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PROJECTS, ENERGY & INFRASTRUCTURE

MONTHLY NEWSLETTER

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LEGAL & POLICY UPDATES

In this Section

Ministry of Power notifies the Draft National Electricity Policy, 2021 and invites suggestions

- The Ministry of Power (**MoP**) notified the Draft National Electricity Policy, 2021 (**NEP21**) on April 27, 2021 and has sought comments and suggestions within a period of 21 days.
- The key objectives of the NEP21 include reliable and quality supply of power for sustainable electricity generation, development of adequate and efficient transmission systems and markets, revitalization of DISCOMs, development of efficient markets for electricity, move towards light touch regulations and promotion of manufacturing of goods and services in India in the generation, transmission and distribution segments of the power sector.
- The NEP21 aims at laying guidelines for accelerated development of the power sector, providing supply of electricity to all areas and protecting interests of consumers and other stakeholders keeping in view availability of energy resources, technology available to exploit these resources, economics of generation using different resources, and energy security issues.
- To read more, please click here: https://powermin.gov.in/en/content/national-electricity-policy

MNRE grants extension of time in SCD RE projects

- The Ministry of New and Renewable Energy (**MNRE**) on May 12, 2021 has issued an Office Memorandum (**OM**) whereby it has granted time-extension for commissioning of Renewable Energy (**RE**) projects.
- It may be noted that MNRE, by virtue of its Office Memorandum dated August 13, 2020, had earlier granted a blanket time-extension of 5 months to RE projects for commissioning, on account of Covid-19 and the associated nationwide lockdown. Thereafter, subsequent clarifications dated February 9, 2021 and March 30, 2021 were issued, stating that a further time-extension beyond 5 months could be granted by implementing agencies in exceptional cases. However, for any time extension totalling beyond 6 months, a reference was required to be made to MNRE.
- In view of resurgence of Covid-19 and imposition of restrictions on mobility of people by several States/Union Territories (**UTs**), various representations were made by RE developers before MNRE seeking time-extension for commissioning of the projects. MNRE observed that although there is no nationwide lockdown, various States/UTs have taken measures like imposition of night curfew, Section 144, weekend lockdown, etc. which may have affected RE projects.

- Accordingly, by virtue of the OM, MNRE has issued following directions:
  - RE projects, being implemented through Implementing Agencies designated by the MNRE or under various schemes of the MNRE, having their Scheduled Commissioning Date (**SCD**) on or after April 1, 2021, would be eligible to claim time-extension for completion of their project activities, provided such time-extensions are not used as a ground for claiming termination of Power Purchase Agreement (**PPA**) or for claiming any increase in the project cost.
  - While applying for such time-extension, RE developers are required to undertake that time-extension would not be used as a ground for claiming termination of PPA or for claiming any increase in the project cost, including Interest During Construction (**IDC**) or upward revision of tariff. If the conditions are satisfied, then no other supporting documents would be required for granting time-extension.
  - On receipt of an application for time-extension, implementing agency is not allowed to initiate any coercive action on the project for recovery of penalty on delayed commissioning, till the time-extension request is decided upon.
  - Within the extended time provided for commissioning, intermediate milestones of RE projects, scheduled for completion on or after April 1, 2021 after considering the time extension under clarifications dated February 9, 2021 and March 30,2021, would also be commensurately extended.
  - Developers are required to pass on the benefit of time-extension to other stakeholders down the value chain including EPC contractors, material/equipment suppliers, OEMs etc

MNRE waives off the requirement for submission of hard copy of invoice/bill for monthly energy supplied by RE projects

- MNRE on May 12, 2021 has issued an OM whereby it has waived off the requirement for submission of hard copy of invoice/bill for monthly energy supplied by RE projects.
- In view of the prevailing circumstances on account of Covid-19 and the subsequent restrictions imposed by the Governments, various representations were received by MNRE, seeking waiver of the requirement for submission of hard copy of invoice/bill for monthly energy supplied by RE power projects on the ground that there has been resurgence of Covid-19, leading to imposition of restrictions on mobility by several States/UTs.
- Pursuant to examination of the aforementioned representations, MNRE has noted that while there are no Central Government instructions for a countrywide lockdown, since the beginning of April 2021, several States/UTs have taken various measures like night curfew, imposition of Section 144, weekend lockdown etc., which may have affected invoicing with respect to RE Generating Stations.
- Accordingly, MNRE has decided that for RE projects being implemented through MNRE designated implementing agencies, from April 1, 2021, the requirement of submission of physical hard copies is waived off. Further, the implementing agencies have been directed to accept soft copies of invoices. This arrangement would continue for a period to be decided in due course depending on Covid-19 related developments that take place in the coming weeks.
- In cases involving Joint Meter Reading (**JMR**) where signing of JMR is difficult, soft copies of invoices based on self-meter readings by RE power generators, duly substantiated by photographs of the meter reading/ downloaded meter data, may be accepted.
- Further, in cases where such self-meter reading is also not possible, or as an alternative, implementing agencies may choose to pay on the basis of invoice for the same month of the previous year or invoice for the previous month, if it is lower. This would however be subject to subsequent truing up based on actual meter reading.
- As regards the situation once the period mentioned above gets over, normal invoicing would be resumed, and within 15 days of the last date of such period, RE power projects are required to submit hard copies of invoices for this period for necessary adjustment, if any, in the subsequent bill.

MoP issues letter to CERC and SERCs for timely issuance of tariff orders

- The MoP on May 3, 2021 vide its letter has requested the SERCs in the States and Union Territories of Arunachal Pradesh, Chhattisgarh, Jharkhand, Karnataka, Madhya Pradesh, Nagaland, Punjab, Rajasthan, Tamil Nadu, Telangana, Tripura, Uttar Pradesh, Uttarakhand, West Bengal, Delhi, Jammu & Kashmir and Ladakh to issue tariff orders in a timely manner.
- The letter states that some SERCs issue tariff orders every financial year whereas others are not strictly adhering to the time limit prescribed for doing so in the Electricity Act. APTEL had in this regard, issued an Order in OP No. 1 of 2011 dated November 11, 2011 whereby certain directions were issued to the SERCs w.r.t the following aspects:
  - Ensuring regular and timely revision of Tariffs including regular truing up of tariffs
  - Non creation of fresh regulatory assets, allowing carrying cost of the past regulatory assets
  - A mechanism for fuel and power purchase cost adjustment to be put in place
- MoP in the letter further states that as per the available information some SERCs have not issued tariff orders for FY-2021-22, thereby not adhering to the provisions of the Electricity Act and directions of APTEL.
- MoP has observed that the distribution sector is crucial to the entire electricity value-chain and therefore it is imperative that the distribution sector sees sustainability and growth.
- Therefore, in order to comply with the APTEL directions and considering the importance of timely issuance of tariff orders, the SERCs have been requested to issue the tariff orders for FY 2021-22 at the earliest, so as to ensure financial health of DISCOMs.
- MoP has further sought for a status report in this regard from the SERCs.

PNGRB issues Public Notice inviting comments on proposed amendment to Technical Standards Regulation, 2008

- Petroleum and Natural Gas Regulatory Board (**PNGRB**) has issued a Public Notice dated May 6, 2021, inviting comments from the stakeholders including general public on the amendment proposed by PNGRB to the Petroleum and Natural Gas Regulatory Board (Technical Standards and Specifications including Safety Standards for City or Local Natural Gas Distribution Networks) Regulations, 2008.
- The views/comments on the proposed amendment by the stakeholders can be given within 21 days from the date of issue of this public notice.

RECENT JUDGMENTS

In this Section

Fortum Solar India Pvt Ltd v. KERC & Anr & Batch

APTEL Order dated May 21, 2021 in Appeal Nos. 104 of 2021 & Batch

Background facts

- By way of its Notification dated May 30, 2018 (**Safeguard Duty Notification**), the Department of Revenue (Ministry of Finance) introduced imposition of Safeguard Duty (**SGD**) on the import of solar cells (whether or not assembled in modules or panels) when imported from China during the period July 30, 2018 to July 29, 2020.
- In the course of setting up 5, 50 MW solar projects at the Pavagada Solar Park in the State of Karnataka which were won pursuant to a competitive bidding process, Fortum Solar India Pvt Ltd (**Fortum**) was subjected to levy of SGD on import of solar modules from China.
- After commissioning its Solar Projects, Fortum approached the Karnataka Electricity Regulatory Commission (**KERC**) seeking a declaration that the Safeguard Duty Notification amounted to a change in law event under its PPAs along with consequential reliefs including determination of incremental tariff as specified under the PPAs.
- By way of its order dated December 31, 2020 (**KERC Order**), KERC held that the Safeguard Duty Notification amounted to change in law and that Fortum was entitled for reimbursement of SGD to the extent of approximately INR 104.45 crores. However, Fortum was directed to re-submit all documents to the DISCOMs for re-verification and thereafter the parties were directed to mutually arrive at the incremental tariff by consensus.
- Aggrieved by the KERC Order on various counts, Fortum filed Appeal Nos. 104, 105, 108, 111 and 112 of 2021 before the Appellate Tribunal for Electricity (**APTEL**).

Issues at hand?

- Whether failure of KERC to issue directions for reimbursement of amount which culminated into real and tangible relief was justified?
- Whether delegation of statutory function of adjudication on the quantum of incremental tariff by KERC to the parties was justified?

Decision of the Tribunal

- APTEL came down heavily upon KERC for adjudicating Fortum's change in law petitions in an inchoate & incomplete manner. By way of its Order dated May 21, 2021 (**APTEL Order**), APTEL has reprimanded KERC for abdicating its statutory responsibility to finally determine the change in law claims brought before it in a manner which would have culminated into a tangible and real compensatory relief for Fortum.

- Elaborating on the principles enshrined under Section 97 (Delegation) of the Electricity Act, 2003, APTEL has held that once KERC had reached a conclusion on the quantum of reimbursement to which Fortum was entitled to, there was no occasion for KERC to direct re-verification of documents by the Karnataka DISCOMS which virtually amounts to the Karnataka DISCOMS sitting in review of the KERC Order. Further, KERC's directions to the parties for deciding the incremental tariff by mutual consensus has been held to be bad in law as such directions amount to delegation of the adjudicatory functions itself of the KERC which is specifically barred under Section 97 of the Electricity Act, 2003.

Our viewpoint

HSA represented Fortum in this matter, with the team led by our Partner *Puja Priyadarshini* and Associate *Nived Veerapaneni.*

We believe that the APTEL Order comes as a much needed respite for generators all over the country ensnared in vicious cycles of litigation & re-litigation for recovering their rightful change in law reimbursements. Particularly, the APTEL Order pithily lays down that State Electricity Regulatory Commissions adjudicating change in law claims, not only have to decide on principle as to whether a change in law event has occurred, but they must also provide a relief which results in a tangible compensation thereby, avoiding any multiplicity of proceedings particularly at the stage of execution & implementation.

SBG Cleantech Projectco Five Pvt Ltd v. SECI & Anr

CERC Order dated May 04, 2021 in Petition No. 81/MP/2021

Background facts

- SBG Cleantech Projectco Five Pvt Ltd (**Petitioner**) sought payment of Change in Law compensation from Solar Energy Corporation of India Ltd (**SECI**) as a consequence of imposition of Safeguard Duty by the Central Government and the same being treated as an event of Change in Law under the terms of the Power Purchase Agreement (**PPA**) dated January 04, 2019 read with Ministry of New and Renewable Energy (**MNRE**) letters dated March 12, 2020 and March 23, 2020.
- SECI issued a Request for Selection (**RfS**) to select Solar Power Developers (**SPDs**) for development of grid connected cumulative solar capacity of 200 MW. Pursuant to submission of its bid, the Petitioner emerged as the successful bidder for developing the project of 200MW cumulative capacity in the State of Karnataka with its intended sale to SECI. Accordingly, the Petitioner executed four independent PPAs (to set up 4 projects) with SECI for supply of cumulative 200 MW capacity. The Effective Date under the PPAs had been stipulated as December 31, 2018 and the tariff was agreed to be INR 2.82/kWh. Further, SECI executed Power Supply Agreements (**PSAs**) with the State Distribution Companies of Uttar Pradesh Power Corp Ltd (**UPPCL**).
- Vide Notification dated July 30, 2018, the Central Government imposed Safeguard Duty (**SGD**) on the import of 'solar cells whether or not assembled in modules or panels'. Pursuant to the imposition of SGD, the Petitioner approached SECI furnishing documents necessary for exhibiting correlation between the project and supply of goods and services, duly supported by the invoices raised by the supplier for goods and service and Auditor's Certificate. Accordingly, SECI had reconciled, accepted and acknowledged the amount of INR 103,67,46,075 towards the SGD payments.
- Meanwhile, SECI filed Petition No. 536/MP/2020, seeking approval of the annuity calculation methodology proposed by SECI for payments to be made towards SGD and GST. In view of the same, SECI informed the Petitioner that as an interim measure, it would release SGD payments (spread over 13 years) at the annuity rate of 10.41% per annum, subject to final outcome of the Petition No. 536/MP/2020.
- Petitioner submitted that since SGD Notification has been notified by the Department of Revenue, Ministry of Finance, it was within the ambit of the definition of 'Law' as provided in the PPA and therefore was an event of Change in Law as specified in Article 12 of the PPAs. As such, SECI was liable in terms of the PPAs, to compensate the Petitioner by way of an upfront payment on annual basis (along with interest) for the additional non-recurring and recurring expenditure incurred by the Petitioner as a result of enactment of SGD Notification.
- It was also the case of the Petitioner that MNRE vide its letters dated March 12, 2020 and March 23, 2020, dispensed with the need for approaching the Central Commission to seek declaration of imposition of SGD by the Central Government as a 'Change in Law' Event, and also considering various orders issued by CERC declaring SGD as a 'Change in Law Event' under the PPAs.
- The Petitioner had submitted that despite accepting the reconciled amounts, SECI had not released any payments towards the same. Owing to the non-payment of above amounts, the Petitioner was losing INR 1.11 crore per month being the interest cost over additional capital @12.9% per annum (14%x70% + 10.41%x30%) and despite investing hefty amounts, was still awaiting recovery of those amounts.

- In response thereto, SECI submitted that it had communicated the provisional reconciliation of the SGD claims of the Petitioner till Commercial Operation Date (**COD**) to UPPCL, which had been agreed to by UPPCL. However, as per Article 12.2 of PPA, the event of Change in Law had to be approved by the Commission. Further, after decision of Commission holding the event as Change in Law, the Petitioner is required to raise supplementary bill under Article 10.7.1 (ii) of PPA. The due date for payment of the supplementary bill as defined in Article 1.1 of PPA is 45th day after Supplementary bill is raised by the Petitioner and same being received and duly accepted by SECI.
- SECI further submitted that the amount as evaluated and reconciled by SECI and to the extent confirmed by UPPCL or the amount duly adjudicated by the Commission in regard to safeguard duty claims of the Petitioner is payable 'within sixty days of the date of this Order or from the date of submission of claims by the Petitioner whichever is later'.
- SECI also sought issuance of effective directions by the Commission to UPPCL, the procurer of power under the PSA to make payment on account of impact of safeguard duty on procurement of modules, panels in the present matter.
- In rejoinder to the submissions made by SECI with respect to cut-off date with regard to liability of payment on account of impact of SGD in respect of 'Scheduled Commercial Operation Date' instead of 'Scheduled Commissioning Date', the Petitioner referred to the decision of Central Commission in its Judgment dated January 24, 2021 in Petition No. 365/MP/2019, had already held that impact of the SGD till the COD as per the PPA or till the COD upon extension of Scheduled Commercial Operation Date/Scheduled Commissioning Date in terms of the PPA, would be considered while reconciling claims between the developer and the intermediary procurer/procurer.
- Petitioner also submitted that it may raise four invoices, one for each of the four Project IDs, for the entire amount claimed and payable for SGD, which then may be paid based on the 'annuity model' as agreed between the Petitioner and SECI. Such payments would be subject to adjustments based on the outcome of the Petition No. 536/MP/2020.Further, the Petitioner shall not be required to unnecessarily raise invoices for monthly instalments payable in accordance with the aforementioned 'annuity model'.

Issue at hand

- Whether the imposition of Safeguard Duty qualifies as 'Change in Law' under the PPAs and entitle the Petitioner to relief under Article 12 of the PPAs?
- Whether the compensation payable by SECI to the Petitioner is conditional upon the payment to be made by the Respondent UPPCL?
- Whether the cut-off date with regard to liability of payment on account of impact of Safeguard Duty on procurement of modules and panels is COD or 'Scheduled Commissioning Date'?

Decision of the Commission

- CERC observed that the Petitioner has submitted the bid on May 10, 2018 and the same was accepted and crystallised after e-reverse auction held on May 18, 2018. Further, the SGD Notification was promulgated on July 30, 2018 i.e. after the approval of the bid submitted by the Petitioner. Accordingly, the imposition of Safeguard Duty qualifies as 'Change in Law' under the PPAs and entitles the Petitioner to relief under Article 12 of the PPAs.
- It was further observed that as per the Record of Proceedings (**RoP**) dated March 19, 2021, SECI had admitted that there was no dispute over the claimed amount. Further, the provisional reconciliation of the Petitioner's claims toward Safeguard Duty had been confirmed by UPPCL. Further, the Petitioner has conveyed its acceptance to the annuity rate of 10.41% as suggested by SECI as an interim measure subject to the outcome of Petition No. 536/MP/2020. It was taken into consideration that SECI had also submitted that the Central Commission may pass an appropriate order in the matter subject to the outcome of Petition No. 536/MP/2020 filed by SECI whereby SECI has sought approval of annuity methodology including annuity rate.
- In view of the above observations, the Central Commission has directed SECI to pay to the Petitioner as per mutually agreed mechanism for payment of such compensation on annuity basis, subject to the outcome of Petition No. 536/MP/2020 filed by SECI for approval of annuity methodology including annuity rate.
- As regards the issue of payment of compensation towards SGD being conditional in nature, the Central Commission clarified that the compensation paid to the Petitioner is not conditional upon the payment to be made by the UPPCL to SECI. However, SECI is eligible to claim the same from UPPCL on 'back to back' basis and further UPPCL has been directed to expeditiously settle such claims in term of the PSA. Accordingly, the first instalment of the claim is liable to be paid within sixty days of the date of the Order or from the date of submission of claims by the Petitioner whichever is later, failing which it would attract late payment surcharge as provided under PPA/PSA.
- With respect to the clarification as regards the cut-off date with regard to the liability of payment on account of impact of Safeguard Duty on procurement of modules and panels, the Central Commission has observed that as per definition of COD provided in Article 1 of the PPA, COD will be the date on

which the commissioning certificate is issued upon successful commissioning (as per provisions of the Agreement including but not limited to the witnessing of Commission by the Committee Constituted by MNRE/SECI) of the full capacity of the Project or the last part capacity of the Project as the case may be. Accordingly, the Central Commission has declared that the liability of payment on account of imposition of Safeguard duty on procurement of Solar PV panels and associated equipment by the Petitioners shall lie with the Respondents till the COD only.

Our viewpoint

HSA represented SBG Cleantech Projectco Five Pvt Ltd in this matter, with the team led by our Associate Partner *Molshree Bhatnagar* and Associate *Nehul Sharma*.

The Order passed by CERC is a positive order having a sector vide impact in as much as compensation towards 'Change in Law' due to imposition of SGD has been allowed to be recovered by the generation developer. The clarification by CERC that the liability of payment of compensation would lie with the Respondents till the COD is in conformity with the provisions of the PPA.

The decision of CERC in this matter is significant as it has been reiterated in line with its precedents that the compensation payable under 'Change in Law' clause by SECI is not conditional upon the payments being received by UPPCL. The Commission has aptly observed that since the PPAs and PSAs being 'back to back' in nature, SECI is eligible to claim the aforesaid payments from UPPCL.

Bangalore Electricity Supply Co Ltd v. E.S. Solar Power Pvt Ltd & Ors

SC's Judgement dated May 03, 2021, in Civil Appeal No. 9273 of 2019

Background facts

- A Request for Proposal (**RfP**) was issued by the Karnataka Renewable Energy Development Ltd (**KREDL**) on November 20, 2015, to develop 1,200 MW of solar projects in the State of Karnataka through private-sector participation. Subsequent to the issuance of RfP, a Letter of Award was issued by KREDL to Emmvee Photovoltaic Power Pvt Ltd (**Parent Company**).
- The Parent Company incorporated two special purpose vehicles (**SPVs**) namely – ES Solar Power Pvt Ltd for the development of a 10 MW ground-mount solar project at Bidar, Karnataka and ES Sun Power Pvt Ltd for setting up for developing a 20 MW solar project at Bagpalli in Chikkaballapura (**Projects**). The Parent Company and SPVs are collectively referred to as Respondents/Developers.
- On May 23, 2016, the Power Purchase Agreements (**PPAs**) were executed between the SPVs and Bangalore Electricity Supply Co Ltd (**BESCOM**) for supply of power from the Projects. The said PPAs were approved by Karnataka State Electricity Commission (**KERC**) on October 17, 2016 (**Effective Date**). The Commissioning Certificate for the Bidar project was issued on October 25, 2017, and for the Bagpalli project, on November 23, 2017.
- The Original Petition was filed by the Developers who were aggrieved by the reduction of PPA tariff from INR 6.10/kWh to INR 4.36/kWh by BESCOM and imposition of liquidated damages to the tune of INR 20,00,000 on account of the delay in commissioning of the Projects by one day. KERC dismissed the Original Petition filed by the Developers based on its finding that the Scheduled Commissioning Date (**SCOD**) for the Projects was October 16, 2017, and not October 17, 2017.
- Thereafter, the Respondents approached Appellate Tribunal for Electricity (**APTEL**) to consider (i) whether the Projects were delayed by one day in terms of the PPAs; and (ii) whether KERC was justified in imposing liquidated damages on the Respondents for such delay in commissioning of the Projects. Considering the facts of the case, APTEL noted that the commissioning of projects was done within the prescribed time limit. Consequently, APTEL set aside the KERC Order, and as a result, BESCOM filed this Civil Appeal before the Supreme Court (**SC**) challenging APTEL's Order.

Issues at hand

- Whether the Respondents commissioned the project before the 12 months from the Effective Date i.e., date of approval of the PPA by KERC which is October 17, 2016?
- Whether the SCOD of the Projects is October 16, 2017, or October 17, 2017?

Decision of the Court

- SC observed that the reduction in applicable tariff as per Article 12.2 of the PPAs is permissible only in the case of a delay in commissioning of the projects beyond the SCOD. It has further noted that there is no dispute between the parties qua the Effective Date being October 17, 2016, i.e., the date of approval of PPAs by KERC. Further, SC observed that if the event date of October 17, 2016, is excluded in terms of the interpretation of the clauses of the PPAs, SCOD will be October 17, 2017.

- As regards the issue of reduction of tariff due to a day's delay in commissioning of the Projects, SC noted that KERC by way of its Order, held that the injection of power is sine qua non for declaring that the Projects are commissioned and actual injection of power from the Projects into the Grid was only done on October 17, 2017. Thereafter, APTEL reversed the findings recorded by KERC on this aspect by relying upon the Commissioning Certificate issued by KPTCL, which stated that the Projects were commissioned on October 16, 2017.
- Considering the facts of the case, SC upheld the Order issued by APTEL by declaring October 17, 2017 as the SCOD of the Projects and granted four weeks' time to BESCOM to implement the Order of APTEL.

Our viewpoint

The decision of SC in this matter is significant as it has been reiterated in line with its precedents that a contract should be read as a whole and the words used in a contract shall be given their natural meaning. This is indeed a positive Judgment as the issue in the present matter relates to whether the date of the approval should be included or excluded in the calculation of 12 months of the SCOD? SC has relied on specific provisions of the contract entered between the parties to hold that the 12 months' time-period for the purpose of calculation of SCOD will start from the next date of the PPA approval.

Coastal Gujarat Power Ltd v. CERC & Ors

APTEL Judgment dated April 27, 2021 in Appeal Nos. 172 of 2017 and 154 of 2018

Background facts

- The present Appeals had been filed by Coastal Gujarat Power Ltd (**CGPL/Appellant**) against the denial of the claim of for compensation by increase in tariff (after commissioning of the power project) founded primarily on clause on change in law in the long-term power purchase agreement with the procurer(s) on the grounds that the view taken by the Central Electricity Regulatory Commission (**CERC/Respondent**) was unjust, against the letter and spirit of the contract, Competitive Bidding Guidelines (**CBG**) and declared Tariff Policy as also in the teeth of binding law declared by the Supreme Court.
- In Appeal No. 172 of 2017, CGPL had challenged the following disallowances for FYs 2012-15:
  - Increase in Service Tax and Secondary and Higher Education Cess on Service Tax on Works Contract disallowed since the increase is on account of exercise of option by CGPL
  - Refund of Green Cess (paid by CGPL) in view of SC being seized of the issue of challenge to the constitutional validity of the Gujarat Green Cess Act, 2011 (**Green Cess Act**) and the Gujarat Green Cess Rules, 2011 (**Green Cess Rules**)
  - Change in Law (**CIL**) compensation on coal based levies (Clean Energy Cess, Basic Customs Duty, Countervailing duty etc.) computed on the quantum of coal taking normative bid parameters and not on the basis of actual coal consumed
  - CIL compensation on increase in Gujarat VAT to be paid on fuel oil allowed at lower of normative bid parameters and actual
  - Corporate Social Responsibility (**CSR**) expenditure mandated by Ministry of Environment and Forest (**MoEF**)
  - Carrying Cost on the CIL compensation payable since PPA does not permit the same and
  - Failure to deal with claim regarding Clean Energy Cess
- Similarly, in Appeal No. 154 of 2018, CGPL had challenged the following disallowances for FYs 2015 to 2017
  - Krishi Kalyan Cess and Swachh Bharat Cess on 20 services availed by CGPL rejected since these services are not directly linked to CGPL's business of generation and sale of electricity
  - Pass through of costs/expenses related to CSR mandated by the Companies Act, 2013 (**Companies Act**) read with the Companies (Corporate Social Responsibility) Rules, 2014 (**CSR Rules**) since CSR does not impact CGPL's cost/revenue and passing it onto consumers will defeat its purpose
  - CIL compensation related to coal-based levies computed on quantum of coal calculated on the basis of normative parameters instead of actual coal consumed
  - Carrying Cost on compensation for CIL since PPA does not permit the same and
  - Compensation for any reduction in rate of Service Tax on transportation of goods by a vessel from a place outside India to first custom station of landing in India (Service Tax on Transportation of Imported Goods)

- CGPL had submitted that contract (**PPA**) expressly provides for restitution for CIL, for the Construction Period, as also for Operation Period, it being contingent for 'Operation Period' on determination of compensation for any increase/decrease in revenues/cost to the seller by CERC and such compensation to be payable where the impact of CIL is in excess of 1% Letter of Credit (**LC**) in aggregate for a contract year.
- The Respondents submitted that there may be various activities carried out by the CGPL as a commercial decision but which are neither necessary nor concerned with the business of selling electricity. Further, it was stated that the CGPL had failed to demonstrate as to how the other services claimed have an impact on the cost of or revenue from the business of selling electricity by it to the Procurers.
- As regards the levy of Green Energy Cess, the Respondents submitted that the levy of Green Energy Cess could not be held to be Change in Law in present situation wherein the said cess had been declared by the High Court of Gujarat to be ultra vires the Constitution of India with directions for refund. It was further stated that if SC decides the matter in favor of the Government of Gujarat and upholds the Green Cess Act, CGPL could raise the issue for consideration on merits, the Respondents reserving the right to raise appropriate objections at such stage, the claim presently being premature.

Issue at hand

- Whether the Appellant was entitled to compensation on payments arising due to Change in Law?

Decision of the Tribunal

- APTEL observed that there was merit in the claim for compensation on account of CIL due to levy of Gujarat Green Cess, should the fiscal law be eventually upheld, and the judgment of High Court be vacated. Conversely, however, if the Supreme Court were to endorse the view taken by the High Court and the law is held bad and inoperative and the Government of Gujarat were called upon to refund the tax collected, the claim for compensation as CIL by the Procurer would be rendered meaningless.
- APTEL held that CERC shall be obliged to undertake the exercise of ascertaining net effect of change effected by the option exercised after CIL event and subsequent change in rate of tax and allow adjustment accordingly to recompense the party which has suffered the impact. Further, as regards the educational cess, the APTEL observed that the Respondents had failed to show any material as could indicate possibility of exemption from such cess. Since there is no doubt that such levy had been imposed after the cut-off date, by virtue of change in law, the impact of entire actual additional burden had to be off-set by compensation under Article 13 of the PPA.
- With respect to the Swachh Bharat and Krishi Kalyan Cesses, the APTEL observed that the expression 'supply of electricity' has to be interpreted to mean all activities that are required to be undertaken by a generating company for the purpose of generation and supply of electricity to the Procurers. Levy of any taxes or duties or cess on the said services tantamount to a tax implication on the supply of electricity by CGPL to the Procurers. Accordingly, it ought to have been allowed as a CIL event in terms of Article 13 of the PPA.
- Further, the APTEL held that CERC had fallen in grave error by declining to undertake the computation of coal for determining the CIL compensation based on actual coal consumed by CGPL. Such compensation could not be restricted to normative bid parameters as held by CERC. APTEL further directed CERC to bring about suitable correction.
- As regards the disallowance of Gujarat VAT, the APTEL observed that after allowing CIL on account of Gujarat VAT without linking it to actual or scheduled generation, CERC could not be allowed to adopt a contrary approach for similar relief *vis-à-vis* operation period. The APTEL thus held that for the Operation Period, Gujarat VAT on fuel oil has to be allowed as recoverable as per actuals.
- As regards the claim towards the CSR expenditure of CGPL, the APTEL observed that since CSR is mandated as the responsibility on the Company and not on its consumers, the same could not be allowed as a pass through.
- As regards the expenditure mandated by MoEF, the APTEL observed that the same was over and above the CSR mandated under the Companies Act, the former being directly linked to the Project Cost. The APTEL thus held that the additional expenditure incurred by the CGPL in terms of the modified EC added to the capital expenditure for the project, there being no nexus with CSR under Section 135 of the Companies Act, the obligation having arisen due to CIL event within the meaning of Article 13 of the PPA, CGPL is entitled to commensurate compensation.
- With respect to the claim for carrying cost, the APTEL held that the carrying cost in respect of the additional expenditure allowed on account of nexus with CIL events shall also be allowed for the period(s) from which the Seller incurred such additional expenditure, be it by payment to State under taxation laws or otherwise borne for infrastructural developments mandated by law. As such, CERC was directed to pass necessary Orders in this regard.

Our viewpoint

APTEL has rightly taken into consideration the claim of the developer for compensation in relation to the payments made under various mandates of the Legislature and held that if the burden created and borne by the developer on account of enforcement of the said law, the same shall be duly compensated.

MSEDCL v. MERC & Ors

APTEL Judgment dated April 27,2021 in Appeal No. 77 of 2018

Background facts

- The present Appeal had been filed by Maharashtra State Electricity Distribution Co Ltd (**MSEDCL**) challenging the Order dated November 16, 2017 passed by Maharashtra Electricity Regulatory Commission (**MERC**) in Case No. 24 of 2017 rejecting the contention of MSEDCL that introduction of the Base Rate system and the Marginal Cost of funds-based Lending Rate System (**MCLR**) by Reserve Bank of India (**RBI**) does not constitute a Change in Law (**CIL**) event within the meaning of the expression used and contingency provided for to incorporate restitutionary principle in the PPAs, in order to amend the rate at which Late Payment Surcharge (**LPS**) is payable by the procurer to the sellers
- It was the case of MSEDCL that though the LPS for delay in payment of bills is stipulated to be computed on the basis of the applicable SBAR (i.e. Prime Lending Rate fixed by State Bank of India (**SBI**)) as per Article 8.3.5 read with definition of SBAR under the PPA, it cannot be ignored that the RBI replaced the Prime Lending Rate (**PLR**) method of interest fixation with the Base Rate Method in 2010 and the Marginal Cost of Lending Rate (**MCLR**) method in 2016.
- MSEDCL further submitted that RBI qualifies as an Indian Governmental Instrumentality, it being vested with the authority and statutory powers for regulation of the Banking business in the country, and as such, the notifications, guidelines or circulars issued by RBI qualify as Change in Law, SBI being bound by the same.
- MERC had rejected the case of the Appellant on the reason that it was evident from the PPA provisions that t not all changes in legal dispensations by a Governmental Instrumentality such as RBI amount to Change in Law events for the purposes of compensating the affected party in terms of the PPAs. CERC had observed that for this purpose:
  - Change in Law must result in additional recurring/non-recurring expenditure by the Seller or any income to the Seller
  - Compensation is for restoring, through monthly tariff payments, the affected party to the same economic position as if such Change in Law had not occurred
  - Any change in the Tariff by reason of Change in Law is to be reflected in the Monthly Bills raised by the Seller.
- MERC had also taken into consideration that the the LPS provision in attracted only when payments are not made by MSEDCL against the Monthly Bills of the Seller within the time stipulated in the PPAs. Any changes in the basis of the LPS rates consequent to revisions by the RBI do not affect in any manner the rates at which power was agreed to be sold and purchased under the PPAs and in the consequent financial implications for either Party resulting in a liability to compensate the affected Party. The LPS is essentially compensatory in character, in terms of the effect on the Seller on account of delay by MSEDCL (as the Procurer in this case) in making due payments. The additional liability of LPS on MSEDCL would also be expected to encourage timely payment and deter delay.
- The Respondents submitted that LPS is levied under the PPAs which were duly executed by MSEDCL is triggered only when there is a default by MSEDCL. It was stated that, it is inappropriate to project the outstanding liability towards LPS as an additional burden being placed upon MSEDCL.
- The Respondents further urged the APTEL that for matters involving monetary claims, issuance at the stage of final decision on appeal, a time bound direction may be issued for compliance by the parties. It was submitted that in such cases the parties may be encouraged to file their respective claims and the same may be recorded in the Judgment which would facilitate narrowing the dispute between the parties and ensure quicker resolution at stage of execution.

Issue at hand

- Whether introduction of the Base Rate system and the Marginal Cost of funds-based Lending Rate System by Reserve Bank of India (**RBI**) constitute a Change in Law?

Decision of the Court

- APTEL observed that liability towards LPS is a matter within the control of the Procurer since it is called upon to pay LPS only when it delays in payment of monthly or supplementary bills beyond the due date. It is a penalty it voluntarily agreed to be visited with, the invocation of the clause on LPS being not on account of CIL event.
- Further, it was observed that in terms of the relevant clauses in PPA on the subject of Change in Law, the pre-requisites are that the event in question must be one that is covered by Article 10.1.1 (broadly speaking, a new enactment, or amendment of existing legislation, or new interpretation by a competent court), the event must have occurred after the Cut-off Date (for present case, concededly July 31, 2009, it being seven days prior to the Bid Deadline i.e. August 07, 2009) and such event must have resulted in additional recurring or non-recurring expenditure or income for the Seller. It has been held that the Appellant fails to meet the first and third of these conditions.

- The APTEL also observed that provision for compensation to the affected party for a Change in Law event is essential with regard to tariff only. The rate of LPS has no bearing or impact on tariff and any possible changes in the basis of the LPS rates consequent to revisions by the RBI, or for that matter, SBI would not affect the rate at which power was agreed to be sold and purchased under the PPAs and consequently there is no financial implications on expenditure or income for either Party. For the above reasons, the Appeal has been found devoid of any substance, and thus, liable to be dismissed.
- The APTEL also directed MERC to take up the matter after four weeks to ascertain if the Appellant has discharged its liability towards LPS unto the second to fifth respondents for the period in question in compliance with above directions, pass all necessary orders in such regard and make a report to this tribunal within three months.

Our viewpoint

APTEL has appropriately determined that LPS is not economic restitution but a disincentive, penalty suffered on account of default. Considering that LPS is in the nature of a contingent liability incurred by the Procurer for failing to adhere to its obligations under the PPA., it has been rightly held that the rate of LPS has no bearing or impact on tariff.

NTPC Ltd v. Madhya Pradesh Power Management Co Ltd & Ors

CERC Order dated 28.04.2021 in Petition Nos. 335/MP/2020, 519/MP/2020, 509/MP/2020, 516/MP/2020, 338/MP/2020, 521/MP/2020, 526/MP/2020, 512/MP/2020 and 339/MP/2020

Background facts

- The present Petition has been filed by the Petitioner under Section 79 of the Electricity Act, 2003 read with Regulation 29 of the CERC (Terms and Condition of Tariff) Regulations, 2019 (**CERC Tariff Regulations**) for approval of Additional Capital Expenditure (**ACE**) on account of installation of various Emission Control Systems (**ECS**) in compliance with the Environment (Protection) Amendment Rules, 2015 dated December 7, 2015 (**MoEFCC Notification**) notified by the Ministry of Environment, Forests and Climate Change, Government of India (**MoEFCC**) requiring all thermal power plants to comply with the revised emission norms as specified in the said notification.
- MoEFCC vide its Notification dated December 7, 2015 has amended certain provisions of the Environment (Protection) Rules, 1986, whereby introducing revised standards for emission of environmental pollutants to be followed by all existing and new thermal plants.
- As per the MoEFCC Notification, all TPPs were mandatorily required to comply with the revised norms within a period of two years from the date of the said notification, which was subsequently modified to 2022 vide the notification dated April 1, 2021.
- As per the MoEFCC Notification, water consumption norms for TPPs with Once Through Cooling (**OTC**), existing CT-based TPPs and new TPPs commissioned after January 1, 2017 were specified. Further, norms for particulate matter, sulphur dioxide, nitrogen dioxide and Mercury for TPPs commissioned before December 31, 2003; TPPs commissioned after January 1, 2003 upto December 31, 2016 and TPPs commissioned after January 1, 2017 were also specified.
- For implementation of ECS in compliance of the MOEFCC Notification, the Central Electricity Authority (**CEA**) was entrusted with planning and coordination. CEA along with Regional Power Committees formulated a phasing plan up to 2024 which was subsequently reduced by 2022 as per revised action plan of Ministry of Power. Further, SC issued direction to complete the installation of ECS in highly polluted and densely populated area by December 2021 and other stations latest by December 2022.
- MoP issued directions to CERC under Section 107 of Electricity Act, 2003, vide letter dated May 30, 2018 to consider additional cost implication due to installation of ECS as a pass through in tariff.
- On this account the Petitioner filed Petition No. 98/MP/2017 before CERC for in-principle-approval of the capital cost required for installation of ECS and other facilities in Singrauli STPS and Sipat STPS Stage-I. The CERC vide its order dated July 20, 2018 held that implementation of ECS in terms of MoEFCC Notification is 'Change in Law' event. The CERC vide the said order further directed CEA to prepare guidelines regarding suitable technology, operation parameters, norms and other technical inputs.
- CEA accordingly vide its letter dated February 20, 2019 recommended various technologies to comply with revised emission control norms as specified by MOEFCC Notification. However, prior to recommendation made by CEA vide its letter dated February 20, 2019, the Petitioner had already identified technologies such as wet limestone based FGD system suitable for its various generating stations to achieve revised environmental norms as specified in MoEFCC Notification.
- Accordingly, the Petitioner has filed the present petitions for approval of ACE for implementation of ECS as per Regulation 29 of the CERC Tariff Regulations.

Issue at hand

- Whether the additional capitalisation incurred by the Petitioner for implication of ECS in order to comply with the emission norms mentioned in the MoEFCC Notification shall be allowed by CERC?

Decision of the Commission

- The CERC before allowing/disallowing the additional capitalization incurred by the Petitioner for the implementation of ECS has analysed the following aspects:
  - **Approvals and the bidding process**
    - Based on the documents submitted by the Petitioner, the CERC on this account held that the process from the stage of identification of Flue Gas Desulphurisation (**FGD**) package to Notification of Award (**NoA**) was with the approval of the Petitioner's Board of Directors and as per the procedure laid down under its Delegation of Power (**DoP**) and the bidding was carried out in a fair and transparent manner
  - **Re. Suitability and effectiveness of the ECS**
    - On this account the CERC observed that the suitability and selection of the technology depends on various parameters like the age, size and location of the plant/generating station, cost and availability of the technology, cost and availability of the reagents, usage of the by-products, etc. The CEA has recommended four types of technologies for control of SO_2 emissions and the Petitioner has selected the wet limestone based FGD system for all the generating stations under the instant petitions. Therefore, considering the fact that the NoA was issued by the Petitioner before the recommendations made by CEA pertaining to the technology to be used for ECS and that the Petitioner in its respective submissions has clearly outlined the advantages of wet limestone based FGD system over other FGD systems as far as its generating stations are concerned, the CERC held that the Petitioner has done due diligence in identifying wet limestone based FGD systems as the most suitable technology for reduction of SO_2 emissions notified by MOEFCC. Further, in regard to the installation of Combustion Modification System, the CERC after considering the justification made by the Petitioner held that the Petitioner has undertaken proper assessment while undertaking installation of Combustion Modification System for reduction in the NO_2 emissions.
  - **Capital cost of the identified ECS**
    - Based on the fact that the cost of installation of the required system has been discovered through transparent bidding system and the cost recommended by CEA is only indicative in nature, the CERC on this account has observed that the costs claimed by the Petitioner towards installation of wet limestone based FGD system and the Combustion Modification System being discovered through competitive bidding process are in line with or marginally higher than the cost recommended by CEA.
  - **Liberty to approach the Commission**
    - In regard to the Petitioner's prayer for approaching the CERC for installation of ECS for control of water consumption, mercury emissions and particulate matter if required in future, the CERC held that the same would be dealt as per the applicable laws and regulations.
  - **Conclusion**
    - Based on the above, the CERC accords 'in-principle approval' of ACE under Regulation 11 of the CERC Tariff Regulations towards installation of ECS (hard cost for FGD system and total cost claimed for Combustion Modification System) to meet the revised norms issued by MoEFCC vide its MOEFCC Notification.
    - In regard to the Petitioner's claim of total capital cost towards installation of FGD, the CERC held that since the same also includes cost for IDC, IEDC, FERV, taxes and duties and other costs and since the same is required to be considered on case-to-case basis, a separate petition is required to be filed on this account.

Our viewpoint

Despite of the Petitioner failing to install the technology as suggested by CEA in its recommendation for the installation of ECS, the CERC after considering the fact that the technology proposed by the Petitioner is after due-diligence and is best suitable for the project, and the fact that the cost for procuring such technology has been discovered through competitive bidding process, the CERC has accorded its 'in-principle approval' to the additional cost incurred by the Petitioner for the installation of ECS system.

Suo-Moto Petition for extension of time limit for execution of PPAs for the projects covered in 'Small Scale Distributed Solar Projects, 2019' policy of the Government of Gujarat

GERC Order dated April 23, 2021 in Suo-Moto Petition No. 1967 of 2021

Background facts

- A Petition being Petition No. 1954 of 2021 was filed before Gujarat Electricity Regulatory Commission (**GERC**) under Section 86 (1) (b) and (e) of the Electricity Act, 2003 by the GUVNL and others for incorporating provision regarding 'Change in Law' in the PPAs to be executed by State DISCOMs with Project Developers under the Government of Gujarat's Policy for Development of 'Small Scale Distributed Solar Projects, 2019' notified vide Notification dated March 6, 2019 and approval of draft PPA.
- By virtue of Order dated March 25, 2021, the GERC approved the incorporation of provision of 'Change in Law' in the proposed PPAs to be executed by the State DISCOMs with Project Developers. Further, the GERC also upon presentation made by various stakeholders for granting extension of period for execution of the PPAs instead of limit of 'on or before March 31, 2021 to April 30, 2021.
- Several representations were made before GERC stating that in view of the current serious COVID pandemic circumstances, it was not possible to execute the PPAs by large number of solar project owners who were required to execute the PPAs in prescribed time limit as per the aforesaid Order passed by GERC. Accordingly, GERC invited views/suggestions of interested persons for taking a view on the matter.
- SPDs submitted that the time limit for execution of PPA be extended from one month to three months as some of the project developers who were to sign the PPA were suffering from COVID and were either in hospital or in quarantine. Further, it was sought that the power of attorney holder of the selected solar power project developers be authorized to sign the PPAs on behalf of solar power project developers.
- GUVNL and various distribution licensees stated that they had made adequate arrangements for signing of the PPAs by the SPDs keeping in view the prevailing Covid-19 pandemic conditions. It was further submitted that that Commission may pass appropriate order and there was no objection to extension of time period.

Issue at hand

- Whether the time period for execution of PPAs as granted under the Order dated March 25, 2021 could be further extended in view of the prevailing conditions?

Decision of the Commission

- GERC observed that the situation had become grave than before, and as such, the prevailing situation warranted extension of the period for signing the PPAs after April 30, 2021 due to serious Covid pandemic conditions. GERC found force and substance in the representations made by the stakeholders and though GUVNL and DISCOMs appeared to have extended all necessary facilities for completion of the work, time period was required to be extended further.
- GERC took due note of the submissions made by Distribution Licensees of the fact that due care had been taken for the work of signing PPAs with the solar power project developers within the stipulated time period up to April 30, 2021. However, considering the serious prevailing circumstances of Covid pandemic, GERC decided that a special case, the time limit for execution of PPAs as provided in the Order dated March 25, 2021 in Petition No. 1954 of 2021 be extended further.
- GERC ordered that time limit for execution of PPAs is further extended up to May 31, 2021 instead of up to April 30, 2021 as decided in Petition No. 1954 of 2021.
- CERC after taking into consideration the difficulties experienced by the Petitioner while commissioning the Project, has allowed the extension of time under Regulation 8(7) of the CERC Connectivity Regulations as sought by the Petitioner under the present Petition for injecting infirm power into the grid for commissioning tests (including full load test of Unit-I) up to September 25, 2021 or actual date of commercial operation, whichever is earlier.

Our viewpoint

GERC has aptly taken into consideration the ongoing conditions due to Covid-19 and has rightly extended the time limit for execution of PPAs up to May 31, 2021 instead of up to April 30, 2021 as decided in Petition No. 1954 of 2021.

Tata Power Renewable Energy Ltd v. MSEDCL

MERC Case No. of 25 of 2020 & MA No. 55 of 2020

Background facts

- The Ministry of Finance vide its Notification No. 1/2017 and Notification No 11/2017 dated June 28, 2017 (**2017 Notifications**), fixed the following Goods & Services Tax (**GST**) rates – 5% on Supply Contracts and 18% on Service Contracts.
- MSEDCL floated a tender dated April 9, 2018 to procure 1000 MW Solar Power on Long Term basis from new or existing Solar Projects through Competitive Bidding process. A Letter of Award (**LOA**) dated June 05, 2018, was issued to Tata Power Renewable Energy Ltd (**TPREL/Petitioner**). Subsequently, a PPA was executed between TPREL and MSEDCL, for supply of 150 MW of AC power from TPREL's Solar Energy based Power Plant to MSEDCL at tariff of INR 2.72/unit (**Project**).
- As per the PPA, TPREL was required to construct, operate and maintain Solar PV Project. Accordingly, on September 21, 2018, TPREL entered into and EPC contract (Supply Contract) and a Service Contract with Tata Power Solar Systems Ltd (**TPSSL**).
- After enactment of the GST Act, 2017, MOF issued the Notification bearing No. 27/2018 and Notification bearing No. 24/2018 dated December 31, 2018 (**Impugned Notifications**), which clarified that for Composite Contracts:
  - 70% of taxable value would be treated as the supply component of the contract (to be taxed at 5%)
  - 30% of the taxable value would be treated as service component of the contract (to be taxed at 18%)
- As a result of Impugned Notifications, GST at rate of 8.9% became payable on Supply and Service Contracts for setting up of Solar Power Plants instead of 5% on the taxable value of the Supply Contracts and 18% on the taxable value of the Service Contracts for setting up Solar Power Plants.
- TPREL, on November 7, 2019, issued a 'Change in Law' notice to MSEDCL, highlighting the events and requesting to compensate to the tune of INR 246.2 million immediately along with the appropriate carrying cost, on account of issuance of Impugned Notification being a Change in Law event. MSEDCL neither responded to the notice nor compensated TPREL.
- In terms of the facts stated above, the Petitioner filed a petition before MERC seeking compensation due to increase in costs on account of change in rate of GST by issuance of the Impugned Notifications amounting to a Change in Law event in terms of the PPA.

Issue at hand

- What was applicable tax rates at the time of bid submission?
- Whether the Impugned Notifications have changed tax rates applicable for TPREL's Project?
- Whether TPREL is eligible for claiming increased expenses on account of Change in Law event?

Decision of the Commission

- **Applicable tax rate at the time of bid submission**
  - MERC has noted that the bid submission date was May 08, 2018 which is subsequent to the issuance of Notification 2017 and accordingly 5% GST was applicable on EPC Contract/ Supply Contract and 18% GST was applicable on Service Contract of the Petitioner.
- **Change in tax rate by issuance of Impugned Notifications**
  - MERC held that post issuance of Impugned Notifications, Supply and Service Contracts for setting up of the Project attracts a composite tax rate of 8.9% (i.e., 5% on 70% of the consolidate taxable value of the Contracts and 18% on remaining 30% of consolidated taxable value of the Contracts)
- **Claim of increased expenses**
  - MERC has observed that due to issuance of the Impugned Notifications, the tax rate for EPC contract of TPREL has been increased whereas tax rate for Civil Works contract has been reduced. Considering value of each contract, TPREL may have incurred net additional expenses due to increased tax rate post bid submission date. However, MERC has noted that if party through prudent utility practice can be able to control impact of Change in Law event, it shall do the same and thereafter can claim compensation for any residual impact, if any. In the present case, although change in GST rate is clearly beyond the control of contracting parties, in the opinion of MERC, TPREL could have controlled the expenses on taxes.
  - In view of the above, MERC has held that it was expected and required by TPREL to construct the solar project economically and it would have been economical and prudent for TPREL to place goods supply contract directly with manufacturers of solar modules and for Services such as erection, testing and commissioning TPREL could have place separate contract with TPSSL. By not entering into a most appropriate contract for the supply of goods, TPREL has lost the opportunity to use a legitimate lower tax rate of 5%.
  - Further, it has held that any adverse implication of such contracting practices adopted by TPREL cannot be allowed to be pass on to buyer under Change in Law provision of the PPA.

Our viewpoint

MERC in this judgment has rightly stressed on the significance of Prudent Utility Practices as enshrined in the PPA, i.e., the parties through its reasonable prudence and due diligence should be able to control the impact of change in law event whenever possible. The Commission in the instant case has meticulously put the onus on TPREL by suggesting that it should have executed three contracts instead of two which would had attracted lower rate of GST i.e., 5% instead of 8.9% respectively. This judgment in its essence and interpretation highlights that the intent of the parties while entering into any contract must be just, reasonable and bonafide.

SB Energy One Pvt Ltd v SECI & Anr

CERC Order dated May 13, 2021 passed in Petition No. 73/MP/2020

Background facts

- The present Petition was filed by SB Energy One Pvt Ltd (**Petitioner**), seeking approval and consequential relief on account of Change in Law, i.e, the imposition and implementation of Goods and Services Tax (**GST**) and Safeguard Duty (**SGD**), which has led to an increase in capital cost.
- The Petitioner had entered into three PPAs dated Pctober 06, 2017 with SECI for sale of power from its 300 MW solar power projects in the State of Rajasthan.
- Rajasthan Urja Vikas Nigam Ltd (**RUVNL**) is the buying utility in the State of Rajasthan purchasing power from SECI, which is being sold by the Petitioner to SECI. In this regard RUVNL has entered into a Power Sale Agreement (**PSA**) with SECI.
- The Petitioner has claimed for relief on account of Change in Law, under Article 12 of the PPA, which provides that a Change in Law event would be the occurrence of an event (as specified in bullets 1 to 5 of Artice 12), after the Effective Date, resulting into any additional recurring/non-recurring expenditure by the solar power developer i.e., the Petitioner.
- The present matter was listed before CERC on June 4, 2020 and was adjouned sine die and the Petitioner and SECI were directed to undertake reconciliation process in terms of directions issued by MNRE vide letters dated March 12, 2020 and March 23, 2020 (**Letters**). The Petitioner was also granted the liberty to revive the present Petition based on the outcome of the settlement discussion.
- MNRE vide its Letters, dispensed with the need for approaching CERC to seek declaration of imposition of SGD by Central Government as a 'Change in Law Event'. Thus, SECI and Petitioner through mutually agreeable process, progressed to reconcile SGD claims made by the Petitioner.
- However, SECI contended that such payments could only be made to the Petitioner once RUVNL made the said payments to SECI, considering the back-to-back nature of the PPAs and the PSA.
- RUVNL challenged the claims of the Petitioner in its entirety and stated that the reconciliation between SECI and the Petitioner does not ipso facto bind RUVNL to make payments to SECI.
- Thereafter, the Petitioner by way of an Interlocutory Application being 21/IA/2021 revived the present Petition, seeking issuance of directions to MNRE to immediately release payments towards SGD, as reconciled between the Petitioner and SECI.

Issues at hand

- Whether the enactment of GST Laws and imposition of Safeguard Duty are Change in Law events under Article 12 of the PPA and whether the Petitioner is entitled to relief thereunder?
- Whether the claim of GST on O&M expenses as prayed by the Petitioner is sustainable?
- Whether the claim of Petitioner regarding interest on Working Capital, Return on Equity and Carrying Cost for delay in reimbursement by the Respondent is sustainable?

Decision of the Commission

- CERC has held that the enactment of GST Laws and imposition of SGD are squarely covered as Change in Law events under Article 12 of PPAs, and the Petitioner is entitled to relief.
- Liability of payment on account of said Change in Law ecents lie with the Respondents till the Commercial Operation Date for the contracted capacity and energy as per Article 4.4 of the PPAs.
- SECI was directed to pay to the Petitioner as per mutually agreed mechanism for payment of such compensation on annuity basis spread over the period not exceeding the duration of the PPAs, subject to the outcome of Petition No. 536/MP/2020 filed by SECI for approval of annuity methodology including annuity rate.
- The compensation to be paid to the Petitioners is not conditional upon the payment to be made by the RUVNL to SECI. However, SECI is eligible to claim the same from the RUVNL on back-to-back basis. CERC also directed RUVNL to expeditiously settle such claims in term of the PSA.
- CERC also directed that the first installment of the claim shall be paid within 60 days from the date of passing of the Order, failing which the provisions of Late Payment Surcharge will be attracted.
- CERC has however, disallowed the claims of the Petitioner pertaining to GST on O&M expenses, Carrying Cost and Interest on Working Capital.

Our viewpoint

The view taken by CERC is consistent with its previous decisions wherein it has allowed the imposition and implementation of GST and SGD as Change in Law events. Further, the finding that the payment of compensation on account of Change in Law to the Petitioner by SECI is independent and not conditional upon RUVNL paying the said amounts to SECI, safeguards the interest of the Petitioner). CERC has taken a balanced approach by further holding that SECI is eligible to claim the said amounts from RUVNL on a back-to-back basis. It will be interesting to see how the findings of CERC in Petition No. 536/MP/2020 impact the manner in which payments on account of GST and SGD are made to the power developers.

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