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PROJECTS, ENERGY & INFRASTRUCTURE

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LEGAL & POLICY UPDATES

In this Section

RERC notifies the Rajasthan Electricity Regulatory Commission (Transaction of Business) Regulations, 2021

- Rajasthan Electricity Regulatory Commission (**RERC**) on February 17, 2021 notified the RERC (Transaction of Business) Regulations, 2021 (**TOB Regulations, 2021**) in terms of Section 92 and Section 181 of the Electricity Act, 2003 .
- By way of TOB Regulations, 2021, RERC has sought to review and rationalize the RERC (Transaction of Business) Regulations, 2005, in view of subsequent developments in power sector. RERC had also invited suggestions/ comments from the interested persons/ stakeholders.
- **Key features of TOB Regulations, 2011 are as under:**
  - Matters, other than those which RERC has to decide through adjudicatory/regulatory proceedings, may be decided by RERC by way of discussion in the internal meetings of the Commission, by circulation amongst Chairperson and Members or such officers or persons to whom the powers and functions have been delegated or by holding proceedings.
  - The quorum of proceedings before the Commission shall be two except where only one member is functional due to vacancies in the Commission or any member(s) have recused himself from a proceeding/subject matter due to reasons stated by such member, the quorum would be one.
  - Any person who intends to file objections/comments pursuant to the notice published for the purpose of adjudication of the Petition, shall deliver the statement of objections/comments duly signed and verified along with evidence(s) in support thereof.
  - In case of a Petition being filed by an organization/company before RERC, the same is required to be signed by the Managing Director or any other person authorized by him.
  - RERC is empowered to refer such issue(s) involved in the matter, as it considers appropriate, to such person, whom RERC considers as qualified to give expert or specialized advice or opinion on such issue or issues.
  - Filing of Petition/Reply/Rejoinder etc. may be allowed through electronic media such as online filing and rectification of defects may be done through e-mail or net may be allowed by RERC, from a date to be notified separately and instructions may be issued by the Chairperson from time to time.
  - RERC may permit any association/ forum or other body corporate or any group of electricity consumers to participate in any proceedings before the Commission.
  - RERC has the power to remove difficulties, if any arise in giving effect to the provisions of TOB Regulations, 2021.

RERC notifies the RERC (Standards of Performance for Distribution Licensees) Regulations, 2021

- RERC has notified the RERC (Standards of Performance for Distribution Licensees) Regulations (**SOP for Distribution Licensees**) on February 19, 2021 in terms of Section 181(1) and (2) (za and zb) read with Section 57(1),(2),59(1) and 86(1)(i) of the Electricity Act, 2003.
- The SOP for Distribution Licensees lays down the standards to maintain distribution system parameters within the permissible limits and sets a benchmark for Licensees/Franchisee for providing an efficient, reliable, coordinated and economical system of electricity distribution.
- **Some noteworthy aspects of the SOP for Distribution Licensees are as under:**
  - **Standards of performance**
    - Certain standards are specified through Schedule-I as the minimum standards of service that a distribution licensee/franchisee is required to achieve, failure of which shall entail payment of compensation to the aggrieved consumers, as provided in Schedule to the Regulations.
    - The Distribution Licensee is required to restore supply in cases of supply related problems, overhead line/cable breakdowns, underground cable breakdowns, transformer failure, scheduled outages.
    - In case of variations disturbing the quality of supply, the Distribution Licensee is required to resolve the problem within the time frame as provided in the Regulations, viz. in 2 working days of the original complaint provided no expansion/enhancement/up-gradation of the distribution system/network is involved. Further, the Licensee is also required to ensure reliability of the system to avoid heavy fluctuations or short circuiting of lines.
    - In case of reporting of a meter not functioning properly, the Licensee is required to verify the correctness of meter at site and correctness of the meter, without charging a test fee. Further, the Licensee is also under an obligation to replace any stopped/damaged/burnt meter within twenty-four hours in urban areas and seventy-two hours in rural areas.
  - **Grievance redressal/complaint handling**
    - The Licensee is required to develop an IT enabled centralized customer care centre at licensee/franchisee headquarter which should be capable of registering a complaint or claim of compensation, electronically (SMS, email, mobile app, website of the licensee/franchisee) or telephonically and remain operational 24x7.
    - Complaints made by customers are required to be immediately recorded in the suitable registers maintained by the help desks and the system generated number is required to be immediately communicated to the complainant.
    - The licensee is required to maintain a database of the consumers and link the same to their mobile numbers. After the resolution of complaint, the resolution time is required to be recorded and the intimation of resolution of complaint along with date and time of resolution is to be communicated to the complainant.
  - **Compensation mechanism/fees and fines**
    - In case of failure of Licensee/Franchisee to meet the guaranteed standards of performance as enlisted in Schedule-I, the Licensee shall pay compensation to the affected person upon lodging of a claim for compensation, as provided in Schedule II of the Regulations ranging from INR 75 to INR 4000, as per the nature of complaint.
    - Such compensation is required to be made only by adjustment against current and immediate future bills for supply of electricity by the licensee/franchisee, the details of which and the amount paid thereof shall be shown in every electricity bill of the consumer.
    - The Licensee/Franchisee is required to give compensations within 45 days from date of filing of the claim of compensation giving details as well as reference of relevant regulations. In case of refusal of compensation Licensee/Franchisee shall pass an appropriate Order with respect to each claim of compensation within 45 days from filing the claim of compensation.
    - Failure on account of the Licensee to pay the compensation or non-satisfaction the consumer with the decision of the licensee/franchisee shall constitute a Grievance, which would be dealt and decided by the respective Consumer Grievance Redressal Forum, in accordance with procedure set out in the RERC (Guidelines for Redressal of Grievances) Regulations, 2008
    - No fees shall be levied on the consumer for lodging a complaint/compensation under the Regulations with the Licensee/Franchisee and application/complaint for redressal of the claim for compensation to the CGRF or Ombudsman.

- **Responsibilities of the Licensee**
  - Licensee is required to furnish to RERC as well as the Electricity Ombudsman, quarterly reports within 45 days at the end of each quarter during a financial year, indicating its actual performance in the formats SOP-1 to SOP-4, attached to the Regulations.
  - Licensee/Franchisee is required to develop report generation framework on its website, to generate reports related to complaints and claim for compensation. Further, it is also required to publish a manual of practice for handling consumer complaints and make it available for reference of consumers at every office of Licensee/Franchisee.
  - The Licensee/Franchisee is responsible to publish the guaranteed standards of performance along with compensation structure, information on procedure for filing of complaints, on their website and in the newspapers every month.

Centre notifies the Major Port Authorities Act, 2021

- On February 18, 2021, the Major Ports Authorities Act, 2021 (**MPA Act**) came into effect, superseding the Major Ports Trusts Act, 1963 (**1963 Act**).
- The MPA Act has been enacted to regulate the operation and planning of Major ports in India, and to vest the administration, control, and management of such ports upon the Boards of Major Port Authorities (Board) and for matters connected therewith or incidental thereto. Major Port has been defined under Section 3 (8) of the Indian Ports Act, 1908 as any port which the Central Government may by notification in the Official Gazette, declare to be a major port.
- The MPA Act has been enacted to decentralize decision making in governance of major ports, to promote expansion of port infrastructure and facilitate trade and commerce while safeguarding the interest of all stakeholders.
- **Key features of the MPA Act are as under:**
  - The MPA Act envisages the constitution and composition of Board, which will replace the existing Port Trusts.
  - All assets and liabilities of the Tariff Authority for Major Ports shall stand transferred to, and vested in, the Board.
  - The MPA Act provides for inclusion in the Board, representatives of State Government where Major Port(s) are situated, Defence, Customs, Department of Revenue and Ministry of Railways.
  - The Board after every five years will have to prepare and submit a list of its employees, to the Central Government.
  - Under the MPA Act, every port will now be governed by the Major Port Authority which will have the authority to set credential tariffs for several port services. They may regulate rates for services that will be discharged at ports, the approach to and usage of the port assets, and different classes of stocks and crafts, amidst others. Under the 1963 Act, the Tariff Authority for Major Ports, set the scale of rates for assets and services obtainable at ports.
  - An Adjudicatory Board has been constituted to carry out the function of the erstwhile Tariff Authority for Major Ports, to adjudicate disputes between ports and PPP concessionaires, to review stressed PPP projects and suggest measures to revive such projects and to look into complaints regarding services rendered by the ports/private operators operating within the ports.
  - The Adjudicatory Board has been empowered to make rules on, availability of port assets for port related activities and services, developing infrastructure facilities such as setting up new ports, jetties, and providing exemption or remission from payment of any charges on any goods or vessels.

Bombay High Court suspends tender for privatization of Dadra & Nagar Haveli, Daman and Diu DISCOMS

- Torrent Power had emerged as the highest bidder for acquisition of 51 percent equity stake in the DISCOMS in Dadra & Nagar Haveli and Daman and Diu. However, after a few days, a Public Interest Litigation (**PIL**) had been filed before the Bombay High Court, claiming that the distribution company, in which 51 percent stake had been put up for sale, does not exist. Further, it was stated that there was an attempt to transfer 51 percent shares of a company which is yet to be incorporated. Bombay High Court on March 3, 2021 admitted the above Petition and stated that in the absence of any statutory provisions justifying the action of the Respondents, it was prima facie satisfied that not only had the Petitioner set up an arguable case on merits for admission but he had also set up a strong case for grant of interim relief. Accordingly, the Bombay High Court has, inter-alia, suspended the tender process in the PIL until further Orders in the matter.

Ministry of Power issues new rules for Late Payment Surcharge payable by DISCOMs

- Ministry of Power (**MoP**) on February 22, 2021, has issued new regulations regarding the late payment surcharge, which will be applicable for power purchase agreements (PPAs) and transmission service agreements in which the tariffs have been determined through competitive bidding. Late payment surcharge refers to the charges payable by a distribution company (**DISCOM**) to a generating company or electricity trader for power procured, or by a user of a transmission system to a transmission licensee on account of delay in payment of monthly charges beyond the due date (Late Payment Surcharge Rules, 2021).
- As per the Late Payment Surcharge Rules, 2021, the late payment surcharge will be payable on the outstanding payment after the due date at the base rate of late payment surcharge for the first month of the default. The late payment surcharge rate for the successive months will increase by 0.5% for every month of delay. The surcharge should not be higher than 3% of the base rate at any time.
- The rule will be applicable when the rate of late payment surcharge payable is not higher than the rate specified in the agreement for the purchase or transmission of power.
- Further, a DISCOM which has a late payment surcharge outstanding against a bill after the expiry of seven months from the due date will be debarred from procuring power from a power exchange or grant of short-term open access until such bill is paid.
- According to the Late Payment Surcharge Rules, 2021, all payments by a DISCOM to a generating company for power procured from it or by a user of a transmission system to a transmission licensee should be first adjusted towards late payment surcharge and thereafter, towards monthly charges, starting from the longest overdue bill.

Development Finance Institution Bill

- The Cabinet cleared a Bill to set up a government-owned Development Finance Institution (**DFI**) with initial paid-up capital of INR 20,000 crore so that it can leverage around INR 1 lakh crore from the markets in a few years in order to provide long-term funds to infrastructure projects. The National Bank for Financing Infrastructure and Development (**NaBFID**) Bill, 2021 is expected to be tabled in the ongoing session of the Parliament.
- The Government will also provide INR 5,000 crore as grant to the institution. The grant has been provided as tax-saving bonds and aims at providing the hedging cost if the DFI borrows from multilateral or bilateral institutions and it will subsidize the guarantee fee. This would aid the entity in shelling out less money, and at the same time ensure the cost of funds to be lower.
- DFI will be fully government-owned initially, and the government’s stake will be brought down to around 26% over the next few years. The government will also approach the regulators on increasing the cap for investment in the DFI by pension funds and insurance companies, along with a 10-year tax exemption for investments.
- The Government has stated that the new institution plans to start on a ‘clean slate’, with speculations that the India Infrastructure Finance Co Ltd (**IIFCL**) might merge with the proposed DFI.

Supreme Court ends extension of Limitation Period from March 15, 2020 to March 14, 2021

- On March 8, 2021, the Supreme Court of India (**SC**) in *Re: Cognizance for extension of limitation*[1] has lifted the extension of the limitation period for filing of cases, granted by SC vide Order dated March 23, 2020 on account of COVID-19 pandemic and the national lockdown which was extended from time to time and held as under:
  - In computing the period of limitation for any suit, appeal, application or proceeding, the period from March 15, 2020 till March 14, 2021 shall stand excluded. Consequently, balance period of limitation remaining as on March 15, 2020, if any, shall become available with effect from March 15, 2021.
  - In cases where the limitation would have expired during the period between March 15, 2020 till March 14, 2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from March 15, 2021. In the event the actual balance period of limitation remaining, with effect from March 15, 2021, is greater than 90 days, that longer period shall apply.

[1] Suo Motu Writ Petition (Civil) No.3 of 2020

- The period from March 15, 2020 till March 14, 2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of Arbitration and Conciliation Act, 1996, Section 12A of Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.
- Apex Court directed Government of India to amend guidelines for containment zones. It further, stated that regulated movement will be allowed for medical emergencies, provision of essential goods and services, and other necessary functions, such as, time bound applications, including for legal purposes, and educational and job-related requirements.

Mineral Laws (Amendment) Bill, 2020

- On March 12, 2020, Rajya Sabha passed the Mineral Laws (Amendment) Bill, 2020 (**Bill**). The Bill also amends the Mines and Minerals (Development and Regulation) Act of 1957 (**MMDR Act**) and the Coal Mines (Special Provisions) Act of 2015 (**CMSP Act**). The CMSP Act had established an auction and allocation process for mines whose allocation was revoked by the Supreme Court in 2014. All such mines are classified in Schedule I of the Act along with Schedules II and III containing the sub-classes of the mines listed in Schedule I. The Bill amends certain provisions for this auction and allocation process.
- **Key takeaways from the Bill:**
  - **Removal of restriction on end-use of coal:** Currently, companies acquiring Schedule II and Schedule III coal mines through auctions can use the coal produced only for specified end-uses such as power generation and steel production. The Bill lifts this ban on the use of coal mined by such companies. Companies would be permitted to mine coal for their own use, for export, or any other reason that the central government will specify.
  - **Eligibility for coal and lignite block auctions:** The Bill clarifies that companies do not require previous coal mining experience in India to engage in coal and lignite block auctions. Furthermore, competitive bidding mechanism for coal and lignite block auctions would not apply to mines considered for allotment to a government company or its joint venture for own use, sale, or any other defined purpose and a company that has been awarded a power project based on a competitive tariff offer.
  - **Composite license for prospecting and mining:** Currently, separate prospecting and mining licenses for coal and lignite are available, referred to as prospecting license and mining lease, respectively. Exploring, identifying, or discovering mineral deposits are all part of prospecting. A new form of license, known as a prospecting license-cum-mining contract, is added to the Bill. This will be a composite license providing for both prospecting and mining activities.
  - **Exclusive reconnaissance permit holders to obtain other licenses:** Non-exclusive reconnaissance permit holders for discovering such listed minerals are currently ineligible to obtain a prospecting license or mining lease. The Bill provides that the holders of such permits may apply for a prospecting license-cum-mining lease or mining lease. This will apply to certain licensees as prescribed in the Bill.
  - **Transfer of statutory clearances to new bidders:** Mining leases for listed minerals (minerals other than coal, lignite, and atomic minerals) are currently auctioned off when they expire. Before beginning mining activities, this new lessee must obtain statutory clearances. The Bill stipulates that the previous lessee's different permits, licenses, and clearances will be applied to the effective bidder for a period of two years. The new lessee will be permitted to resume mining operations throughout this period. The new lessee must, however, obtain all necessary clearances within the two-year term.
  - **Reallocation after termination of the allocations:** In certain situations, the CMSP Act allows for the cancellation of coal mine allotment orders. The Bill states that the central government can reallocate such mines through auction or allotment. The central government may nominate a custodian to oversee the mines until they are repurposed.
  - State governments are required by the MMDR Act to obtain prior approval from the central government before issuing a reconnaissance permit, prospecting license, or mining lease for coal or lignite. Under the Bill, the central government's prior approval is not necessary when issuing these coal and lignite licenses in certain cases.
  - Mining leases for listed minerals (minerals other than lead, lignite, and atomic minerals) are auctioned on the lease term's expiration under the MMDR Act. The Bill will allow state governments to take steps ahead of time to sell a mining lease before it expires.
- The Bill aims to increase coal production, reduce import dependence, and change the mining industry. The Bill has simplified the process of securing mining licenses and made it easier for private players to engage in mining activities. This is a commendable move by the government to increase job opportunities while also supporting the ‘Made in India’ initiative.

Imposition of Basic Customs Duty on Solar PV Cells & Modules/Panels

- On March 9, 2021, the Ministry of New and Renewable Energy (**MNRE**) issued an office memorandum[2] stating that the Ministry of Finance (**MoF**) has agreed to impose a Basic Customs Duty (**BCD**) on imported solar modules and solar cells with effect from April 1, 2022.
- It is pertinent to note that MNRE has been preparing to impose BCD on several goods since the Union Budget of 2021-2022 was announced when the BCD was proposed. The announcement was to review 400 old exemptions in the Custom Duty structure in order to rationalize Customs Duty structure by eliminating outdated BCD exemptions. The Finance Bill, 2021 revised customs duty structure for several goods, however, there was no mention of BCD on solar modules and cells.
- **Key aspects of this memorandum are summarized here below:**
  - While there is no BCD on imported solar modules and solar cells presently, following rate of BCD has been proposed:
    - Solar modules – 40%
    - Solar cells – 25%
  - BCD shall be imposed in addition to Safeguard Duty (**SGD**) and Anti-Dumping Duty (**ADD**) on imported solar modules and cells.
    - MoF, vide notification[3] dated July 30, 2018, had imposed an SGD on imported solar modules and cells for a period of two years, minus anti-dumping duty payable, if any, at the following rates:

Rate *ad valorem*	Period of import
25%	From July 30, 2018 to July 29, 2019
20%	From July 30, 2019 to January 29, 2020
15%	From January 30, 2020 to July 29, 2020

*This duty is calculated after anti-dumping duty payable.

    - Thereafter, through its notification[4] dated July 29, 2020 extended the SGD and provided that the SGD imposed on solar modules or panels, minus anti-dumping duty payable, if any, shall be reduced to the following rates:

Rate *ad valorem*	Period of import
14.9%	From July 30, 2020 to January 29, 2021
14.5%	From January 30, 2021 to July 29, 2021

*This duty is calculated after anti-dumping duty payable.

    - MoF vide notification[5] dated March 29, 2019, imposed ADD at various rates, which would be effective for a period of 5 years unless revoked on specific goods imported from countries like China, Saudi Arabia, Thailand and Malaysia.
  - The MNRE directed all implementing agencies and stakeholders to include this in the tender documents and the bidders to take the BCD into account while quoting tariffs in all future bids where the last date of bid submission falls after this notification.
- The office memorandum to implement BCD is a welcome move and a part of the 'Atmanirbhar Bharat' initiative to boost domestic manufacturing. The domestic industry has had ample time to prepare and for the ongoing solar projects to be completed. This office memorandum also mentions that India seeks to achieve the ambitious goal by ramping up its renewable capacity to 175 gigawatts by 2022 and 450 GW by 2030, from about 93 GW currently, as part of its commitment under the Paris Climate Agreement. A robust domestic manufacturing capability will be critical for achieving these targets.

[2] No. 283/3/2018-GRID SOLAR
[3] No. 01/2018-Customs (SG)
[4] Notification No. 02/2020-Customs (SG)
[5] Notification No. 15 /2019-Customs (ADD)

RECENT JUDGMENTS

In this Section

Tata Power Renewable Energy Ltd v. Tata Power Company Ltd – Distribution

MERC Order dated March 05, 2021 in the case No. 218 of 2020

Background facts

- Tata Power Renewable Energy Ltd (**TPREL**) filed the petition seeking the imposition of Safeguard Duty (**SGD**) for the period of July 30, 2020 to July 29, 2021 on the import of solar cells vide Notification No. 02/2020 - Customs (SG) dated July 29, 2020 (**New Notification**) of the Ministry of Finance (**MoF**) as an event of 'Change in Law and further seeking liberty to file appropriate Petition for seeking approval of cost.
- TPREL entered into a power purchase agreement with Tata Power Company Ltd – Distribution (**TPCD**) for procurement of 150 MW of solar power at a Tariff of INR 2.83/unit. During the submission of bid on September 20.09.2019, MoF Notification dated July 30, 2018 regarding imposition of SGD on the import of solar modules (**Old Notification**) was operational and made valid till July 2020. Accordingly, TPREL planned to import the solar PV modules after July, 2020 by which date the effective SGD would not be applicable and entered into a supply agreement for the procurement of solar modules.
- However, on July 29, 2020, the Ministry of Finance notified the New Notification whereby it extended the applicability of SGD for another one year valid till July 29, 2021.
- TPREL contended that as such change could not have been factored in at the time of submission of bid or the cut-off date, the New Notification should qualify as a Change in Law event in terms of the PPA.
- TPCD contended that TPREL must produce proper documents establishing the actual costs for seeking compensation. It further added to its contention that the impact of SGD on the project cost and on tariff should only be determined at the time of Commercial Date Operation (**COD**) of the project only after considering actual payment made against SGD duly presented with documentary evidence.

Issues at hand?

- Whether the imposition of SGD by MoF for the period from July 30, 2020 to July 29, 2021 on the import of solar cells is an event of 'Change in Law'?
- Whether TPREL is entitled to recover any additional cost in terms of Article 9 of the PPA?

Decision of the Commission

- The MERC observed that an event can be qualified as a 'Change in Law Event', only if it satisfies the provisions stipulated under the PPA. The commission analyzed the relevant clauses of the PPA dealing with provisions of Change in Law including the definition of Law, Governmental Instrumentality.

- MERC held that since the New Notification is subsequent to the last date of Bid Submission, it squarely qualifies as an event of 'Change in Law'.
- In regard to the additional cost and impact, the Commission held that the actual impact of SGD can only be ascertained when the project achieves the COD. Therefore, the impact of SGD on the project cost and tariff should only be determined at the time of COD of the project only after considering actual payment made against SGD duly presented with documentary evidence. Accordingly, MERC directed TPREL to approach the Commission at later date for determination of increase in cost or/and revenue expenditure on account of imposition of SGD, if any. 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.

Our viewpoint

As the timelines for completion of generating projects are spilling over the time period for safeguard duty, vide the instant order, the Commission has rightfully held that the imposition of New Notification qualifies as Change in Law. The same will assist other similarly placed generators governed by similarly provisioned PPAs) to approach the Hon'ble Commission and claim parity.

GUVNL v. Amit Gupta & Ors

Civil Appeal No. 9241 of 2019

Background facts

- On April 30, 2010, GUVNL and Astonfield Solar (Gujarat) Pvt Ltd (**Corporate Debtor**) executed a PPA, basis which GUVNL agreed to purchase all the power generated by the Corporate Debtor through its Solar Power Plant.
- Due to the heavy rainfall and the flood in Gujarat during June and July 2017, the Solar Power Plant of the Corporate Debtor was severely damaged, and the Corporate Debtor was only able to operate at 10 – 15% of its original capacity. Hence, the Corporate Debtor suffered major financial crunch. Consequently, the Corporate Debtor was unable to fully service its debt to the Financing Parties and the Corporate Debtor was declared to be a Non-Performing Asset (**NPA**) on May 04, 2018.
- Thereafter, vide Order dated November 20, 2018, the NCLT admitted a petition filed by the Corporate Debtor under Section 10 of the Insolvency and Bankruptcy Code, 2016 (**IBC**) and directed for commencement of Corporate Insolvency Resolution Process (**CIRP**) in respect of the Corporate Debtor. Mr. Amit Gupta was appointed as the Insolvency Resolution Professional of the Corporate Debtor (**Respondent No. 1**). Thereafter, vide order dated February 01, 2019, the Respondent No. 1 was confirmed as the Resolution Professional of the Corporate Debtor by the NCLT.
- However, on May 01, 2019, GUVNL issued two notices of default to the Corporate Debtor (in terms of Clause 9.2.1(e)[6] and 9.2.1(a) of the PPA) and thereafter, on May 21, 2019, GUVNL affirmed to the Corporate Debtor that they would be terminating the PPA with the Corporate Debtor on the ground that the Corporate Debtor is undergoing insolvency.
- Thereafter, the Respondent Nos. 1 & 2 (the Resolution Professional and EXIM Bank) preferred Applications before the NCLT under Section 60(5) of IBC seeking an injunction restraining GUVNL from terminating the PPA with Corporate Debtor. This Application was allowed by NCLT vide order dated August 29, 2019 whereby GUVNL was restrained from terminating the PPA. The NCLT also set aside the notice of default dated May 01, 2019. It is pertinent to note that the NCLT's reasoning in its final order for restraining GUVNL from terminating the PPA was premised on the fact that PPA was an 'instrument' within meaning of Section 238 of IBC and therefore, the clauses of the PPA cannot be placed on a higher pedestal than provisions of IBC. Thus, NCLT held that the clauses of PPA (with regard to Termination on account of insolvency) are inconsistent with the provisions of the IBC and stand overridden in terms of Section 238 of the IBC.
- Aggrieved by the abovementioned, GUVNL filed an Appeal before the NCLAT, which was dismissed by the Appellate Tribunal vide order dated October 15, 2019 (**Impugned Order**). The NCLAT noted

[6] Clause 9.2.1(e): If the Power Producer becomes voluntarily or involuntarily the subject of proceeding under any bankruptcy or insolvency laws or goes into liquidation or dissolution or has a receiver appointed over it or liquidator is appointed, pursuant to law, except where such dissolution of the Power producer is for the purpose of a merger, consolidated or reorganization and where the resulting entity has the financial standing to perform its obligations under the Agreement and credit worthiness similar to the Power producer and expressly assumes of obligations under the agreement and is in a position to perform them.

that the Corporate Debtor was to be maintained as a going concern in accordance with the objects of the IBC and termination of the PPA would render the Corporate Debtor defunct. Thus, GUVNL could not terminate the PPA solely on the ground of the initiation of CIRP of the Corporate Debtor.

- In the above background, GUVNL approached the SC.

Issues at hand

- Whether the NCLT/NCLAT can exercise jurisdiction under the IBC over disputes arising from contracts such as the PPA?
- Whether GUVNL's right to terminate PPA in terms of Article 9.2.1(e) read with 9.3.1 of the PPA is regulated by the IBC?

Decision of the Court

Issue 1: Jurisdiction of NCLT/NCLAT under the IBC over disputes arising from contracts such as the PPA

- **Jurisdiction of the NCLT/NCLAT over contractual disputes**
  - In order to enumerate the contours of the jurisdiction which can be exercised under Section 60(5)(c) of the IBC, SC emphasized upon understanding the extent of the words '*arising out of*' and '*in relation to*' as used under Section 60(5)(c) of the IBC.
  - The Court referred to the principles of statutory interpretation and observed that while the phrases '*arising out of*' and '*relating to*' have been given an expansive interpretation in various cases, words can have different meanings depending on context. The Court also reiterate that the words of a statute have to be construed in a manner which would give them a sensible meaning which accords with the overall scheme of the statute.
  - In view of the above, SC was of the opinion that while construing Section 60(5), a starting point for the analysis must be to decipher Parliamentary intent based on object underlying the enactment of the IBC.
  - Thereafter, the Apex Court shed light upon the intent behind the introduction of the IBC and the essence for its working i.e. ensuring continuity of 'going concern' status, to avoid multiplicity of legislation and adjudicating bodies dealing with issues pertaining to insolvency and bankruptcy, and to ensure a timely resolution of the Corporate Debtor.
  - In view of the same, SC referred to the observations made in the Report of the BLRC, and also reiterated the ratio in various cases such as *Innoventive Industries*[7] and *Arcelor Mittal (India) (Pvt) Ltd*[8], whereafter it was concluded that considering Section 60(5)(c) and the interpretation of similar provisions in other insolvency related statutes, the NCLT has jurisdiction to adjudicate disputes, which arise 'solely' from or which relate to the insolvency of the Corporate Debtor. However, in doing so, NCLT and NCLAT must ensure that they do not usurp the legitimate jurisdiction of other Courts, Tribunals and fora when the dispute is one which does not arise solely from or relate to the insolvency of the Corporate Debtor. Thus, Resolution Professional can approach NCLT for adjudication of disputes which are related to CIRP.
  - However, for adjudication of disputes that arise dehors insolvency of Corporate Debtor, Resolution Professional must approach the relevant competent authority.
  - Lastly, regarding the facts of the current case, SC observed that as the dispute had arisen solely on the ground of the insolvency of the Corporate Debtor, therefore, the NCLT was empowered to adjudicate this dispute under Section 60(5)(c) of the IBC.
- **Jurisdiction of NCLT and the State Commission (GERC) regarding the application of the clauses of the PPA**
  - The arguments advanced by the counsels of the parties premised around determining the nature of the PPA as an 'instrument' under the provisions of IBC, particularly application of the non - obstante clause in Section 238 of IBC which has an overriding effect over the clauses of PPA which have the force of law under the Electricity Act, 2003.
  - SC deliberated and differentiated the facts of the present case with ratio laid down in the matter of *Embassy Property Developments Pvt Ltd v. State of Karnataka*[9] and *Municipal Corporation v. Abhilash Lal*[10] and observed that even though the aforementioned cases dealt

[7] (2018) 1 SCC 407
[8] (2019) 2 SCC 1
[9] (2020) 13 SCC 308
[10] (2020) 13 SCC 234

with the extent of the statutory power of the NCLT to adjudicate upon matters of public law, however, the decisions laid down therein cannot be applied to the facts of the present case.

While arriving at this conclusion, the reasoning by the court was that the decision to terminate PPA was not taken by any governmental or statutory authority acting within the domain of its public law functions. The decision had simply been taken by a contracting party solely on account of the initiation of insolvency proceedings against Corporate Debtor in terms of an agreement between the parties.

- Further, the Court also held that Section 238 of the IBC does not state that the instrument must be entered into by operation of law, rather it states that the instrument has effect by virtue of any such law. In other words, the instrument need not be a creation of a statute. It becomes enforceable by virtue of a law.
- Hence, it was concluded that NCLT's jurisdiction could be invoked in present case because termination of PPA was sought solely on ground that Corporate Debtor is subject to an insolvency resolution process under IBC.

- **Residuary jurisdiction of the NCLT under Section 60(5)(c) of the IBC**
  - SC held that residuary jurisdiction of NCLT under Section 60(5)(c) of IBC provides it with a wide discretion to adjudicate questions of law or fact arising from or in relation to insolvency resolution proceedings. If jurisdiction of NCLT were to be confined to actions prohibited by Section 14 of IBC, there would have been no requirement for legislature to enact Section 60(5)(c) of IBC. Section 60(5)(c) would be rendered otiose if Section 14 is held to be exhaustive of grounds of judicial intervention contemplated under IBC in matters of preserving value of CD and its status as a going concern. However, it is pertinent to mention that NCLT cannot exercise its jurisdiction over matters dehors insolvency proceedings since such matters would fall outside the realm of IBC. Further, NCLT's residuary jurisdiction, though wide, is nonetheless defined by text of IBC.

<u>Issue 2: GUVNL's right to terminate the PPA in terms of Articles 9.2.1(e) read with 9.3.1 is regulated by IBC</u>

- **Validity of ipso facto clauses**
  - In order to determine the validity of termination of PPA in terms of Articles 9.2.1(e) read with 9.3.1 of the PPA, which were considered as the ipso facto[11] clauses of the PPA, SC examined the legal position and the applicability of such ipso facto clauses in India, particularly with respect to its application over Section 14 of the IBC.
  - The Court took note of the observations made in Report of the Expert Committee on Company Law headed by J.J. Hirani, which observed that there is a need to invalidate ipso facto clauses so as to prevent the value of a Corporate Debtor's assets from becoming diluted during the insolvency process. However, this invalidation was to be subject to exceptions, keeping in mind the compelling, commercial, public or social interest in upholding the contractual rights of the counter party to the contract.
  - SC thereafter discussed the Insolvency and Bankruptcy Code (Amendment) Act, 2020 which, inter alia introduced an Explanation to Section 14(1) and the legislative intent for its introduction. The aforesaid Explanation introduced by way of the amendment prohibited the suspension or termination of any license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force on the grounds of insolvency of Corporate Debtor. The legislative intent behind this amendment was to ensure that Corporate Debtor continues to function as a going concern during moratorium period imposed under Section 14 of IBC.
  - In view of the above observations read parallelly with the legal precedents and the standards set globally, SC acknowledged that from the bare text of the IBC, no clear position emerges in relation to the validity of ipso facto clauses in other contracts. Owing to the principle of separation of powers, the Court limited itself from setting any general principle of law and held that the question of the validity/invalidity of ipso facto clauses in contracts is one which the Court ought not to resolve exhaustively in the present case. Rather, an appeal can be made to the legislature to provide concrete guidance on this issue, since the lack of a legislative voice on the issue will lead to confusion and reduced commercial clarity.
- **Validity of the termination of the PPA**

[11] ipso facto clauses arise in a variety of contracts. Ipso facto clauses are contractual provisions which allow a party (terminating party) to terminate the contract with its counterparty due to the occurrence of an event of default.

- It was observed that in the facts of the present case, in case of termination of the PPA, the Corporate Debtor would no longer remain as a going concern. Thus, the continuation of the PPA assumes enormous significance for the successful completion of the CIRP.
- It was noted that the inclusion of the Explanation to Section 14(1) and Section 14(2A) of the IBC indicated that Parliament has been amending the IBC to ensure that the status of a Corporate Debtor as a going concern is not hampered on account of varied situations, which may not have been contemplated at the time of enacting the IBC.
- SC reiterated the observations given by it with respect to ambit of powers of NCLT under Section 60(5)(c) to entertain and dispose of any question of fact or law 'solely' arising out or in relation to the insolvency resolution process and concluded that in the factual matrix of the given case and the significance of PPA (which was terminated solely on the ground of insolvency) for successful resolution of Corporate Debtor, NCLT was empowered to restrain GUVNL from terminating the PPA.
- However, while arriving at this conclusion, SC specifically indicated that in all future cases, NCLT would have to be wary of setting aside valid contractual terminations which would merely dilute the value of the Corporate Debtor, and not push it to its corporate death.

- On the basis of the above findings, SC held that:
  - The NCLT/NCLAT could have exercised jurisdiction under Section 60(5)(c) of the IBC to stay termination of PPA by GUVNL, since GUVNL sought to terminate PPA only on account of CIRP being initiated against the Corporate Debtor.
  - NCLT/NCLAT correctly stayed termination of PPA, since allowing it to terminate PPA would certainly result in corporate death of Corporate Debtor due to PPA being its sole contract.
  - SC left open the broader question of validity/invalidity of ipso facto clauses in contracts for legislative intervention.

Our viewpoint

It is a well understood fact that a PPA is *sine quo non* for not only the functioning but the very existence of a power project. This judgment, in as much as it ensures the continuity of the PPAs, would bring a sigh of relief to the lenders of the power generators which are undergoing insolvency proceedings as it would help in value maximization. Moreover, provided that the Corporate Debtor is able to fulfil the supply obligations, this decision would ensure that the Corporate Debtor would have a steady source of income and would continue to function as a going concern during the resolution process.

Jai Prakash Power Ventures Ltd v. UP Power Corporation Ltd & Ors

UPERC Order dated February 22, 2021 in Petition No. 1376 of 2018

Background facts

- The present Petition had been filed by Jai Prakash Power Ventures Ltd (**Petitioner**), under Sections 86(1)(b) and 86(1)(f) of the Electricity Act, 2003 seeking revision in Design Energy, consequent changes in the Saleable Design Energy and also changes in the incentives towards the Secondary Energy according to the revised Design Energy owing to Change in Law.
- The tariff for the sale of energy from Petitioner's (4x100MW) Vishnu Prayag Hydro Electric Project had been approved by the Order dated October 07, 2009 and October 13, 2008 passed by UPERC for the years 2008-09. Pursuant to passing of an Order dated August 09, 2017 by the National Green Tribunal (**NGT**) directing that all rivers in the country are required to maintain minimum 15% to 20% of the average seasonal lean flow of that river, Government of Uttarakhand vide Order dated June 05, 2018 directed all Hydro-electric Project Developers to inter-alia, release minimum environmental (E)-flow at the rate of 15% of average flow during the lean season.
- Petitioner claimed that in view of the event of 'Change in Law' as ordered by the NGT, the Petitioner is now to maintain the increased E-flow to 15% of the average flow during the lean season which works out to 1.43 cumecs and consequently, the Design Energy generation in 90% dependable year would be reduced to 1704.04MU from 1774.42MU. Accordingly, the Petitioner stated that based on the above revised Design Energy, there would be consequent reduction in the Saleable Design Energy, Incentive for Saleable Secondary Energy.
- The UP Power Corporation Ltd (**UPPCL/Respondent**) submitted that the prayers of the Petitioner may be considered by the UPERC only after ascertaining the veracity of the claims of the Petitioner based on Central Electricity Authority (**CEA**) certificate to be placed on record by the Petitioner.

- Petitioner stated that considering that there is no provision either in the Regulations or in the PPA pertaining to change in design energy, the Petitioner was claiming the design energy based on the change in law provisions in the Power Purchase Agreement (**PPA**) which clearly define 'an order of a Court/Tribunal' to fall within the ambit of Change in Law.
- Petitioner had placed on a record a Central Water Commission (**CWC**) letter dated July 23, 2020 informing that it was monitoring the e-flow status as mandated, a copy of the Certificate dated February 17, 2020 from CEA certifying the design energy as 1432.28Mus. Accordingly, the Petitioner had also sought revision of design energy from 1774.42Mus to 1695.54MUs for the period of October 03, 2018 to December 14, 2019 and consequently to 1432.28MUs from December 15, 2019 till dated in terms of Article 6.9 of the PPA.
- Respondent submitted that as per the energy bills raised by the Petitioner, it was evident that revised design energy was lower than the actual energy being generated by the plant. Further, there was no change in the annual capacity charge and the energy charge due to the present Change in Law but the only change had been brought in the saleable design energy. Though there had been a Change in Law due to the NGT Order yet the impact on cost of generation of energy or the change in amount of energy being produced had not reduced, therefore, no financial loss was being incurred by the Petitioner.

Issues at hand

- Whether the Order dated August 09, 2017 passed by the NGT and Notification dated October 09, 2018 and its amendment dated September 14, 2019 issued by Ministry of Jal Shakti (Deptt. Of Water Resources, River Development Ganga Rejuvenation) constitute 'Change in Law'?
- Whether Design energy of the Petitioner's Project ought to be revised in terms of the PPA and applicable Generation Tariff Regulations of the UPERC?

Decision of the Commission

- UPERC observed that in terms of the Change in Law defined in the PPA/Generation Tariff Regulations, 2014, the Order dated August 09, 2017 passed by NGT and the notification dated October 09, 2018 issued by Ministry of Jal Shakti were 'Change in Law' resulting in different e-flow as compared to 0.43Cumecs in PPA dated July 19, 2006.
- UPERC observed that Article 6.9(e) of the PPA provides for incurring expenditure due to change in law towards additional facilities or modification of any existing facility of the Project. As such, the Article 6.9(g) provides that for giving effect to change in law, if there is a certain planned expenditure required to be made to mitigate the effect, shall be mutually agreed. Considering that the Petitioner has submitted that the mandated e-flow had been achieved through barrage gate settings and no capital expenditure had been incurred for giving effect to mandated e-flows, there was no change in capital cost of the Project resulting in consequential change in tariff.
- UPERC further observed that the economic loss of the Petitioner cannot be assessed by reducing the Design Energy of the plant because in some years, even after accounting for the environment flow, the power generation may be more than design energy. In case, the Design Energy is reduced but the actual generation is more than the reduced design energy, it may lead to undue enrichment to the Petitioner by recovering more on account of primary as well as secondary energy charges.
- As regards the reliefs sought by the Petitioner with respect to design energy reduction on account of NGT Order and Notification dated October 09, 2018, the UPERC directed that in case the actual generation in a particular year is less than the design energy of the project i.e. 1774.42Mus, on account of above change in law, the actual generation shall be taken as design energy of that particular year for recovery of Energy Charge and Fixed Charges of the year to offset any economic loss. Further, the Petitioner has been granted the liberty to approach UPPCL, on account of any economic loss as per the provided methodology on annual basis.

Our viewpoint

UPERC has interpreted the 'Change in Law' clauses stipulated in the PPA and Generation Tariff Regulations, 2014 to include within its purview the Order dated August 09, 2017. Further, the Commission has also provided the methodology for computation of economic loss, if any, incurred by the Petitioner with effect from date of issuance of Notification by Ministry of Jal Shakti i.e. October 09, 2018 based on actual annual generation of the Petitioner to prevent from undue enrichment. The same is aligned within the accepted principles of 'Change in Law' wherein an aggrieved party is responsible to establish such adverse impact.

National Engineering Industries Ltd v. Jaipur Vidyut Vitran Nigam Ltd

RERC Order dated March 01, 2021 in Petition Nos. RERC/1835/20 and RERC/1836/20

Background facts

- A Petition was filed by National Engineering Industries Ltd, Jaipur and National Engineering Industries Ltd., Newai (**Petitioners**), under Section 86(1)(f) against Jaipur Vidyut Vitran Nigam Limited (**JVVNL/Respondent**) for directions to not recover fixed charges for period of lockdown.
- Petitioners have submitted that due to imposition of lockdown due to Covid-19, by the Government of India under the Disaster Management Act, 2005, the Petitioners had no option but to totally shut down their plants, causing heavy losses, dislocation of entire industrial activity apart from the extreme hardship to workers.
- It is the case of the Petitioners that force majeure conditions are attracted in such situations, considering that Government of India had also recognized this irrefutable legal position and all Industrial Consumers had been restricted use of electricity supply due to lockdown Orders of Central Government/State Government and/or District Magistrates, it had become impossible for the industrial consumers to draw any electricity from the DISCOMs, fixed charges for the relevant period are not leviable under the Terms and Conditions of Supply of Power (TCOS).
- The Petitioners have also prayed that the Load Factor Formula be based on Maximum Demand Recorded rather than on Contract Demand and e calculated during the Lockdown period, with actual number of days worked in the particular months of lock down period rather than multiplying the same with 30 days. Further, the Petitioners have also prayed that the recovery of special fuel surcharge be deferred without interest for six months or till lifting of lockdown.
- Respondent argued that the Guidelines issued by the State Government, in view of the impact of Covid-19 outbreak on industries and the relaxations provided therein, have already been implemented by the DISCOM and fixed charges have been deferred up to June 30, 2020, such that the industrial consumers are not burdened with the liability to pay the fixed charges immediately.
- Further, Respondent submitted that considering that the Petitioners were invoking the provision under Clause 48(4) of the TCOS, the Petitioners are liable to adopt the redressal procedure provided under clause 49 i.e. by approaching 'Grievance Redressal-cum-Settlement Forum'.
- As regards the other aspects raised by the Petitioners namely; modification in the formula of load factor, special fuel surcharge and power factor rebate/surcharge, it is the case of Respondent that the Petition is not maintainable. Further, all these aspects had been considered by RERC at different times under different proceedings or are otherwise covered under applicable Regulations.

Issues at hand

- Whether the issue of payment of fixed charges raised by the Petitioners is covered by the Order dated October 28, 2020 passed by the RERC in Petition Nos. 1735/2020 and 1754/2020 whereby the Petitions were dismissed?
- Whether the present Petitions are maintainable inasmuch as the Petitioners have not challenged the Order dated June 13, 2019 passed by RERC with respect to Special Fuel Surcharge?

Decision of the Commission

- RERC observed that Petitioners are seeking waiver of Fixed Charges in terms of Tariff and TCOS since the industrial units were forced to shut down due to Covid-19. For other relief such as modification in Load Factor formula till the total lifting of the Lockdown period, deferment of recovery of special fuel surcharge and suspension of condition of maintaining Power Factor during the lockdown period, they are seeking amendment/relaxation in the relevant Regulations for the lockdown period.
- RERC also observed that same issues raised in the Petitions 1815/20 and 1820/20 filed by Rajasthan Textile Mills Association & Ors and RERC vide Order dated February 05, 2021 had observed that Government of Rajasthan and RERC had provided the necessary reliefs to mitigate hardships to the consumers on account of Covid-19. As such no relief could be provided as regards the Fixed Charges and accordingly the Commission was not inclined to review its decision at that stage.
- RERC further held that if any particular consumer had specific grievance regarding non-compliance of TCOS, then appropriate grievance redressal mechanism should be invoked and the procedure for grievance redressal be followed.

- RERC held that the considering the reliefs claimed in the present Petitions were similar to that of Rajasthan Textile Mills Association & Ors, the judgment rendered in the said cases squarely applied to the present Petitions. Therefore, the Petitions were disposed of in terms of no relief to the Petitioners as regards payment of fixed charges.

Our viewpoint

RERC, relying upon its earlier Order in similar circumstances, has aptly held that no further reliefs as regards payment of fixed charges could be granted to the Industrial Consumers in view of the specific relaxations provided to them under the Guidelines issued by State Government and, as such, no other relief could be granted to the Petitioners. Further, RERC has also validly held that the imposition of Special Fuel Surcharge by Discoms was in compliance of Order dated June 13, 2019 passed by RERC.

In the matter of amendments to APERC Forecasting, Scheduling and Deviation Settlement of Wind and Solar Generation Regulation, 2017 (Regulation No. 4 of 2017)

APERC Order dated March 01, 2021 in Original Petition No. 2 of 2020

Background facts

- Andhra Pradesh State Load Dispatch Centre (**APSLDC**) submitted a detailed report before APERC consolidating the difficulties being faced by APSLDC in day-to-day operation of the grid and requested the APERC for suitable amendments to the APERC Forecasting, Scheduling and Deviation Settlement of Solar and Wind Generation Regulation, 2017 (**Regulation**) which are effective from July 01, 2018.
- The amendments were proposed for ensuring the integrated grid operations and for achieving maximum economy and efficiency in the operation of power system in Andhra Pradesh.
- That certain observations were noticed in adopting Clauses 2.1 (a), 2.1 (j), 4.1, 6.3 and 2.1 (aa) of the Regulation in day-to-day operation of the grid with the mix of Variable Renewable Energy (**VRE**) and conventional generation and that therefore, as per APSLDC amendments are required to the above clauses.

Issues at hand

- Whether the proposed amendment for replacing the words 'Available Capacity' with the words 'Scheduled Generation' in the denominator of the following original formula can be permitted?
  Absolute Error (%) = 100 X (Actual Injection - Scheduled Generation)/Available Capacity (AvC)
  Absolute Error (%) = 100 X (Actual Injection - Scheduled Generation)/Available Capacity (AvC)
- Whether the proposed amendment for insertion of definition 'Allowable Forecast error' (in percentage) with suggested formula in the Regulation can be accepted?
- Whether the proposed amendment for levy and collection of 'Deviation Charges' as proposed can be approved?
- Whether the proposed amendment for removing the option of rescheduling of forecast on one-and-half hourly basis during the day of operation and to strictly adhere to scheduling on day ahead basis, can be approved?
- Whether the proposed amendment for deletion of the definition of the phrase 'virtual pooling' can be accepted?

Decision of the Commission

- With regard to first issue, the Commission observed that APERC has no reason to lay down a different formula from what has been laid down by the CERC and provided by APERC, in the existing Regulation. Commission finds no merit in the proposal for amendment in the formula for calculation of Absolute Error and accordingly rejects the proposed amendment for change in the said formula.
- In second and third issue, the Commission opined that APERC while issuing the 2017 Regulations adopted a liberal tolerance band of 15% for all the generators while also allowing virtual pooling which is being implemented (the forecasting and scheduling) since three years. The Forum Of Regulators (**FOR**) observed in the year 2015 itself, while framing the Model Regulations, that 10% accuracy is quite achievable with the framework of aggregator (**QCA**) at pooling station.
- In order to maintain stability of the grid and ensure proper accountability in forecasting by the VRE generators, the tolerance band needs to be tightened from the present level to a reasonable

extent. This will not only achieve grid discipline but also enable the APSLDC and the licensees to plan their activities in a more efficient and economical manner.

- Hence, the following table replaces the clause 6.3 of the Regulations:

S. No.	Absolute Error in the 15 min. Time block	Deviation charges payable to State Pool Account
1.	≤=10%	None
2.	≥10% but ≤=20%	At INR 0.50 per unit for shortfall or excess energy for absolute error beyond 10% and up to 20%.
3.	≥20% but ≤ = 30%	At INR 0.50 per unit for shortfall or excess energy for absolute error beyond 10% and up to 20% + INR 1 per unit for balance energy beyond 20% and up to 30%
4.	≥30%	At INR 0.50 per unit for the shortfall or excess energy for absolute error beyond 10% and up to 20% + INR 1 per unit for balance energy beyond 20% and up to 30% + INR 1.50 per unit for balance energy beyond 30%

- With respect to the fourth issue, APERC observed that the proposal to withdraw the provision of intra-day revision of schedule for Wind and Solar generators and mandating only day ahead forecast is against the well considered reasoning of the expert bodies like CERC and FOR. The Commission, therefore rejected the proposal of AP Transco/APSLDC in this regard.
- In fifth issue, APERC observed that the conditions as they stood when the Regulations were made in 2017 have undergone a qualitative change on the aspect of forecasting. However, the Commission feels that a sudden change in the deviation settlement from virtual pool concept to an individual generator stage is not desirable.
- Further, the point of entry of the pooled VRE generation into the grid and possible first point in the grid that encounters the effect of deviations, is the pooling station or the substation.
- APERC, as a via media, intends to allow aggregation at pooling station level instead of restricting to individual level, as also being followed in all other RE rich states such as Tamil Nadu, Gujarat, Rajasthan, and Maharashtra. As per this, deviations of all generators connected to a pooling station/substation will be settled accordingly. Consequently, the definition of the phrase of virtual pooling at clause 2.1 (aa) and clause 6.9 of the Regulation stands deleted.

Our viewpoint

In order to maintain stability of the grid and ensure proper accountability in forecasting by the VRE generators, APERC tightened the tolerance band from the earlier level to a reasonable extent. The Commission replaced amendment to Clause 6.3 of the Regulations to enable APSLDC and licensees to plan their activities in a more efficient and economical manner. Also, the conditions as they stood when the Regulations were made in 2017 have undergone a qualitative change on the aspect of forecasting. Thus, APERC for the present, allowed aggregation at pooling station level instead of restricting to individual level, as also being followed in all other RE rich states such as Tamil Nadu, Gujarat, Rajasthan, and Maharashtra.

Determination of Point of Connection (PoC) rates for the period of October 2020 to November 2020 in accordance with Regulation 17(2) of the CERC (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010 and amendments thereto

CERC Order dated February 21, 2021 in No.L-1/44/2010-CERC

Background facts

- CERC formulated the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010 (**2010 Sharing Regulations**) which came into force with effect from July 01, 2011.
- As per Regulation 17 of the 2010 Sharing Regulations, National Load Dispatch Centre (**NLDC**) being the Implementing Agency has been entrusted with the responsibility of computation of transmission charges and losses.

- The NLDC/Implementing Agency vide its letter dated October 5, 2020 has submitted following information in compliance with Regulation 17 of the 2010 Sharing Regulations:
  - Approved Basic Network Data and Assumptions
  - Zonal and nodal transmission charges for the ensuing Application Period
  - Zonal and nodal transmission losses data for the ensuing Application Period
  - Schedule of charges payable by each constituent for the ensuing Application Period
  - Yearly Transmission Charges (YTC) details of ISTS Licensees
  - PoC rates and loss percentage computation details
  - LTA /MTOA and their commencement schedule.
- CERC approved the Basic Network, Load Flow and the assumptions made for computation of the final PoC rates and final transmission losses, their fitment into sabs and schedule of charges payable by each DIC for the period from October 2020 to November 2020 as submitted by Implementing Agency.

Issue at hand

- Whether the calculations submitted by NLDC/ Implementing Agency are appropriate or determining the PoC slab rates?

Decision of the Commission

- CERC held that the NLDC/Implementing Agency after computation of PoC rates for each injection zone and demand zone has assigned them to different slabs. Moreover, CERC after analyzing the details furnished by the NLDC/Implementing Agency, find the same in order. Thus, held that the total Monthly Transmission Charge (**MTC**) considered for the period from October 2020 to November 2020 is INR 3328.24 crore.
- CERC thus approved the following:

  The applicable PoC slab rates for Long Term Access (**LTA**) and Medium Term Open Access (**MTOA**) in INR/MW/month for each demand zone (for withdrawal DICs) and injection zone (for injection DICs having LTA to target region). The slabs for POC rates for LTA/MTOA, as determined by CERC are as follows:

PoC Slab	(₹/MW/Month)
I	481067
II	428211
III	375355
IV	322499
V	269643
VI	216787
VII	163931
VIII	111075
IX	58219

- CERC held that the PoC rates in the instant Order is for the period from October 2020 to November 2020. However, the CERC (Sharing of inter-state transmission charges and losses) Regulations 2020 have become effective from 01.11.2020 and accordingly the transmission charges for period from November 01, 2020 shall be in accordance with CERC (Sharing of inter-state transmission charges and losses) Regulations 2020. That Regulation 22 of the CERC (Sharing of inter-state transmission charges and losses) Regulations 2020 provides that in the transition period of November 2020 and December 2020, bills would be raised as per the provisions of the 2010 Sharing Regulations. Thus, the bills raised in the month of November 2020 and December 2020 shall be based on the notified PoC rates for October 2020 and November 2020 respectively, determined in accordance with the 2010 Sharing Regulations.

Our viewpoint

CERC observed that the calculations submitted by the NLDC/Implementing Agency have been done as per provisions of the 2010 Sharing Regulations and amendments thereof. Accordingly, CERC approved Basic Network, Load Flow and the assumptions made for computation of final PoC rates and final transmission losses, their fitment into sabs and schedule of charges payable by each DIC for the period from October 2020 to November 2020 as submitted by Implementing Agency.

UPPCL v. Rosa Power Supply Co Ltd

UPERC Order dated March 08, 2021 passed in Petition No. 1525 of 2019

Background facts

- The present Petition was filed by the Petitioner, Uttar Pradesh Power Corp Ltd (**UPPCL**/**Petitioner**), seeking recovery of excess interest on working capital on account of non-funded components of Entry Tax and VAT on coal and secondary fuel along with interest claimed against government loan.
- The Petitioner has submitted that the Uttar Pradesh Power Policy, 2003 (**2003 Policy**) provided for deferring the tax liability on entry of all goods other than capital goods, plants, machinery and spare parts for a period of nine years from the date of commencement of commercial production/generation of each phase of the project.
- UPERC vide its Order dated June 28, 2019 in Petition No. 1427/2019 has held that by virtue of the 2003 Policy, the Respondent No. 1, Rosa Power Supply Co Ltd (**RPSCL**) got an extra resource which is interest free.
- The fuel cost paid by the Petitioner included the entry tax and VAT liability and RPSCL in return was not required to make payment of the same to the Government of Uttar Pradesh (GOUP). Such payments should have been reduced from the working capital requirement of RPSCL when claiming interest on working capital, as the part of capacity charges.
- It is the Petitioner's case that RPSCL failed to reduce the interest free loans in the form of deferred tax liability from its working capital requirement, while claiming interest on working capital as part of capacity charge. As a result, there is an over recovery of generation tariff from FY 2010-11 to FY 2018-19. The Petitioner has estimated that RPSCL has over charged an amount approximately amounting to INR 209.9 Crores towards Interest on Working Capital (**IWC**). Further, the Petitioner has also claimed for carrying cost amounting to INR 114.24 Crore.
- RPSCL has challenged the maintainability of the present Petition. RPSCL has stated that the present Petition is barred by the principles of res judicata since the subject matter of the dispute has been settled by UPERC in Petition Nos. 1427 and 1422 of 2019. RPSCL has also contended that the Petitioner by virtue of its prayers seeks to overwrite/revise/revisit the tariff orders.
- RPSCL has also contended that the Petitioner has filed the present Petition under UPERC (Conduct of Business) Regulations, 2004, which have been repealed, and therefore, the Petition is not maintainable.

Issues at hand

- Whether the Petition filed by the Petitioner is maintainable as being barred by the principles of res judicata? Whether the relief(s) sought by the Petitioner are beyond the scope of the present proceedings? Whether the Petition filed by the Petitioner maintainable on account of the fact that it relies upon a repealed law i.e. the UPERC (Conduct of Business) Regulations, 2004?
- Whether the claim of the Petitioner on account of excess recovery of IWC by RPSCL can be allowed along with the applicable carrying cost?

Decision of the Commission

- UPERC has held that the present Petition is not barred by the principle of res judicata. The dispute in the instant case is on a completely different subject matter, from the dispute in Petition No. 1427 and 1422 of 2019. The prayers made by the Petitioner in the present matter were held to be distinct from the ones made in the other petitions, and no directions have been passed by UPERC in this regard as well. Therefore, on this issue UPERC held that the present Petition is maintainable.
- In so far as the question of the prayers being beyond the scope of the petition is concerned, UPERC has held that the dispute in the instant case relates to adjustment of excess recovery of IWC. Therefore, RPSCL's contention that the Petitioner by virtue of its prayers seeks to overwrite/revise/revisit the tariff orders, has been rejected.
- UPERC has further held that the UPERC (Conduct of Business) Regulations, 2004 were repealed on November 08, 2019. The Petitioner had however, filed the Petition on November 05, 2019, prior to the said repeal and coming into effect of the subsequent regulations. Therefore, RPSCL's contention has been held to be incorrect.

- UPERC has held that the issue of over recovery of IWC on account of non-funded components of Entry Tax and VAT on coal and secondary fuel shall be looked into by it while carrying out the true-up exercise for FY 2014-19, of RPSCL in Petition No. 1529 of 2019, in terms of the relevant provisions of the UPERC Generation Tariff Regulations, 2019. However, the claim of carrying cost from FY 2009-14 i.e., until 31.03.2014, has been rejected by UPERC in absence of regulatory provisions for carrying out true up of working capital under the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014.

Our viewpoint

The view taken by UPERC on the issue of maintainability is in terms of the express provisions of the law. UPERC has considered the difference in the subject matters involved in the various matters while determining the issue of the petition being barred by res judicata. Further, the other issues have also been considered in depth by UPERC while determining the maintainability of the proceedings. While the carrying cost until FY 2013-14 has been rejected by UPERC, it will be interesting to see how UPERC deals with the issue of over-recovery of IWC in the true up proceedings.

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