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PROJECTS, ENERGY & INFRASTRUCTURE

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LEGAL & POLICY UPDATES

In this Section

Aligning regulatory restriction on share transfer

- The discrepancy in the provisions of Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects issued on August 03, 2017 (**Bidding Guidelines**) and the Central Electricity Regulatory Commission (**CERC**) (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 (**Connectivity Regulations**), in relation to the change of shareholding, have been a matter of concern.
- The Bidding Guidelines entail a restriction on the parent company to maintain a minimum of 51% shareholding in the project linked special purpose vehicle (SPV) till 1 year after the Commercial Operation Date (**COD**). As a result, a parent can transfer up to 49% of its shareholding in the SPV within the lock-in period. On the other hand, the Connectivity Regulations restrict the transfer of connectivity and Long-Term Access (**LTA**) in entirety, with the only exception of transfer of connectivity from the parent company to a wholly owned subsidiary (and vice versa) after expiration of 1 year from COD[1]. Therefore, in case of Connectivity Regulations, the parent of the SPV cannot transfer any of its shares in the SPV till the connectivity is transferred to the SPV upon expiry of the lock-in period.
- It has been a long standing demand of the industry to make the provisions of the Connectivity Regulations and the Bidding Guidelines, in this regard, consistent. The Ministry of Power (**MoP**), acknowledging the need for such a change, has issued directions to the CERC on February 12, 2021 to align the inconsistency.
- The Central Government is empowered to issue directions in policy matters involving public interest to the CERC[2] under Section 107 of the Electricity Act, 2003 (**Act**), as iterated under:

  Section 107. (Directions by Central Government):

  (1) In the discharge of its functions, the Central Commission shall be guided by such directions in matters of policy involving public interest as the Central Government may give to it in writing.

  (2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the Central Government thereon shall be final.
- Accordingly, the MoP has directed the CERC to amend the Connectivity Regulations to align the relevant provision under the Connectivity Regulations with the Bidding Guidelines. Once aligned, if a SPV is utilizing the connectivity granted to a parent company, the parent would still be allowed to part with up to 49% of its shareholding in the SPV during the lock-in period, being 1 year from the COD.

[1] Regulation 8A, Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) (Seventh Amendment) Regulations, 2019

[2] In accordance with Section 2(9) of the Act, "Central Commission" refers to the Central Electricity Regulatory Commission.

- This is certainly a positive step. We can now expect the CERC to evaluate the direction and amend the Connectivity Regulations. In order to give effect to the same, CERC would issue draft amendments for stakeholder comments. Post receipt of comments, the amendments would be formalized and notified. Once the amendment has been notified, the mentioned change will be deemed to be implemented.
- In what can be seen as a recent step to achieve the aim of enabling quicker clearance of deals by unclogging a major roadblock and fastening fund raising for renewable projects, the Central Government seems to have heard the calls of market players who were in requisition of the same.

SC allows CERC to resume Administrative Operations and pass Orders on Reserved Matters

- Supreme Court (**SC**) vide its order dated January 20, 2021 in Contempt Petition(C) No. 429/2020 in Civil Appeal No. 14697/2015 titled as *K K Agarwal v. Sanjiv Nandan Sahai & Anr* has allowed the Central Electricity Regulatory Commission (**CERC**) to pronounce judgments in reserved matters considering the appointment of Member (Law) by CERC. In addition, the Court also has permitted adjudicatory functioning of CERC upon the Member Law joining the Commission. CERC's functioning was stalled by virtue of Court's Order dated August 28, 2020 for SC's directives as issued through Order dated April 12, 2018 in *State of Gujarat & Ors. vs Utility Users' Welfare Association & Ors.*[3]

SC vacates Order of Interim Injunction by Punjab and Haryana High Court on privatization of Chandigarh's DISCOM

- SC vide order dated January 12, 2021 has placed on hold the stay Order dated December 01, 2020 passed by the Punjab and Haryana High Court (**HC**) thereby allowing the process of privatisation of Electricity Distribution Company of the Union Territory of Chandigarh (**DISCOM**) to continue.
- In pursuance of a notification by the Central Government in May 2020 to privatize DISCOMs in UTs, the Chandigarh Administration in November 2020, issued a request for proposal inviting bidders to participate in competitive bidding process to acquire a 100% stake in its DISCOM. Opposing the privatisation, a Writ Petition was filed by the 'UT Powermen Union of Chandigarh' in the HC on grounds of being 'unjust and illegal', wherein the HC granted an interim injunction.

GERC allows INR 1.99/kWh Tariff determined in GUVNL's 500 MW Solar Auction

- The Gujarat Electricity Regulatory Commission (**GERC**) has allowed the tariff of INR 1.99/kWh ascertained in the competitive bidding process of 500 MW of grid-connected power from solar projects conducted by the Gujarat Urja Vikas Nigam Ltd (**GUVNL**). GERC has directed GUVNL to execute the Power Purchase Agreements (**PPAs**) within 30 days from January 01, 2021 which is the date of issuance of the Letter of Award (**LoA**) to the winning bids. As per GUVNL, the successful bidders are expected to Commission the projects within 18 months of signing of the PPAs. The record-breaking tariff of INR 1.99/kWh was quoted by NTPC Ltd for 200 MW, Torrent Power Ltd for 100 MW, Al Jomaih Energy and Water Co Ltd for 80 MW, and Aditya Birla Renewables for 120 MW.

SC disposes-off appeals involving interpretation of Section 121 of the Electricity Act, 2003

- SC has passed an order dated January 29, 2021 in C.A. No. 226-227/2021, involving interpretation of Section 121 of the Electricity Act, 2003. SC held that the Appellate Tribunal for Electricity (**APTEL**) does not have power under Section 121 of the Electricity Act, 2003 to adjudicate or decide any matter pending before the State Commission. The power under Section 121 is only limited to instruct/direct/issue order to the appropriate commission to perform its duty as provide in the statute.
- Civil Appeals were filed before SC against two orders dated December 24, 2020 and January 12, 2021 passed by APTEL which were adjudicated on merits by APTEL as no legal member had been appointed to the Central Electricity Regulatory Commission (**Central Commission**). SC observed that APTEL took up the case and decided the same on merits on its own despite the fact that the respondent had approached Central Commission.
- Considering the facts of the case, SC observed that a bare reading of Section 121 of Electricity Act, 2003 states that the APTEL can instruct/direct/issue order to the appropriate commission to perform its duty as provide in the statute. Moreover, it does not authorize the APTEL to decide the cases pending before the tribunal. Therefore, SC set aside the order dated December 24, 2021 and other consequential orders therein.
- Further, SC directed the parties to approach Central Commission for adjudication of the dispute. The court further held that as the Appellant had complied with the erroneous order of APTEL and had granted short-term open access. Therefore, the short-term open access will be continuing only for a week from the date of this order and will cease thereafter.

[3] Civil Appeal No. 14697/2015

MNRE announces new order for the public procurement to provide for purchase preference in respect of RE sector

- Ministry of New and Renewable Energy (**MNRE**) has passed an order dated February 09, 2021, in supersession of its previous orders covering certain products related to Renewable Energy (**RE**) sector under the Public Procurement (Preference to Make in India) Order, 2017, and specifying the minimum percentage of local content required for such RE products (**Order 2021**). The Public Procurement (Preference to Make in India), Order 2017 was issued by Department for Promotion of Industry and Internal Trade (**DPIIT**) for encouraging the *'Make in India*' scheme and promoting manufacturing and production of goods and services in India and has been amended vide DPIIT orders dated June 04, 2020 and September 16, 2020 (DPIIT's Order dated September 16, 2020). Salient features of the Order 2021 are set out herein below:
- **Applicability:**
  - MNRE has decided that the Order 2021, will be applicable in respect of the procurements made by all offices or subordinate offices or autonomous body under the MNRE, Government of India including Government Companies as defined in the Companies Act, 2013 and/or the States and Local Bodies making procurement under all Central Schemes/Central Sector Schemes, where the scheme is fully or partially funded by Government of India. The aforesaid order will also be applicable in respect of funding of capital equipment by Indian Renewable Energy Development Agency Ltd (**IREDA**), Power Finance Corp (**PFC**) and REC Ltd, for all RE projects, for which the bids are issued on or after April 01, 2021.
- **Definitions:**
  - The definitions of various terms used in the Order, 2021, and provisions relating to: (i) eligibility of Class-I local supplier/Class-II local supplier/Non-local suppliers for different types of procurement; (ii) purchase preference; (iii) exemption to small purchases; and (iv) margin of purchase preference, will be the same as in DPIIT's order dated September 16, 2020.
- **Eligibility of Class-I local supplier, Class-II local supplier, Non-local suppliers for different types of procurement:**
  - In procurement of all goods and services or works in respect of which there is sufficient local capacity and local competition, only 'Class—I local supplier', will be eligible to bid irrespective of purchase value.
  - Further, it has been decided by MNRE that only Class I local supplier and Class-II local supplier, as defined under the DPIIT's order dated September 16, 2020, will be eligible to bid in procurements undertaken by procuring entities, except when Global tender enquiry has been issued. In global tender enquiries, 'Non-local suppliers' shall also be eligible to bid along with 'Class-I local suppliers' and 'Class-II local suppliers.
  - In procurement of all goods, services or works, not covered by above, and with estimated value of purchases less than INR 200 crore, in accordance with Rule 161(iv) of General Financial Rules, 2017, the Global tender enquiry will not be issued except with the approval of competent authority as designated by Department of Expenditure. Further, in pursuance of para 3A and 3B of DPIIT Order dated September 16, 2020, the purchase preference will be given to local suppliers.
- **Constitution of Committees:**
  - MNRE has decided to constitute a committee for independent verification of self-declarations and auditor's / accountant's certificates on random basis and in the case of complaints. The composition of the committee is given below:

Chairperson	DG, NISE
Member	Dir (JKJ)
Member	Dir (Wind)
External Expert	Dir (Technical), IREDA
Convener	Dir (RG)

  - Further, it has also been decided to constitute a committee to examine the grievances of suppliers, procuring entities and complainants, in consultation with stakeholders and recommend appropriate actions to the Competent Authority in MNRE. The composition of the Committee is given below:

Chairperson	EA
Member	Dir (Wind)
Member	Dir (JKJ)
Convener	Dir (RG)

- **Grievance Redressal Mechanism:**
  - The complaint fee of INR 2 lakh or 1% of the value of the local item being procured (subject to maximum of INR 5 lakh), whichever is higher, will be paid in the form of online transaction or Demand Draft, drawn in favour of Indian Renewable Energy Development Agency Ltd (IREDA). In case the complaint is found to be incorrect, the complaint fee will be forfeited.
  - In case, the complaint is upheld and found to be substantially correct, deposited fee of the complainant would be refunded without any interest.

- **Revision of tender documents:**
  - Procuring entities are advised to revise their tender documents fully complying with the Order 2021, and the subsequent orders that would be issued in this regard by DPIIT/this Ministry from time to time.
  - All tenders for procurement by Central Government Agencies must be certified for compliance of the procurement Orders by the concerned procurement officer of the Government Organization before uploading in the portal.
  - In pursuance of the provision of para 13 of DPIIT's Order dated September 16, 2020, equipment used in the renewable energy sector which are manufactured under license from foreign manufacturers holding intellectual property rights and where there is a transfer of technology agreement, if any, will be listed as under Annexure-II of the Order 2021.
  - In terms of para 13A of DPIIT's Order dated September 16, 2020, the procuring entities, while procuring Solar PV Cells beyond 250 MW per annum, will prescribe in their respective tenders that foreign companies will enter into a joint venture with an Indian company to participate in the tender. This will encourage the foreign companies to invest in Indian Companies in order to maintain the minimum local content requirement prescribed under this order in the goods and services.
  - In order to further encourage Make in India initiative and promote manufacturing and production of goods and services in India, general guidelines as provided under the Order 2021, may be adopted in an appropriate manner according to the circumstances by the procuring entities in their tendering process.

MERC allows the Maharashtra DISCOM to purchase power from bagasse based project through MoU route at the tariff of INR 4.75 per unit

- Maharashtra Electricity Regulatory Commission (**MERC**) has allowed the Maharashtra State Electricity Distribution Co Ltd (**MSEDCL**) to purchase power from bagasse based project through Memorandum of Understanding (**MoU**) route at the tariff of INR 4.75 per unit for a tenure of 20 years.
- The Government of Maharashtra (**GoM**) had notified the State Renewable Energy Policy 2020 (**RE Policy**) on December 31, 2020. The RE Policy sets a target to envisage 1350 MW from bagasse based co-generation projects through MoU route, and the tariff was to be decide by the MERC.
- The Commission held that Electricity Act, 2003 (**EA**) provides only two methods through which power can be purchased by a Distribution Licensee i.e. MSEDCL (a) through MoU route under Section 62, EA and (b) through competitive bidding under Section 63, EA. However, due to specific provision of GoM's RE Policy 2020 mandating MoU route for capacities upto 1350 MW, MSEDCL is required to resort to MoU route till the power upto target of 1350 MW is procured.
- Although MERC Renewable Tariff Regulations 2019 do not envisage generic tariff determination, but Regulation 7.3 of the said Regulation allows signing of PPA at recent discovered tariff for capacities which cannot participate under competitive bidding process.
- It further noted that MSEDCL proposed to enter into the MoU based EPA at tariff rate of INR 4.75 per unit for a period of 25 years but the above-mentioned tariff rate was discovered for a Power Purchase Agreement for a tenure of 20 years only and therefore it could not be used for 25 years.

RECENT JUDGMENTS

In this Section

Lalitpur Power Generation Co Ltd v. U.P. Power Corp Ltd

UPERC Order Date 20.01.2021 in Petition No. 1652 of 2020

Background facts

- Lalitpur Power Generation Co Ltd (**LPGCL/Petitioner**) filed a Petition being Petition No. 1468/2019 filed by the Petitioner under Section 86 of the Electricity Act, 2003, read with Regulation 6(5)(b) and 22(2)(ii) of the UPERC (Terms and conditions of Tariff) Regulations 2014 (**UPERC Tariff Regulations 2014**), seeking regulatory directions with reference to in-principle approval of capital and operational cost of Flu Gas Desulphurization (**FGD**) and other associated Systems notified. The same was in light of the Ministry of Environment Forest and Climate Change (**MoEFCC**) notification dated December 07, 2015. The Uttar Pradesh Electricity Regulatory Commission (**UPERC**) passed the following order dated December 07, 2020 in Petition No. 1468/2019:
  - Additional capital expenditure for a Change in Law event can be approved in terms of prudence, only after it is incurred by the Petitioner.
  - The applicability of "Change in Law" to every thermal power plant will be governed by its pre-existing obligation, conditions, standards, norms, applicable regulations and the PPA.
  - The PPA does not contain any provision that provides for a prior declaration of Change in Law event by the Commission i.e., UPERC. Since, the PPA does not contemplate any such prior declaration, therefore the same cannot be granted to the Petitioner.
- The above findings of UPERC were appealed against before the Appellate Tribunal for Electricity (**APTEL**) by LPGCL in Appeal No. 101 of 2020. APTEL vide its Order dated November 13, 2020 set aside the UPERC order dated December 07, 2020 as being bad in law and passed the following order:
  - MoEFCC notification dated December 07, 2015 is a Change in Law event and can be claimed by LPGCL as a Change in Law event for modification of tariff. In consideration of the same, APTEL remanded the matter back to UPERC for re-adjudication.
- The Present Petition dated November 26. 2020 was filed by the Petitioner in pursuance of the order of the APTEL Order dated November 13, 2020, seeking in-principle approval of the expenditure to be incurred by LPGCL on account of installation of FGD system.
- In this regard, LPGCL submitted the Environment Impact Assessment Report for its Project based on the Terms of Reference and conditions stipulated by MoEFCC vide letter dated March 12, 2010, the Environmental Clearance accorded by MoEFCC on March 31, 2011, and the Consent to Operate (**CTO**) under Air (Pollution Prevention and Control) Act 1981 and Water (Pollution Prevention and Control) Act 1974 which did not specify any emission limits of SO_2 and which came to light only after MoEFCC Notification dated December 07, 2015, thereby mandating compliance by installation of FGD system.

Issue at hand?

- Whether the MOEFCC Notification dated December 07, 2015 read with the CTO under Air (Pollution Prevention and Control) Act 1981 and Water (Pollution Prevention and Control) Act 1974 is a Change in Law event, with respect to the Petitioner's thermal power plant?

Decision of the Commission

- The MoEFCC notification dated December 07, 2015 read with the CTO under Air (Pollution Prevention and Control) Act 1981 and Water (Pollution Prevention and Control) Act 1974 is a Change in Law event.
- UPERC held that the indicative CAPEX and OPEX for wet limestone based FGD system along with other recommendations of CEA shall be applicable to the Petitioner.
- UPERC accorded in-principle approval for incurring additional capital and operational expenditure as per CEA recommendation report dated 21.02.2019 subject to prudence check.
- UPERC has also observed that the opportunity cost is a function of time taken for installation of FGD system under and conditions of the tender invited by LPGCL. Therefore, UPERC held that the same would be considered after the MOEFCC emission norms are met, at the time of truing up after prudence check to the effect that the Petitioner has tried to synchronize the interconnection of FGD with annual overhaul and has consulted the beneficiaries in this regard.

Our viewpoint

The view taken by UPERC, albeit in terms of the directions issued by APTEL, is similar to the stand taken by various other Electricity Regulatory Commissions, including the Central Electricity Regulatory Commission, whereby the MOEFCC Notification dated December 07, 2015 has been declared as a Change in Law event.

Gujarat Urja Vikas Nigam Ltd

GERC Order dated January 29, 2021 in Petition No. 1906/2020

Background facts

- By way of the present Petition, Gujarat Urja Vikas Nigam Ltd (**GUVNL/Petitioner**) had sought for adoption of the tariff discovered by the Petitioner under the transparent Competitive Bidding process conducted through RFS No. GUVNL/700 MW/Solar (Phase IX) dated March 18, 2020 for procurement of power from the 700 MW Solar PV Projects to be set in 1000 MW Dholera Solar Park.
- During the course of proceedings, and with thorough deliberations with the State Government and after their due consent, the Petitioner filed an affidavit dated January 27, 2021 whereby the Petitioner sought approval for initiating a separate re-tendering process for the 700 MW Dholera Solar Park light of recent price trends.
- The Petitioner had floated a tender to purchase solar power of 1 GW of solar projects in 2019. However, only two bids of 250 MW and 50 MW came up. Subsequently, Tata Power Renewable Energy Ltd (**TPREL**) who bid 520 MW with the quoted tariff of INR 2.75/kWh, emerged as the successful bidder and was issued the letter of award (**LOA**).
- Thereafter, in second bidding process for the Dholera Solar Park, the Petitioner received only single bid from TPREL for 50 MW capacity wherein TPREL quoted the tariff of INR 2.75/unit. GERC approved and adopted the tariff discovered in these two bidding rounds vide its Order dated October 23, 2019 in Petition No. 1818 of 2019.
- In December 2020, comparatively low tariffs of INR 1.99 /kWh were recorded. As a result, the Petitioner reviewed the auction.
- The Petitioner thus approached GERC seeking permission to start a separate re-tendering process for 700 MW capacity in light of recent price trends wherein lower tariffs were recorded to be INR 1.99 per unit as against INR 2.78 – INR 2.81 per unit. It is the Petitioner's case that the re-tendering process is in the interest of the consumers at large.

Issue at hand

- Whether re-tendering process can be permitted for the solar power project?

Decision of the Commission

- GERC analysed the matter and noted that the Petitioner desires re-tendering by inviting fresh bids. GERC further opined that the re-tendering appears to be in the benefit of public at large and common good.
- GERC observed that the Petitioner has not sought the original prayer in the present petition but seeks relief as per the affidavit filed on January 27, 2021.
- Thereafter, GERC disposed of the petition while allowing the re-tendering process.
- GERC further granted the Petitioner with the liberty to approach GERC for adopting fresh tariffs after taking appropriate actions regarding bidding in accordance with law.

Our viewpoint

GERC has looked into the practical problems being faced by the Petitioner while inviting bids for setting up of solar power projects at the Dholera Solar Park. As such, an approach like this creates flexibility in the process of inviting developers to place their bids. Further, the lower tariff discovered in December 2020 will now be an important factor in the fresh call for bids.

MSL Ltd v. MSEDCL

Case No. 150 of 2020 dated February 01, 2021 by MERC

Background facts

- MSPL Ltd (**MSPL**) filed petition against Maharashtra State Electricity Distribution Co Ltd (**MSEDCL**) before Maharashtra Electricity Regulatory Commission (**MERC**) seeking directions for settlement of claims for the units injected during April, 2018 to June, 2018 and non-issuance of credit notes in April, 2014.
- It was the case of MSPL that it had valid permission for short-term sale of power upto March 31, 2018. To continue the sale of power to MSEDCL, MSPL vide its letter dated March 17, 2018 requested MSEDCL for permission to sell power for the period from April 01, 2018 to March 31, 2019. However, as against the past practice of submitting offline applications, on April 23, 2018, MSEDCL informed that it has developed a web portal for procurement of short-term power from wind power projects from January 01, 2018 and accordingly discontinued the practice of offline applications. Notably, the change in mode was never informed to MSPL prior to April 23, 2018.
- Despite there being no valid agreement, on account of MUST RUN status granted to wind power plants under Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 and the Maharashtra Electricity Regulatory Commission (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2019, MSPL injected power into the Grid during the period from April-2018 to June-2018. Meanwhile, MSEDCL denied to consider offline application and sale of power for the said period as web based online platform was opened from January 01, 2018 to offer sale to MSEDCL with effect from April, 2018 and the wind power generators were aware of such web portal.
- MSEDCL further contended that the claims Credit Notes for the period April 2014 were objected for being outside the period of limitation.

Issues at hand

- Whether the claims raised by MSPL for energy injected during April-2018 to June-2018 are valid?
- Whether MSPL's claims pertaining to April-2014 is barred under Limitation Act?

Decision of the Commission

- MERC held that post expiry of the short-term EPA on March 31, 2018, MSEDCL signed EPA with MSPL through online portal for the period of July 01, 2018 onwards. Thus, during the period of April 01, 2018 to June 30, 2018, there was no valid agreement between MSPL and MSEDCL.
- MSPL, as a generator who desired to sell electricity was not diligent enough and did not take adequate precaution to update itself about changed method of power procurement by MSEDCL. Therefore, no fault can be made attributable to MSEDCL for introducing new method.
- With regard to MUST RUN status of wind energy due to which MSPL injected energy during April, 2018 to June, 2018, MERC held that the entity injecting any energy into the grid without a valid contract need not be compensated and accordingly rejected the claims of MSPL for the said period.
- Regarding the second issue, MERC held that the claims for credit notes pertaining to April 2014 became time barred in April 2017 in terms of the Limitation Act. MSPL's contention that it had sent constant reminders to MSEDCL for adjustment of claims is unsustainable as it is a settled principle of law that mere correspondence between the contracting parties cannot extend the period of limitation.

- In the present case, the cause of action arose in May,2014 and MSEPL approached MERC in 2020 i.e. after a gap of 6 years without any valid justification for such delay. Therefore, MERC rejected the claim for credit notes pertaining to April 2014 which is barred by limitation.

Our viewpoint

MERC vide the instant judgment has reiterated the importance of an entity to keep itself updated with the applicable procedures to be adopted. It was further emphasized on an entity not being entitled for compensation in absence of valid agreement as all the generators have to generate power as per the schedule given by the SLDC and the grid code in the interest of secure and economic operation of the grid. Unwanted generation can jeopardize the security of the grid.

R.B Diversified Pvt Ltd & Anr v. MSEDCL

MERC Order dated February 12, 2021 in Petition No. 199/2020

Background facts

- This Petition was filed by R.B Diversified Pvt Ltd (**RBDPL**) for the purpose of adjudication of disputes between the parties concerning the applicability of Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2016 (**MERC DOA Regulations 2016**) and Maharashtra Electricity Regulatory Commission (Grid Interactive Rooftop Renewable Energy Generating Systems) Regulations, 2019 (**GIRREGS Regulations 2019**) in the context of captive solar rooftop power plants.
- RBDPL sought clarity and necessary directions from the Maharashtra Electricity Regulatory Commission (**MERC**) pertaining to applicability of MERC DOA Regulations 2016 in the circumstance that it is an open access consumer while simultaneously operating a rooftop Solar CPP. The main contention of RBDPL is that MERC DOA Regulations 2016 does not apply to a captive renewable energy system which is being operated in a stand-alone manner and isolated from the grid though the premises is connected to the MSEDCL grid.
- MSEDCL contended that if RBDPL does not intend to be governed by the provisions of the DOA Regulations, 2016 and Amendment thereof it would have to completely isolate its solar roof-top installation from the grid/MSEDCL's distribution system. Therefore, RBDPL would necessarily have to connect its solar roof-top system with the grid if it intends to utilize the same for any premises which is connected to the grid/MSEDCL's distribution system thereby bringing it under the purview of the DOA Regulations, 2016 and Amendment thereof.

Issues at hand

- Whether DOA Regulations, 2016 and GIRREGS Regulations 2019 are applicable to off-grid roof-top PV installations?
- What provisions of DOA Regulations 2016 are applicable to the consumer having grid-connected behind the meter roof-top PV installations?

Decision of the Commission

- GIRREGS Regulations 2019 classify roof-top PV installations in consumer's premises on the following basis:
  - **Off-grid roof-top PV:** Which does not connect with common electrical network of consumer having connectivity with network of Licensee, and
  - **Grid-connected roof-top PV:** Which connects to common electrical network of consumer which has connectivity with network of licensee further classified on the basis of exchange of electricity with the licensee's grid and its commercial settlement as i) Net-metering, ii) Net-Billing and iii) behind the meter installations.
- With regard to the first issue, MERC held that DOA Regulations, 2016 and GIRREGS Regulations 2019 were not applicable to off-grid roof-top PV installations because they are applicable only to consumers who are connected to the Distribution System.
- With regards to the second issue, after referring to Regulation 3 of DOA (First Amendment) Regulations 2019 and Regulation 7.9 of GIRREGS Regulations 2019 MERC observed that in the event RBDPL installs reverse power flow relay to prevent energy from being fed into the Grid, it can be concluded that RBDPL's solar system is grid-connected behind the meter roof-top solar system without net-metering or net-billing arrangement and shall therefore be converted into net-billing arrangement for the period of Open Access. This would also bring RBDPL's roof-top Solar PV within the purview of GIRREGS Regulations 2019.

- MERC observed that a consumer who wishes to install behind the meter roof-top solar installation for self-consumption has to intimate to the Distribution Licensee to enable the authorities to arrive at grid balancing requirements and also in computation and levy of applicable taxes and duties on such generation.

Our viewpoint

The decision of MERC is based on express provisions stated in DOA Regulations, 2016 and GIRREGS Regulations 2019. By applying these provisions as per classification of roof-top PV installations into Off-grid roof-top PV and Grid-connected roof-top PV, MERC has provided much needed clarity where consumers are now emphasising on installing and utilising for their captive needs power generated through renewable sources.

Simbhaoli Power Pvt Ltd v U.P. Power Corporation Ltd & Ors

UPERC Order dated January 25, 2021 passed in Petition No. 1557 of 2020

Background facts

- The present Petition was filed by Simbhaoli Power Pvt Ltd (**SPPL**) before the UPERC (**UPERC**), seeking amendment in Power Purchase Agreement (**PPA**) and Supplementary Power Purchase Agreement (**SPPA**) to revise weighted average for the purpose of tariff based on contracted capacity of the Units commissioned in different years.
- The dispute in the instant Petition pertained to the supply of surplus power from SPPL's bagasse based generating plant.
- SPPL in the instant petition sought the indulgence of UPERC on the limited ground of amendment of tariff on weighted average of 7 MW instead of 19 MW and to issue necessary amendment in PPA on account of the reduction of its export capacity from 19 MW to 7 MW. It is SPPL's case that due to increase in the cost of bagasse, higher consumption and its non-availability, SPPL has decided to isolate its 12 MW plant and dismantle the same. This was communicated to chief engineer vide letter dated September 16, 2019.
- It was SPPL's contention that this case is covered under Force Majeure as the reduction in export capacity is on account of unforeseen circumstance that were beyond the control of SPPL.
- UPPCL refuted the claims of SPPL and contended that SPPL cannot be allowed to assume the date September 16, 2019 as the date of dismantling, isolating and reduction of exportable power by 12 MW as it has not been established through evidence.
- UPPCL further clarified that UPPCL shall end up paying higher tariff by INR 0.26/unit on the power supplied after reduction in contracted capacity as contended by SPPL which is against the provisions of PPA and therefore unacceptable.

Issue at hand

- Whether the PPA and SPPA must be amended in terms of the revised weighted average for the purpose of tariff for the power supplied by SPPL to UPPCL?

Decision of the Commission

- UPERC in its judgment observed that SPPL had taken the decision of dismantling the plant for its inefficient operational performance. This was purely a commercial decision and not exclusively beyond the control of SPPL.
- There is no provision in the PPA(s) to reduce contracted capacity till expiry of twenty years from the date of commissioning of the unit(s).
- UPERC declined to accept SPPL's contention that reduction in contracted supply is due to reasons beyond its control and covered under Force Majeure and therefore disallowed SPPL to reduce the contracted capacity under the PPA(s).
- UPERC also declined to amend the PPA(s) and weighted average tariff.

Our viewpoint

The view taken by UPERC is consistent with the terms of the PPA and has drawn the line between a Force Majeure event which is completely beyond the control of the Petitioner, and a commercial decision undertaken by a company to enhance its operational performance. However, the issue of increase in the cost of bagasse, higher consumption and its non-availability has not been extensively dealt with by UPERC.

Tamil Nadu Spinning Mills Association v. Tamil Nadu Electricity Regulatory Commission & Ors and batch appeals

Judgment dated January 28, 2021 in Appeal No. 191 of 2018 and batch appeals

Background facts

- The present Appeal was filed before the Appellate Tribunal For Electricity (**ATE**), against the Wind Tariff Order (being no. 6/2018) dated April 13, 2018 (**Impugned Order**) passed by Tamil Nadu Electricity Regulatory Commission (**TNERC**) determining the Tariff Components and other allied issues related to Wind Energy Generators (**WEGs**) installed in the State of Tamil Nadu for the control period of two years with effect from April 01, 2018 to the extent of certain modifications in the dispensation on the subject of 'power banking' declining to withdraw the facility altogether as pressed for by Tamil Nadu Generation and Distribution Corp Ltd (**TANGEDCO**).
- The dispute in the instant appeal pertained to the impugned order by which TNERC, inter alia, increased the banking charges from 12% to 14% apart from holding that any WEG installed or commissioned after March 31, 2018 is not eligible for banking facility; withdrawn the banking facility to the existing WEGs including those which are selling power generated from such WEGs under the Third Party Sale Scheme; directed that Open Access Charges, hitherto collected at 40% of the charges applicable for thermal power plants, would be hereafter collected at 50% (Transmission and Wheeling Charges); increased the Scheduling and System Operation Charges from 40% to 50%; also increased the cross subsidy surcharge to 60% from existing 50%; determined the 'Feed in Tariff' (**FIT**) for sale of power to the utility at INR 2.86 without Accelerated Depreciation (**AD**) and INR 2.80 with AD; retaining the payment period at 60 days but reducing delayed payment levy to 1% interest from 1.5%.
- TANGEDCO in the instant appeal sought indulgence of ATE on the limited ground that the banking facility is proving financially detrimental to its interest and deserves to be done away with, it also pressing for increase in Cross subsidy surcharge from 50% to 100%. It was TANGEDCO's case that TNERC is not justified in rejecting the prayer for withdrawal of banking facility to WEGs in State of Tamil Nadu in larger public interest, it having failed to consider the provisions of Section 61 of Electricity Act, 2003 and the Tamil Nadu Electricity Regulatory Commission Regulations, 2006 (TNERC Regulations, 2006) in the right perspective, having glossed over the fact that the benefit of banking facility is not provided under the statute, the financial impact for providing such promotional facility passed on to the general consumer under the tariff order being heavy, the factual data presented for consideration instead establishing that the banking facility has resulted in substantial financial loss to the distribution licensee, State Load Dispatch Centre (SLDC) and the transmission licensee.
- It's TANGEDGO's case that the order is inherently contradictory since the banking facility has been unjustifiably extended for WEGs commissioned prior to April 01, 2018 even while on correct understanding of the issue it has been disallowed for WEGs commissioned on or after April 01, 2018.
- The other three appeals, in contrast, are by entities which have been insistent on continuance of the facility of power banking, particularly for WEGs, arguing that there is no cause for the reliefs afforded to this sector to be taken away since the grounds on which such promotional measures were adopted continue to hold good till date.
- The WEGs, on the other hand, argued that it is the State policy that they are promoted by all possible measures and, therefore, there is no justification whatsoever for the demand that power banking and ancillary reliefs be abolished. They point out that productivity of the processes and technology used by wind power projects is not consistent, it being dependent essentially on uncontrollable factors such as wind speed, velocity, direction, climate etc. and, therefore, the lean periods/seasons have to be taken into account.
- The WEGs further pleaded that the provision for high production (during high wind periods) be accommodated and adjusted to make up for the losses incurred during lean periods (of low or no wind seasons) and, therefore, the banking facility is fully justified even in present-day scenario. It is stated that the very basis of introduction of this equitable privilege in 1986 in State of Tamil Nadu, as also adopted in various other States of the country, continues to be valid.

Issue at hand

- Whether TNERC was right in determining the Tariff Components and all other allied issues related to WEGs installed in the State of Tamil Nadu for the control period of two years?

Decision of the Commission

- ATE in its judgment has set aside the impugned order and vacated the directions of TNERC to the extent it stipulated (a) withdrawal of banking facility (i) for 12 months to Wind Power Projects commissioned after March 31, 2018 and (ii) altogether for all existing and new WEGs selling under third party open access sale scheme, irrespective of date of commissioning; (b) increase in banking charges from 12% to 14%: (c) increase in cross subsidy surcharge from 50% to 60%: (d) determination of the capacity utilisation factor at high level of 29.15%: (e) increase in open access charges from 40% of the normative charges for conventional sources of power to 50% of transmission and wheeling charges and the basis of levy on the installed capacity instead of generated units and imposing 100% scheduling and system operation charges for REC WEGs: (f) fixed feed-in-tariff at INR 2.86 without accelerated depreciation (**AD**) and INR 2.80 with AD without considering relevant parameters: and (g) reduction in liability for delay in Invoice payment on sale to Discoms category to 1% interest.
- In the result, the orders on the above subjects, as prevailing prior to impugned order, shall stand restored and revived for the control period covered by the impugned order.
- ATE also directed that TNERC shall not bring about changes in the rules for power banking (of the kind attempted through the non-speaking impugned decision) by any further order without undertaking a study based on requisite data properly gathered and analysed so as to draw informed conclusions about financial impact on various stakeholders.

Our viewpoint

The decision of ATE is in light of the fact that the previous TNERC Order dated April 13, 2018 was not a fair and equitable solution balancing the competing interests bearing in mind the legislative scheme and public policy of the State. ATE rightly observed that as long as the preferential treatment for renewable sources of electricity is mandated by law and public policy, the benefit of power banking cannot be taken away.

UPPCL v. Rosa Power Supply Co Ltd

UPERC Order dated January 29, 2021 passed in Petition No. 1502 and 1491 of 2019

Background facts

- Uttar Pradesh Power Corp Ltd (**UPPCL**) filed Petition No. 1502/2019 under Section 186 (1) (f) of Electricity Act, 2003 (**Electricity Act**) read with Order XX Rule 16 of the Code of Civil Procedure, 1908 (**CPC**) and relevant provisions of UPERC (Conduct of Business) Regulation, 2004 for seeking accounts and details of domestic and imported coal at thermal power plant of Rosa Power Ltd for FY 2010-11 to FY 2012-13.
- This direction was issued by UPPCL Letter dated August 18, 2018 to Rosa Power Supply Co Ltd (**RPSCL**) to submit its accounts pertaining to fuel consumption for FY 2010-11 to FY 2012-13 which was requested in order to recover amount of damages/ over recover, if any done by RPSCL along with the interest computed on basis of data provided by RPSCL. UPPCL provided that in the terms of article 51 (1) (b) (c) of PPA, UPPCL is entitled to recover this amount of breach of terms of the PPA by RPSCL.
- RPSCL provided fuel data for 2014-15 to 2017-18 but not for the demanded period i.e., FY 2010-11 to 2012-13.
- UPPCL issued a notice of event default to RPSCL in regards to the terms and conditions of the PPA signed by the parties.
- In reply, RPSCL communicated that as per Article 12.5 of PPA it was only required to maintain records for 5 years and accordingly, the data for FY 2013-14 to 2017-18 was furnished to UPPCL. Thus, Petitioner UPPCL (1502/2019) filed this petition.
- RPSCL also preferred a petition (1491/2019) for quashing the event of default notice dated April 27, 2019. The Commission tagged two petitions together.
- Furthermore, RPSCL challenged the maintainability of the petition and the admissibility of the interim application filed by UPPCL was in question.
- RPSCL Raised the issue of maintainability for petition filed by UPPCL and took a position that merit is to be adjudicated only after maintainability is established. It was argued that the data records upto 5 years were to be maintained by RPSCL and as per the agreement they are not bound to furnish the data for the period requested for. The records for FY 2010-11 to 12-13 have been invoked in 2018, after a lapse of 7-8 years which is barred by provisions of limitation act, 1963.

- It was highlighted that Order XX Rule 16 of CPC, 1908 is applicable where there exists any Principal – Agent relationship between the parties, but here there is no such relationship. Moreover, as per provision of Order VII Rule 11 of CPC which provides that if the 'cause of action' is not disclosed, the complainant is 'barred by law'. Thus, this instant petition is liable to be rejected.

Issues at hand

- Whether the interim application filed by UPPCL is admissible or not?
- Whether the instant petition filed by UPPCL is maintainable or not?
- Whether the instant petition lacks cause of action and is liable to be rejected under Order VII Rule 11 (Rejection of Plaint) of Code of Civil Procedure, 1908 or not?

Decision of the Commission

- With regard to first issue, UPERC verified the documents furnished by UPPCL and observed that despite due diligence, these documents could not be filed at the time of filing of the petition and Rejoinder and therefore did not form part of pleadings. Further, through the CPC provisions regarding production of additional documents are not strictly applicable to the commission, Order 7 Rule 14 of the CPC states that a particular document is to be introduced by the parties at an early stage of the proceedings if it is not done at the time of the petition.
- Therefore, as all these documents were already available with UPPCL and should have been filed with petition/rejoinder before concluding the hearing on maintainability of the petition on July 16, 2020, UPERC, has decided to disallow the interim application dated September 16, 2020.
- Regarding second issue, UPERC observed that a statutory provision supersedes a contract executed between private parties. Therefore, in the instant situation, the Limitation Act, 1963 being statutory provision qua the limitation period will override the contract/PPA executed between the parties. The right to sue accrues from May 03, 2019, when the respondent denied furnishing data sought by UPPCL after having regards to provide the same vide its communication dated January 30, 2019. The present petition has been filed on August 26, 2019 for adjudication before the UPERC. Therefore, the petition is not barred by the Limitation Act, 1963.
- In the third issue, UPERC referred to its order dated August 22, 2017 and observed that RSPCL has constantly been avoiding the submission of the data pertaining to its fuel consumption.
- UPPCL noted that the bills raised by RPSCL, subsequent to UPERC's Order dated August 22, 2017, only provided a blended GCV of coal fire on daily basis and did not mention the break-up of the coal source (domestic or imported) nor provided their respective GCVs. RSPCL denied furnishing the requisite document/information with respect to fuel consumption and the same has also been recognized by UPERC as a deficit on the part of RSPCL in its tariff order dated August 22, 2017. The intent of the instant petition is to ascertain the correct cost of fuel sourced by the RSPCL and consequently, determine if there has been an excess recovery by RSPCL to the detriment of larger consumer interest. Therefore, UPERC has held that there is cause of action to adjudicate this petition.

Our viewpoint

The Order passed by UPERC reflects how the provisions of CPC cannot be done away with even in proceedings before Electricity Regulatory Commissions. UPERC has rightly held that UPPCL has a cause of action to pursue the present Petition. It will be interesting to see how the UPERC adjudicates the disputes involved in the matter. The matter is listed for hearing before UPERC on February 09, 2021.

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