PROJECTS, ENERGY & INFRASTRUCTURE

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In this Section

MoP approves net metering for rooftop systems up to 500 kW capacity

IL&FS floats EOI for selling 100% stake in wind farm project

AGEL acquires 100% stake in Spinel Energy and Infrastructure

SECI plans 2,000 MWh capacity standalone energy storage project

Major ports now have a new tariff setting authority

Ministry of Power approves net metering for rooftop systems up to 500 kW capacity

- Ministry of Power (**MoP**) on June 29, 2021, had notified the Electricity (Rights of Consumers) Amendment Rules, 2021 (**Amendment Rules**), relating to net-metering for rooftop solar installations. Under the Amendment Rules, the Electricity Regulatory Commissions (**ERCs**) may allow net-metering to the Prosumer for loads up to 500 kW or up to the sanctioned load, whichever is lower. For loads beyond 500 kW, gross-metering arrangement must be used.
- Previously, net-metering for rooftop solar systems was capped at 1 MW until December 2020, when the Electricity (Rights of Consumers) Rules, 2020, mandated net-metering for loads up to 10 kW and gross-metering for loads beyond 10 kW.
- The Amendment Rules further provide that in case of Prosumers availing net-billing or net feed-in arrangement, ERCs may introduce time-of-the-day (**TOD**) tariffs whereby Prosumers are incentivised to install energy storage for utilization of stored solar energy by them or feeding into the grid during peak hours, thus helping the grid by participating in demand response of the distribution licensee.
- In case of net-metering or net-billing or net feed-in arrangement, the distribution licensee may install a solar energy meter to measure the gross solar energy generated from the grid-interactive rooftop solar systems for Renewable Purchase Obligation (**RPO**) credit, if any.
- As per the Amendment Rules, ERCs may permit gross-metering for Prosumers who would like to sell all the generated solar energy to the distribution licensee instead of availing the net-metering, net-billing or net feed-in facility and the ERCs shall decide generic tariff for gross-metering as per tariff regulations.

IL&FS floats EOI for selling 100% stake in wind farm project

- Infrastructure Leasing and Financial Services (IL&FS) on Tuesday invited Expressions of Interest (**EOI**) from eligible investors for its 100 per cent stake in Ramagiri Renewable Energy Ltd (**RREL**) and purchase of fixed assets of IL&FS Energy Development Company (**IEDCL**). IL&FS and its group companies collectively hold 95.54% of the total issued, subscribed and paid-up share capital of IEDCL. RREL is a 100% subsidiary of IEDCL.
- RREL owns a 6.5 MW wind farm project with 26 wind turbines having a capacity of 250 KW each at Ramagiri, district Anantapur, Andhra Pradesh.
- IEDCL also owns a wind mast, situated at the wind farm site of RREL, and a solar irradiation measurement equipment mounted on the wind mast (together 'Fixed Assets') that are used for gathering meteorological and solar data respectively.

- EOI are invited from eligible applicants for acquisition of the total issued, subscribed and paid-up shares of RREL and purchase of the Fixed Assets, IL&FS said in the EOI.
- The last date for submission of the EOI and other required documents by 5 PM on August 10, 2021.

AGEL acquires 100% stake in Spinel Energy and Infrastructure

- Adani Green Energy Ltd (**AGEL**) has acquired 100% equity stake in Spinel Energy and Infrastructure from Hindustan Cleanenergy and Peridot Power Ventures.
- This acquisition is part of AGEL's overall growth strategy where the company is planning to build a capacity of 25 GW by 2025. While acquisitions of existing infrastructure would help it grow inorganically, AGEL is expanding organically too by establishing greenfield power plants. This particular acquisition will help it add 20 MW to its existing capacity and help meet the targeted decarbonization plan for a greener environment. AGEL's present capacity includes power plants worth 15,240 MW in 86 locations, spread over 11 states in the country.
- The company also recently announced the acquisition of a 75 MW solar power project from Sterling & Wilson - a Shapoorji Pallonji group company - at the cost of INR 446 crore in Telangana.

SECI plans 2,000 MWh capacity standalone energy storage project

- The Solar Energy Corporation of India (**SECI**) is planning a 2,000 MWh standalone energy storage system which will be executed by the private sector. The state-owned solar energy focused corporation said the projects will be set up on a build-own-operate (**BOO**) basis with a 25-year agreement. The detailed tender will be floated by August end. SECI has issued a notice for request for selection and will enter into an agreement with the successful bidders for 25 years as per the terms, conditions, and provisions.

Major ports now have a new tariff setting authority

- The Tariff Authority for Major Ports (**TAMP**) will no longer be in charge of setting tariffs at the 12 major ports under Central government control. The Major Ports Authority Bill, 2020 established the Board of Port Authority, which will now set tariffs that will be used as a guide during the bidding process for public-private-partnership (PPP) projects.
- According to the Ministry of Shipping's annual report for 2020-21, PPP operators are free to set tariffs based on market conditions. TAMP's Reference Tariff Guidelines were extended until 8th March 2021, or until further orders, whichever comes first. According to the ministry's annual report, it's now official that TAMP is no longer in effect.
- With the addition of multiple facilities, both private and public, the landscape of ports and port terminals has changed dramatically over time, providing users with options that aren't always based on tariffs. This reduced TAMP's importance in an indirect way. The ministry could, however, initiate a consultative process.

In this Section

Solitaire BTN Solar Pvt Ltd v. Tamil Nadu Electricity Regulatory Commission & Ors

Timarpur-Okhla Waste Management Co Ltd v. BSES Rajdhani Power Ltd & Ors

Hindustan Urban Infrastructure Ltd & Ors v. Jaipur Vidyut Vitran Nigam Ltd & Ors

HPCL Mittal Pipelines Ltd & Ors v. Jodhpur Vidyut Vitran Nigam Ltd & Ors

SECI v. Delhi ERC
SECI v. Punjab State ERC

Hindalco Industries Ltd & Ors v. MPERC & Ors

Pune Bioenergy Systems Pvt Ltd v. MSEDCL & Ors

Power Grid Corp of India Ltd v. Rajasthan Rajya Vidyut Prasaran Nigam Ltd & Ors

In the matter of making suitable amendments to the APERC (Terms and Conditions for Determination of Tariff for Wheeling and Retail Sale of Electricity) Regulation, 2005 (Regulation 4 of 2005), concerning the specification of FPPCA formula for pass-through of Power Purchase Cost variation on quarterly basis instead of annually

Solitaire BTN Solar Pvt Ltd v. Tamil Nadu Electricity Regulatory Commission & Ors

APTEL's Judgement dated July 05, 2021 in Appeal No. 67 of 2021

HSA Advocates partners Hemant Sahai and Nitish Gupta, along with Associate Partner Molshree Bhatnagar and Associates Samarth Kashyap and Shefali Tripathi, represented Solitaire BTN

Background facts

- Solitaire BTN Solar Pvt Ltd (**Solitaire BTN**) filed an appeal before the Appellate Tribunal for Electricity (**Tribunal**) against the Order dated November 24, 2020, passed by the Tamil Nadu Electricity Regulatory Commission in DRP No. 05 of 2020 (**TNERC Order**).
- TNERC by way of the TNERC Order rejected the claims of Solitaire BTN to seek extension of the Scheduled Commercial Operation Date (**SCOD**) as defined under the Power Purchase Agreement dated September 27, 2017 (**PPA**), executed between Solitaire BTN and Tamil Nadu Generation & Distribution Co Ltd (**TANGEDCO**), for supply of power from its 100 MW Solar PV Power Plant at village Ganguvarpatty, Periyakulum Taluk, District Theni – Tamil Nadu (**Project**).
- The delay in achieving commissioning of the Project was a direct consequence of the delay by TANGEDCO and the Tamil Nadu Transmission Corporation (**TANTRANSCO**), in providing an adequate transmission system to Solitaire BTN for evacuation of power.

Issues at hand

- Did TANTRANSCO grant conditional connectivity approval to the Appellant to interface its Project at Batlagundu S/S at 110 kV level?
- Have the Respondents completed the works, identified in the letter dated January 06, 2018 giving the conditional approval, to provide transmission system to facilitate evacuation of the entire 100 MW of power from the projects of the Appellant?
- Whether the Appellant can be granted extension of time for commissioning of its solar plant invoking the provisions of Force Majeure under PPA?

Decision of the Tribunal

- ***Re: Grant of conditional connectivity approval to interface the Project at Batlagundu S/S at 110 kV level***
  - The Tribunal observed that due to the difficulty faced in acquiring the land at Kariapatti Taluk, Solitaire BTN applied for a change of project location to Ganguvarpatty Taluk and also requested TANGEDCO to undertake a load flow study for the said location to connect it to the existing 110 kV Batlagundu Substation. Further, TANGEDCO vide its letter dated January 06, 2018, informed Solitaire BTN that as per the load flow studies conducted, the Project can be interfaced at the existing 110 kV Batlagundu Substation only after completion of the 4 pre-connectivity works listed in the said letter (Conditional Evacuation Approval).

- The Tribunal held that TANGEDCO granted conditional connectivity approval to Solitaire BTN as the said approval was contingent on successful completion of the 4 pre-connectivity works identified in the said approval.

- ***Re: Completion of pre-connectivity works to provide transmission system to facilitate evacuation of the entire Project***
  - It was noted that in terms of the conditional evacuation approval, Solitaire BTN can only evacuate the entire capacity of its Project after completion of pre-connectivity works. The existing Wolf Conductor installed at 110 kV Theni-Sembatti I & II is 60 years old and evacuation of power from the existing 110 kV Batlagundu Substation can only be at a maximum limit of 60 MW. Since, the pre-connectivity work i.e., conversion of 110 kV Theni-Sembatti Feeder I and II by Wolf equivalent HTLS has not been undertaken by TANGEDCO, therefore, the existing evacuation infrastructure is incapable of evacuating the entire contracted capacity of 100 MW.
  - Further, the Tribunal also observed that the TANGEDCO failed to complete all the works identified in the conditional evacuation approval and its obligation under RfS, LoI, PPA and the Electricity Act, 2003, to provide an adequate transmission system to Solitaire BTN to evacuate the entire output of the Project.

- ***Re: Grant of extension of SCOD on account of Force Majeure***
  - The Tribunal observed that in terms of Rfs, LoI, PPA and Electricity Act, 2003, the delay caused in the implementation of the Project due to unavailability of the transmission system is for reasons beyond the control of Solitaire BTN. Therefore, Solitaire BTN has been given the following extensions: (i) ten months on account of Force Majeure event of unavailability of transmission system; and (ii) five months on account of Force Majeure event of lockdown due to corona pandemic.
  - Further, the SCOD of the Project has been extended from September 27, 2019 to December 27, 2020, without the encashment of Performance Bank Guarantee and payment of Liquidated Damages. Accordingly, the Tribunal has directed the TANGEDCO to return the Performance Bank Guarantee of INR 20 crore and Additional Performance Bank Guarantee of INR 7.6 crore to the Appellant without any delay along with the cost of renewing such Bank Guarantee.
  - It has further directed TANGEDCO to pay full tariff of INR 3.47/unit for the balance 50 MW w.e.f. February 08, 2021, i.e., the date on which this capacity was synchronised with the grid and TANGEDCO to pay the differential tariff withheld along with carrying cost.

Our viewpoint

This judgement is in line with various precedents that have reiterated that the delay in receiving various approvals/clearances by the Government and its instrumentalities which are beyond the control of the Generating Companies should be treated as an event of Force Majeure. The decision of the Tribunal is positive in so far as extension of SCOD on account of delay in availability/construction of evacuation infrastructure by State instrumentality is concerned.

Timarpur-Okhla Waste Management Co Ltd v. BSES Rajdhani Power Ltd & Ors

DERC Order dated June 24, 2021 in Petition No. 29 of 2016

Hemant Sahai, HSA Founding Partner, along with Associate Partner Molshree Bhatnagar and Associate Shefali Tripathi, represented Timarpur Okhla Waste Management Co Ltd

Background facts

- Timarpur Okhla Waste Management Company Ltd (**Petitioner**) entered into an Energy Purchase Agreement (**EPA**) dated January 20, 2010 with BSES Rajdhani Power Ltd (**BRPL**), which was amended on July 27, 2011. In terms of the EPA, 50% of power being generated by the Petitioner to the tune of 60 million units per year from 16 MW Waste-To-Energy project, shall be supplied/sold to BRPL.
- The case of the Petitioner before DERC was that BRPL failed to open an unconditional, revolving and irrevocable Letter of Credit (**LC**) as stipulated under Clause 5.10 of the EPA and Ministry of Power Order dated June 23, 2020 (**MoP Order**). It also failed in making the payment of the late surcharge in terms of the Clause No. 5.5 of the EPA.
- Further, BRPL violated the Order dated December 24, 2013 and its amendment dated May 18, 2015 passed by the DERC, by virtue of which DERC granted exemption to the renewable generating company from payment of wheeling charges (**DERC Exemption Order**). The Petitioner further claimed that it suffered deemed generation loss due to frequent tripping of the Plant, which has resulted in the financial loss to the Petitioner for which BRPL is exclusively liable.

Issues at hand

- Whether BRPL is required to open unconditional and irrevocable LOC in terms of MOP Order and the terms of the EPA?
- Whether BRPL is liable to pay late payment surcharge?
- Whether Petitioner is entitled for refund of wheeling charges deducted by BRPL for the period February 24, 2014 to May 17, 2015?

Decision of the Commission

- ***Re: LC opening issue***
  - DERC has observed that the opening of LC is not optional but mandatory under the provisions of EPA and MoP Order. Therefore, DERC directed BRPL to open unconditional, revolving and irrevocable LC in terms of the EPA and MoP Order.
- ***Re: Non-payment of Late Payment Surcharge (LPSC)***
  - DERC has noted that BRPL failed to clear the outstanding dues in respect of LPSC for the period beginning from January 2012 to March, 2015 in a timely manner and the outstanding dues were cleared on January 19, 2021. Keeping in view that the amount withheld for long by BRPL has opportunity cost, DERC has allowed levy on simple interest @ 0.75% per month i.e., 9% per annum of the said amount. Accordingly, BRPL has been directed to pay simple interest @ 0.75% per month i.e., 9% per annum on the amount of INR 35,85,006 from April 01, 2015 till January 18, 2021, within one month from the date of this Order.
- ***Re: Refund of wheeling charges***
  - It has been noted that vide DERC Exemption Order, DERC exempted the payment of wheeling, transmission charges from the Open Access Customer (buyers & Sellers) of Delhi availing energy from all renewable energy sources. Accordingly, DERC has held that the Petitioner is entitled for refund of wheeling charges deducted by BRPL for the period February 24, 2014 to May 17, 2015.

Our viewpoint

The findings of DERC are based on the premise of the settled principle of law that parties to the contract are bound to honour the terms of contract. DERC, after considering the market dynamics and constraints in development and promotion of Waste-To-Energy projects, has allowed the Petitioner to take benefit of all the legitimate claims and exemptions raised in the Petition viz. opening of LC, payment of LPSC and refund of wheeling charges.

Hindustan Urban Infrastructure Ltd & Ors v. Jaipur Vidyut Vitran Nigam Ltd & Ors

RERC Order dated July 13, 2021 in Petition Nos. RERC/1822/20 and batch matters

Background facts

- The captioned Petitions were filed by wind and solar generating companies (**Petitioners**) under Section 86(1)(f) of the Electricity Act, 2003 against Jaipur Vidyut Vitran Nigam Ltd, Ajmer Vidyut Vitran Nigam Ltd, Jodhpur Vidyut, Vitran Nigam Ltd and Rajasthan Urja Vikas Nigam Ltd (**Respondents/Discoms**) for delay in payments of the principal amount as well as non-payment of Late Payment Surcharge (**LPS**) by the Respondents, in lieu of the power purchased by the Petitioners. In view of pendency of similar issues in the said Petitions, Rajasthan Electricity Regulatory Commission (**RERC**) decided to dispose them of by a common order.
- The Petitioners had entered into Power Purchase Agreements (**PPAs**) with the Respondents, to purchase the power generated by them and supply electricity. As per the terms of the PPA, the Respondents were required to make payments for the energy within 30-45 days of the purchase. In the event of delay in making such payment, the PPA along with relevant regulations provided for payment of interest on the principal amount as Late Payment Surcharge (**LPS**).
- The Petitioners submitted that Discoms had failed to make regular payments towards the principal amount, and further, were also not paying the LPS amount that accrued by virtue of such delay. Petitioners also averred that the Discoms were furnishing common replies to their petitions, thereby not giving specific details of payments made by them in each case.
- Per contra, Discoms submitted that they had complied with the RERC's directions issued in the order dated December 07, 2020 and the Respondent DISCOMs had paid the LPS up to March, 2020. Further, it was stated that two of the Respondent Discoms had paid the principal amount up to January, 2021 while the third had paid the principal amount up to June, 2020.
- During the course of hearing in the captioned Petitions, RERC directed the Rajasthan Urja Vikas Nigam Ltd (**RUVNL**) to submit a detailed reply in each petition indicating the status of payments

made towards the principal amount and LPS. Additionally, it was directed to provide a road-map for making pending payments in future.

Issue at hand

- Whether the generating company were entitled to regular payment of LPS by the Respondent Discoms, in a time bound manner?

Decision of the Commission

- RERC observed that there had been a delay in making principal payment as well as LPS amounts to the Petitioners. The Commission cited the fact that in earlier petitions regarding the same issue, RERC had held that delay in making payments beyond the due dates provided in the PPAs entitles the generating company to LPS in accordance with the extant tariff regulations for renewable energy based power plants.
- It was noted that despite worsening of the liquidity crisis in the face of the Covid-19 pandemic, the Respondents were attempting to meet their contractual liabilities. However, it was emphasized that the Respondent Discoms must endeavour to make payments to generators in a time-bound manner, without them having to resort to legal recourse.
- RERC directed all Respondents to verify each of the claims made by the Petitioners, subject to the claims being in accordance with the law and terms of the PPA. It also directed the Respondents to make all due payments towards the principal amounts to the Petitioners at the earliest so as to ensure smooth operation of their plants.
- Further, the RERC directed the Respondents to pay the unpaid LPS due to the solar and wind generators at the earliest, on a first come first serve basis irrespective of whether they have filed a petition or not.

Our viewpoint

The RERC has taken into consideration the requirement of timely payments towards the power purchased by the Discoms, in order to ensure smooth operation of plants. Accordingly, the Commission has rightly directed the Discoms to pay the LPS due to RE based generators, irrespective of petition being filed by them.

HPCL Mittal Pipelines Ltd & Ors v. Jodhpur Vidyut Vitran Nigam Ltd & Ors

RERC Order dated July 01, 2021 in Petition No. RERC 1812/2020

Background facts

- A petition was filed by HPCL Mittal Pipelines Ltd (**Petitioner**) under Regulation 30(3) of the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2016 (**OA Regulations**) for the levy of excessive drawl penalty charges on account of wrong application of the OA Regulations.
- The Petitioner was an EHT consumer of the Respondent, drawing power under Inter State Short Term Open Access (Open Access) through the Indian Energy Exchange (**IEX**). The Petitioner had scheduled 5100 kW of power from the IEX for the entirety of March 18, 2016. However, a curtailment was imposed by NRLDC for a few hours on that day. As per the OA Regulations the total admissible level of drawl of the Petitioner from the Respondent was 2158kW. The Respondent, therefore, imposed a penalty for INR 71,54,237 since the Petitioner drew excess power than was permitted on the day, thus allegedly violating Regulation 26 and 21(V) of the OA Regulations.
- Aggrieved by the levy of such penalty, the Petitioner filed a representation before SLDC under Regulation 30(1) of the OA Regulations. Vide order dated February 02, 2017, SLDC held that the curtailment of power on March 18, 2016 was notified by the IEX and communicated to the Petitioner on the same day. SLDC observed that despite such intimation, the Petitioner failed to adhere to the instructions and was thus in violation of the OA Regulations. The Petitioner then approached the State Power Committee, who vide order dated August 06, 2019 also rejected the Petitioner's claim. Thus, this appeal was preferred.
- The Petitioner has argued that while the over drawl took place on March 18, 2016, the Procedure for Grant of Open Access (Procedure), framed under Regulation 9(2) of OA Regulations, was not in place at the time. The regulation was issued by the STU, upon approval of the Commission, only on May 18, 2016. Thus, the Petitioners couldn't have complied with the regulation on the date of the alleged over drawl. It was their assertion that the levy of penalty based on non-compliance with such Procedure was arbitrary and unlawful.
- The Petitioner submitted that Clause 8 of the Procedure details the scheduling and computation of penalty for over drawl as per Regulation 26(7) of OA Regulations. While clause 8(ii)(c), (d), (e) and the 'illustrative example' prescribe how admissible drawl along with excess drawls and the additional charges therewith are to be calculated. It was the case of the Petitioner that the amount of admissible drawl was not calculated in accordance with the illustrative example for

Procedure. Further, the fact that such Procedure wasn't in place as on March 18, 2016 was overlooked, resulting in unlawful penalization of the Petitioner.

- Further, the Petitioner submitted that OA Regulations have replaced the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2014 (**Old OA Regulations**). As per Regulation 32(3) of the OA Regulations, Open Access granted in accordance with the Old OA Regulations shall continue to apply till the terms of Open Access granted under existing agreements expire. Further, the NOC that was issued on January 29, 2016, in accordance with the Old OA Regulations, did not state that its terms and conditions may change in case of new Regulations coming in force to govern the same act. The Petitioners, therefore, claimed that it was essential for the Respondent and SLDC to inform the Petitioners of the change in Open Access Regulations, and issue a revised NOC which clearly stated the new legal provisions, which led to a hefty penalty. The Petitioners therefore prayed for their penalty of INR 71,54,237 to be set aside.
- Per contra, the Respondent submitted that as per the OA Rules, the penalty was not dependent on the number of excess drawl units, but rather is imposed in the form of charges as per Regulation 21. Further, Regulation 26(8) stipulates the way excess drawl has to be calculated, while Regulation 21(v) provides for over drawl regarding scheduled approved by the SLDC. On a conjoined reading of the two Regulations, the manner in which charges are to be levied is clearly discernible. It was also submitted by the Respondents that the Old OA Rules were continued only for the purpose of Open Access Regulations, the Old OA Regulations were repealed by the OA Regulations.
- Further, the Respondents averred that as per Regulation 26 of the OA Rules, Open Access consumers must abide by the Indian Electricity Grid Code, the State Grid Code and instructions issued by the STU and SLDC. Therefore, even if the illustrative example was not there, Regulations 21(v) and 26(8) are amply clear about the amount and procedure for levy of charges due to excess utilization of power.

Issue at hand

- Whether excess drawl charges can be levied in accordance with the OA Regulations prior to the enactment of the Procedure?

Decision of the Commission

- RERC observed that Regulation 9(2) of the OA Regulations provide for issuance of the Procedure. The same has been prepared by the Rajasthan Vidyut Prasaran Nigam Ltd in consultation with the SLDC, which has been approved by the Commission. The Procedure, therefore, needs to be read with the OA Regulations.
- The RERC further observed that the Procedure reiterates Regulation 26(8) and 21(v) of the OA Regulations, and doesn't travel beyond the scope of the Regulations. The illustrative example is nothing but a mathematical depiction for calculation of the excess drawl charges. If the Procedure and OA Regulations are read together, they provide the same method for calculation. Therefore, the Petitioner's contention that prior to the issuance of the Procedure, excess drawl cannot be worked out as per the illustrative example was rejected.
- The RERC further held that the OA Regulations do not specify that Regulation 21 and 26 would be applicable only after issuance of the Procedure.
- RERC referred to the case, *Executive Engineer Southern Electric Company of Orissa Ltd v. Sri Sitaram Rise Mill*[1] wherein while interpreting section 126 of the Electricity Act, 2003, the Hon'ble Supreme Court had held that the regulations in force should be interpreted in a manner to achieve the aim of workability of the enactment as a whole, while giving it a purpose interpretation in preference, rather than a textual interpretation. Placing reliance on this case, the RERC held that Regulation 26(8) could not be read in any other manner so as to distort the meaning of the provision. It further asserted that that Regulation 26(8) was clear in providing a methodology for calculation of the excess drawl charges.
- Notably, the RERC observed that once the Petitioner is governed by the OA Regulations, which repealed the Old OA Regulations, there would be no application of the latter or provisions of Terms and Conditions of Supply.
- Further, RERC observed that the argument that without issuance of Procedure, excess drawl charged could not be levied on the Petitioner as per the OA Regulations was devoid of merit and decided that the prayers sought by the Petitioner could not be granted.

Our viewpoint

RERC rightly placed reliance on SC decision to state that the Regulations in force should be so interpreted so as to achieve the aim of workability of the enactment as a whole. Accordingly, the RERC has interpreted the Regulation 26(8) and decided that the Petitioner was governed by the OA Regulations 2016, which repealed the OA Regulations, 2004.

[1] (2012) 2SCC 108

SECI v. Delhi ERC
SECI v. Punjab State ERC

APTEL order dated July 02, 2021 in Appeal No. 52 of 2021 and in Appeal No. 70 of 2021

Background facts

- The present appeals were filed by Solar Energy Corp of India Ltd (**SECI**) before the Appellate Tribunal for Electricity (**APTEL**), challenging the orders passed by the DERC and PSERC reducing the trading margins from the negotiated INR 0.07/kWh to INR 0.02/kWh.
- On September 19, 2019, TPDDL filed a petition before the DERC for approval of a PSA (with SECI) dated June 26, 2019 mentioning its trading margin of INR 0.07/kWh as their power procurement cost for 200MW solar power. The DERC granted approval to the PSA dated June 26, 2019 but reduced the trading margin from INR 0.07/kWh to INR 0.02/kWh.
- On September 17, 2020, PSPCL filed a petition before PSERC for approval of procurement of 500MW Wind Solar Hybrid Power under the PSA (with SECI) dated January 03, 2020 praying for approval of trading margin of INR 0.02/kWh. This trading margin was disputed by SECI. The PSERC granted approval to the PSA dated January 03, 2020 but reduced the trading margin from INR 0.07/kWh to INR 0.02/kWh.
- The contention of the Appellant in the instant appeals is that the respective State Commissions have no jurisdiction to interfere with the trading margins set by SECI as the transactions involved in the matter are inter-state operations.
- In context of Delhi case, the Appellant contends that TPDDL had duly accepted and mutually agreed to the trading margin of INR 0.07/kWh by the PPAs and PSA which are long term arrangements consistent with Regulation 7 of the Trading License Regulations 2020, the State Commission having erred in taking into consideration the trading margin capping applicable for short-term transactions of INR 0.04/kWh when tariff is less than INR 3/kWh as specified in Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations 2010.
- In context of Punjab case, it has been similarly submitted that the Respondent PSPCL had duly proceeded on the basis of trading margin being INR 0.07/kWh, it having been mutually agreed by the PPAs and PSA which are long term arrangements consistent with the governing regulations.
- APTEL allowed both the appeals and set aside and vacated both the orders passed by DERC and PSERC (dated December 31, 2020 and February 01, 2021 respectively), to the extent thereby the trading margin of 7 paise/ kWh agreed by the parties was reduced.

Issue at hand?

- Whether the state commissions were within their powers to pass the direction to reduce the trading margin from INR 0.07/kWh to INR 0.02/kWh?

Decision of the Tribunal

- APTEL in its judgement observed that the nature of the transactions involved in the matters being inter-state operations, and not intra-state or within the State operations, the State Commission has no jurisdiction to deal with the trading margin of the interstate trading licensee (SECI).
- It was held that in the case from Delhi, a binding mutual agreement existed between the trader and the procurer with regard to applicability of Trading Margin of INR 0.07/kWh.
- PSPCL had duly accepted the trading margin of INR 0.07/kWh when it entered into the PSA dated February 03, 2020 and this has brought into existence a mutual agreement with regard to applicability of trading margin of INR 0.07/kWh. Thus, it was held that PSERC had erred by disturbing the agreed terms settled by the contracting parties on the subject of trading margin.

Our viewpoint

APTEL's reasoning on the issue of jurisdiction was in line with the established law as inter-state transactions come under the purview of the Central Commission. APTEL's decision was also consistent with the existing law while holding that the reduction of the trading margin was not up to the State Commissions because of it being a domain reserved for the parties, as there existed a contract between the trader and the procurer.

Hindalco Industries Ltd & Ors v. MPERC & Ors

APTEL Order dated July 02, 2021 passed in Appeal No. 207 of 2016 & batch matters

Background facts

- This appeal was preferred by Captive Power Generators (**CPPs**) and challenges the order dated December 31, 2012 passed by the first respondent Madhya Pradesh Electricity Regulatory Commission (**MPERC**) in suo motu Petition no. 73 of 2012 whereby Parallel Operation Charges (**POC**) @ INR 20/KVA per month were levied on the capacity of the Captive Generating Plants (**CGPs**) connected to the grid, after deducting load pertaining to auxiliary consumption.
- It appears that the Additional Director and the Joint Director (second and third respondents in first captioned appeal, respectively) raised Bills demanding from the Appellant's payments of Grid Support/Parallel operation charges on the basis of the impugned order dated December 31, 2012 of the MPERC for the period January 2013 to February 2013.
- Aggrieved by the impugned order of MPERC dated December 31, 2012, and the demand notices issued pursuant thereto, appeals were preferred under Section 41 of the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 against the impugned order dated December 31, 2012 before the Madhya Pradesh High Court (**HC**).
- HC entertained the said challenge and passed an interim order, which asked the Appellants to deposit 50% of the asked amount in the impuged order. Therefore, the Appellants continued to depost 50% of recurring current charges throughout the pendency of the appeal.
- This appeal through an order dated May 23, 2016 was dismissed and the Appellants were asked to appeal before the APTEL since only the impugned order was challenged and not the constitutional validity of the Regulation.
- The Appellants have raised questions as to propriety of procedure adopted, viz., non-consideration of submissions of certain Industries opposing such levy; acceptance of a report of a consultant, Electricity Research & Development Association (**ERDA**), Vadodara, based statedly on assumptions, it having generalized all CGPs and not considered different industrial processes which have a different load pattern than industries like steel, cement and aluminium; and lack of proper discussion, deliberation or analysis, relying on expert opinion to the contrary.
- It was also contended that the impugned order is illegal and unsustainable since it suffers from the defect of want of quorum, and was passed in gross violation of principles of natural justice, it being non-speaking, arbitrary and whimsical, based on ERDA Report which, ex-facie, is premised on fallacious, imaginary and unrealistic assumptions, the conditions precedent for levy of POC as indicated in ERDA Report not fulfilled in respect of the appellants.
- While conceding that this tribunal in the past has dealt with POC and related issues, the Appellants submitted that the issues raised are distinct and different and the previous decisions are either *per incuriam* or *passed sub silentio*.

Issue at hand

- Whether the Order dated December 31, 2012 passed by the MPERC that levies POC on the capacity of CGP connecting to the grid is valid?

Decision of the Tribunal

- Regarding the contention that the MPERC had no authority in law to levy POC, the Tribunal stated that it found no substance in the arguments of the Appellants, as the power, jurisdiction and authority of the SERC to impose POC has never been in doubt, which is evident by a host of rulings of the SC and the Tribunal itself. The legislative aim of promotion of CGPs does not mean they are entitled as of right to unrestricted or free use of transmission systems of the licensee. The transmission licensee exists, operates and maintains its transmission network for the larger interest of the electricity industry and is not providing charity. It must receive compensation from those who use its network, particularly if such use adds to its obligations of maintaining an efficient system.
- Regarding the contention of the Appellants that the impugned order is vitiated by presence of new member, the Tribunal stated that the member, who held the office at the time of public hearing, did not render judgment and the new member did not sign the impugned order. Mere discussion with the new member by the Chairperson would not be a proper ground to infer prejudice.
- Regarding the contention of the Appellants that the impugned order was null and void for want of quorum, the Tribunal stated that it was appropriate for the Chairperson to only sign the impugned order since at the time of hearing, he was the only member of the Commission and the new member was not there. Some judgments, interpreting Section 93 of the Electricity Act and allowing the proceedings to not get invalidated by the reason of a want of quorum, were referred to.
- Regarding the contention of the Appellants that the impugned order is a product of pre-judged mind and hence violative of principles of natural justice, and that the ERDA report was prepared behind their back, the Tribunal stated that since the Appellants had not even become operational at the time of public hearing, they cannot say that the report was prepared behind their back and

since the the Commission invited objections and held public hearing more than once, it cannot be said that the impugned order is a product of pre-judged mind.

- Regarding the contention that the impugned order is discriminatory against CPPs, the Tribunal stated that the determination of POC with universal applicability to all the industries is simpler method and cannot be questioned by arguments which are in nature of hindsight, they not having been raised before the Commission. It will not be fair to give grid connectivity services by the transmission utility without being in readiness to correspondingly compensate. Also, on the recommendation of the ERDA, the POC was reduced to INR 20 per KVA per month from INR 53.32 per KVA per month, which is in line with the objective of promoting CPPs.
- Thus, the batch of appeal was rejected altogether.

Our viewpoint

The view taken by the APTEL seems to be right as all the contentions of the Appellants have been refuted by the Tribunal with reasons. In addition, there was already a huge discourse on the levy of POC by the State Commissions, that have upheld the levying of POC. The want of quorum issue has been provided under Section 93 of the Electricity Act, 2003 and under various rulings, wherein the want of quorum was not held to be invalidating proceedings. Also, the decision of the Commission cannot be said to be pre-judged as there were public hearings conducted and opportunities given to contest the case. The Appellants also failed to buttress the discrimination issue based on the documents available with the Commission in relation to the issue, since no new evidence was considered by the Tribunal.

Pune Bioenergy Systems Pvt Ltd v. MSEDCL & Ors

MERC Order dated July 03, 2021 passed in Case No. 48 of 2021

Background facts

- The present petition was filed by Pune Bioenergy Systems Pvt Ltd (**PBESPL**) before the Maharastra Electricity Regulatory Commission (**MERC**), seeking review of the Commission's Order dated March 22, 2021 in Case No. 162 of 2019 (**Impugned Order**) for determination of tariff for supply of electricity to Distribution Licensees in Maharashtra from 750 Tons Per Day (**TPD**) capacity of Municipal Solid Waste (**MSW**) processing project to be commissioned at Pune.
- PBESPL, on 20 August 2020, submitted a revised petition in accordance with the MERC RE Tariff Regulations, 2019 for supply of electricity to Distribution Licensee in Maharashtra from 750 TPD capacity of MSW processing project to be commissioned at Pune.
- The Commission issued the Order for determination of Tariff dated March 22, 2021 in Case No. 162 of 2019 against which the present review petition has been filed.
- It is PBESPL's contention that in the impugned Order, there are certain apparent errors and certain matters have been ruled without appropriate discussion on them and hence the review petition
- MSEDCL, while refuting the claims of PBESPL, contended that PBESPL has failed to raise any plausible ground regarding mistake or error apparent on the face of record in the impugned Order and highlighted that MSEDCL has approached the APTEL, assailing the impugned Order.
- Further, Maharashtra State Load Dispatch Centre (**MSLDC**) did not even respond to the prayers of the PBESPL as according to them the prayers do not pertain to them.

Issue at hand

- Whether the assailing of the Impugned Order before the APTEL by the MSEDCL would impact the review proceedings and whether the Impugned Order passed by the MERC deserves to be reviewed?

Decision of the Commission

- Regarding the issue of maintenance of review proceedings in light of the challenge to the Impugned Order before the APTEL by MSEDCL, the Commission noted that the ambit of review is limited as per Regulation 85 of the MERC (Conduct of Business) Regulations, 2004 and that the MSEDCL's petition has to be evaluated accordingly.
- Regarding the issue of Marginal Cost of Funds Based Landing Rate (**MCLR**) considered for the FY 2020-21 instead of FY 2019-20, MERC observed that it had consciously considered the MCLR for FY 2020-21 so as to factor in realistic existing market dynamics and ensure that the end consumer and the project developer are not affected, as at the time of passing of the Impugned Order the FY 2020-21 was coming to an end.
- Regarding the contention of the PBESPL that MAT rate was considered for grossing up ROE, the Commission noted that the 10 year tax holiday granted under Section 80IA of the Income Tax Act was no more applicable (as it was for projects commissioned till 2016-17) and instead Corporate Tax (equivalent to about 22% and effectively, 25.17% after applying applicable cess) would be applicable for grossing up of RoE. Hence, this prayer was allowed.

- Regarding the contention of the PBESPL to grant the benefit of zero contract demand charges for the present Project, the Commission noted that it had clearly ruled that netting-off arrangement needs to be allowed to PBESPL which means any energy drawn by PBESPL's project will be deducted from energy injected by PBESPL. Such arrangement does not require separate connection from Distribution Licensee and hence issue of levying Contract Demand Charges does not arise. Hence, no errors on this ground.
- Regarding the issue of incomplete cost being allowed as part of compensation for Transmission Right of Way, the Commission noted that in the Impugned Order it had already allowed 15% compensation towards diminution of land value as per para 3(ii) of the MoP's guidelines but non-usability allowance as per 3(iii) of the guidelines has not been allowed. This error was rectified by the Commission by revising the cost to INR 9.72 crore from INR 5.09 crore.
- Regarding the prayer of the PBESPL that receivables from tipping fee were not considered as part of Working Capital requirement calculation, it was stated that on account of Regulations 19.2(c) of the MERC RE tariff Regulations 2019, the Commission had not considered receivables from tipping fee (as the said provision does not mention tipping fee) but it thought to include tipping fee on working capital as the same is a source of income for the PBESPL and its contribution towards annual cost of PBESPL is about 10%. Hence, two months receivables on account of Tipping Fees were considered as part of Working Capital Requirement in case of MSW projects, by using the power of removal of difficulties.
- Regarding the prayer of the PBESPL that the tariff must be determined without reduction on account of Central Financial Assistance, it was noted that to protect the interest of both parties (generator and Discom), it was ruled that in initial years, tariff determined with CFA (INR 6.08/kWh) would be applicable. Generator has to avail CFA in 48 months from CoD. In case even after taking all efforts, generator is not able to avail CFA then it can approach the Commission and the Commission may allow levy of tariff without considering CFA (INR 6.95/kWh). Moreover, the Commission was not given any reason to reverse its stance on this ground.
- Regarding the issue in the calculation of escalation rate of Operation and Maintenance cost, it was observed that the PBESPL has merely reiterated its submissions on the issue and hence, this cannot be allowed under review jurisdiction.
- Regarding the prayer that contingency cost was not considered as part of total soft cost, it was noted that the PBESPL has brought new documents on record. After consideration of the same and keeping in mind the impact on project timelines due to Covid-19, it approved contingency cost of 3% of the total project cost approved by it in the impugned Order. Thus, the Commission approved INR 704.68 Lakhs as Contingency cost for the PBESPL MSW project
- Regarding the contention of the PBESPL that insufficient terminal cost were considered while determining tariff, it was noted that the PBESPL has reiterated the same submissions in the review petition, which is clearly not allowed. While considering the issue of insufficient depreciation value, the Commission noted that although it is upto Pune Municipal Corporation and PBESPL to make various provisions under the Concession Agreement (**CA**), in order to protect interest of larger consumers, the Commission cannot allow implication adverse provisions of such CA be passed on in the Tariff. Thus, review on this ground was rejected.
- Regarding the issue of adequate direction not given to MSEDCL to provide payment security mechanism via Letter of Credit, the Commission noted that RE Tariff Regulations do not provide for any such mechanism and it is upto the parties to decide the existence of the same. Regarding late payment surcharge, it was noted that since the Regulations provide for the same, the Commission need not go on to deliver a separate ruling on the late payment surcharge. Regarding waiving off of various charges, it was noted that such requests are to be dealt in a separate tariff proceedings and the same cannot be dealt with in review petition. Hence, review on these grounds was also rejected.
- Accordingly, the Commission hereby determines the project specific levelised tariff for the said MSW-based power project of PBESPL as INR 7.45/kWh without considering the applicability of CFA and INR 6.53/kWh after considering the maximum CFA of INR 50 crore.

Power Grid Corp of India Ltd v. Rajasthan Rajya Vidyut Prasaran Nigam Ltd & Ors

CERC Order dated July 10, 2021 in Petition No. 494/MP/2020

Background facts

- The Petitioner had filed the present Petition under Regulation 8(4) of the Central Electricity Regulatory Commission (Sharing of Revenue Derived from Utilization of Transmission Assets for Other Business) Regulations, 2020 (**Sharing of Revenue Regulations**) seeking approval of the CERC for incorporation of a wholly owned subsidiary company of the Petitioner to undertake the telecommunication and digital technology business related to telecommunication services & products, infrastructure, system integration and consultancy.
- The Petitioner holds a deemed transmission licensee under the provisions of Section 14 of the Electricity Act, 2003 and owns and operates inter-State transmission network of 1,62,489 circuit km of transmission lines and 248 sub-stations.

- Under Section 41 of the Electricity Act, 2003 a transmission licensee may engage in other businesses which may optimize the utilization of the transmission assets by giving a prior intimation to the Appropriate Commission.
- The telecommunication activities in the country are regulated by the Department of Telecommunication (**DoT**). In terms of law, the Petitioner has already obtained the required license from DoT and is also registered as an IP-I (Infrastructure Provider) with DoT for leasing out passive telecom infrastructure to other Telecom Service Providers and Infrastructure Service Providers.
- Since as per the Sharing of Revenue Regulations, a transmission licensee is required to obtain prior approval of the CERC in case it intends to form a subsidiary company for engaging in other businesses for utilizing the transmission assets, therefore, the Petitioner has filed the present Petition for obtaining prior approval of the commission.

Issue at hand

- Whether the Petitioners in terms of the Electricity Act, 2003 and Sharing of Revenue Regulations should be allowed to create a subsidiary in order to engage in other businesses i.e. telecommunication activities?

Decision of the Commission

- CERC has analysed that under the Sharing of Revenue Regulations, the Petitioner before forming a subsidiary is required to take approval under Regulation 8(4) and 4(1).
- CERC after going through the documents and submissions made by the Petitioner, has approved the formation of a wholly owned subsidiary company by the Petitioner under Regulation 8(4) of the Sharing of Revenue Regulations, to undertake the Telecommunications and Digital Technology business for the works related to telecommunications services & products, infrastructure, system integration utilizing transmission assets, with the condition that such a wholly owned subsidiary company by the Petitioner shall not be a transmission licensee or a deemed transmission licensee under the provisions of Section 14 of the Act.
- Further, the approval granted by the CERC is subject to (a) the Petitioner shall not, through the wholly owned subsidiary company, undertake any Telecommunications and Digital Technology business for the works related to telecommunications services & products, infrastructure, system integration by utilizing the transmission assets without the approval of the CERC under Regulation 4(1) of Sharing of Revenue Regulations; (b) the Petitioner shall indemnify all the long-term transmission customers for any additional cost or losses or damages caused due to creation of the subsidiary company; and (c) the Petitioner shall maintain the accounts of the wholly owned subsidiary company separately.
- On account of the above, the CERC disposed off the present Petition.

Our viewpoint

CERC through the present order has allowed the Petitioner to create a subsidiary in terms of the Sharing of Revenue Regulations in order to undertake 'other business' activity of telecommunication services.

In the matter of making suitable amendments to the APERC (Terms and Conditions for Determination of Tariff for Wheeling and Retail Sale of Electricity) Regulation, 2005 (Regulation 4 of 2005), concerning the specification of FPPCA formula for pass-through of Power Purchase Cost variation on quarterly basis instead of annually

APERC Order dated June 13, 2021 passed in O.P. No. 33 and 35 of 2020

Background facts

- APEPDCL and APSPDCL filed petitions (O.P.No. 33 of 2020 and O.P.No.35 of 2020) requesting the Commission to make suitable amendments to the Principal Regulation to allow for pass-through of Fuel & Power Purchase Cost Adjustment (**FPPCA**) on a quarterly basis instead of true-up on annual basis.
- The Commission conducted public hearings on the above petitions and issued an order after considering the views/objections/suggestions of the stakeholders, the arguments of the learned advocate for APSPDCL and APEPDCL and the material available on record.
- In the order, the Commision approved the proposal of APSPDCL and APEPDCL with certain modifications and decided to publish the necessary amendments to the Principal Regulation to bring into effect the pass-through of Power Purchase Cost variations every quarter.

- This Regulation may be called the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Wheeling and Retail Sale of Electricity) Second Amendment Regulation, 2021, repealing the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Wheeling and Retail Sale of Electricity) First Amendment Regulation, 2014

Issues at hand

- Whether clause 12.5 of Regulation No.4 of 2005 for introducing Fuel & Power Purchase Cost Adjustment Formula (FPPCA) for pass-through of power purchase cost variation every quarter as proposed, in place of Annual True-Ups be amended?
- Whether the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff for Wheeling and Retail Sale of Electricity) First Amendment Regulation, 2014 (Regulation No.1 of 2014) be repealed?

Decision of the Commission

- APERC vide its order, amended the Principal Regulations in exercise of the powers conferred on it under Clauses (zd), (ze) and (zf) of Section 181(2) read with Sections 61, 62 of the Electricity Act, 2003 (36 of 2003).
- The following sub-clause shall be inserted after sub-clause 12.4 in the Principal Regulation.

  "12.5. FPPCA(Fuel and Power Purchase Cost Adjustment)

  Within two months from the end of every quarter, the Distribution Licensee shall file an application for FPPCA for that quarter before the Commission. The filing shall be accompanied by purchase details source-wise for the quarter along with the monthly breakups duly certified by the auditor as per the format annexed to this Regulation. If the Distribution Licensee is unable to file the FPPCA within two months, it may file the same within a further grace period of up to one month. After examining the request of the Distribution Licensee, the APERC may entertain the claims, if it is satisfied with the reasons submitted by the Distribution Licensee for the delay in the filings. For any wrong information furnished by Distribution Licensee, penalties will be levied on it by the Commission."
- APERC, after a prudent check of the filings and due public consultation process, will issue an order determining the FPPCA for that quarter in accordance with the following formula.

  Formula: FPPCA = (APPC-BPPC) / (100-Loss in%)

  Where, FPPCA = Fuel & Power Purchase Cost Adjustment in Rs/unit up to 4 decimal places

  APPC = The actual weighted average power purchase cost per unit of energy, which shall be arrived at as the actual total power purchase cost (including the transmission & scheduling costs) in Rs. Million that is allowed by the Commission after prudent check for the quarter for which the Distribution Licensee is seeking

  'FPPCA' divided by the actual quantum of power purchases in Million Units made by the Distribution Licensee from the sources approved by the Commission for that quarter.

  BPPC = The base weighted average power purchase cost per unit of energy, which shall be arrived at as the total power purchase cost approved by the Commission in Rs. Million (including the transmission & scheduling costs) in the RSTO (Retail Supply Tariff Order) for the quarter for which the Distribution Licensee is seeking 'FPPCA' divided by the total quantum of energy in Million Units approved by the Commission in the RSTO for the Distribution Licensee for that quarter.

  Loss in % = The weighted average Transmission and Distribution losses (%) approved by the Commission for the Distribution Licensee for the quarter for which the Distribution Licensee is seeking 'FPPCA' or actual weighted average Transmission and Distribution losses (%) for the corresponding quarter of the previous year for that Distribution Licensee, whichever is lower.
- Manner of recovery or refund of FPPCA by the Distribution Licensee and conditions:
  - The FPPCA determined by the Commision in the FPPCA order shall be recovered from or refunded to the consumers by the Distribution Licensee, as the case may be, in three equal monthly installments as specified by the Commision in the FPPCA order.
  - If the Distribution Licensee fails to file FPPCA for any quarter within two months or within the grace period of one month from the end of that quarter, its claim for upward revision shall stand forfeited subject, however, to true-down, if any, at the end of the Financial Year. The DISCOMs shall pay the true-down amounts to the consumers by way of adjustments in future CC bills as determined by the Commission in the FPPCA order.
  - The Distribution Licensee is permitted to pass on the variations (true-down or true-up) in fuel costs (variable costs) based only on the actual bills admitted by it from the approved sources(excluding purchases from exchanges) for a quarter on its own subject to a ceiling of 50 paise/unit as per the formula specified in this Regulation to all the categories of consumers (except agricultural consumers) automatically in the CC charges of month(s) that immediately follow that quarter on a provisional basis subject to the adjustment of the same based on the subsequent determination of FPPCA by the Commission for that quarter. In respect of

agricultural consumers, the Distribution Licensee may claim upward revision in fuel costs(variable charges), if any, from the Government.

- The Distribution Licensee shall pass through the FPPCA uniformly on all categories of consumers existing in that quarter based on consumption.
- The Distribution Licensee may raise the FPPCA bills on the Government in respect of the consumers who are provided subsidy under Section 65 of the Electricity Act, 2003.
- The Distribution Licensee shall publish the FPPCA approved by the Commission in one English newspaper in English and one Telugu newspaper in Telugu having wide circulation in its area of supply for information and wider reach of the public. The FPPCA collection schedules shall be clearly indicated in the publication."

Our viewpoint

As per the view taken by APERC, Commission has made suitable amendments to the Principal Regulation to allow for pass-through of FPPCA (Fuel & Power Purchase Cost Adjustment) on a quarterly basis instead of true-up on annual basis.

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