

# PROJECTS, ENERGY & INFRASTRUCTURE

## MONTHLY NEWSLETTER

### AUGUST 2021



# LEGAL & POLICY UPDATES



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## MoP issues Revamped Distribution Sector Scheme

- Ministry of Power (**MoP**) on July 22, 2021, has notified the Revamped Distribution Sector Scheme, a result based scheme with the objective of improving the quality and reliability of power supply to consumers through a financially sustainable and operationally efficient sector (**Scheme**). The scheme has an outlay of INR 3,03,758 crore with a gross budgetary support of INR 97,631 crore from the Government of India. The Scheme seeks to improve the operational efficiencies and financial sustainability of all distribution companies (**DISCOMs**)/Power Departments, excluding private sector distribution companies, by providing conditional financial assistance to DISCOMs for strengthening of supply infrastructure. The assistance will be based on meeting pre-qualifying criteria as well as upon achievement of basic minimum benchmarks by the DISCOM evaluated on the basis of agreed evaluation framework tied to financial improvements. Implementation of the Scheme would be based on the action plan worked out for each state rather than a 'one-size-fits-all' approach.
- The Scheme aims to improve operational efficiencies and financial sustainability, by providing result-linked financial assistance to DISCOMs for strengthening of supply infrastructure based on meeting pre-qualifying criteria and achieving basic minimum benchmarks. The Scheme would be available till the year 2025-26. REC and PFC have been nominated as nodal agencies for facilitating implementation of the Scheme.
- **Key objectives of the Scheme:**
  - Reduction of AT&C losses to pan-India levels of 12-15% by 2024-25.
  - Reduction of ACS-ARR gap to zero by 2024-25.
  - Developing Institutional Capabilities for Modern DISCOMs
  - Improvement in the quality, reliability, and affordability of power supply to consumers through a financially sustainable and operationally efficient Distribution Sector.
- **Major components of the Scheme:**
  - **Consumer Meters and System Meters**
    - Prepaid Smart Meters for all consumers except Agricultural consumers
    - 25 crore consumers to be covered under prepaid Smart Metering
    - Prioritizing the urban areas, UTs, AMRUT cities and High Loss areas for prepaid Smart metering i.e., 10 crore prepaid smart meter installation by 2023, the balance to be taken up in phases
    - Communicable AMI meters proposed for all Feeders and Distribution Transformers to enable energy accounting, leading to better planning for loss reduction by DISCOMs
    - Installing prepaid Smart Meters should help DISCOMs in improving of their operational efficiencies and strengthen DISCOMs to provide better service to consumers

- **Feeder Segregation**
  - The Scheme focuses on funding for feeder segregation for unsegregated feeders, which would enable solarization under KUSUM scheme
  - Solarization of feeders will lead to cheap/free day time power for irrigation and additional income for the farmers
- **Modernization of Distribution system in urban areas**
  - Supervisory Control and Data Acquisition (SCADA) in all urban areas
  - DMS in 100 urban centers with population over 2.75 lakhs
  - Rural and urban area system strengthening
- **Provision for Special Category States**
  - All Special Category States including North-Eastern States of Sikkim and States/Union Territories of Jammu & Kashmir, Ladakh, Himachal Pradesh, Uttarakhand, Andaman & Nicobar Islands, and Lakshadweep will be treated as Special Category States.
  - For Prepaid Smart Metering, grant of INR 900 or 15% of the cost per consumer meter worked out for the whole project, whichever is lower, shall be available for 'Other than Special Category' states. For 'Special Category' states, the corresponding grant would be INR 1350 or 22.5% of the cost per consumer, whichever is lower. In addition, the DISCOMs can also avail of an additional special incentive of 50% of the aforementioned grants if they install the targeted number of Smart meters by December 2023.
  - For works other than Smart Metering, maximum financial assistance given to DISCOMs of 'Other than Special Category' States will be 60% of the approved cost, while for the DISCOMs in Special Category States, the maximum financial assistance will be 90% of the approved cost.

## MoP issues revised guidelines and SBDs for procurement of ISTS through TBCB

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- MoP on August 06, 2021 has released the revised Standard Bid Documents (**SBDs**), containing Request for Proposal (**RfP**) and Transmission Service Agreement (**TSA**) for award of Inter-State Transmission System (**ISTS**) Projects on Tariff Based Competitive Bidding (**TBCB**).
- These guidelines aim at laying down a transparent procedure for facilitating competition in the transmission sector through wide participation in providing transmission services and tariff determination through a process of tariff-based competitive bidding. Based on extensive stakeholders' consultation, revised SBDs for award of ISTS system on TBCB have been prepared. Some of the salient provisions of the revised SBDs are:
  - The Transmission Service Agreement (**TSA**) with the selected bidder will now be signed by CTU, instead of the Long-Term Transmission Customers (**LTTCS**). In the past, bidding process for ISTS projects could not be completed in time due to non-signing of TSA by LTTCS and this provision would help in timely completion of bidding process.
  - In line with best practices available in other infrastructure sector, provision of Independent Engineer during construction phase has been included in the SBDs for monitoring, quality assurance and quantification of cost/time related issues. These would help in reducing number of disputes as well as appropriate risk sharing.
  - Completion of many transmission lines is found delayed due to not so precise line route survey handed over to the bidders during bidding process. As a result, many a times, bidders used to do their own survey before submitting their bids. Provision has been made for preparation of transmission line route survey in advance, to ensure better accuracy of transmission line route survey. As a result, the need for having transmission line route survey carried by each bidder would be obviated and as well as bidders would be aware of all issues involved in construction of the lines before the bidding.
  - In the earlier SBDs, it was stipulated that the entire bidding process needs to be completed within 145 days from date of initiation of bidding process. The time of completion of bidding process has been reduced to 91 days in the revised SBDs. Further, it has been stipulated that entire bidding process shall be completed online in a transparent manner.
  - In order to enhance competition, EPC contractors having adequate experience of developing infrastructure projects have been allowed to participate in the bidding subject to meeting net worth requirement and other criteria as per SBDs.
  - Provisions relating to change in law, termination and consequential payments have been changed to bring more clarity and to reduce risk perception to the bidders.
  - In order to bring more clarity to developer on status of TBCB assets after expiry of contract period of 35 years, the mode of execution of ISTS project has been changed from Build-Own-Operate-Maintain (**BOOM**) to Build-Own-Operate-Transfer (**BOOT**).



- To promote ease of doing business, bidders will now be required to quote one transmission tariff for the actual TSA period.
- It is envisaged that the Revised SBD would promote ease of doing business for private developers in transmission sector, address concerns of developers on risk sharing, encourage competition in transmission, and facilitate timely completion of transmission lines.

## MoP issues guidelines for encouraging competition in Transmission Projects

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- On August 10, 2021, MoP notified the Guidelines for Encouraging Competition in Transmission Projects (**Guidelines**). The National Electricity Policy notified on February 12, 2005, provides that the transmission system requires adequate and timely investment as well as efficient and coordinated action to develop a robust and integrated power system for the country.
- As per the Guidelines, the Central Transmission Utility (**CTU**) will discharge all functions of planning and coordination relating to Inter-State Transmission System and transmission of electricity through Inter-State Transmission System. The Central Electricity Authority would then prepare a National Electricity Plan comprising perspective plan (three five-year plan periods), short term plan (corresponding to the current five-year plan) and a Network plan will be created by CTU based on the National Electricity Plan.
- The Network plan will be reviewed and updated as and when required but not later than once a year. This would include the projects for new lines and substations, strengthening and up-gradation of the existing lines and interregional transmission lines. The Network Plan will clearly identify the scope of the project, broad parameters such as design specifications including Voltage level, line configuration i.e S/C or D/C, functional specifications of conductor etc., length of transmission line and probable location of substation or converter station of HVDC transmission lines.
- A National Committee shall be constituted by the MOP in order to identify the projects to be developed, facilitate evaluation of Bids and development of identified projects. The State Governments are therefore advised to adopt these guidelines and may constitute similar committees for facilitation of transmission projects.

## Amendment in the guidelines for Tariff-based Competitive Bidding process for procurement of power from grid connected wind solar hybrid projects issued on October 14, 2020

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- As a consequence of these amendments, any deviation in the bid documents from the guidelines will now have to approved by the Commission as opposed to Ministry of New and Renewable Energy.
- Though the original guidelines referred SECI as the nodal agency and hence the procurer, the amendment has made it unambiguous that the term SECI shall be read as Procurer(s) except for clause 4 (b) (i).
- The amendment incorporates an additional payment security mechanism clause for a scenario where Distribution Licensee is directly procuring power from the Hybrid Power Generator. Wherein the clause provides that in addition to Payment Security Fund for at least three months of billing and Revolving Letter of Credit of an amount not less than 1 month of billing, the Distribution Licensee may also provide a State Government Guarantee ensuring that there is an adequate security to the Hybrid Power Generator.
- In a scenario where an intermediary procurer procures power from Hybrid Power Generator and sells it to a Distribution Licensee, therein in case the Distribution Licensee is not covered by the Tri-Partite Agreement nor is able to provide the State Government Guarantee then in that case the present amendment mandates that the Revolving Letter of Credit provided by the Distribution Licensee shall be for two months instead of one.
- By way of the present amendment, having a Long-Term Access (**LTA**) is not a necessity for declaration of early commissioning but even with Medium/Short Term Access along with transmission connectivity the Generator may declare early commissioning.
- The amendment omits the clause that in cases of delay in commissioning on account of delay in LTA Operationalization the decision with regard to requisite extension will be taken by SECI. Further, LTA has been made a compulsion only for sale of power, whereas for commissioning of the Project Long Term/Medium Term/Short Term Access may be submitted.

# RECENT JUDGMENTS



## In this Section

[Solitaire BTN Solar Pvt Ltd v. Tamil Nadu Electricity Regulatory Commission & Ors](#)

[GMR Kamalanga Energy Ltd & Anr v. CERC & Ors and Bihar State Power \(Holding\) Co Ltd v. GMR Kamalanga Energy Ltd & Ors](#)

[Talettutayi Solar Projects One Pvt Ltd v. SECI & Ors](#)

[Dhursar Solar Power Pvt Ltd v. JVVNL & Ors](#)

[Think Gas Ludhiana Pvt Ltd v. PNGRB & Ors](#)

[TANGEDCO v. CERC & Ors](#)  
[BALCO v. CERC & Ors](#)

[Rama Shankar Awasthi & Anr v. UPERC & Ors](#)

## NSEFI v. TNERC & Ors

APTEL Judgment dated August 2, 2021 in Appeal No. 197 of 2019

### Background facts

- The present Appeal was filed by National Solar Energy Federation of India (**NSEFI**) challenging the legality of the findings of Order dated March 25, 2019 passed by Tamil Nadu Electricity Regulatory Commission (**TNERC**).
- The issue in the instant matter involved various solar power developers who were facing enormous monetary loss due to the backing down instructions and forceful disconnection/curtailment, which were issued telephonically by respondents Tamil Nadu State Load Dispatch Centre (**TNSLDC**), TANGEDCO, and Tamil Nadu Transmission Corp Ltd (**TANTRANSCO**) (**collectivity, Respondents**), without rendering any reasons for the same.
- In the impugned order, the TNERC casted a clear suspicion on the Respondents that the backing down instructions did not arise for the purpose of ensuring grid security. However, the TNERC failed to grant deemed generation compensation on the premise that there was no provision for the same in the Power Purchase Agreements/Energy Purchase Agreements between the generators and TANGEDCO.

### Issues at hand

- Whether TNERC failed to grant the prayers of the NSEFI despite having casted a clear suspicion that backing down did not arise for the purpose of ensuring grid security?
- Whether TNERC, having casted a suspicion on the Respondents, failed to undertake a fact finding exercise and thereby abdicated its statutory responsibility under section 86(1)(f) of the Electricity Act, 2003 (**Act**)?
- Whether the Respondents intentionally issued the backing down of solar power in an arbitrary manner solely for commercial reasons?
- Whether the member solar plants of NSEFI in the State of Tamil Nadu are entitled to receive deemed generation compensation for the loss occurred to them due to breach of contract by TANGEDCO?
- Whether TNSLDC is liable to be penalized for the failure of its statutory functions and for misfeasance?

## Decision of the Tribunal

- After analysing the Power System Operation Corp Ltd (**POSOCO**) Report and TNERC's observation, Appellate Tribunal for Electricity (**APTEL**) observed that SLDC in collusion with TANGEDCO has issued back down instructions to renewable generators for other than grid security reasons which is in violation of the provisions of the Grid Code.
- APTEL, inter alia, held that for the period March 1, 2017 to June 30, 2017, the Respondents shall pay compensation for 1080 blocks considered by POSOCO, during which curtailment instructions were issued for reasons other than grid security, at the rate of 75% of PPA tariff per unit within 60 days from the date of this order. The computation shall be made separately for individual members of the Appellant Association based on the curtailment period/blocks falling in 1080 blocks.
- APTEL directed POSOCO to carryout similar exercise for the period up to October 31, 2020 on the same lines and submit report to TNERC within 3 months. TNSLDC and NSEFI are directed to submit details to POSOCO. Based on POSOCO report, TSERC shall allow compensation for the backed down energy at the rate of 75% of the PPA tariff per unit. Curtailment quantum shall be considered as per POSOCO report and the Respondents shall pay compensation along with interest at 9% for the entire period.
- In addition, APTEL further clarified the position in regards to any curtailment of renewable energy for future:
  - Any curtailment of renewable energy shall not be considered as meant for grid security if the backing down instruction were given under following conditions:
    - System Frequency is in the band of 49.90Hz-50.05Hz
    - Voltages level is between: 380kV to 420kV for 400kV systems & 198kV to 245kV for 220kV systems
    - No network over loading issues or transmission constraints
    - Margins are available for backing down from conventional energy sources
    - State is overdrawing from the grid or State is drawing from grid on short-term basis from Power Exchange or other sources simultaneously backing down power from intrastate conventional or non-conventional sources.
  - As a deterrent, the curtailment of renewable energy for the reasons other than grid security shall be compensated at PPA tariff in future. The compensation shall be based on the methodology adopted in the POSOCO report. POSOCO is directed to keep the report on its website.
  - SLDC shall submit a monthly report to the State Commission with detailed reasons for any backing down instructions issued to solar power plants.
  - The above guiding factors stipulated would apply till such time the Forum of Regulators or the Central Government formulates guidelines in relation to curtailment of renewable energy.
- Accordingly, APTEL allowed this present petition on merit and set aside the impugned order passed by TNERC in Petition M.P. No. 16 of 2016 to the extent of denial of deemed generation charges/compensation for issuing backing down instructions.



### Our viewpoint

APTEL, by passing the instant judgment, has granted major relief to the renewable power developers by upholding the concept of 'deemed generation charges' and the 'Must-run status' accorded to solar and wind power plants. With there being no clear provisions on curtailment of power in the Grid Code, APTEL has given directions to all the SERCs, DISCOMs and SLDCs to secure renewable power developers from any illegal curtailment of power in future until proper guidelines are formulated pertaining to curtailment of renewable energy.

## GMR Kamalanga Energy Ltd & Anr v. CERC & Ors and Bihar State Power (Holding) Co Ltd v. GMR Kamalanga Energy Ltd & Ors

APTEL Judgment dated August 06, 2021 in Appeal No. 423/ 2019 and 173/ 2021

### Background facts

- GMR Kamalanga Energy Ltd (**GKEL/Appellant**) supplies power from the Project to three states namely, Odisha, Haryana and Bihar. For Bihar, GKEL supplies 282 MW gross (260 MW net of auxiliary consumption) power to Bihar State Electricity Board in terms of the PPA dated November 9, 2011 with delivery point being Bihar STU Bus bar interconnection point (**Bihar PPA**). The 5<sup>th</sup> Schedule of the Bihar PPA specified source of coal as Coal Linkage from Coal India Limited and Rampia and Dip Side Rampia coal block allocated to GEL. The cut-off date for Change in Law under the Bihar PPA is March 28, 2011.

- The fuel requirements for the Project were secured through the following arrangements:
  - Firm coal linkage for the Project providing 2.14 MTPA for 500 MW approved by SLC-LT on August 2, 2007. Pursuant thereto, LOA dated July 25, 2008 providing firm linkage of 2.14 MTPA for 500 MW was issued in favour of GEL, the holding company of GKEL (**LOA dated July 25, 2008**).
  - On November 6, 2007, the Ministry of Coal (**MoC**) intimated its decision to allocate Rampia and Dip Side Rampia coal blocks in Odisha to a consortium comprising of GEL and five other allottees as confirmed by letter No. 38011/1/2007-CA-1 on January 17, 2008. GEL entitlement of coal from the said coal blocks was sufficient for the entire capacity of 1050 MW.
  - Tapering coal linkage for 2.384 MTPA for 550 MW approved on November 12, 2008 by SLC-LT for the Project. Pursuant thereto, LOA dated July 8, 2009 providing tapering coal linkage of 2.384 MTPA coal for 550 MW was issued in favor of GEL. The Tapering Linkage was to be made available till supply of coal from Rampia Coal Block started (**LOA dated July 08, 2009**).
  - GKEL and MCL signed FSAs dated March 26, 2013 and August 28, 2013 for 1.819 MTPA and 0.6556 MTPA respectively.
  - On January 16, 2014, MoC, Govt. of India wrote a letter extending supply of coal under Tapering Linkage for a period of 3 years beyond Normative Date of Production on account of delay in operationalization of the captive coal block.
  - On August 24, 2014, the captive coal blocks allocated to GEL got cancelled pursuant to the judgment of the Supreme Court (**SC**) in the case of *Manohar Lal Sharma v. The Principal Secretary & Ors*<sup>1</sup> (**Coal Judgment**) and the subsequent cancellation order dated September 24, 2014<sup>2</sup> reported as (**Cancellation Order**) (collectively referred as **Manohar Lal Judgment**).
  - On April 15, 2015, GKEL filed Petition No. 112/MP/2015 before the Central Commission claiming compensation for certain Change in Law events which affected the Project during the Operating Period qua the Bihar PPA.
  - On June 30, 2015, MoC issued an Office Memorandum inter-alia granting temporary relief to Projects with Long Term PPAs be supplied coal on MoU basis till March 31, 2016.
  - On July 20, 2015 and December 24, 2015, GKEL and MCL executed MoU with validity till March 31, 2016 for supply of coal (GCV grade of G10 to G13) 'on best effort basis' as per the level prevailing as on June 30, 2015 along-with add-on price of 20% over and above the applicable price.
  - On April 13, 2016, MoC wrote to Coal India Ltd inter-alia stating that coal supplied under MoU basis be extended till June 30, 2016.
- On April 7, 2017, the Central Commission passed an order in Petition No. 112/MP/2015 inter-alia disallowing shortage of domestic coal as Change in Law.
- GKEL filed Appeal No. 193 of 2017 before this Tribunal impugning disallowance of the above claims.
- On December 21, 2018, Tribunal passed the Remand Judgment allowing the following claims as Change in Law and remanded the same to the Central Commission to pass consequential orders and to determine compensation due to GKEL.
- Subsequent to the Remand Judgment, CERC re-opened Petition No. 112/MP/2015.
- On September 16, 2019, CERC passed the Impugned Order and determined the compensation payable to GKEL for the allowed Change in Law events. Aggrieved by the impugned order, this Appeal is filed.
- According to GKEL, the primary issue in the present Appeal is that the Central Commission failed to correctly give effect to the findings of this Tribunal in the Remand Judgment and provide for compensation to GKEL for meeting the expenditure incurred towards procuring coal from alternate sources to meet the shortfall of coal from domestic sources. The Central Commission provided a formula for computing compensation due to shortfall in supply of coal which fails to restore GKEL to the same economic position as mandated by Article 10 of the Bihar PPA.

### Issues at hand

- Whether GKEL can recover expenditure involved in procurement of alternate coal to service the Bihar PPA arising out of shortfall in domestic sources, corresponding to scheduled generation?
- Can GKEL be restored to the same economic position?

<sup>1</sup> (2014) 9 SCC 516

<sup>2</sup> (2014) 9 SCC 614

## Decision of the Tribunal

- APTEL upheld the Appeal no. 423/2019 (dismissed the Appeal no. 173/ 2021) and held that the shortfall of coal is to be computed *vis-à-vis* 100% assurance under NCDP 2007 *vis-à-vis* the actual supply received by GKEL. It cannot be limited to the percentage envisaged under NCDP 2013 as contended by the Bihar Discom. Once the proposition of law has been laid down and confirmed by the SC in Energy Watchdog Case, any decision which is passed by any other authority cannot come to the assistance of the Bihar Discom.
- The NCDP 2007 having promised 100% supply of coal, at this stage when the Appellant all along had the benefit of NCDP 2007 promise, there is no justification to apply NCDP 2013 as claimed by the Appellant Bihar Discom.
- GKEL is entitled to recover expenditure involved in procurement of alternate coal due to shortfall in domestic coal supply corresponding to scheduled generation pertaining to Bihar PPA obligation in order to restore the Appellant to the same economic position as before as if no change in law event has occurred.
- GKEL is entitled to recover expenditure involved in procurement of alternate coal due to shortfall in domestic coal supply corresponding to scheduled generation pertaining to Bihar PPA obligation in order to restore the Appellant to the same economic position as before as if no change in law event has occurred.
- GKEL is entitled for carrying costs from the date of change in law events till the dues are paid.
- All the amounts due and payable to the generator, the GKEL by the Bihar Discom under various change in law events shall be paid along with carrying costs in accordance with law within six weeks from today.



### Our viewpoint

APTEL rightly observed that the Generator (GKEL in present case) is entitled to recover expenditure involved in procurement of alternate coal due to shortfall in domestic coal supply corresponding to scheduled generation pertaining to Bihar PPA obligation in order to restore the Appellant to the same economic position as before as if no change in law event has occurred.

## Talettutayi Solar Projects One Pvt Ltd v. SECI & Ors

45/MP/2019 along with IA No. 24/2021

### Background facts

- Talettutayi Solar Projects One Pvt Ltd (**Petitioner**) is a generating company for developing solar power project for generation and sale of solar power.
- Solar Energy Corporation of India Ltd (**SECI**) is a Public Sector Undertaking under the administrative control of Ministry of New and Renewable Energy (**MNRE**), set up to facilitate the implementation of Jawaharlal Nehru National Solar Mission and invited proposals for setting up of solar power projects in the State of Karnataka.
- The Petitioner was declared as successful bidder for development of 30 MW Solar Power Project on August 02, 2016, and accordingly it entered into a PPA with SECI.
- The Goods and Sales Tax, 2017 (**GST**) were enacted for levy and collection of tax, w.e.f. July 01, 2017, on intra-State supply of goods or services, or both, by the Central Government.
- MNRE issued an Office Memorandum extending Scheduled Commercial Operations Date (**SCOD**) of the solar power plants on account of introduction of GST.
- The Petitioner achieved commissioning on January 05, 2018 and commercial operation on February 04, 2018.
- The Petitioner has submitted that it had not contemplated introduction of GST at the time of the bid submission and that the introduction of GST made a substantial impact on the actual cost of the project *vis-à-vis* the projected cost, which was beyond its control and, therefore, relief on account of Change in Law is being prayed for. Introduction of the GST Laws qualifies as Change in Law under Article 12 of the PPA and they should be compensated accordingly.
- Further, in spite of reconciliation of claims, SECI has not released any amount towards compensation.
- Thus, the present Petition.



## Issues at hand

- Whether the imposition of GST Laws is an event of Change in Law in terms of Article 12 of the PPA?
- Whether the Petitioner may be restored to the same economic condition prior to occurrence of the Change in Law by way of adjustment in tariff in terms of Article 12 of the PPA by increasing the tariff along with carrying cost?

## Decision of the Commission

- **Issue 1:** The introduction of the GST w.e.f. 01.07.2017 is covered under Change in Law in terms of Article 12 of the PPA. SECI shall pay to the Petitioner as per mutually agreed mechanism for payment of such compensation on annuity basis, subject to the outcome of the Petition No. 536/MP/2020. The compensation paid to the Petitioner by SECI is not conditional upon payment to be made by the Respondent Discoms to SECI. However, SECI is eligible to claim the same from the Respondent Discoms on 'back to back' basis.
- **Issue 2:** The Commission noted that the PPA in the instant matter does not have restitution provisions. Therefore, in view Precedents/judgments of the Tribunal and the Hon'ble Supreme Court, since the PPAs in the instant Petition do not have a provision dealing with restitution principles of restoration to same economic position, the claim regarding 'carrying cost' is not admissible. Thus, claim regarding carrying cost is not admissible.



### Our viewpoint

The ruling passed by the Commission is in complete consonance with judgements/precedents cited and the provisions of PPA. The Commission had rightly held SECI liable as the trader for its obligation under the PPA, independent of its right to seek corresponding compensation from the Discoms under Power Supply Agreement.

## Dhursar Solar Power Pvt Ltd v. JVVNL & Ors

RERC Order dated August 03, 2021 in Petition No. RERC-1808/20

### Background facts

- The present Petition had been filed by Dhursar Solar Pvt Ltd (**Petitioner**) seeking adjudication of disputes regarding unlawful recovery of wheeling charges by Jodhpur Discom. The Petition was filed pertaining to its 40MW solar PV Project at Dhursar, Jaisalmer, Rajasthan. For the purpose of fulfilment of its obligations under the long term Energy Purchase Agreement (**EPA**) with Adani Electricity Mumbai Ltd (**AEML**), the Petitioner had executed Long Term Access (**LTA**) Agreement with Rajasthan Vidyut Prasaran Nigam Ltd (**RVPN**) and another LTA agreement with Power Grid Corp of India Ltd (**PGCIL**) on March 30, 2021 and March 23, 2012 respectively.
- It is the case of the Petitioner that odhpur Vidyut Vitran Nigam Ltd (**JVVNL/Respondent**) had demanded wheeling charges from the Petitioner at the rate of INR 0.01/kWh on the basis of Open Access capacity contracted without taking into account that Petitioner was not using any distribution network of JVVNL for supplying power from its PV plant to its Power procurer. As such, it was contended that there was no question of payment of wheeling charges as claimed by the Respondent Discom.
- It was contended by the Petitioner that it is using only transmission network for evacuating power from its PV plant, therefore it is liable to pay transmission charges and transmission losses only as per the Clause 38 (a) of RERC (Terms and Conditions for Determination of Tariff for Renewable Energy Sources-Wind and Solar Energy) Regulations 2014. Accordingly, the transmission charges and transmission losses are being paid to RVPNL. Further, it had been stated that the Respondent Discom could not levy any kind of service charge on the Petitioner, which is an EHT consumer, and is not a consumer within the meaning of Section 2(15) of the Electricity Act, 2003.
- On the contrary, JVVNL stated that wheeling charges are being levied on the Petitioner since April 01, 2012, if the charges would have been unlawful as stated by the Petitioner then the same Petitioner had filed a Petition No. 1125/2017 challenging the validity of the levy of UI charges, levy of incorrect MDI, levy of incorrect reactive charges appeal of which is pending before the Hon'ble APTEL and as such, the Petitioner could have claimed about the prayers/claims in the said Petition. Thus, JVVNL stated that the claims made by Petitioners were barred by res judicata.
- Further, JVVNL contended that as per LTA Agreement dated March 30, 2012, head 2.2. charges for Open Access, the Petitioner is under obligation to pay the charges to the Distribution licensees for drawl therefore, the wheeling charges are levied. Since the Petitioner is drawing energy and is being billed by the Respondent Discom, it cannot be said that the Petitioner is not utilizing the system of JVVNL.

## Issue at hand

- Whether the Discom was entitled to recover wheeling charges from the Petitioner, despite the Petitioner being EHT consumer?

## Decision of the Commission

- RERC observed that the only issue raised by the Petitioner in the present Petition was with respect to the recovery of wheeling charges from Petitioner, who is directly connected to the Transmission System. RERC referred to its earlier Order dated February 21, 2015 in Petition No. 40/2004 filed by JVVNL, wherein the Commission had decided the issue relating to Wheeling Charges for the first time.
- RERC reiterated that the abovementioned Order stipulated that the wheeling charge inter alia comprised of its components, namely, conveyance of electricity on wires (i.e. on lines and transformers) and of providing facilities and services, like metering system, their testing, calibration, operation & maintenance, meter readings, billing, revenue collection, telecommunication and consumer service.
- Further, RERC also referred to its Order dated September 19, 2006 whereunder, it had been observed that the Discoms are allowed to charge wheeling charge @ INR 1p/kwh from EHT consumers towards the services provided by them. In view of various other Orders passed by the Commission, RERC held that the demand raised by JVVNL for wheeling charges to the Petitioner was valid and legal.



### Our viewpoint

RERC has correctly relied upon its interpretation of the wheeling charges and rightly determined that the wheeling charges are payable by the EHT consumers as well.

## Think Gas Ludhiana Pvt Ltd v. PNGRB & Ors

APTEL order dated August 2, 2021 in Appeal No. 239 of 2020 and batch

### Background facts

- Petroleum and Natural Gas Regulatory Board (**PNGRB**) issued three separate Show Cause Notices (**SCNs**) dated March 26, 2019 to Jai Madhok Energy Pvt Ltd (**JMEPL**) led Consortium under Section 23 of the PNGRB Act, 2006 (**PNGRB Act**), asking the JMEPL to show cause as to why the authorisations granted to the consortium led by JMEPL for the Geographical Areas (**GAs**) of Ludhiana, Jalandhar and Kutch (E) should not be suspended/cancelled by the PNGRB as there is a prima facie case, inter alia, that JMEPL has violated Regulations 5(6)(f) and 10(3) of PNGRB (Authorising Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 (**CGD Authorization Regulations**) and Clause 8 of the 2013 Bid Documents.
- While the PNGRB had reserved the above matter for orders on November 5, 2020, on November 10, 2020, the Think Gas Ludhiana Pvt Ltd (**Think Gas**) who had authorization to develop City Gas Distribution Network in major part of the Jalandhar and Ludhiana District, filed an intervention application before PNGRB seeking to be impleaded as a party to the proceedings relating to the PNGRB SCNs dated March 26, 2019 and placing on record that the Business Transfer Agreement entered into between JMEPL and other respondents cannot be considered by PNGRB and it has valid legitimate interest as an authorised entity in the adjacent areas of the disputed area of JMEPL.
- The Application for intervention was not considered by PNGRB and vide order dated November 11, 2020, dismissed in limine with the liberty to file objections at the appropriate proceedings as the instant proceedings were related to Regulation 16 of CGD Authorization Regulations read with Section 23 of the PNGRB Act for violation of terms and conditions of authorisation for the Jalandhar, Ludhiana and Kutch (East) GAs of JMEPL and were proceedings in personam. Thereafter PNGRB passed final order on SCNs dated March 26, 2019 on December 3, 2020.
- Think Gas filed an appeal being 239/2020 challenging PNGRB orders dated November 11, 2020 and December 3, 2020 and JMEPL filed appeal against PNGRB order dated December 3, 2020.

### Issues at hand?

- Whether Think Gas is an 'aggrieved person' within the meaning of Section 33 of the PNGRB Act or not?
- Whether Think Gas has any locus to file appeal against the impugned orders & has any claim of legitimate expectation?
- Whether there is any monopoly/exclusivity?
- Whether the impugned order is 'in rem' and not 'in personam'?

## Decision of the Tribunal

- **Issue No. 1:** As per Section 33 of the PNGRB Act, a person who was not made a party to the original proceedings before the PNGRB may still file an appeal with the leave of the Appellate Forum provided that the said person is able to make out a prima facie case to the Appellate Court that he is the 'person aggrieved'.
  - With regard to Think Gas being the 'person aggrieved', the Tribunal observed that Section 23 of the PNGRB Act confers the right of hearing only on the authorised entity and no third party has any right of impleadment or intervention in such regulatory proceedings and as such no right of Think Gas stood violated by the order dated November 11, 2020.
  - Moreover, Think Gas was unable to show how his right is infringed with the proposed action initiated by PNGRB and is adversely affected by any violation of the condition of authorisation by JMEPL.
- **Issue No. 2:** Legitimate expectation is not a legal right of a party but only imposes a duty of fairness on an authority. For a party to have any legitimate expectation, it has to show, inter alia, that by depriving him of some benefit or advantage which he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do. The fact is that the right of any authorised entity is limited to its concerned GA and does not confer any legal right or interest in any other GA including adjoining GA under the statute. There is no question of any right of Think Gas being affected/injured. Therefore, Think Gas has failed to show how the 'impugned orders' had deprived him of some benefit or advantage that he had in the past and thus no right of Think Gas has been infringed. Thus, it is not the case of legitimate expectation.
- **Issue No. 3:** On account of dispute in JMPEL's areas, Think Gas held authorization in adjacent areas and challenged authorization and exclusivity of JMPEL of its areas. As such, alternate suppliers, including Think Gas are being prevented from reaching consumers located in Jalandhar city and Ludhiana city. In this regard, the Hon'ble Tribunal observed that there is no doubt that Think Gas is also enjoying the exclusivity under the Act for its own areas but, under the garb of public welfare, is conveniently seeking to operate in JMEPL's areas by wrongly claiming that the latter's exclusivity has ended. Exclusivity and authorisation are separate rights. As per the CGD Exclusivity Regulation, once the marketing exclusivity of the area gets over, PNGRB notifies the same for which there is a procedure under Section 20 of the Exclusivity Regulation. But Think cannot get a right to question authorisation. Even assuming that the Board declares the exclusivity to have ended then also Think Gas still has to follow the statutory/regulatory scheme. Thus, even by the end of exclusivity would not grant Think Gas a legal right in JMEPL areas/authorisations. Thus, it is not a case of 'Monopoly'.
- **Issue No. 4:** The Tribunal opined that the right of authorisation is the personal right of the authorised entity granted by PNGRB for a specified GA through a competitive bidding process in accordance with the PNGRB Act. The SCNs dated March 26, 2019 was a suo moto proceeding initiated by the PNGRB against the authorised entity as per the PNGRB Act. Thus, proceedings commenced by PNGRB, based on the SCNs, were in personam.
- Therefore, the appeal filed by Think Gas is dismissed as it has failed to show any legal injury suffered or has been unjustly denied or deprived.



### Our viewpoint

The Tribunal has explained the meaning of 'aggrieved party' in a dispute under Section 33 of the PNGRB Act and exhaustively interpreted doctrine of legitimate expectation to establish that mere interest of parties in the fruits of litigation cannot be a real test for being impleaded as parties.

## TANGEDCO v. CERC & Ors

### BALCO v. CERC & Ors

APTEL Judgment dated August 12, 2021 in Appeal Nos. 22 of 2019 and 58 of 2018

## Background facts

- The present Appeals had been filed by the Appellants against the common Order dated April 27, 2018 passed by Central Electricity Regulatory Commission (CERC) holding that Bharat Aluminium Co Ltd (BALCO) is entitled to be compensated for the impact on the cost of generation pursuant to the Change in Law alleged in the Petition. The CERC also held that Article 15 does not have a nonabsente clause and therefore Article 10 of the PPA overrides the provisions of Article 15. The CERC without giving any reasonable explanation to the contentions raised by the appellant before it granted relief sought by the respondent generator for some of the components and dis-allowed the rest on account of want of relevant documents.
- It was the case of Tamil Nadu Generation and Distribution Corp Ltd (TANGEDCO) that escalable energy charge quoted by BALCO consists not only coal price but also all the taxes and levies and therefore by applying escalation rate on energy tariff every month, not only the coal price and

taxes get escalated but also the hidden component like profit also get escalated. It is precisely for this reason, no further compensation on account of Change in Law could be allowed to BALCO as it would result in double payment.

- TANGEDCO has further submitted that compensation on Change in Law is the payment of difference in cost due to changes in taxes or introduction of taxes. The generator/seller has to prove increase/decrease in cost of power generation or revenue/expense due to Change in Law. A portion of tax components has already been escalated and paid in monthly tariff. The argument of TANGEDCO is that no further compensation on account of Change in Law should be allowed to BALCO and if allowed, then the same should be allowed only after adjusting the amount of taxes and duties which have already been paid to BALCO on monthly basis as tariff.
- It was the contention of BALCO that in a Section 63 bid PPA, the tariff quoted by the generator cannot be re-opened. BALCO executed the PPA with TANGEDCO on the basis of the provisions of the bidding guidelines, and the standard RFP and PPA documents, which did not contemplate any correlation between change in law compensation and compensation based on escalable parameters, as both are distinct. Therefore, TANGEDCO cannot today shift the goal post, and add words to the PPA by seeking to deduct Change in Law compensation with the perceived/alleged increase in the component of energy.
- It was also the submission of BALCO that e BALCO that Article 15.8.1 of the PPA only mandates that BALCO to make payment of statutory taxes, duties, levies and cess. However, it was contended that this does not mean that after making the said payment of statutory charges BALCO is not entitled to claim compensation under Change in Law, as per Article 10, in the event of increase in, or introduction of, any Change in Law component after the cut-off date.
- BALCO further contended that carrying cost on the compensation ought to be allowed on account of Change in Law and referred to the judgments passed by the Hon'ble Supreme Court and the APTEL wherein it had been held that carrying cost is inbuilt in the Change in Law claims as the same is based upon the principle of restitution, so that the generator/affected party is restored to the same economic position as if the Change in Law event did not occur. Further, it was stated that the above above principle was enshrined in Article 10.2.1 of the PPA.

### Issues at hand

- Whether the decision of the CERC to allow compensation in respect of seven (7) items on account of Change in Law is as per the relevant provisions of the PPA?
- Whether the decision of the CERC to disallow the compensation in respect of seven (7) items on account of Change in Law is as per the relevant provisions of the PPA?
- Whether BALCO can be allowed the carrying cost on the amount of compensation allowed by CERC on account of Change in Law?

### Decision of the Tribunal

- As regards Appeal 22 of 2019, the APTEL observed that decision of the CERC to allow compensation on seven (7) items on account of Change in Law is as per the relevant provisions of the PPA, the Regulations on the subject and is as per law. As such the appeal No. 22 of 2019 cannot be allowed and is accordingly dismissed as devoid of merits.
- The APTEL allowed the levy of busy season charges and levy of development surcharge as Change in Law event placing reliance on its Judgment passed in Appeal No. 119 of 2016, M/s Adani Power Rajasthan Ltd. v. Rajasthan Electricity Regulatory Commission & Ors. whereunder, the Tribunal had allowed the busy season charges and levy of development surcharge as Change in Law event.
- The APTEL observed that if the terms of the contract provides that parties must be brought to the same economic position, it would include that all additional costs, which occurs after the cut-off date in terms of the Change in Law event, have to be compensated and if there is any time gap between the date of spending and realizing the said amount, carrying cost/interest has to be paid then only the parties could be put to the same position. Thus, the prayer of BALCO as regards the carrying cost on the amount of compensation on account of Change in Law was allowed.



#### Our viewpoint

APTEL has upheld the significance of the requirement under the PPA to place the affected party in the same economic position and rightly allowed carrying cost on the compensation for Change in Law event.



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