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PROJECTS, ENERGY & INFRASTRUCTURE

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LEGAL & POLICY UPDATES

In this Section

PNGRB issues PNGRB (Technical Standards and Specifications including Safety Standards for City or Local Natural Gas Distribution Networks) Regulations, 2008

- In exercise of the powers conferred by Section 61 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (**19 of 2006**), the Petroleum and Natural Gas Regulatory Board (**PNGRB**) has made the following regulations to further amend the PNGRB (Technical Standards and Specifications including Safety Standards for City or Local Natural Gas Distribution Networks) Regulations, 2008.
- The said regulations, amended on August 27, 2021, shall be known as the Petroleum and Natural Gas Regulatory Board (Technical Standards and Specifications including Safety Standards for City or Local Natural Gas Distribution Networks) Amendment Regulations, 2021.
- In the PNGRB (Technical Standards and Specifications including Safety Standards for City or Local Natural Gas Distribution Networks) Regulations, 2008, in Annexure-II under the heading 'Metering Equipment', after the entry beginning with the letters and numbers 'ISO 17089-2' and ending with the words 'industrial applications', the following entries shall be inserted:
  - AGA Report No. 11 API MPMS Chapter 14.9, Measurement of Natural Gas by Coriolis Meter
  - IS 15672: Flow measurement of natural gas and fluids by Coriolis Meters
  - ISO 10790: Measurement of fluid flow in closed conduits - Guidance to the selection, installation and use of Coriolis Flowmeters (mass flow, density and volume flow measurements)

RERC issues Draft RERC (Renewable Energy Obligation) (Seventh Amendment) Regulations, 2021

- Rajasthan Electricity Regulatory Commission (**RERC**) has issued Draft 'Renewable Energy Obligation (**Seventh Amendment**) Regulations 2021,' (**Draft Regulations**) for comments from interested persons vide public notice in August 2021. The Draft Regulations have been proposed pursuant to the powers conferred under the Sections 86(1)(e) and 181 of the Electricity Act, 2003 and all other powers enabling it in this behalf.
- The Commission vide its Fifth Amendment in the Non-Solar Renewable Purchase Obligations (**RPO**) Regulations had specified the RPO targets up to FY 2023-24, but the Commission observed that several other SERCs (such as Uttar Pradesh SERC, Punjab SERC, Haryana SERC, Himachal Pradesh SERC and Chhattisgarh SERC) have also incorporated Hydropower Purchase Obligations (**HPO**) in their RPO Regulations where most of the SERCs have adopted the HPO trajectory prescribed by Ministry of Power (**MOP**).

- Therefore, to encourage the hydropower production, the Commission considers it appropriate to specify HPO notified as a separate entity within Non-Solar RPO. In the proposed Amendment, the Commission considers it appropriate to suitably adopt the HPO trajectory prescribed by MoP upto FY 2023-24.
- The last date for submitting comments/suggestions with the Receiving Officer of the Rajasthan Electricity Regulatory Commission was September 23, 2021.

Ministry of Power issues Draft Electricity (Promoting Renewable Energy through Green Energy Open Access) Rules, 2021

- On August 16, 2021, Ministry of Power (**MOP**) issued the Draft Electricity (Promoting Renewable Energy through Green Energy Open Access) Rules, 2021 (**Draft Rules**) and sought comments from stakeholders within 30 days of the date of issuance of the said rules.
- These Draft Rules are proposed for purchase and consumption of green energy, including the energy from Waste-to-Energy plants. The entities covered under the Draft Rules are all consumers who have contracted demand or sanctioned load of 100 kW or more, except for captive consumption.
- The Draft Rules have the following subheads:
  - **Renewable Purchase Obligation (RPO):** As per the Draft Rules, a uniform RPO will apply to all obligated entities such as distribution licensees (**DISCOMs**), open access consumers and captive power consumers. Any entity, whether obligated or not, may choose to purchase and consume renewable energy based on their requirements through the following methods:
    - Self-generation from renewable energy sources
    - By procuring renewable energy through Open Access from any Developer with which the entity enters into an agreement
    - By requisition from distribution licensee
    - Purchase of renewable energy certificates
    - Purchase of Green Hydrogen
  - **Green Energy Open Access:** The Appropriate Commission will formulate the regulations by following the Draft Rules to provide 'Green Energy Open Access' to consumers willing to consume the green energy.
  - **Nodal Agency**: The Central Government will notify the Central Nodal Agency (**Agency**), which will operate a single-window Green Energy Open Access system for renewable energy. The Agency will set up a 'centralized registry' for all Green Energy Open Access consumers.
  - **Procedure for grant of Green Energy Open Access:** The forum of regulators will prepare a common application format for Green Energy Open Access in 60 days, which will be adopted by the Appropriate Commission. The application will be approved within 15 days, failing which it will be considered deemed approved subject to the fulfilment of the technical requirement specified by the Appropriate Commission.
  - **Banking:** Banking may be permitted every month on payment of charges to compensate the DISCOMs for any additional costs – the Appropriate Commission will determine these charges. The quantity of banked energy by the Green Energy Open Access consumers will not be more than 10% of the consumers' total annual consumption of electricity from DISCOMs.
  - **Cross Subsidy Surcharge (CSS):** CSS will be levied on Open Access consumers as per the provisions of the Tariff Policy. However, CSS for Open A ccess consumers purchasing energy from renewable energy projects will not be increased during the 12 years from the date of commissioning of the project by more than 50% of the surcharge fixed for the year in which open access is granted. CSS and additional surcharge will not be applicable if the energy generated from a Waste-To-Energy project is supplied to the open access consumer.

Ministry of Power issues Draft Electricity (Late Payment Surcharge) Amendment Rules, 2021

- Ministry of Power (**MoP**) on August 19, 2021, issued the Draft Electricity (Late Payment Surcharge) Amendment Rules, 2021 (LPSC Amendment Rules) and invited comments from the stakeholders on the same. The LPSC Amendment Rules have beens proposed with an intention to reduce the burden on the Distribution Licensee (**DISCOMs**) in order to reduce the retail tariff for electricity consumers. Under the LPSC Amendment Rules, the generating companies are given an option to sell power to a third party and recover their cost, thereby helping reduce the fixed cost burden of the DISCOMs.
- The LPSC Amendment Rules provide for levying of Late Payment Surcharge on overdue payments of distribution licensees to a generating company or a trading licensee. It also provides for adjustment of any payment by the distribution licensee first towards the Late Payment Surcharge and then towards monthly charges starting from the longest overdue bill.

- The LPSC Amendment Rules propose that the payments by the distribution licensee must be first made against oldest procurement followed by the payment for subsequent procurements. This will ensure that all old payments are done before payment for any new procurement is made.
- f a distribution licensee has any payment, including Late Payment Surcharge, outstanding after the expiry of seven months from the due date as prescribed in the Power Purchase Agreement, the generating company may sell power to any consumer or any other licensee or power exchanges, for the period of such default. In such cases, the generating company will retain the claim over the distribution licensee for the fixed charges and capacity charges, after giving notice of 15 days for such claims.

RECENT JUDGMENTS

In this Section

Tata Power Renewable Energy Ltd v. Andhra Pradesh Electricity Regulatory Commission & Ors

APTEL order dated August 12, 2021, in I.A. 1258 and 1260 of 2020 in Appeal No. 126 of 2020

Background facts

- The instant Appeal was filed before Appellate Tribunal for Electricity (**APTEL**) challenging the legality of the findings of Andhra Pradesh Electricity Regulatory Commission (**APERC**) regarding curtailment instructions issued to Renewable Generating Companies including Tata Power Renewable Energy Ltd (**TPREL**) by Andhra Pradesh State Load Dispatch Centre (APSLDC) and Transmission Corporation of Andhra Pradesh (**APTRANSCO**).
- APSLDC and APTRANSCO indulged in backing down the power from TPREL's wind plant to an extent of 95%, while only 5% of generation of power could be evacuated in certain time blocks, which is in complete derogation of Indian Electricity Grid Code **(IEGC**) provisions that mandates Wind Power as 'Must Run' and September 11, 2020 order passed by the Hon'ble APTEL whereby APTRANSCO and APSLDC were directed to ensure the evacuation of 70% of the power from TPREL's wind project.
- Further APSLDC and APTRANSCO were extending different treatment to wind independent generators while showing preference to thermal plants and state-owned generating plants as wind power project was being curtailed to over 96%, the evacuation from thermal power plants were in the range of 70-100%.
- TPREL filed 2 applications, one being I.A. No. 1258 of 2020 seeking directions to APTRANSCO and APSLDC to immediately revise schedule of curtailment to 70% and another being I.A. No. 1260 of 2020 seeking directions to appoint Power System Operation Corporation (POSOCO) as an expert to look into the documents to be produced by APSLDC and APTRANSCO for making an enquiry into whether backing power from TPREL's plant is due to safety reasons or for economic consideration. The Hon'ble Tribunal vide order dated August 12, 2021, has decided these two applications.

Issue at hand

- Whether curtailment of 96% of power generation by APSLDC and APTRANSCO is against the provisions of IEGC and AP Grid Code (AP Code of Technical Interface?

Decision of the Tribunal

- After analysing the Power System Operation Corp Ltd (**POSOCO**) Report and TNERC's observation, 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.

- The Hon'ble APTEL observed that maintaining of higher technical minimum for its state-owned thermal power stations while curtailing 96% power generation of TPREL's wind project is in violation of the Act, IEGC and AP Grid Code.
- Section 86(1)(h) of the Act authorises the State Commission to specify the State Grid Code consistent with IEGC specified by the Central Commission. Regulation 1.10 of AP Grid Code provides that provisions of IEGC will precede the provisions of AP Grid Code.
- APTRANSCO and APSLDC by virtue of Section 86(1)(h) read with Regulation 1.10 of AP Grid Code must follow the provisions of IEGC. This was recognized in the judgment of the Hon'ble Supreme Court in *Central Power Distribution Co. & Ors vs. CERC*[1] by opining that State Grid Code is subservient to the Central Grid Code.
- Therefore, disregarding the mandate that renewable generating stations must maintain 'Must Run' status as specifically provided in IEGC, if APSLDC and APTRANSCO adopt a methodology to promote their state-owned generation for economic consideration, and if such methodology conflicts with the provisions of the Electricity Act 2003, IEGC and AP Grid Code, the same cannot be allowed to continue.
- APSLDC and APTRANSCO should not procure least expensive power at the cost of curtailing RE power whenever they find energy charge of thermal power plants is much cheaper than the total cost of RE energy.
- Moreover, Ministry of Power vide its Rules dated February 01, 2020, after recognizing the 'Must Run' status of RE generators, mandates that such generators should not be subjected to curtailment on account of Merit Order Despatch or for any other commercial consideration.
- Therefore, the Hon'ble APTEL directed APSLDC and APTRANSCO to revise the schedule of curtailment i.e., evacuation of power at least up to 70% in terms of Order dated September 11, 2020. Further, the Hon'ble APTEL directed POSOCO to analyze whether the curtailment of power was fair and justified and submit a report within four weeks.

Our viewpoint

Through the instant judgment, the Hon'ble APTEL has granted security to renewable power developers from any illegal curtailment of power by upholding the 'Must Run' status accorded to solar and wind power developers. By directing POSOCO to examine the actual generation and injection of energy, the Hon'ble APTEL intends to keep the SLDC under scrutiny so that SLDC does not issue backing down instructions to the renewable power developers without recording proper reason(s) in terms of the Act and IEGC.

Maharashtra State Electricity Distribution Company Ltd v. Maharashtra Electricity Regulatory Commission and Anr

APTEL order dated September 20, 2021, in Appeal No. 386 of 2019

Background facts

- Maharashtra State Electricity Distribution Company Ltd. (**MSEDCL**) filed the instant Appeal before APTEL challenging the legality of the findings of Maharashtra Electricity Regulatory Commission (**MERC**) whereby MERC levied additional penal interest of 1.25% per month on Late Payment Surcharge/Delayed Payment Charge in the event MSEDCL fails to make payment of outstanding amount beyond the due date.
- MSEDCL contended that the directions to pay 1.25% penalty interest above the Delayed Payment Charge (**DPC**) envisaged by Clause 11.04 under the Wind Power Purchase Agreement (**WEPA**) executed between MSEDCL and Rajlakshmi Minerals is contrary to the contract. MSEDCL submitted that Late Payment Surcharge (**LPS**) in case of delay in payment of the generator by a period beyond 60 days as stipulated under the WEPA is in the nature of interest, which is itself a penalty upon MSEDCL on account of delay in payment of invoices and that a penalty over and above the same is contrary to the established principles and precedents in matters of sanctity of contract.

Issues at hand

- Whether the directions of MERC regarding imposition of 1.25% penal interest over and above the LPS/DPC is against the provisions of WEPA and constitutes excess in law committed by the State Commission?
- Whether the levy of 1.25% penal interest on LPS/DPC is 'interest on interest'?

Decision of the Tribunal

- The Tribunal observed that while adjudicating upon a dispute, a Regulatory Commission under the Electricity Act, 2003 exercises powers and jurisdiction which are essentially that of a civil court

[1] (2007) 8 SCC 197

but transferred to the regulator under the special regime governing this sector. In legal proceedings for recovery of money that is due, the adjudicating authority is competent not only to award (or decree) the principal sum but also interest – past, pendente lite and future.

- It is trite that if future interest (over and above the sum determined to be paid till the date of the decision) were to be denied, and if the sum determined were not paid for substantial period after the decision, the party held entitled to recover will not receive the money due in full, the compensation suffering erosion of real value due to time elapse which would cause injustice to the aggrieved party. Thus, the practice of adding the condition of future interest to the sum awarded in such cases is the norm, denial an exception. If the claim arises out of a contract, the addition of such condition does not amount to re-writing of contract.
- To MSEDCL's contention that there is no provision in the contract which states that LPS is to be levied over and above DPC, the Hon'ble Tribunal referred to Clause 13.02.of WEPA and observed that the very fact that the 'obligor's liability (is to) be limited to direct actual damages' means the real value has to reach the hands of the creditor, the loss of real value due to delay in discharge of liability determined by the decision representing 'actual damages'.
- The impugned direction comes in post the point of computation of principal sum plus the element of DPC and there is no overlap. Since the defaults have occurred prima facie on account of mismanagement on the part of MSEDCL, the possibility of that part of burden being not given pass through to MSEDCL is of no concern to the creditor.
- Regarding the second issue, the Hon'ble Tribunal observed that accrual of penal interest beyond the due date at 1.25% per month on any LPS/DPC is not against the provisions of Section 3 of the Interest Act, 1978 for the reason that it is not 'interest upon interest', the levy also being not over the amount of debt (arrears) after it has been repaid. Instead, it is in accord with what was accepted in *Central Bank of India v. Ravindra & Orsz*[2] as long-established practice of awarding future interest on the 'principal sum adjudged'.
- The APTEL further directed MERC to examine the financial affairs of MSEDCL and take appropriate measures in accordance with law so as to bring about financial discipline in a time-bound manner.

Our viewpoint

Through this judgment, APTEL has granted major financial relief to the power developers, specially to wind power generators, by recognizing the importance of payment of outstanding dues in time-limits as prescribed under the contract to avoid continuous defaults by distribution companies. The instant judgment will also encourage private sector investments as it would ensure financial security to investors.

Jaiprakash Power Ventures Ltd v. Madhya Pradesh Power Management Company Ltd & Ors

APTEL Judgment dated 24.08.2021 in Appeal No. 232 of 2016

Background facts

- The present Appeal has been filed against the order dated July 08, 2016 passed by the Madhya Pradesh Electricity Regulatory Commission (**State Commission**) in Petition No. 64 of 2015, wherein the Appellant was denied capacity charges in respect of back down unit of its power station under Reserve Shut Down on the premise that it is invalid to claim Deemed Capacity or Availability of an Off-Bar unit even though the Appellant is ready to supply the Contracted Capacity to the distribution licensees in terms of the Power Purchase Agreement dated January 5, 2011 (**PPA**), and further, the insistence on the Appellant is that it is bound to generate the Contracted Capacity simultaneously from both the units of the power plant.
- The Appellant has entered into a PPA with the Madhya Pradesh Power Management Company Limited (**MPPMCL**) wherein the Appellant is required to supply 30% of the installed capacity to the MPPMCL. The Appellant's thermal power plant consists of two units of 660 MW each and both units have achieved the commissioning. Further, in order to operate the power plant in an optimum manner, the Appellant insisted to schedule the entire Contracted Capacity from one of the units while backing down the other unit which is otherwise capable of operation to avoid operations under the technical minimum level. However, the same was disallowed by the Madhya Pradesh State Load Dispatch Centre (**SLDC**) on the ground that the PPA provides for supply of 30% of Installed Capacity from each of the units.
- The Appellant contended that it had declared the availability as per the Indian Electricity Grid Code, 2010 for both of its units. However, the same was not certified by the Western Regional Load Dispatch Centre (**WRLDC**) and thus, in the absence of any such clarification regarding availability, the MPPMCL cannot deny the Capacity Charges to the Appellant for the unit which is under Reserve Shut down.

[2] (2002) 1 SCC 367

Issue at hand

- Whether the Appellant is required to generate the Contracted Capacity simultaneously from both units of the power plant?

Decision of the Tribunal

- The Petitioner is declaring its availability in line with the Indian Electricity Grid Code, 2010 at all the relevant times for both the units, and the Appellant's project has been duly certified by the WRLDC since commissioning. In such circumstances, when both the units of the Power Station are declared to be available, then the supply of Contracted Capacity is permissible from any of the units. Thus, it is unreasonable to insist on generation of power by both the units in order to meet the Contracted Capacity.
- The backdown/Reserve Shut Down of any unit of the generating unit by shifting the load to any other unit is permissible under the regulatory regime. The economic and efficient functioning of the power station is the responsibility of the generator, and the procurer cannot insist for the generation from both the units specifically when there is no such stipulation in the PPA.
- Regulation 40 of the MPERC (Terms and Conditions for determination of Generation Tariff) Regulations, 2012 (**MPERC Tariff Regulations**) dealt with the recovery of annual capacity or fixed charges and Plant Availability Factor for a month and thus, in case wherein availability of power is certified by the concerned Load Dispatch Centre, then the Capacity Charges shall be recoverable. Therefore, the certification by WRLDC of the Appellant's Declared Capacity is conclusive of the availability of the project at the relevant time and Capacity Charges have to be paid in terms of such certification.
- The Appellant is held entitled to recover the Capacity Charges from the MPPMCL along with the delayed payment surcharge subject to certification of the availability by WRLDC, and thus, the determination regarding the Capacity Charges shall be done by the State Commission. Therefore, the matter is remanded back to the State Commission for passing a fresh order

Our viewpoint

The APTEL has aptly adjudicated on the basis of its decisions in similar matters wherein one unit of the plant is put on Reserve Shut Down and the Contracted Capacity is met through the power available from the other unit, then the said arrangement cannot be a ground to deny the Capacity Charges. The APTEL rightly remanded the matter back to the State Commission for fresh adjudication.

The Tata Power Company Ltd-Transmission v. State Transmission Utility

MERC Order dated September 07, 2021, in Case No. 14 of 2021

Background facts

- The present Petition has been filed as per the Section 17(3) of the Electricity Act, 2003 read along with Regulation 15.3 of the MERC (Transmission License Conditions) Regulations, 2004 for prior approval of the Commission to de-capitalize the assets from the Tata Power Company Limited-Transmission (**TPC-T**) regulated Gross Fixed Asset (**GFA**).
- It is important to note that the Commission granted a Transmission License (Transmission License No. 1 of 2014) to TPC-T for a period of 25 years effective from August 16, 2014 and valid till August 15, 2039. Since then, TPC-T has been operating as a Transmission Licensee. However, during its operation, TPC-T has identified the Target Asset, which is now not utilized optimally in the Transmission Business of TPC

Issue at hand

- Upon a cogent reading of the Regulation 2(26) with Regulation 27.2 read with Regulation 30.1 of the MYT Regulations, 2019 the following legal position emerges:
  - De-capitalization of an asset has to be carried out on the approved value i.e. Book Value
  - Upon de-capitalization of an asset amount initially invested and approved by the Commission, debt and equity pertaining to such de-capitalized asset must be reduced from the total debt capital and corresponding equity capital from the total equity and dept for the purpose of determination of tariff
- The issue at hand pertains to whether TPC-T's proposal to de-capitalize the target assets from the regulated business and transfer to TPC for utilization of its other businesses is in the interest of the consumers

Decision of the Commission

- After analysis of the pleadings submitted by the parties and based on the arguments advanced, the Ld. Commission dismissed the present Petition and declined the request of TPC-T to de-capitalize the target asset at Book Value due to the following reasons:
  - The Book Value and Market Value of the asset is 0.008 % and 0.038% of the GFA, which is very negligible. Further, the Book Value as well as Market Value of the asset as compared to the ARR of TPC-T and TTSC of ISTS is also very low. Hence, there would hardly be any benefit to the consumer out of de-capitalization of the target assets as sought by TPC-T. Hence, the claim of TPC-T that decapitalization of the assets will benefit the consumers is not true.
  - TPC-T's assets in the instant Petition are freehold land which is not depreciable as per the provisions of the Regulation 28.2 of the MYT Regulations, 2019. Also, the land can be utilized for the regulated business as per the requirement even if the bungalow constructed on the land becomes non-usable.
  - Regarding reference of the DERC MYT Regulations by TPC-T, it is observed that TPC-T has proposed de-capitalization of the target assets from its asset base and transfer to the TPC for utilization of its other businesses, which is not the case as explained in the DERC MYT Regulations, 2017 on which the TPC-T has relied. Also, as per the provisions of the Section 17(3) of the EA, 2003, the prior approval of the Commission is mandatory for transfer of the assets from TPC-T to TPC (parent company). The same position has been held by the Central Electricity Regulatory Commission vide its Order dated January 27, 2021 in *Warora Kurnool Transmission Limited and Others v. Tamil Nadu Generation and Distribution Corporation Limited and Others*[3]. TPC-T's argument based on the provisions of the DERC Tariff Regulations, 2017 is not applicable in the present matter as the Commission has notified its MYT Regulations, 2019 and the issue needs to be treated accordingly.
  - Responsibility is also cast on TPC-T to build, maintain, and operate an efficient, coordinated, and economical transmission system. Section 41 of the EA, 2003 provides that transmission licensee may, with prior intimation to the Appropriate Commission, engage in any business for optimum utilization of its assets. Further, the MYT Regulations, 2019 as well as State Grid Code Regulations, 2020 envisage the optimum utilization of the existing assets in the interest of the consumers
- In view of the above observations, the Ld. Commission is of the view that it would not be appropriate to de-capitalize the target asset from TPC-T's GFA based on submission of TPC-T without carrying out due diligence in terms of further scrutiny for utilzsation of the target assets. Hence, the Commission directs TPC-T to examine the various options for optimum utilization of the assets as per the provisions of the Act and the MYT Regulations in the interest of the electricity consumers

Our viewpoint

The Ld. Commission, while passing the present Order, has considered the fact that in a situation where de-capitalization of an asset is taking place, it is essential to verify whether the proposed de-captalization has been subjected to proper due diligence and the said action is justified or not. This approach not only gives a chance to analyze that the said action is in the interest of the consumers at large but also considers whether the said action will have any impact on the operational and technical issues affecting the services of the Grid.

M/s Maru Transmission Service Company Ltd v. Jaipur Vidyut Vitran Nigam Limited and Ors

RERC Order dated August 08, 2021 in Petition No. 1910 of 2021

Background facts

- The present Petition has been filed as per the Sections 17(3) and (4) of the Electricity Act, 2003 seeking approval of the Commission for assignment of licence by way for creation of security interest in favour of new security trustee and other security creating documents/financial agreements by way of mortgage/hypothecation/assignment of rights, title, interest, claims, demands, benefits, mortgage properties, project assets, clearances, project documents, agreements, approvals and rights.
- The Petitioner herein had been granted transmission license dated August 14, 2012 by the Commission under Section 14 of the Electricity Act, 2003. The Commission vide its order dated

[3] Petition No. 71/MP/2020

January 05, 2018 in Petition No. 1267 of 2017 had allowed security creation and in principle assignment of license in favour of SBICAP Trustee Company Limited.

- That thereafter, to refinance the debt requirement of the Project, the Petitioner requested ICICI Bank Limited and Axis Bank Limited for making available financial assistance. Further at request of the Petitioner, Catalyst Trusteeship Services Limited had agreed to act as security trustee for the lenders and to enter all relevant financing documents.

Issues at hand?

- The issues for consideration before the Ld. Commission were as follows:
  - Approval of assignment of the Transmission License and Utility of the Petitioner by way of security in favour of Catalyst Trusteeship Limited as Security Trustee, acting for the benefit and on behalf of the lenders
  - Approving the creation and/or perfection of security interest in favour of the Catalyst Trusteeship Limited as Security Trustee, acting on behalf of and for the benefit of the lenders as provided under the Rupee Term Loan Agreement dated March 10, 2021
  - Approving the security documents and execution thereof, for creation and/or perfection of aforesaid security interest in relation to the aforesaid security in favour of Catalyst Trusteeship Limited as Security Trustee acting on behalf and for the benefit of the lenders

Decision of the Commission

- After analysis of the pleadings submitted by the parties and based on the arguments advanced, the observation and directions of the Commission are as follows:
  - In light of the provisions of the Electricity Act, the Commission granted in-principle approval to the Petitioner to assign its rights, etc. as required by Catalyst Trusteeship Services Limited subject to the condition that the approval given is limited to creating rights, etc. in favour of Catalyst Trusteeship Services Limited only and to the extent provided in the TSA and in supersession to earlier permission granted in favour of SBICAP Trustee Company Limited.
  - It was further held by the Ld. Commission that the transmission licence granted by the Commission to the Petitioner and the underlying assets cannot be assigned in favour of the nominee of the Security Trustee unless prior approval of the Commission is obtained at the time of creating rights in favour of such nominee. Before agreeing to transfer of the licence and the assets of the Petitioner to the nominee of Security Trustee, the Commission shall evaluate such a nominee's experience in development, design, construction, operation, and maintenance of transmission lines, and to be able to execute the project and undertake transmission of electricity. The licensee, lenders, security trustee and the nominee, accordingly, shall be jointly required to approach the Commission for seeking approval. This will give an opportunity to the Commission to satisfy itself of the circumstances necessitating such transfer.
  - It was also held that in case of default by the licensee in debt repayment, the Commission may, on a joint application made by the licensee, lender, Security Trustee, and the nominee, approve the assignment of the licence to a nominee of the lender subject to proper due diligence of the process. Therefore, specific prior approval of the Commission for assigning the licence to the nominee of Security Trustee or transfer of any assets to them shall always be needed.

Our viewpoint

The Ld. Commission, while passing the present order with respect to assignment of licence by way for creation of security interest in favour of new security trustee, has held that the underlying assets cannot be assigned in favour of the nominee of the Security Trustee unless prior approval of the Commission is obtained at the time of creating rights in favour of such nominee. This approach of the Commission shall evaluate such a nominee`s experience on various grounds such as development, design, construction, operation, and maintenance of transmission lines, and to be able to execute the project and undertake transmission of electricity. Therefore, it is correct to say that this approach scrutinizes the nominee in terms of the requirements of the Electricity Act and other regulations.

ACB (India) Ltd v. Gujarat Urja Vikas Nigam Ltd & Anr

CERC Order dated 01.09.2021 in Petition No. 48/MP/2021

Background facts

- The Petitioner filed the Petition under Sections 79(1)(b) and 79(1)(k) of the Electricity Act, 2003 read with Regulations 49(C)(a) and 49(C)(b) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 for approval of Station Heat Rate (**SHR**) on actual basis of the 270 MW (2x135 MW), coal reject based Thermal Power Plant at Village Kasaipali, Dist. Korba (**Project**).

- The Project, situated in the State of Chhattisgarh, is selling power to more than one State in as much as it has PPAs with the Respondents 1 and 2 in the State of Gujarat and in the State of Chhattisgarh. Therefore, the Petitioner in terms of Section 79(1)(b) of the Act, has a composite scheme for generation and sale of electricity in more than one State.
- The Petitioner is being forced to give discount upon consideration of hypothetical units of energy considering design SHR instead of actual SHR. The Petitioner participated in third round of e-auction under the Shakti Scheme and quoted discount of 7 paise/kWh, on the assumption that the actual SHR will be considered while working out the energy generated from the Project since the same is specifically provided in the 2019 Tariff Regulations.
- Under Section 61(d) of the Act, the Petitioner is entitled to recover its cost in a reasonable manner. It is, thus, imperative that actual SHR of the Project is considered, the same being in line with the SPPA, while computing the energy generated by the Project so that the Petitioner can recover its cost in a reasonable manner.

Issue at hand

- Whether CERC has the jurisdiction to deal with the present petition under Section 79(1)(f) of the Act, in view of the objections raised by the Respondent GUVNL stating that as the SPPA was considered and approved by GERC, the issues arising thereof should appropriately be considered by GERC and since the Petitioner had willingly submitted to the jurisdiction of GERC and, therefore, Section 64(5) of the Act applies, even as per the decision of the Hon'ble Supreme Court in Energy Watchdog case?

Decision of the Tribunal

- After analysis of the pleadings submitted by the parties and based on the arguments advanced, the Ld. Commission dismissed the present Petition on the preliminary issue of jurisdiction by stating the following reasons:
  - That Section 64(5) of the Act provides for determination of tariff for any inter-State supply. Transmission and wheeling of electricity and the prayer of the Petitioner in this petition was to approve SHR of the Units of the Project on actual basis, in terms of provisions of the 2019 Tariff Regulations. This determination of SHR is for the purpose of computing energy charges in terms of SPPAs approved by GERC. Thus, determination of SHR is essentially related to determination of tariff and such determination cannot be in parts i.e. one part of tariff is determined by one Commission while other part by another Commission. Such part determination does not seem to be envisaged under Section 64(5) of the Act. In this regard, the Petitioner, by a conscious decision, having consented to the jurisdiction of GERC in terms of Section 64(5) of the Act, cannot now invoke the jurisdiction of this Commission to seek relief, under Section 79(1)(b) read with Section 79(1)(f) and 79(1)(k) of the Act.
  - Further the Commission also stated that on numerous occasions it has entertained petitions filed by various generating companies having composite scheme in terms of Section 79(1)(b) of the Act for approval of SPPAs related to allocation of coal under the Shakti Scheme and the Commission had approved amendments to the relevant PPAs/PSAs therein. But no such approval was sought by the Petitioner herein from this Commission in terms of Section 79(1)(b) of the Act. Rather the Petitioner chose to invoke provisions of Section 64(5) of the Act in approaching GERC.
  - It was further observed by the Ld. Commission that GERC by its order dated October 9, 2020 had directed the parties to mutually discuss and arrive on the agreed terms of the proposed SPPA and thereafter approach GERC for its approval. In this background, the submission of the Petitioner that the present case relating to the determination of SHR is an independent proceeding, is misconceived and is not accepted.

Our viewpoint

While passing the present Order, the Ld. Commission has considered the fact that in a situation where the Project has a 'composite scheme' for the generation and sale of electricity in more than one State, then CERC has the jurisdiction to adjudicate the dispute/ claims under Section 79(1)(b) read with Section 79(1)(f) of the Act. However, in the present case, the Petitioner had knowingly and willingly submitted to the jurisdiction of GERC in terms of Section 64(5) of the Act and obtained approval of SPPAs, and the said Petition was dismissed by CERC citing a lack of jurisdiction due to this reason. This approach of the Ld. Commission is correct in light of the fact that the parties to an agreement cannot simply oust the jurisdiction of a specific commission if the same has been willingly agreed between the parties on an earlier account and an adjudication before any such commission has already taken place.

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