PROJECTS, ENERGY & INFRASTRUCTURE

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LEGAL & POLICY UPDATES

In this Issue

Draft RPO and REC Framework Implementation, 2020

- In exercise of powers conferred under Section 181 read with Section 61(h), Section 66 and Section 86(1)(e) of the Electricity Act, 2003 and all other powers enabling it in this behalf, the Delhi Electricity Regulatory Commission has issued the Draft (Renewable Purchase Obligation (**RPO**) and Renewable Energy Certificate (**REC**) Framework Implementation) Regulations, 2020.
- These Regulations come into force from the date of notification. Provided that for the period from April 01, 017 to March 31, 2020, RPO targets for Long Term Open Access (**LTOA**) and Medium Term Open Access (**MTOA**) Consumers shall be same as the target of FY 2016-17 as specified in Delhi Electricity Regulatory Commission (Renewable Purchase Obligation and Renewable Energy Certificate Framework Implementation) Regulations, 2012. Further compliance of cumulative targets for above-mentioned intervening period for LTOA/MTOA shall be met by such entities within two years from the date of notification of these Regulations. These Regulations shall apply to the following obligated entities in the National Capital Territory of Delhi:
  - Distribution Licensees
  - Any Captive User using other than Renewable Energy Sources exceeding 1 MW
  - Any Open Access Consumer having contract demand exceeding 1 MW and sourcing power from other than Renewable Energy Sources
- The Commission has invited comments/suggestions from the stakeholders on the said Draft Regulations, available on the website of the Commission, on or before November 10, 2020.

MoP releases amendments to the guidelines for procurement of round the clock renewable power

- MoP, on November 03, 2020, issued amendments to the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Round-The-Clock (**RTC**) Power from Grid Connected Renewable Energy Power Projects, complemented with Power from Coal Based Thermal Power Projects (**Principal Guidelines**). The Principal Guidelines have been amended inter alia, to provide for (i) supply of renewable energy along with the power produced from any other source or storage, to ensure uninterrupted RTC power supply to distribution companies (**DISCOMs**); and (b) additional renewable energy capacity, to ensure fulfilment of the renewable purchase obligation by DISCOMs (**Amended Guidelines**). These Guidelines have been issued by MoP under Section 63 of the Electricity Act 2003 which provides for adoption of tariff by the appropriate electricity regulatory commission, if such tariff has been determined by a transparent bidding process under the 'guidelines' issued by the Government of India.

- Set out below are some of the key provisions of the Amended Guidelines:
  - **Broadening the Extent of Applicability:** Under the Principal Guidelines, only inter-state transmission system connected solar power and wind power projects (or a combination of both, with or without Energy Storage System) were considered for renewable energy supply. Further, for bundling, only coal-based thermal power from thermal power plants, partly or fully commissioned or to be commissioned before the issuance of the bid or under construction at the time of issuance of the bids, having a spare generating capacity (with no power supply commitments or contracts) available on a long term basis were considered. With the Amended Guidelines, MOP has broadened the extent of applicability of the Principal Guidelines, which will now be applicable to grid connected renewable energy power projects coupled with firm power from any power generating systems other than renewable power. In other words, firm power from thermal/hydro or other sources or storage can be utilised to balance renewable energy and provide RTC power to the DISCOMs thus, fulfilling the need for DISCOMs to balance power.
  - **Amendment to the definition of 'RTC Power Generator':** The Amended Guidelines have amended the definition of RTC Power Generator or Generator from 'a generator and supplier of RE Power complemented with Thermal Power, in Round-The-Clock manner' to 'a generator and supplier of RE Power complemented with Power from any other source, in Round The-Clock manner'.
  - **Shift from Composite Tariff to Weighted Average Levelised Tariff:** Under the Principal Regulations, the bidders were required to quote a composite single tariff considering the tariff for the coal based thermal power. Since the cost associated with thermal power generation is prone to variation, 25% of the composite tariff was adjusted and indexed with the index of coal price (both domestic and international) as notified by the Central Electricity Regulatory Commission periodically. The Amended Guidelines provide that bidding evaluation parameter will be the weighted average levelised tariff per unit supply of RTC power. The procurer will invite bids wherein the bidder will quote the first-year weighted average levelised Tariff in Rs/kWh. Notably, the quoted tariff will comprise of four-parts – Fixed component (RE power (fixed), non-RE power (fixed)) and Variable component (Non-RE power (escalable for fuel), and non-RE power (escalable for transportation)). The Fixed component of the tariff of the RE power and Non-RE power will be quoted for each year of the term of the Power Purchase Agreement (**PPA**). The variable component of the Non-RE power shall be quoted as on the scheduled date of commissioning. The levelised tariff shall be arrived at using the CERC escalation indices for the type of fuel quoted by the bidder and the discount factor to be specified in the bidding document. The bidder shall also quote the proportion of energy from RE sources and non-RE sources that they wish to supply. The weighted average levelised tariff per unit supply shall be arrived at for the term of PPA and the proportion of energy from RE sources and Non-RE sources.
  - **Energy mix:** The energy mix in the power to be supplied should be such that at least 51% of the power comprises renewable energy and the remaining 49% is the power from any other source, in Round-The-Clock manner. The power generators will be required to ensure 85% of the power availability annually, along with 85% of power availability during peak hours (i.e. 4 hours out of 24 hours). Peak hours will be specified in the bid documents (Ref: Para 7.2 (a) of the Amended Regulations). In case of a shortfall from the specified 85% minimum capacity, RTC-Generators will be liable to pay the procurer a penalty of 400% of the cost of power they fell short of. This will be computed based on the applicable tariff during the year. Earlier, the amount of penalty was 25% of the cost of the shortfall. This was to be calculated at the maximum indexed composite tariff payable during the year.
  - **Timelines for financial closure and commissioning of power supply:** The Amended Guidelines have also revised the timelines for attaining financial closure and commissioning of power supply from RTC projects by RTC Generators. Projects which are 1000 MW and below must be closed within 18 months from the date of execution of the PPA. The projects which are larger than 1000 MW, must attain financial closure within 24 months. Previously, projects which are 500 MW and below were to be closed within 12 months, projects between 500 MW and 1000 MW were to be closed in 18 months, while projects above 1000 MW were given 2 years to achieve financial closure (Ref: Para 13.1 of the Amended Regulations). For commissioning and the commencement of power supply, projects smaller than 1000 MW are now allowed 2 years, while projects over 1000 MW must be commissioned and start supplying power within 30 months. Previously, projects which are 500 MW and below were allowed 18 months, projects between 500 MW and 1000 MW were allowed 2 years, while projects over 1000 MW were allowed 30 months.

Guidelines for tariff based competitive bidding process – Amended

- Ministry of Power (**MoP**) has issued a resolution dated November 3, 2020 amending the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Round-The-Clock Power from Grid Connected Renewable Energy Power Projects, complemented with Power from Coal Based Thermal Power Projects (Guidelines), whereby the following alterations, including without limitation, to the Guidelines of July 22, 2020 were proposed:
  - The amended Guidelines allow for firm power from any other source or storage to be bundled with renewable energy. Therefore, it provides round-the-clock power to the DISCOMs from renewable energy sources balanced with firm power from any other source.
  - The scope of Composite Tariffs within the Guidelines has also been altered to cater to tariffs of firm power derived from any other source.
  - Additionally, the title of the Guidelines itself has been altered to 'Guidelines for Tariff Based Competitive Bidding Process for Procurement of Round-The Clock Power from Grid Connected Renewable Energy Power Projects, complemented with Power from any other source or storage'.
- The amended Guidelines are expected to usher in a broader range of bidders having greater flexibility, and its effective implementation will play a key role in the development of Indian renewable energy sector.

RECENT JUDGMENTS

In this Issue

Bhopal Dhule Transmission Co Ltd v. CERC & Ors.

APTEL Judgment dated October 20, 2020 in Appeal No. 208 of 2019

Background facts

- This Appeal was filed by Appellant – Bhopal Dhule Transmission Co Ltd (**BDTCL**) – against the Order dated April 24, 2019 passed by Central Electricity Regulatory Commission (**CERC**) in Petition No. 297/MP/2018 (**Impugned Order**).
- BDTCL had initially approached CERC vide Petition No. 216/MP/2016 seeking relief on account of Force Majeure and Change in Law events which impacted its Project and caused a delay in achieving Commercial Operation as envisaged in the Transmission Service Agreement (**TSA**) dated December 07, 2010.
- CERC vide its Order dated June 25, 2018 in Petition No. 216/MP/2016 considered BDTCL's claims pertaining to uncontrollable events, and inter alia extended the Scheduled Commercial Operation Date (**SCOD**) of the Project. Further, CERC also granted liberty to BDTCL to approach it with all relevant documents for consideration of the impact of the delay on the additional costs incurred by BDTCL.
- Pursuant to the above, BDTCL approached CERC by way of Petition No. 297/MP/2018.
- However, CERC vide the Impugned Order while holding that BDTCL was in fact adversely impacted by Change in Law events and had also complied with all necessary pre-requisites for claiming relief under the TSA, denied Change in Law relief to BDTCL.
- It was CERC's finding in the Impugned Order that no relief can be allowed for additional Interest During Construction (**IDC**) incurred since the same is not a direct consequence of the Change in Law events. CERC further held that relief for additional IDC cannot be allowed since IDC is not a component that is disclosed or evaluated at the time of bidding. Thus, CERC while on one hand accepted that uncontrollable events in the form of Changes in Law have impacted the Project, but on the other hand it held that BDTCL deserves no compensation for the same.
- BDTCL challenged the Impugned Order by way of the present Appeal and sought for the allowance of additional liability towards IDC.

Issues at hand

- Whether CERC was justified in denying BDTCL's claims for IDC and corresponding carrying cost?
- Whether BDTCL is entitled to grant of an increase in the non-escalable Transmission Charges as compensation for Change in Law as per the TSA?

Decision of the Tribunal

- APTEL in its Judgment dated October 20, 2020 has observed that the Change in Law clause of the TSA has a built in restitutionary mechanism meant to compensate a party affected by such Change in Law event, in order to restore the said party to the same position as if the Change in Law event had not occurred. There can be no exceptions to the grant of relief on account of Change in Law once it has been determined that such a Change in Law event has indeed affected a party. APTEL has observed that CERC's decision in the Impugned Order is against the spirit of the relevant provision of the TSA and has therefore decided the issue in favour of BDTCL.
- APTEL has held that since the Change in Law events took place during the construction period of the Project i.e. before the declaration of commercial operation of all the elements of the Project, therefore BDTCL is covered under the relevant provision of the TSA which entitles it to relief. Based on the formula provided in the TSA, the Non-escalable Transmission Charges of BDTCL are also to be increased.

Our viewpoint

APTEL in its judgment has looked into the provisions of the TSA which provide for relief on account of Change in Law and has thereafter allowed BDTCL's claims. The underlying principle in APTEL's decision is that if the adverse impact due to Change in Law is demonstrated by the affected party and is allowed as well, then relief in terms of the relevant provision of the contract cannot be denied to the said party. By upholding BDTCL's claims, APTEL has provided an assurance to the generators who are impacted due to Change in Law events and are in the process of seeking relief for the same.

Jaiprakash Power Ventures Ltd v. Madhya Pradesh Electricity Regulatory Commission (MPERC) & Ors.

Case No. 130 of 2020

Background facts

- Jaiprakash Power Ventures Ltd (**Appellant**) filed the Appeal challenging the Order dated August 12, 2015 passed by MPERC in Petition No. 37 of 2015 (**Impugned Order**).
- The said petition before MPERC was filed by the Appellant seeking a declaration that the Additional Levy raised by the fuel supply company, Madhya Pradesh State Mining Corp. Ltd. on the Appellant is recoverable as variable fuel charges from the procurers of electricity.
- The said Additional Levy was imposed pursuant to the direction of the Supreme Court (**SC**) in its Order dated September 24, 2014 in W.P. (Criminal) No. 120 of 2012 and the provisions of the Coal Mines (Special Provisions) Act, 2015. The Additional levy was to be payable by the allottees of coal block towards financial loss caused to the exchequer by illegal and arbitrary allotments of coal blocks.
- The Appellant paid the said Additional Levy as part of landed cost of coal supplied to the Appellant's 1320 MW (2 x 660 MW) coal based power project at Nigrie, district Singrauli in Madhya Pradesh (**Project**).
- The Appellant sought that the said Additional levy of INR 295 per metric ton be allowed to be recovered from the distribution companies.
- MPERC vide the Impugned Order rejected the Appellant's claims. MPERC stated that he landed cost of coal shall include price of coal corresponding to the grade and quality of coal including the royalty, taxes and duties as applicable in terms of the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2012 (**Tariff Regulations**). The Tariff Regulations do not provide for the inclusion of such Additional Levy. Further, in the energy charges determined MPERC for the Appellant's Project do not form any case to deal with MPERC. Thus, MPERC held that the subject petition is not maintainable and hence disposed of the same.

Issue at hand

- Whether the Additional Levy imposed by SC can be allowed as a pass through in the generation tariff of the Appellant?

Decision of the Tribunal

- APTEL in its judgment has dismissed the Appeal filed by the Appellant on the ground that the same is devoid of merits and held that the additional levy is not a simpliciter compensation but is rather a penalty for consuming the benefits of an illegal process. Therefore, the additional levy of INR 295 per metric ton imposed on the original allottees of the captive coal block will not be included in the determination of generation tariff, to be passed on to the end consumers.

Our viewpoint

The finding in the judgment issued by APTEL clarifies the position that a charge which has been imposed as a penalty cannot be passed through in the tariff of the generating company.

Tata Power Co Ltd v. Maharashtra Electricity Regulatory Commission

APTEL Judgment dated October 20, 2020 in Appeal No. 58 of 2018

Background facts

- Tata Power Company Ltd (Distribution) (**Appellant**) has filed present Appeal challenging specific findings of Maharashtra Electricity Regulatory Commission (**MERC**) in its Order dated October 21, 2016 (**MYT Order**) and the Order dated November 22, 2017 (**Review Order**).
- MYT Order in Case No. 47 of 2016 was passed by MERC for Truing-up of FY 2014-15, provisional Truing up for FY 2015-16 and Aggregate Revenue Requirement and Tariff for FY 2016-17 to 2019-20.
- Being aggrieved by MERC's MYT Order, Appellant filed a Review Petition seeking review of MERC's MYT Order to the extent stated therein. The said Review Petition was partly allowed by MERC vide its Review Order. As a result, the Review Order has merged with the MYT Order (**Impugned Orders**) modifying the same to that extent.
- The Appellant has challenged the following aspects in its Appeal:
  - Disallowance of appropriate depreciation rates for Retail Supply Business for FY 2014-15
  - Disallowance of Demand Side Management (**DSM**) employee cost as part of its DSM expenditure for FY 2014-15
  - Erroneous remittance of transmission charges received by the Appellant from the Open Access Consumers to State Transmission Utility (**STU**)

Issues at hand

- Whether partial disallowance of depreciation qua the Appellant's retail supply and business?
- Whether partial disallowance of DSM expenses on account of employees expenses?
- Whether remittance of revenue from partial Open Access customers to STU?

Decision of the Tribunal

- Since AMPL was affected by change in law on account of the de-allocation of Lohara Coal Blocks, therefore, the same was allowed as change in law as per the PPA.
- It was held that since AMPL has incurred the additional cost for coal due to subsequent change in law event, therefore, it is entitled to be paid the coal cost (Lohara) including the transportation cost as base while computing the compensations for the change in law events.
- **Issue 1**
  - The Appellant's case on this was that it was entitled to depreciation of INE 7.23 Crores qua its Retail Supply Business for FY 2014-15 at an average rate of 6.49%on the current capital value of the assets computed at the asset-wise depreciation rates provided in the Depreciation Schedule to the MYT Regulations 2011.
  - APTEL has allowed the Appellant's claims and held that the rate of depreciation for the Retail Supply Business shall be computed afresh by MERC. The Appellant has been directed to furnish the requisite details/data in this regard.
- **Issue 2**
  - The grievance of the Appellant on this issue is that out of the total claim of INR 2.82 Crores under DSM expenditure, MERC has disallowed the claim towards DSM employee cost amounting to INR 1.37 crores.
  - APTEL while observing that Demand Side Management is an integral part of the day to day operations of the Appellant, has held that expenses on any additional manpower are to be borne by the Appellant within the allowed O&M expenses.
- **Issue 3**
  - The Appellant had alleged that MERC directed remittance of revenue collected from Open Access Consumers to the STU to the tune of INR 2.02 Crores. Although MERC conceded to this error in the Review Order, it did not pass any consequential orders in this regard.

– APTEL on this issue has rejected the Appellant's claim and held that the amount collected from partial open access consumers in lieu of transmission charges has been accounted for by MERC in reducing the transmission charges of the end consumers. Further, even the Appellant has not suffered an loss, and the matter may be considered as trued up and the reference amount of Rs.2.02 crores has been accounted for the ultimate benefit of end consumers in reducing the transmission tariff and the Appellant has also remained revenue neutral. Therefore, this issue need not be re-opened for further consideration/true up.

Our viewpoint

The specific findings of APTEL with respect to the Issue No. 2 lays down the principle for treatment of specific O&M Costs in terms of the MYT Regulations. While such expense may be integral, it need not necessarily be allowed as a pass through in tariff.

In Issue No. 3 APTEL has analyzed that whether or not the amount collected from partial open access consumers impacts the Appellant and has then proceeded to uphold the fundamental premise of protecting the interest of the end consumers.

Eastern India Powertech Ltd v. Nabha Kumar Dar, Chairperson, AERC & Anr.

APTEL Judgment dated October 20, .2020 in Appeal No. 294 of 2017

Background facts

- Eastern India Powertech Ltd (**Appellant**) has filed the present Appeal aggrieved by the decision of the Assam Electricity Regulatory Commission (**AERC**) in Order dated December 30, 2016 in Petition Nos. 20 – 31 of 2016 (**Impugned Order**).
- The Appellant is a generator of electricity owning and operating gas based power plants at Basankadi and Adamtilla in Assam (**Plants**).
- The Appellant on December 01, 2015 filed a common tariff petition for its Plants for the period from FY 2009-10 to FY 2014-15, and paid a court fee of INR 20 lacs, which was consistent with the applicable fee for the tariff determination period of FY 2009-2010 to FY 2014-15.
- However, AERC intimated to the Appellant that AERC was required to file individual annual petitions for each power plant for current year and true up petition for previous years. In compliance thereof the Appellant filed separate petitions for each of the plants for individual years.
- However, AERC held the Appellant to be in default for non-payment of processing fees in terms of the AERC (Payment of Fees etc.) Regulations 2015 (**2015 Fee Regulations**).
- The dispute in the present Appeal is regarding the payment of fees with the tariff petitions under the notified AERC Fee Regulations from time to time. The Appellant has contended that composite tariff petitions pertaining to two of its generation plants be filed from the period from 2009-10 to 2014-15.
- However, AERC vide its Impugned Order has directed that tariff petition would need to be filed for each generating plant separately and year wise. In other words, against a composite petition, contemplated by the Appellate, AERC desires for twelve petitions (2 plants – 6 years).
- It is pertinent to note here that the Appellant had filed an execution petition being E.P No. 2 of 2015 before APTEL seeking payment of outstanding amounts of INR 165.67 Crores from the distribution licensee, Assam Power Distribution Co Ltd (**APDCL**). During the said proceedings AERC apprised APTEL of the issue regarding payment of court fees for the tariff petitions by the Appellant. APTEL thereafter had directed the Appellant to pay the said court fee. The Appellant has paid the purported additional fee as sought by AERC under protest in terms of APTEL's directions.
- However, the Appellant has challenged the findings of AERC with respect to the payment of fee by way of the present Appeal.

Issue at hand

- Whether in the facts and circumstances of the case, AERC was justified in directing the Appellant to deposit the court fee year wise as well as generating station wise in accordance with the 2015 Fee Regulations?

Decision of the Tribunal

- APTEL has observed that a generating company may file composite petition with station wise detailed information and also separate plant wise petitions giving requisite relevant information. For the tariff petition pertaining to FY 2008-09, AERC has considered composite tariff petition for both the generating plants of the Appellant but subsequently it desired plant wise and year wise petitions to be submitted by the same Appellant. Under such a dispensation by AERC, while the evaluation of plant parameters may involve similar exercise in tariff determination but the only difference is to be in payment of fee i.e. in place of INR 20 lakh, the Appellant would need to pay INR 2.40 Crores. such fee or charge paid/payable fees by the Appellant would be a pass through in the tariff and would ultimately be shared by the end consumers.

- Since, the determination of tariff for the period under reference (April 01, 2009 – March 31, 2015) has already been completed and tariff order passed by the Commission on December 30, 2016, the additional deposited fee of INR 2.20 crores has remained with the AERC only. The same may either be recovered through the revised tariffs during true up proceedings or otherwise waived of by AERC. APTEL has also noticed that the generating plant of the Appellant stand closed and APDCL owes considerable outstanding dues to be paid to the Appellant. Therefore, AERC, instead of truing up the decided tariffs up to FY 2014-15, by considering the additional paid up fees of INR 2.20 crores (which ultimately shall be borne by the end consumers), may exercise its general powers under Regulation 43 of the 2015 Fee Regulations and waive the requirement of the additional fee of INR 2.20 crores and refund the same to the Appellant.
- APTEL has held that this methodology will be prudent in light of the fact that the Appellant's Plants have closed and APDCL owes huge outstanding dues for the power supplied to it.

Our viewpoint

The decision of APTEL in this matter casts light on the issues of procedural aspects while filing petitions before the various Electricity Regulatory Commissions. By looking into the provisions of the relevant regulations, APTEL has laid the groundwork for resolution of similar disputes in the future.

Cogeneration Association of India v. MSEDCL & Ors.

MERC Order dated November 09, 2020 in Case No. 110 of 2020

Background facts

- The Cogeneration Association of India (**Cogen**) has filed the petition before MERC seeking exemption to the bagasse based cogeneration plants from the MERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2019 (**DSM Regulations**), in light of the difficulties being faced in implementation of the DSM Regulations by these plants.
- The difficulties being faced by the bagasse-based cogeneration plants are primarily the uncertain and unpredictable stoppages which occur due to the unavailability of cane supply, considering the fact that sugar cane harvesting takes 90% manual work and over 10 lakh labourers are employed in harvesting and transporting cane.
- Further, the said harvest cannot be stored. It has to be harvested and brought to the cane yard for crushing within six hours to ensure non-inversion of sucrose.
- This leads to variance in the cane crushing at the sugar factories, sometimes even within an hour. As a result, the bagasse generation varies substantially. The variable bagasse quantities are directly fed to the cogeneration boilers immediately after cane crushing and no storage of large quantities of bagasse is available during the crushing operations.
- Therefore, bagasse-based cogeneration power plants at sugar factories, hence, virtually have no fuel linkage, unlike, all other fossil fuel-based power plants due to fluctuations in the sugar cane availability and crushing, bagasse generation and limited operation days (maximum 130-140 days, in a year). Hence, the yardstick applied unilaterally for these plants is inappropriate.
- Thus, it is impossible to schedule any quantum of export power from these plants on 15-minute basis, leading to heavy penalties being imposed as per the DSM Regulations.

Issue at hand

- Whether bagasse-based cogeneration plants deserve to be exempted from the ambit of the DSM Regulations?

Decision of the Commission

- MERC has held that applicability of the DSM Regulations for the bagasse-based cogeneration plants and captive generators with consumption of electricity at the same location and other similarly placed cogeneration plants, shall be based on exportable capacity of the generating unit instead of installed capacity.
- Hence, with respect to the time blocks where the schedule for exportable generation by these plants is 25 MW or above, the provisions of DSM Regulations shall be applicable to these plants for those time blocks. For the rest of the time blocks, the provisions of the DSM Regulations relating to applicability of DSM charges shall not apply.
- MERC has, however, clarified that the applicability of appropriate provisions of Scheduling and Despatch Code under the MERC (State Grid Code) Regulations, 2020 related to scheduling, curtailment, etc. shall be continued in the interest of grid safety and grid discipline.

Our viewpoint

The partial exemption allowed by MERC to bagasse based cogeneration plants and other captive generators with consumption of electricity at the same location, from the DSM Regulations will provide a certain amount of relief to the said generators of power. However, for export of energy at 25 MW or above, the provisions of the DSM Regulations would apply for the selected time blocks. This would mean that in such cases the generators will have to bear the penalty if there is a deviation from schedule.

In re. Uttar Pradesh State Load Despatch Centre

UPERC Judgment dated October 16, .2020 in Petition No. 1580 of 2020

Background facts

- Uttar Pradesh State Load Despatch Centre (**UPSLDC**) had filed a petition seeking relaxation under the UPERC Forecasting Regulations, 2018 (**Forecasting Regulations**). As per the Forecasting Regulations, UPSLDC was required to provide a plan for data telemetry, communication requirements, the format of forecast submission, and other details as part of a detailed procedure prescribed by UPERC. UPSLDC had submitted the plan to UPERC, and it was approved on March 18, 2020.
- However, to adopt these procedures, UPSLDC submitted that it would first have to make arrangements to undertake aggregate forecasting of solar and wind-based power to be injected into the state's grid. In addition, it would also have to modify Energy Accounting and Settlement System (**EASS**) or scheduling portal with a service provider's help. Alternatively, it would have to acquire software to carry this out.
- UPSLDC submitted that it had assigned this work to a service provider, but because of the global pandemic and the subsequent nationwide lockdown, the service provider could not carry out the work. In light of this, it asked UPERC for a six-month relaxation to implement the procedure. However, it noted that the work has been completed and that it is ready to implement it.

Issue at hand

- Whether relaxation of the Forecasting Regulations be allowed in light of Covid-19 pandemic?

Decision of the Commission

- Considering the facts and submissions of UPSLDC, UPERC observed that UPSLDC's submission that the procedures were delayed due to the Covid-19 pandemic is legitimated. Therefore, in its final order, it overlooked the delay and allowed it to implement the regulatory procedures from October 14, 2020.

Our viewpoint

In light of the difficulties being faced by developers/SLDCs with forecasting and scheduling renewable, relaxation provided by UPERC is justified. Earlier this year, UPERC had accepted Uttar Pradesh Power Corporation Limited's request to modify the Central Electricity Regulatory Commission's deviation settlement mechanism regulations to take care of the state-specific needs.

Odisha Power Generation Corp Ltd v. CERC & Ors.

APTEL Judgment dated October 21, 2020 in Appeal No. 16 of 2020

Background facts

- The Appellant – Odisha Power Generation Corp Ltd (**OPGL**) – filed the present Appeal against the Order dated December 26, 2019 passed by Central Electricity Regulatory Commission (**CERC**) in Petition No. 128/MP/2019.
- OPGCL owns and operates a thermal power plant located at Jharsuguda District in Odisha (**Plant**). Units 1 and 2 of the Plant, with a capacity of 210 MW each, have been in operation since the year 1994. In 2019, OPGCL commissioned Units 3 and 4 of the Plant, each with a capacity of 660 MW each (Expansion Project)
- The entire quantum of power generated from Units 1 and 2 of the Plant was to be sold to GRID Corporation of Odisha Ltd (**GRIDCO**). Fort the Expansion Project, it was originally envisaged that 50% of the power would be tied up for sale to GRIDCO and remaining 50% power would be sold inter-state i.e. outside Odisha. In this backdrop OPGCL applied to Power Grid Corporation of India Ltd (**PGCIL**) for grant of Long Term Access (**LTA**) to ISTS for inter-state sale of power, for 600 MW capacity.
- OPGCL thereafter executed the LTA Agreement and a Transmission Agreement with PGCIL on September 11, 2013. In terms thereof OPGCL's LTA was to come into effect from July 2017 or the date on which all the transmission elements specified in the LTA Agreement would commission, whichever is later.
- Pertinently, in terms of the LTA Agreement, there were certain pre-requisite elements which were to be commissioned for operationalization of the LTA quantum of 600 MW. Among these were elements which were under the purview of Odisha Generation Phase II Transmission Limited (**OGPTL**).
- OPGCL has claimed that while its LTA was never operationalized and PGCIL has still raised bills for the purported transmission charges after the commissioning of the pre-requisite assets developed by OGPTL. OPGCL has stated in its Appeal that the purported transmission system made available to OPGCL for effectuating OPGCL's connectivity was inadequate to ensure end-to-end power flow to Inter-State beneficiaries. As per settled law, LTA cannot be operationalized without commissioning of pre-requisite elements. In the absence of operationalisation of LTA, no liability can be fastened on an LTA grantee due to commissioning of one of the four different transmission lines identified under the LTA grant letter and LTA Agreement by the Central Transmission Utility (**CTU**) i.e. PGCIL. Since, the pre-requisite elements were not commissioned till the relinquishment of OPGCL's LTA, the transmission charges for the same cannot be borne by OPGCL.
- Further, OPGCL has also disputed the COD of the transmission lines being developed by OGPTL. OPGCL has in the Appeal claimed that OGPTL did not construct the required optical ground wire (**OPGW**).

Issues at hand

- Whether there was any mismatch in the COD of the transmission line as alleged by OPGCL?
- Whether OPGCL Is liable to pay the transmission charges for 400 kV OPGCL-Jharsuguda D/C line from the date of its deemed COD up to synchronization of its generating units?
- How the transmission charges of the transmission line constructed and implemented by OGPTL will be recovered?

Decision of the Tribunal

- APTEL vide its Judgment dated October 21, 2020 rejected the claims of OPGCL. The issue-wise findings of APTEL has enumerated hereinbelow:
  - **Issue 1:** APTEL observed that the claim of OPGCL that OGPTL did not construct the required OPGW is erroneous for the reason that qua OPGW, the responsibility of the OGPTL was to construct OPGW from the 'gantry' of Jharsuguda (Sundergarh) sub-station, to the 'gantry' of 400 kV OPGC sub-station, and the said OPGW was to be terminated at a joint box at both the ends by the OPGW. The said obligation was fulfilled by OGPTL. It is because of the same that the OGPTL, on August 23, 2017, obtained the Central Electricity Authority's Energization Certificate of the OPGC-Jharsuguda line, which certificate has not been challenged. APTEL has therefore accepted the COD of OGPTL's transmission assets as August 30, 2017 only and has gone on to hold that there was no mismatch in the declared COD.
  - **Issue 2:** APTEL has held that in accordance with the default liability principles laid down by the CERC in its several orders, the defaulting entities are liable to pay the transmission charges for the defaulting period. The responsibility for collection of transmission charges to be paid by defaulting entities into the PoC pool account lies with the CTU. In the present case, OGPTL commissioned its line on August 30, 2017 and the line could be charged only on December 20, 2017 due to delay in

commissioning of the corresponding assets by PGCIL and OPGCL. Since, PGCIL commissioned its bays on November 22, 2017, therefore the transmission charges for the defaulting period i.e. from August 30, 2017 till December 20, 2017 shall be shared by the defaulting entities in the ratio of 50:50 i.e. both OPGCL and PGCIL. Further, OPGCL synchronized its power plant on December 26, 2018 and was drawing start up power using the subject transmission line, therefore, from November 23, 2017 till December 26, 2018, the Appellant is liable to pay transmission charges.

- **Issue 3:** APTEL has held that from August 30, 2017 (commissioning of OGPTL's line) to November 22, 2017 (commissioning of corresponding bays by PGCIL) the transmission charges shall be borne by PGCIL and OPGCL in the ratio of 50:50. The transmission charges for the period from November 23, 2017 to December 26, 2018 are payable by OPGCL in accordance with the default liability principles as laid down by CERC. The transmission charges from December 26, 2018 (after operationalization /synchronization of LTA) will be recovered under the PoC mechanism.

Our viewpoint

APTEL's decision in the present Appeal affirms the position that the liability of transmission charges falls on the entity on who's account the associated transmission system is not put to use on the scheduled date of commercial operation. This principle finds a consistent mention in the recent decisions of APTEL.

Gujarat Urja Vikas Nigam Ltd v. Gujarat Electricity Regulatory Commission & Anr.

APTEL Judgment dated October 20, .2020 in Appeal No. 263 of 2016

Background facts

- This Appeal was filed by the Appellant – Gujarat Urja Vilkas Nigam Ltd (**GUVNL**) against the Order dated August 04, 2015 passed by the Gujarat Electricity Regulatory Commission (**Commission**) in Petition No. 1424 of 2014 (**Impugned Order**) wherein the Commission directed GUVNL to refund the amount of penalty levied by GUVNL on Oreva Energy Pvt. Ltd (**Respondent No. 2**) on account of shortfall in guaranteed supply, in terms of the Power Purchase Agreement dated August 07, 2008 for sale and purchase of electricity from the 3 MW Hydel Electricity Plant of Respondent No. 2 at Karjan Canal.
- In terms of PPA, Respondent No.2 was under obligation to generate and supply minimum of 65% of contracted capacity of 3 MWs in a year. This undertaking of minimum of 65% in a year came to be incorporated on the basis of detailed project report of Respondent No.2 by taking into consideration historical water discharge between June to August in any year, which would have lower discharge of water.
- In the year 2012-13, Respondent No. 2 could not achieve the targeted generation of 65% resulting a shortfall in the supply to GUVNL. Thus, GUVNL deducted the consequential penalty amount of INR 41 lakh from the bills of Respondent No. 2.
- Challenging the said action of GUVNL, Respondent No. 2 filed Petition No. 1424 of 2014 before the Commission seeking refund of the penalty amount deducted by GUVNL alleging that the said shortfall in generation and supply was on account of force majeure conditions, namely non-release of sufficient water by the Irrigation Department.
- GUVNL sought review of the order dated August 04, 2015 by filing Review Petition No. 1531 of 2015 before the Commission. The said review petition was partly allowed by the Commission vide Order dated July 29, 2016. Being aggrieved by the said orders, GUVNL approached this Hon'ble Tribunal.

Issue at hand

- Whether GERC was justified in directing GUVNL to refund the amount of penalty levied by GUVNL on Oreva Energy Pvt Ltd?

Decision of the Tribunal

- Considering the facts and Impugned Order, the Tribunal rejected the contention of GUVNL that it would be possible to generate power in terms of PPA in a year by the Respondent No. 2, even if there is water release at required quantum, since it requires water head at 30 meters on turbine from level of the water.
- Further, it has been observed that it is possible that on certain days only one of the required conditions for generation of power is available, therefore it would automatically result in less generation of power. Though in the detailed project report an ideal situation is brought on record by the project proponent, it

would not lead to conclusion that the anticipated situation/conditions would certainly occur as detailed in the project report.

- The penalty clause was incorporated to assist the losing party to get compensation if there is failure on the part of Respondent No.2 generator to generate power in spite of best possible availability of water head and also quantum of water.
- In the light of above discussion and reasoning, Tribunal held that none of the grounds raised by GUVNL and the decisions relied upon by them would warrant interference of Tribunal with Impugned Order.

Our viewpoint

Judgment passed by the Tribunal is justified as it has considered that in spite of best expert on weather forecast, it can go wrong, similar would be the day-to-day circumstances or weather conditions, which are certainly not within the hands of human beings. Therefore, certain relaxation can be given to in happening of an event beyond the control of the parties.

Indian Railways v. Tata Power Company Ltd & Ors.

APTEL Judgment dated October 22, 2020 in Appeal No. 301 of 2018

Background facts

- The Appeal was filed by the Appellant – Indian Railways (**Indian Railways**) – against the Order dated March 23, 2018 passed by the Maharashtra Electricity Regulatory Commission (**MERC**) in Case No. 53 of 2017 (**Impugned Order**) whereby MERC decided on the aspects of the Standby Charges to be paid by the various Distribution Licensees/Entities to the Maharashtra State Electricity Distribution Company Ltd (**MSEDCL**).
- The limited aspects of challenge by the Indian Railways was in regard to the imposition of Standby Charges on Indian Railways with consequential direction for furnishing of the segregated data related to the Indian Railways, drawal of power for the Mumbai System and for the rest of the Maharashtra for the Indian Railways from the time of the operation of the Indian Railways as a Distribution Licensee i.e. from December 2015 onwards and based on the data provided, the quantification of the Standby Charges payable to MSEDCL including for the past period and in future.

Issues at hand

- Whether in the facts and circumstances of the case, where Indian Railways are considered as an independent single entity as in the case of any other State in terms of the Order dated November 05, 2015 passed by the Central Commission with control area being with WRLDC, Indian Railways can at all be subjected to any Standby Support Charges on the assumption that MSEDCL is giving support to the Mumbai Area operation at the cost of other areas in the State of Maharashtra ?
- Whether in the facts and circumstances relating to Indian Railways, the impugned Order dated March 23, 2018 can at all be implemented in regard to Indian Railways making it liable to pay the Standby Charges to MSEDCL when the Indian Railways are already subject to Deviation Settlement Mechanism and payment of UI Charges?
- Whether the State Commission is right in providing for the liability to Indian Railways for payment of Standby Charges to MSEDCL for its Mumbai Area Operation with retrospective effect from December 2015 onwards when the Indian Railways had already organized its affairs without any imposition of such Standby Charges in the past?

Decision of the Tribunal

- While taking note of the various provisions of the Railways Act, 1989, the Tribunal observed that it is crystal clear that the Indian Railways has been empowered to construct, operate and maintain the required transmission and distribution lines for its operation across the country. Further, the Railways Act, 1989 has been saved under the Electricity Act, 2003 and the inconsistency clause stipulated in the Electricity Act further strengthens the powers of Indian Railways.
- Subsequently, it has been noted that the Indian Railways has been granted the status of a deemed Distribution Licensee by the CERC order dated November 05, 2015 which includes its operations in the Mumbai System. Accordingly, as per the principles laid down by MERC, Indian Railways to the extent of its operations in Mumbai system, like all other Distribution Licensees in the Mumbai System has been directed by MERC to contribute its share of the Stand-by Charges in proportion to its demand.

- It has been further noted that the Indian Railways being a pool participant with other distribution licensees in Mumbai region is already availing the benefits of 24x7 un-interrupted power supply being provided by MSEDCL. Therefore, it rejected the argument of Indian Railways that it is already paying over-drawal charges under CERC (Deviation and Settlement Mechanism and related mattes) Regulations, 2014 and it is not availing any privilege service in Mumbai region or outside for its traction sub-station as being rendered to consumers of Mumbai region being serviced by distribution licensees.
- In view of the above, Tribunal upheld the Impugned Order dated March 23, 2018 in Case No. 53 of 2017.

Our viewpoint

The Tribunal has relied on the CERC order dated November 05, 2015 whereby Indian Railways has been recognized as a deemed distribution licensee and by virtue of being connected to Mumbai system is availing the benefit of standby support provided by MSEDCL. In light of this, the order passed by MERC which has been upheld by the Tribunal is equitable and in interest of the other Distribution licensee.

Rajasthan Rajya Vidyut Prasaran Nigam Ltd & Ors. v. CERC & Anr.

APTEL Judgment dated November 09, 2020 in Appeal No. 01 of 2016 and Batch

Background facts

- The Appeals were filed by Rajasthan Rajya Vidyut Prasaran Nigam Ltd & Ors (**Appellants**) against the Order dated October 09, 2015 passed by the CERC in Petition No. 6/MP/2014 (**Impugned Order**).
- Consequent to the major grid disturbance in the region on July 30, 2012 and July 31, 2012, a Petition No.221/MP/2012 was filed by Northern Regional Load Despatch Centre (**Respondent No. 2**) before the Central Commission. On December 21, 2013, the said Petition was considered by CERC and the same was finally disposed of vide order dated December 23, 2013.
- On March 12, 2014, Coastal Gujarat Power Ltd (**CGPL**) station of 4000 MW tripped causing disturbance to Grid. On April 25, 2014, CERC passed an order in Petition No.06/SM/2014 by which it issued Show Cause Notice to heads of SLDCs and M.D./C.M.D. of the STUs of Punjab, Haryana, Rajasthan, Delhi, Uttar Pradesh, Uttarakhand, Himachal Pradesh, Jammu & Kashmir and the Head of Electricity Department of UT Chandigarh that why an action under Section 142 of the Electricity Act., 2003 should not be initiated against them for violation of Regulation 5.2 (n) and 5.4.2(e) of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulation, 2010 (**Grid Code**).
- On May 17, 2014, Appellants filed its reply in the form of Affidavit in the Petition No.06/SM/2014. The Appellants through the affidavit brought on record the factual position in respect of df/dt relays, the work achieved in respect of the same and about future plan.
- The Central Commission vide the Impugned Order dated October 09, 2015 imposed a penalty of INR 1 lakh on each Heads of STUs and SLDCs of UP, Rajasthan, Delhi, Haryana, Punjab, Himachal Pradesh, Uttarakhand and Head of Electricity Department of UT Chandigarh under Section 142 of the Electricity Act, 2003 for non-compliance of provisions of Regulations 5.2(n) and 5.4.2(e) of the Grid Code.
- The Appellants categorically and emphatically submit that they are taking all their steps under their command to improve day by day the position for achieving the mandate in all respect envisaged in Regulation 5.2(n) and 5.4.2(e) of Grid Code, at this juncture.

Issue at hand

- Whether Appellants could be penalized under Section 142 of the Electricity Act, 2003 without there being any willful default to comply with the directions of CERC with provisions of the Grid Code?

Decision of the Tribunal

- The Tribunal has noted that CERC issued directions vide its order dated December 23, 2013 to all constituents to comply with its directions regarding ensuring adequate provisions of Under Frequency Relays (**UFRs**) & df/dt relays, monitoring their healthiness, etc. However, the same could not be achieved up to desired level and based on the instance of March 12, 2014 after tripping of CGPL station, the same was established beyond doubt. Therefore, CERC concluded that the constituents are not complying with the provisions of the Grid Code in true spirit, therefore, imposed a penalty of INR 1 lakh on each of the constituents of Northern Region.
- Further, basis the rulings of Apex Court, it is crystal clear that non-compliance or contravention adverted to in Section 142 does not constitute an offence or, if at all, non-compliance is only a civil offence, thus, proof of *mens rea* is not necessary for award of punishment under Section 142 of Electricity Act, 2003.

- It has also been observed that any failure or disturbance in the grid affects the national economy to a great extent and, therefore, it is the scrupulous responsibility of all the constituents connected with the grid to ensure the adequate provision and upkeep of the safety and protections measures evolved by the concerned authorities at behest of CERC.
- In view of the above, it has been held that the penalty imposed by CERC is in accordance with law.

Our viewpoint

It is a well-reasoned judgement whereby the Tribunal has stated that the operation of the grid in an efficient, secure and stable manner is of utmost importance to not only the power sector but also to other sectors who are dependent on the power supply.

JSW Energy Ltd v. MERC & Ors

Appeal 33 of 2019 and I.A 172 of 2019

Background facts

- Appellate Tribunal of Electricity (**APTEL**) vide its order dated October 20, 2020 has held that the Appellant claim is sustainable only to the extent of the claim for change in law event for compensation for coal utilised for meeting the auxiliary consumption requirement met from other Units except to the extent of auxiliary power being utilised from Unit No.1 (from which the power is being supplied).
- This Appeal was filed by the Appellant against the order dated January 15, 2019 (**Impugned Order**) passed by MERC in Case No. 289 of 2018.
- In present matter, Appellant is aggrieved by Impugned Order passed by State Commission, in a complaint filed against the 2nd Respondent - MSEDCL under section 142 of Electricity Act, 2003 (**Act**) for non-compliance of the directions contained in the final order dated March 07, 2018 passed by the Commission in Petition No. 123 of Judgment in Appeal No. 33 of 2019, has suo-moto modified and reversed the findings and the directions in the final order dated March 07, 2018.

Issues at hand

- Whether the State Commission has the jurisdiction to readjudicate a case on merits in a proceeding under Section 142 of the Act?
- Whether the findings and the directions in the order dated March 07, 2018 on the issue of entitlement of the Appellant to receive change in law compensation on auxiliary consumption operates as res judicata, thus barring the jurisdiction of the State Commission to re-hear and re-adjudicate the merits of the dispute?
- Whether, without prejudice, the Appellant can be restored to the same economic position, as if the change in law has not occurred, without it being compensated for the change in law impact on coal being utilized for purposes of auxiliary consumption?
- Whether, without prejudice, the Appellant has the flexibility to meet its auxiliary consumption requirements either from unit No. 1 or from any other unit of the generating stations? E. Whether Article 19 of the PPA or the finding at paragraph 18.4 of the order dated March 07, 2018 is applicable to quantum of auxiliary consumption being met from a unit other than Unit No.1?
- Whether, without prejudice, the Appellant is entitled to change in law compensation at least on the quantum of auxiliary consumption being met from Unit No. 1 itself?"

Decision of the Tribunal

- In Tribunal's opinion, the Appellant knew very well that it has to meet requirement of auxiliary power consumption for supply of power from Unit No. 1 by making its own arrangement. Therefore, there is no such indication i.e., payment obligation under PPA.
- Because of the above view, the Appellant cannot demand payment for auxiliary consumption since the Appellant itself waived such claim at the time of offering bid, which became the foundation or reason for the Appellant to become successful bidder. As noted, in Petition No. 122 of 2015, the claim of the present Appellant for reduction of contracted capacity was rejected and the Appellant was also penalised for Judgment in Appeal No. 33 of 2019 , for meeting the obligation of supply of contracted capacity. Therefore, Article 4.4.4 is like an exception or enabling provision. Therefore, Respondent-Commission was justified in rejecting claim of Appellant for revision of terms of PPA, since it would amount to reopening of PPA, which cannot be entertained in view of competitive bidding process contract under Section 63 of the Act. This order dated March 05, 2018 was never challenged by parties.
- Therefore, Tribunal conclude that in so far as auxiliary power consumption from same Unit is concerned, the claim of the Appellant cannot be rejected in the light of Article 4.4.4 of the PPA. The Appellant/seller

shall be eligible to claim change in law compensation on auxiliary power supplied from other units, only when the capacity of entire power station is tied up with MSEDCL through long terms PPAs.

- In the light of above discussion, reasoning and so also conjoint reading of Articles 4.4.4 and 19 of the PPA, it was held that none of the contentions raised by the Appellant are sustainable to claim change in law event compensation for the auxiliary power consumption met from other Units except to the extent of auxiliary power being utilized from Unit No. 1.

Our viewpoint

In light of the difficulties being faced by developers/SLDCs with forecasting and scheduling renewable, relaxation provided by UPERC is justified. Earlier this year, UPERC had accepted Uttar Pradesh Power Corporation Limited's request to modify the Central Electricity Regulatory Commission's deviation settlement mechanism regulations to take care of the state-specific needs.

Eswari Green Energy LLP v. Karnataka Electricity Regulatory Commission & Ors. and Batch Matters

Appeal No. 180 of 2018 (Batch)

Background facts

- Certain wind based generators (**WBG**) entered into PPAs with Hubli Electricity Supply Co Ltd (**HESCOM**) for sale of electricity and same was submitted by HESCOM on March 31, 2017 before the Karnataka Electricity Regulatory Commission (**KERC**) for its approval. The tariff stipulated in the PPA was at INR 4.50 per kWh since such tariff had been determined by KERC by its earlier Tariff order dated February 24, 2015 (for the control period of five years commencing from October 10, 2013 to October 09, 2018, which was the prescribed tariff applicable for projects to be commissioned during said control period.
- During the pendency of PPA approval(s), KERC vide its Order dated September 04, 2017 determined the generic tariff of INR 3.74 per kWh that was to be applicable to all new wind projects, PPAs that were to entered into and approved by the Commission after the date of issue of this Order, to remain in force till March 31, 2018 qua generation and sale of electricity by the wind power projects in the State of Karnataka to the Electricity Distribution Licensees including HESCOM.
- The generic tariff determined vide Order dated September 04, 2017 was applied not only prospectively for the projects which are commissioned after September 04, 2017 but also to the wind power projects of the Appellants whose projects were commissioned prior to September 04, 2017 and whose PPA approval (@ Tariff of INR 4.50 per kWh) was pending before KERC. WBG being aggrieved challenged the said Order dated September 04, 2017 as it denied them the mutually agreed tariff of INR 4.50 per kWh and hence being subject to unjustly reduced tariff of INR 3.74 per kWh.

Issues at hand

- Whether PPA(s) entered into after generic order determining tariff for a control period required approval of the KERC?
- Whether KERC was justified in reducing the tariff from INR 4.50 per kWh to INR 3.74 per kWh for the projects commissioned prior to September 04, 2017?

Decision of the Tribunal

- The Tribunal stated that as per the said definition, the commercial operation date is not contingent on injection of electricity into the grid but it signifies the date on which availability of the plant for commercial operation is attained. In the case of WPPs of the Appellants, the availability had been achieved on March 31, 2017, as affirmed by the Commissioning Certificate authenticated by the Respondent HESCOM itself. The reference made by HESCOM and the State Commission to the actual energy injection and the log book data to argue that the Appellants' plants were not commissioned is contrary to the definition of Commercial Operation Date in the PPA. Thus, they reject the theory as above propounded by the Respondent HESCOM vis-à-vis the Commissioning Certificates while noting that injection of electricity into the grid from March 31, 2017 onwards was not even necessary for COD to be achieved since that depended on availability regarding which there is no doubt.
- Further, the Tribunal stated that the documents produced show that all concerned have throughout been of unanimous view that the PPAs which had been initiated required the approval of the State Commission. Having sought such approval though HESCOM, it is not permissible for the Appellants to now contend that no approval was required. There is no doubt that approval of the State Commission in respect of individual PPA is a condition precedent without which the PPA cannot come into existence

though, the Respondent HESCOM concedes, with post-facto approval the PPA becomes operational retrospectively from the date of the PPA. Although, the Respondents are also right in submission that there is no vested right to get approval of the PPA from the Commission which is duty-bound to consider it in light of statutory provisions and within regulatory framework. But then, more than the above, the core issue raised in these appeals concerns fairness and propriety of the approach of KERC to the request for approval of the PPAs entered into by HESCOM with the appellants.

- The Tribunal did not agree with the arguments of the Respondent that the order of 2015 was a generic order. It would have universal application. Of course, the Electricity Act empowers the Regulatory Commission to modify the tariff and the procurers definitely may renegotiate the terms of PPA. But the fact remains that the Respondent did not engage the Appellants in any such renegotiation. Instead, it had submitted the PPAs – rather resubmitted the PPAs – for approval of the same showing willingness to pay the tariff of 2015. The subsequent order of the Commission reducing the tariff cannot be treated as one modifying the existing PPA, but was intended to be enforced against later entrants. It was clear from its phraseology that the previous contracts covered by dispensation of 2015 were protected. In view of the run up to the COD, the Tribunal found merit in the submission that the Appellants had altered their respective position by acting consistently with the assurances of tariff order then in vogue and the above noted developments. In such factual matrix, the Tribunal agreed with the plea that any change in the tariff order dated February 24, 2015 cannot affect developers, subsequent modification in tariff regime possibly having only prospective effect but definitely not retrospective, particularly when developers such as the Appellants had acted based on the said order and established the projects before the order changing the tariff i.e. September 04, 2017 had come to be passed.
- The Tribunal further went onto upholding the contention that the State Commission has acted contrary to its own consultation paper and has failed to afford an opportunity to the parties thereby affected before deciding the issue of retrospective effect. Since the impugned decision about retrospective effect went beyond what was set out in the proposal made public through the discussion paper, the stakeholders having not been put on notice, the impugned order to that extent is unjust and violative of principles of natural justice and consequently liable to be set aside. The Tribunal also agreed with the submission of the Appellants that, on the foregoing facts, and in the circumstances, it is patently arbitrary and capricious that the Commission has proceeded to apply the tariff determined by the impugned order to such projects as had entered into PPAs with ESCOMs prior to the date of the order particularly if the projects had been commissioned within the time stipulated by previous dispensation, only the PPAs being pending before the Commission for approval.
- The Tribunal held that the issue of injection of power prior to March 31, 2017 is frivolous and has been raised as an afterthought. It is clear that the Commission had no reasons to doubt that the commissioning had taken place prior to the passing of the tariff order dated September 04, 2017 and, therefore, the Appellants could not be deprived of the vested rights arising under concluded contracts.
- The Tribunal taking into account the facts that, It is not denied that the State Commission has, in fact, approved the PPA for number of wind power projects post April 01, 2017 with the tariff of INR 4.50 per unit. These wind projects are similarly placed projects and the approval for such PPAs has been given to such projects after the impugned order dated September 04, 2017. As in the case of Aikyam, there has been violation of equality clause in Article 14 of the Constitution of India even against the Appellants (whose WPPs achieved availability and consequently met the COD on March 31, 2017) in as much as certain other projects not commissioned till March 2018 have received approval of KERC with benefit of tariff determined by order dated February 24, 2015. The impugned order is, therefore, was held to be discriminatory.
- Therefore, in taking into account the views held above, the Tribunal in the present Judgement held that:
  - The order dated September 04, 2017 of the Respondent KERC in Case no. 5/01/17 in so far as it made the generic tariff of INR 3.74/kwh thereby determined applicable to the Wind Power Projects of the Appellants commissioned prior to September 04, 2017 is set aside
  - It is declared that the tariff of INR 4.50/kwh determined by the Respondent Karnataka Electricity Regulatory Commission by its generic tariff order dated February 24, 2015 is applicable to the Wind Power Projects of the Appellants for a period of twenty-five years with effect from the date of COD i.e. March 31, 2017 and that the State Commission is bound to approve the Power Purchase Agreements of the Appellants with Respondent HESCOM accordingly, the decision of rejection of the same on ground that there was no injection of power into the grid by March 31, 2017 being bad in law and consequently vacated.
  - KERC shall pass necessary/consequential orders in compliance with above directions within two weeks.

Our viewpoint

By way of the present Order APTEL has considered that decision of the State Commission holding different view for approval of PPA for similarly placed projects and revision of tariff as discriminatory and has made it clear that Appropriate Commission(s) are bound by its Order and cannot subsequently deviate from it.

RECENT DEVELOPMENTS

In this Issue

Bid deadline for solar power tender for Railways extended

- The tender issued by the Railway Energy Management Co Ltd (**REMCL**), a joint venture company of Indian Railways (49%) and RITES Ltd (51%) for setting up 1 GW of solar power plants on railways' land, has unfortunately failed to make the desired impact in the domestic energy market, subsequently leading to multiple extension of the bid deadline. Initially, the last date for putting in initial bids was June 30, but it was extended a few times, latest being till November 25, 2020.
- The fact that no developer has so far shown interest in tender and made a bid has been attributed to the surplus solar power capacity by numerous industry experts, held by Solar Energy Corporation of India amounting to approximately 14 GW in operation and under execution at various stages. It has been recommended that the same should be used by railways instead of introducing one more tender process through yet another central government entity.

GoI provides massive push for solar power in India

- In an attempt to ramp up domestic manufacturing of solar PV modules and batteries, the Government of India (**GoI**) has announced multiple production-linked-incentives for both domestic as well as international stakeholders looking to manufacture equipment in India. The proposed financial package includes an investment of INR 4,500 crore for manufacturers of Solar PV Modules and INR 18,100 crore in relation to production of ACC batteries.
- The view of the GoI is clear as it aims to capture the global value chains for the renewable energy modules and batteries leading to development of not only the renewable energy sector but also ancillary sectors such as electric vehicles and consumer electronics.

Ministry of Shipping issues draft Coastal Shipping Bill, 2020

- Ministry of Shipping has issued draft of Coastal Shipping Bill, 2020 (**Bill**) for suggestions from stakeholders and general public for augmenting people's participation and transparency in the governance. The Bill is in lieu of Part XIV of the Merchant Shipping Act, 1958.
- With the growth in the shipping sector in the country, there is a need for a separate legislation on coastal shipping, which is an integral part of transport chain and will help in meeting the demands of the Indian shipping industry.
- Key highlights of the Bill are as follows:
  - It proposes to not continue with the requirement of trading licence for Indian flag vessels for coastal trade.
  - It suggests integration of coastal maritime transport with inland waterways.
  - It further expands the definition of coastal shipping and coastal waters.
  - There is a provision for a National Coastal and Inland Shipping Strategic Plan.

- In view of the above, it is seen that the Bill seeks to create a competitive environment and reduce transportation costs, while encouraging Indian vessels to increase their share in coastal shipping.

NHAI – Project progress

- Welspun Enterprises Ltd has received provisional commercial operation date (**PCOD**) for four laning of Gagalheri-Saharanpur-Yamunanagar section of NH 73. The stretch has been constructed under Hybrid Annuity Model (**HAM**) and its completion cost is around INR 1354 crore. Further, Welspun Enterprises Ltd shall now be eligible to receive annuity payments from NHAI every six months in accordance with the concession agreement.
- Dilip Buildcon has executed a concession agreement with NHAI for four laning of Dodaballapur Pass to Hoskote section of NH 648. The project is being undertaken on HAM basis under Bharatmala Pariyojna.
- Ashoka Kandi Ramsanpalle Road, a wholly owned subsidiary of Ashoka Buildcon has achieved financial closure for four laning of NH 161. The project is being undertaken on HAM basis under Bharatmala Pariyojna.

MNRE proposes Draft Policy Framework for developing and promoting Decentralized Renewable Energy (DRE) Livelihood Applications in Rural Areas

- The Ministry of New and Renewable Energy (**MNRE**) has vide its Office Memorandum dated October 19, 2020. has issued Draft Policy Framework for developing and promoting Decentralized Renewable Energy (**DRE**) livelihood applications in rural areas of the country with a view to provide a conducive environment for development and large-scale adoption of these applications. The Draft Policy Framework prepared by MNRE is circulated for comments of all the stakeholders concerned, which were to be submitted by November 02, 2020.
- The DRE Draft Policy entails the following objectives:
  - Enable a market-oriented framework to attract private sector for development and deployment of DRE livelihood applications
  - Easy access to end user finance for DRE livelihood applications
  - Introduction of standards, stringent monitoring and evaluation frameworks
  - Skill development for strengthening the service infrastructure at the local level
  - Encourage innovation and research and development to develop efficient and cost-effective DRE livelihood applications
- Further to promote DRE livelihood applications, the following steps are to be taken up under this framework:
  - **Assessment of Demand:** MNRE will develop a list of DRE livelihood applications in consultation with stakeholders, which will be updated regularly.
  - **Research & Development and Standardization:** Collective efforts by institutions of MNRE and other ministries, state level institutions, private sector, technology incubation centres, bilateral and multilateral agencies, NGOs and other grassroot organisations will be required to identify, develop and promote appropriate DRE livelihood applications through multi-disciplinary research and innovation.
  - **Pilot and Up-Scaling of DRE livelihood applications:** In line with the guidelines issued by MNRE for innovative solar pumps, other programmes may also announce opportunities to run pilot projects under the existing schemes. A list of such programmes and guidelines will be available on the MNRE website.
  - **Access to finance:** MNRE will pursue with financial institutions for credit facilitation.
  - **Skill development and Capacity Building:** MNRE will facilitate in developing and implementing skills and training programs for DRE livelihood applications with Skill Council for Green Jobs, IITs promoting rural development and technology, National Institute for Rural Development and other organizations of stakeholder ministries / departments. In addition to this, existing community level institutional platforms, such as self-help group federations, farmer producer organizations, Krishi Vigyan Kendras, etc. will be mobilized to build capacity of potential users / buyers to boost adoption of DRE technologies.
  - **Public Information and Awareness:** Central/State Government/Ministries/Departments under their existing programmes may take up public awareness campaign to push adoption of DRE livelihood applications.
  - **Programmes of Various Ministries/Departments:** Steps will be undertaken to identify and exploit opportunities under the schemes of various Ministries and Departments of Central / State Government, in order to ensure augmented benefits to the rural entrepreneurs and beneficiaries.

- With respect to Implementation Agencies and Implementation Cell Schemes of different Ministries/Departments are being implemented by various central/state agencies. The State Nodal Agencies (**SNAs**) for Renewable Energy having expertise for RE sector will coordinate with these implementing agencies to provide technical support for DRE livelihood applications in rural areas. Alternatively, SNAs may be appointed as implementing agencies for DRE livelihood applications.

MNRE issues Office Memorandum implementing Guidelines for PM-Kusum scheme

- MNRE on November 13, 2020 has issued the amendments/clarifications to the Pradhan Mantri Kisan Urja Suraksha evam Utthhan Mahabhiyaan (PM-Kusum) Scheme which are as under:
  - **For Component A (Setting up of 10,000 MW of Decentralized Ground Mounted Grid Connected Renewable Power Plants of individual plant size up to 2 MW)**
    - Besides barren, fallow and agricultural land, solar power plants can also be installed on pasture lands and marshlands of farmers.
    - Solar power projects smaller than 500 kW may be allowed by States based on techno commercial feasibility.
    - Selected RE Power generator shall commission the plant within 12 months from date of issuance of LOA.
    - There shall be no penalty to RE Power Developer for shortfall from the minimum prescribed CUF.
  - **For Component B (Installation of 17.50 Lakh standalone Solar Power Agriculture Pumps of individual pump capacity up to 7.5 HP)**
    - MNRE will retain 33% of eligible service charges for nation-wide Information, Education and Communication (**ICE**) activities.
    - MNRE may release 50% of eligible service charges for the sanctioned quantity to State Implementation Agencies after placement of LOA for preparatory activities.
    - For solar pumps to be set up and used by Water User Association/Farmer Producer Organisations/Primary Agriculture Credit Societies for cluster-based irrigation system, the CFA will be allowed for solar pump capacity of higher than 7.5 HP considering up to 5 HP capacity for each individual in the group.
    - Manufacturers of solar PV modules or of solar pumps or solar pump controllers using indigenous technology and joint venture of any of the said manufacturers would be eligible to participate in the centralised tender.
  - **For Component C (Solarisation of 10 Lakh Grid Connected Agriculture Pumps of individual pump capacity up to 7.5 HP)**
    - MNRE will retail 33% of eligible service charges for nation-wide ICE activities.
    - MNRE may release 50% of eligible service charges for the sanctioned quantity to State Implementation Agencies after placement of LOA for preparatory activities.
- For grid connected pumps used by Water User Association/Farmer Producer Organizations/Primary Agriculture Credit Societies for cluster-based irrigation system, the CFA will be allowed for solar pump capacity of higher than 7.5 HP considering up to 5 HP capacity for each individual in the group

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