW projects in each case to be set up in Maharashtra based on the Request for Selection (**RfS**) dated August 27, 2015 and February 24, 2016.
- SECI and MSEDCL entered into two PSAs, on November 4, 2016 (Batch III) and December 1, 2016 (Batch IV) each, wherein SECI undertook to sell solar power to MSEDCL as per terms of PSA by buying the same from the selected SPDs on back to back basis. The agreed capacity of power to be sold by SECI to MSEDCL under both the PSAs was 500MW each.
- The scheduled commissioning dates for Batch-III projects were May 10, 2017 for Open content category (450 MW) and August 16, 2017 for Domestic Content category requirement (DCR) (50 MW) category projects, respectively. The scheduled commissioning date for 500 MW Batch-IV projects was December 23, 2017.
- The Commission vide its Order dated February 20, 2017 in Case No. 109 of 2016 approved the procurement of 1000 MW of solar power by MSEDCL from SECI for fulfillment of its Renewable Purchase Obligation (RPO). SECI started supplying power to MSEDCL from June 2017 in phased manner. However, the commissioning of some of the projects which SECI had tied up for sale of power to MSEDCL got delayed which led to shortfall in supply of power as agreed under the PSA executed between MSEDCL and SECI.
- On February 21, 2018, MSEDCL issued first notice regarding SECI's failure to comply with the material obligations of under PSA as per Article 9 and Article 10.
- On April 12, 2019, MSEDCL wrote letter to SECI claiming compensation in view of short supply of power by SECI and other applicable compensations due to delay in Commissioning of projects. SECI, vide its letter dated April 29, 2019 denied all claims made by MSEDCL regarding compensation on account of delayed commissioning.
- On October 4, MSEDCL wrote another letter intimating SECI that it shall pay to SECI as per the revised tariff (reduced tariff) in view of its material breach of obligations under the PSA. SECI, vide its letter dated October 11, 2019, again denied all the claims raised by MSEDCL towards compensation.
- Hence, the present petition. However, SECI inter alia objected to the jurisdiction of MERC to adjudicate the present dispute and submitted that it is the Central Electricity Regulatory Commission (**CERC**).

Issues at hand

- Whether SECI is acting as Generating Company or a Trading Licensee in the present matter?
- Whether 'Composite Scheme' exists in the present matter?
- Whether SECI is acting as Inter-State Trader or Intra-State Trader in the present case?
- Whether MERC has jurisdiction to adjudicate the present dispute?

Decision of the Commission

- This is an interim order passed by the Commission limited to the issue of jurisdiction only.
- As regards first issue, Commission observed that parties have agreed under PSA to a trading margin of INR 0.07/kWh. Under Electricity Act, 2003 (**Act**), trading margin is payable to trading licensee. Though SECI contends that while it is undertaking trading of electricity, it has been incorporated as a generating company and is not a trading licensee per se, Commission observed that generating company can recover only tariff for sale of electricity and cannot recover any trading margin. After perusing provisions of PSA under consideration, it ruled that SECI is acting as a trading licensee.

- With respect to second issue, SECI referred to various orders of CERC holding that JNNSM Guidelines (**Scheme**) envisage a composite scheme to which Commission opined that CERC orders are not directly binding on State Commission. Thereafter, in terms of Supreme Court (**SC**) judgement in *Energy Watchdog case vs. CERC & Ors*[1], Commission opined that projects involved in present PSAs need to be tested against the provisions of JNNSM Guidelines, NSM Guidelines and Tariff Policy, 2016 before declaring them compliant with 'composite scheme' envisaged under the Act. Commission observed that though the said Guidelines/schemes provide possibility of inter-state sales, it is evident that based on commitment from host State for full offtake, inter-State sales may not be required. In the present case, 100% capacity is tied-up with MSEDCL; therefore, merely having an enabling feature of inter-state supply of energy under JNNSM without acting on it, would not render it a 'composite scheme' to attract jurisdiction of CERC. Considering, PSAs have been signed with only one State with 100% capacity generated within the State and contracted within the State by invoking intra-state transmission connectivity, therefore, there is no existence of 'composite scheme' with respect to the power projects commissioned under the present PSAs/PPAs.
- For the third issue, SECI referred to its right to sale of power to third party under PSA in order to show that it is acting as inter-State trader of electricity to which Commission opined that such right can be exercised by SECI only under circumstances of default of MSEDCL and thus, provision providing for such right cannot be the basis for deciding nature of the agreement. Similarly, right of SECI for sale of excess generation to third party, arising out of another residual clause of agreement, cannot be the basis for deciding the nature of agreement. 100% capacity of projects herein is contracted with MSEDCL under PSAs, hence, SECI is acting as an intra-State trader in the present case.
- For the fourth issue, Commission has held that considering SECI is acting as a trading licensee and not a generating company, no 'composite scheme' exists as envisaged under Section 179 (1) (b) of Act and the transactions are involved are within the State itself (intra-State transactions) and State Distribution Licensee is involved in procurement of power within the State, State Commission i.e. MERC herein, has jurisdiction to adjudicate dispute between the parties. Reliance is placed on APTEL's judgment in *Pune Power Development Pvt Ltd (Inter-State Licensee) v. Karnataka Discoms*[2].

Our viewpoint

This is a significant order passed by MERC whereby it has taken a contrary view from CERC with respect to the issue of jurisdiction over projects located in one State and supplying their 100% power to the same State's distribution licensee under PPAs/PSAs entered under the JNNSM Guidelines. CERC in a catena of judgments has held that considering the Guidelines and the PPAs/PSAs entered therein envisage sale of 10% power to third party for a 'composite scheme'. In the instant matter, MERC took a view that merely having an enabling feature of inter-State supply of energy under JNNSM scheme without acting on it would not render it a 'composite scheme' to attract jurisdiction of CERC. This order of MERC will have adverse impact on the payments for compensation already made to the SPDs based on the law decided by CERC.

Rajasthan Rajya Vidyut Utpadan Nigam Ltd v. Rajasthan Electricity Regulatory Commission & Ors

Judgment dated August 21, 2020 in Appeal No. 94 of 2016

Background facts

- The present Appeal was filed by Rajasthan Rajya Vidyut Utpadan Nigam Ltd (**RRVUNL**) before APTEL against the Order dated July 23, 2014 passed by the Rajasthan Electricity Regulatory Commission (**RERC**) in Petition No. RERC/382/2013 (**Order**) whereby the Annual Performance Review (**APR**) of RRVUNL's generating stations was determined for FY 2010-11.
- The dispute in the instant appeal pertains to two of RRVUNL's power plants viz. Ramgarh Gas Thermal Power Station (**Ramgarh Plant**) and the Dholpur Combined Cycle Gas based Thermal Power Plant (**Dholpur Plant**).
- RRVUNL in instant appeal has sought indulgence of APTEL on limited ground of reduction of fixed cost by RERC for the Ramgarh Plant and Dholpur Plant based on Plant Load Factor (**PLF**) instead of Plant Availability Factor (**PAF**). It was RRVUNL's case that RERC did not consider that non-availability of gas is

[1] (2017) 14 SCC 80
[2] Appeal No. 200/2009, Judgment dated February 23, 2011

an uncontrollable factor and even gas supplier had admitted the non-availability of gas as an event of force majeure.

- It was RRVUNL's case that low PLF for Dholpur Plant and Ramgarh Plant was owing to the fact that there was no gas available in market. Alternative arrangements through spot gas arrangement, however the same was extremely expensive and did not offer long term economic solution to the prevailing gas crisis.
- RRUNL also claimed a loss of INR 45.54 Crore on account of disallowance of its claim by RERC.
- RERC has refuted the claims of RRVUNL and stated that the findings in the Order are based on its earlier findings in another Order dated April 27, 2011 in the matter of truing up of RRVUNL's generating stations for FY 2004-05 to 2008-09, whereby it was held that fuel supply arrangement is responsibility of generator. The same was not challenged by RRVUNL and has thus attained finality.
- RERC has further clarified that it has considered PAF as equal to PLF in absence of SLDC certificates of actual availability of RRVUNL's plants. The fixed cost has been reduced on the basis of PAF, only PAF has been considered as being equal to PLF in absence of SLDC certificates of actual availability.

Issue at hand

- The issue for consideration in present appeal was that whether RERC was right in reducing RRVUNL's fixed cost based on PLF instead of PAF on account of non-availability of gas.

Decision of the Commission

- APTEL in its judgment has upheld RERC's decision and observed that RERC Tariff Regulations 2009 provide incentives to generating companies if they achieve generation target beyond the PLF. RERC has also allowed all prudent expenses met by RRVUNL and encouraged RRVUNL to attain higher PLF so that more energy is available at lower prices in State of Rajasthan.
- In so far as non-availability of gas is concerned, finding of RERC in the Order dated April 27, 2011 remains unchallenged and has thus attained finality. It remains valid in so far as the issue of non-availability of gas is concerned, and therefore it is not open to plead the same non-availability of sufficient gas as a valid reason. APTEL has upheld RERC's opinion that the gas supply arrangement for the generating plants is RRVUNL's responsibility alone.
- APTEL also upheld RERC's contention that since certificates from SLDC demonstrating actual availability were not provided by RRVUNL, it is a deficit on part of RRVUNL and therefore PAF has been treated equal to PLF.

Our viewpoint

Decision of APTEL is in light of the fact that the previous RERC Order dated April 27, 2011 was not challenged by RRVUNL. Thus, the finding that the gas arrangement is the responsibility of the generator cannot be altered till the time the Order dated April 27, 2011 is valid. Further, in its judgment APTEL has even considered the various aspects of the RERC Order whereby RRVUNL has considered incentivizing RRVUNL for its higher performance, and where RRVUNL has been encouraged by RERC to obtain higher PLF. APTEL has comprehensively considered all the facts and circumstances and upheld the Order passed by RERC.

RECENT DEVELOPMENTS

In this Issue

SC stays NGT Order on environmental compensation on thermal plants for non-utilization of 100% fly ash

- Supreme Court (**SC**) on September 08, 2020 issued an Order staying recovery of Environmental Compensation (**EC**) imposed by National Green Tribunal (**NGT**) on Thermal Power Plants (**TPPs**) for non-utilization of 100% fly ash.
- NGT vide its Order dated February 12, 2020 had imposed payment of EC on TPPs which had not attained 100% utilization of fly ash. The said 100% utilization was to be achieved in terms of the directions of the Ministry of Environment, Forest & Climate Change (**MoEFCC**) vide Notification dated September 14, 1999 as amended by Notification dated January 25, 2016.
- In its Order dated February 12, 2020, NGT had taken a view that cut-off date for levy of EC was December 31, 2017 and same was sacrosanct. Therefore, all TPPs which had not achieved 100% utilization of fly ash, were held to be liable to pay EC to Central Pollution Control Board (**CPCB**). Subsequent to the passing of the Order dated February 12, 2020 by NGT, CPCB had issued demand notices to TPPs, seeking payment of EC.
- An association of TPPs, Association of Power Producers (who were also issued demand notices by CPCB), had challenged Order dated February 12, 2020 passed by NGT under Section 22 of NGT Act, 2010. The main issue raised by them was that NGT's Order dated February 12, 2020 was in contravention of Order dated February 04, 2019 passed by SC whereby specific directions had been issued to NGT to determine EC payable on a case to case basis.
- After hearing contentions of the parties, SC issued the Order staying the recovery of EC by CPCB until further orders.

Greenko to invest USD 1 billion in new battery storage business

- In a bid to expand its renewable energy business in India, Greenko Energy Holdings has set an objective to invest around USD 1 billion in its new battery storage business vertical that also includes a vision to produce lithium-ion batteries in India for power grid-scale applications as well as electric vehicles amid India readying its proposed INR 18,000 Crore production-linked incentive package for battery storage manufacturing.
- It is important to note that this comes against the backdrop of the single – largest foreign clean energy announcement in India made by Japan's ORIX Corporation for USD 980 million in Greenko for an approximate 17% stake signifying the growing global uptick in relation to India's renewable energy market.

Gross Metering proposed for Residential Rooftop Solar Systems of above 5 kW capacity

- Draft electricity rules were issued by Ministry of Power (**MoP**) earlier this year that were aimed at streamlining the process of supply of electricity to consumers by DISCOMs amongst other objectives. According to the draft rules, consumers will have the right to set up renewable energy generating projects, including rooftop solar projects, either by themselves or through a service provider. More significantly, rooftop solar projects of capacity up to 5 kW will be applicable for net metering, and projects above 5 kW will be eligible for gross metering.
- As a step towards efficiency, it has also been proposed that DISCOMs delaying connection agreement for rooftop solar systems would be liable to pay compensation of INR 500 per day for each day of default. Additionally, all new electricity connections must be accompanied by a smart prepayment meter. Any exception to this will have to be approved by the appropriate Commission.

UN launches new partnership to promote renewable energy in India

- India's largest renewable energy company, ReNew Power, and the UN Environment Programme (**UNEP**) have signed a partnership agreement to promote increased access to renewable energy and improved energy efficiency. This symbolizes a deeper partnership between the two parties that primarily focuses on enhancing access to renewable energy and improving energy efficiency as part of the progressive strategies that India as a nation has adopted over the past decade.
- The partnership envisages implementation of solar off-grid projects, studies, and relevant assessments. Furthermore, ReNew Power will form an implementation partner for renewable energy installations across India for UNEP with the aim of shifting the heating and cooling sector to an energy-efficient one, including but not limited to, joint efforts that will be promoted through annual events showcasing notable contributions to Indian government's futuristic vision on renewable energy.

India and Bangladesh launch new initiative to connect landlocked North East India

- Tripura recently opened its first-ever inland waterway with Bangladesh from Sonamura (about 60 kms from Agartala) in the Indian side, and Daudkandi of Chittagong in Bangladesh.
- This 93 kms long route on the river Gumti marked a major step in enhancing connectivity between India and Bangladesh and will help the hinterland of both the countries. This is the first export consignment from Bangladesh to Tripura through the inland waterways.
- The operationalization of this new protocol route not only facilitates overall bilateral trade with Bangladesh, but also provides for an economical, faster, safer and environment friendly mode of transport. This will result in substantial economic benefits to local communities on both sides.
  - The Protocol for Inland Water Trade and Transit (**PIWTT**) was signed between India and Bangladesh in 1972 to provide inland waterways connectivity between the two countries, particularly with the North Eastern Region of India, to enhance bilateral trade.
  - The scope of PIWTT was further expanded by the signing of the 2nd Addendum to PIWTT on May 20, 2020 with the inclusion of additional routes and ports of calls.
  - The number of Indo-Bangladesh Protocol (**IBP**) routes have been increased from 8 to 10, ports of call to 11 and extended ports of call to 2. This includes the Sonamura- Daudkhandi stretch of Gumti river and the operationalisation of the Rajshahi-Dhulian-Rajshahi routes with the extension up to Aricha.
- In the last one year, approximately 3.5 MMT of cargo was transported between India and Bangladesh on the protocol routes.

NHAI awards HAM and EPC projects

- Ashoka Buildcon secured two EPC projects worth INR 1,390 Crore in Bihar. The two projects are awarded under Bharat Pariyojna phase 1 and involves four-laning of NH- 319.
- Dilip Buildcon Limited secured HAM project in the state of Telangana worth INR 1140.50 Crore. The project involves four-laning of NH-363.

Ministry of Road Transport and Highways undertakes revision of Model Concession Agreement for BOT projects

- In a move to revive the BOT model, Ministry of Road Transport and Highways (**MoRTH**) has revised the Model Concession Agreement (**MCA**) ensuring improved viability of the model. Some of the major changes to the MCA are as follows:
  - The revenue potential of any BOT project always remained a concern as the developer had to wait for a period of 10 years, under the existing regime, to assess the viability of the project. To resolve this issue the MoRTH has revised the MCA to reassess the revenue potential within 5 years from the award of the contract thereby giving the parties an option to extend the tenure of the contract earlier, if required. This will enable the developer to not fall short of cash flow during the term of the contract.
  - Further, it was observed that many BOT projects get delayed due to delay in land acquisition by the government as BOT projects were awarded at 80% land acquisition. MoRTH to eliminate any such delay, under the revised regime, has guaranteed to the developers that BOT projects shall be awarded upon completion of 90% land acquisition.
- While the amendment of the MCA is a big step towards revival of the BOT model, it will have to be seen whether these amendments will be successful in captivating potential investors.

25-km final stretch of Kochi Metro in Kerala inaugurated

- The final stretch of the Phase-I construction of the Kochi metro's Thykoodam-Petta stretch was inaugurated on September 7, 2020.
- Phase-1 of the Kochi Metro has been completed at a cost of INR 6218 Crore. The total operational stretch of the Kochi Metro is now 25.2 kilometres given latest the inauguration of the 1.33 km stretches from Thykoodam to Petta.
- The Kochi Metro has been developed by the Kochi Metro Rail Ltd (**KMRL**) on PPP basis and is estimated to increase ridership to over one lakh per day with this inauguration.

Contributions by

Aakash Sharma | Associate
Anviti Bhadouria | Associate
Jyotsna Khatri | Associate
Samarth Kashyap | Associate
Soumya Prakash | Associate
Anukriti Jain | Associate
Esha Nair | Associate
Molshree Bhatnagar | Associate Partner
Shefali Tripathi | Associate
Akshay Malhotra | Partner
Ishita Gupta | Associate
Parichita Chowdhury | Associate
Shreshth Sharma | Partner

HSA
AT A GLANCE

FULL-SERVICE CAPABILITIES

- BANKING & FINANCE
- COMPETITION & ANTITRUST
- CORPORATE & COMMERCIAL
- DEFENCE & AEROSPACE
- DISPUTE RESOLUTION
- ENVIRONMENT, HEALTH & SAFETY
- INVESTIGATIONS
- LABOR & EMPLOYMENT
- PROJECTS, ENERGY & INFRASTRUCTURE
- PROJECT FINANCE
- REAL ESTATE
- REGULATORY & POLICY
- RESTRUCTURING & INSOLVENCY
- TAXATION
- TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

GLOBAL RECOGNITION

STAY CONNECTED

www.hsalegal.com
mail@hsalegal.com
HSA Advocates

PAN INDIA PRESENCE

New Delhi
81/1 Adchini
Sri Aurobindo Marg
New Delhi – 110 017
Phone: (+91) (11) 6638 7000
Email: newdelhi@hsalegal.com

Mumbai
Construction House, 5th Floor
Ballard Estate
Mumbai – 400 001
Phone: (+91) (22) 4340 0400
Email: mumbai@hsalegal.com

Bengaluru
Aswan, Ground Floor, 15/6
Primrose Road
Bengaluru – 560 001
Phone: (+91) (80) 4631 7000
Email: bengaluru@hsalegal.com

Kolkata
No. 14 S/P, Block C,
Chowringhee Mansions
Kolkata – 700 016
Phone: (+91) (33) 4035 0000
Email: kolkata@hsalegal.com