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PROJECTS, ENERGY & INFRASTRUCTURE

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LEGAL & POLICY UPDATES

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Circular on supply of fly ash to end users by power plants to increase fly ash utilization

- In line with its observation that the demand of fly ash has been increasing on year-to-year basis contributing to increase in the fly ash utilization, the Ministry of Power (**MOP**) issued a circular on September 22, 2021 on supply of fly ash (**Circular**). Considering the end users of fly ash are commercial ventures and their input costs are accounted for, fly ash should invariably be auctioned through a transparent bidding process.
- By virtue of the Circular, MOP has issued following guidelines to coal/lignite-based power plants to provide fly ash to the end users for new supply:
  - The power plants are required to provide fly ash to end users through a transparent bidding process only.
  - If some quantity of fly ash still remains unutilized after bidding/auction, then only, as one of the options, it could be considered to be given free of cost on first come first served basis if the user agency is willing to bear transportation cost.
  - If ash remains unutilized even after the aforesaid steps, Thermal Power Plant (**TPP**) would be required to bear the cost of transportation of fly ash to be provided free to eligible projects.
  - The end users shall be obligated to source the fly ash from the nearest TPPs to reduce the cost of fly ash transportation. If the nearest TPP refuses to do so, the end user project shall approach MOP for appropriate directions.
  - The transportation cost, wherever required to be borne as per provisions of MOEF & CC notification by the power plants, shall be discovered on competitive bidding basis only. TPPs shall prepare a panel of transportation agencies every year based on competitive bidding for transportation in slabs of 50 km, which may be used for the period.
  - The TPPs shall call for bids well in advance so that a transportation panel is in place as soon as the previous panel expires. There should not be gap between the expiry of one panel and the finalization of the fresh panel.
  - The fly ash will be offered to the end users on the competing demand basis, i.e the end users who offer the highest price and seek minimum support for transportation cost will be offered the same fly ash on priority. This will reduce the tariff of electricity and burden on consumers.
  - The power plants may offer fly ash subject to their technical restrictions such as all precautions required for dyke stability and safety. Power plants having lower ash utilizations shall make all efforts to increase the fly ash utilization.

Draft Electricity (Rights of Consumers) Amendment Rules, 2021

- The Ministry of Power (**MOP**) has issued a draft proposal for amending the Electricity Act, 2021 to ensure that Distribution Companies (**Discoms**) provide round-the-clock uninterrupted power supply to all consumers and thereby prevent the need for the use of diesel generators. The draft proposal is open for comments up to October 21, 2021. MOP has proposed the amendments in light of increasing levels of air pollution in most metros and bigger cities.
- According to the MOP's proposed amendments, State Electricity Regulatory Commissions (**SERCs**) have to give the trajectory of System Average Interruption Frequency Index (**SAIFI**) and System Average Interruption Duration Index (**SAIDI**) for the cities. SAIFI is the average number of times that a power consumer experiences an outage during the year. SAIDI is a description of the length of time all consumers would have been out of power. This is needed if the total number of hours out of service in a year were to be shared (measured in minutes).
- SERCs can also consider a separate reliability charge for Discoms if they need funds to augment infrastructure to ensure consistent power for consumers. If Discoms are unable to meet the defined standards, Commissions have to make penalty provisions.
- MOP said that Discoms should provide temporary power connection through a prepayment meter to consumers within 48 hours for construction activities or any temporary usage. This will avoid the use of diesel-generating sets for short-term use.
- As per the draft, consumers who use diesel-generating sets as a power backup should shift towards clean energy technologies like renewable energy with battery storage in the next five years or according to a timeline set by the State.

Electricity (Transmission System Planning, Development and Recovery of Inter-State Transmission Charges) Rules, 2021

- The Ministry of Power (**MOP**) has notified the Electricity (Transmission System Planning, Development and Recovery of Inter-State Transmission Charges) Rules, 2021 (**Rules**) on October 01, 2021. The Rules have been notified in order to prepare a development plan for Transmission System in the entire country, ensure optimal utilization of resources to subserve the interests of the national economy and provide affordable electricity.
- **Planning & approvals:**
  - The Central Electricity Authority (**CEA**) shall prepare a short-term plan for every year on rolling basis for up to next five years and perspective plan every alternate year on rolling basis for next ten years, for developing the electricity system and coordinating the activities of the planning agencies.
  - The CEA shall prepare a perspective plan for development of transmission system after consultation with all relevant stakeholders i.e. Central Transmission Utility (**CTU**), State Transmission Utilities, System Operators, Generator and Distribution Companies, associations, and the State Governments.
  - The CTU shall prepare a plan for Inter-State Transmission System for up to next five years on rolling basis every year. This plan will be designed after identifying specific transmission projects which are required to be taken up, along with their implementation timelines, considering the plans prepared by the CEA and deliberation of progress in generation capacity and demand in the country along with the General Network Access requests made by Designated Inter-State Customers. Any congestion in any part of the Inter-State Transmission System and difficulties will be addressed right away. For preparing this plan, the CTU shall consult with the above-mentioned relevant stakeholders.
  - The Inter-State Transmission System projects drawn up by the CTU shall be placed before the National Committee on Transmission (**National Committee**) constituted by the Central Government and the National Committee shall include a nominee of each Regional Power Committee. The Central Government, after considering the recommendations of the National Committee, shall approve the projects with their timeline for implementation. Further, the Central Government may approve any transmission project as deemed necessary from the strategic point of view without waiting for the recommendation of the National Committee.
- **Connectivity:**
  - The Generation or Distribution Companies or Inter-State Transmission System Consumers shall be connected to the network and the same may be able to sell or buy power from any Generator or Distribution Company, or to any entity connected to the Inter-State Transmission System and the Appropriate Commission shall issue regulations pertaining to the General Network Access.
  - All existing long term access granted or deemed granted to a Designated Inter-State Customer may be considered as sanctioned general network for that Designated Inter-State Customer while transitioning to General Network Access, unless otherwise stated. The general network

access shall be applied and provided for a specific capacity and the same shall be granted for a specific period. The costs of the connectivity system to the network shall be borne by the connecting entity and the costs of strengthening of the system shall be treated as part of system cost and the same shall be recovered in tariff.
  - The Central Electricity Regulatory Commission (**CERC**) may specify the duration for which general network access can be granted and the procedure and fees regarding the same by issuing the regulations.

- **Recovery of Inter-State Transmission Charges:**
  - The Inter-State Transmission System shall be treated as one integrated system and any Designated Inter-State Customer seeking General Network Access shall pay the one time General Network Access charges as prescribed by the CERC. Further, the existing Designated Inter-State Customers with existing Long Term Access are not required to pay one-time General Network Access Charges. All Designated Inter-State Customers shall pay per Mega Watt tariff as fixed by the CERC as monthly transmission charges in addition to one time General Network Access Charges.
  - In case a Designated Inter-State Customer desires to relinquish the General Network Access, fully or partly, it may be allowed subject to making advance payment of reasonable relinquishment charges as specified by the CERC and ensuring that other Designated Inter-State Customers are not burdened. After complete relinquishment, the Designated Inter-State Customer shall be disconnected from the Inter-State Transmission System.
  - The monthly transmission charges shall be paid by the Designated Inter-State Customers for the General Network Access capacity sanctioned for them or drawal or injections as the case may be, whichever is higher. All drawals or injections within the sanctioned capacity shall be at normal rate and excess drawal or injection over the capacity sanctioned shall be charged at rates, which are at least 25% higher, as determined by the CERC**.**
  - The CERC shall true up the total Inter-State Transmission System charges every month after obtaining reports from CTU about the additions or reductions in generation or transmission capacity and the number or capacity of General Network Access Consumers**.**
  - The CTU is responsible for billing, collection and disbursement of the transmission charges as per the regulations notified by the CERC. The liability to pay transmission charges commences from the date of operationalization of the General Network Access**.**
  - The General Network Access capacity or part thereof can be shared with, sold to or purchased from any other Designated Inter-State Customers as provided under the regulations notified by the CERC. Further, any generator shall be allowed to be connected at the switchyard of another generator which is already connected with Inter-State Transmission System as provided under the regulations notified by the CERC.
  - The CERC shall notify the regulation on fees and charges for CTU to carry out the statutory functions. Further, the Central Government may waive Inter-State Transmission System Charges and losses for notified sources of energy for a specified duration

Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021

- On October 22, 2021 the Ministry of Power (**MOP**) issued the following rules for the sustainability of the electricity sector and promotion of clean energy to meet the India's commitment towards climate change:
  - Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (**Recovery Rules**)
  - Electricity (Promotion of Generation from Renewable Sources of Energy by Addressing Must Run and Other Matters) Rules, 2021 (**Must Run Status Rules**)
- Timely recovery of the costs due to change in law is very important as the investment in the power sector largely depends upon timely payments. At present, the pass-through under change of law takes time, which impacts the viability of the sector, and the developers get financially stressed. In this regard, the Recovery Rules lays down the following:
  - On the occurrence of a change in law, the monthly tariff or charges will be adjusted and be recovered in accordance with the Recovery Rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred.
  - A 3-week prior notice to the other party about the proposed impact in the tariff or charges has to be given by the affected party.
  - The affected party will furnish to the other party, the computation of impact in tariff to be adjusted and recovered, within 30 days of the occurrence of the change in law or on the expiry

of 3 weeks from the date of the notice, whichever is later, and the recovery of the proposed impact in tariff or charges will start from the next billing cycle of the tariff.

- The impact of change in law to be adjusted and recovered may be computed as one time or monthly charges or per unit basis or a combination thereof and will be recovered in the monthly bill as the part of tariff.
- As per Rule 5(b), where the agreement does not lay down any formula, the formula given under the said Rule is to be used to calculate adjustment in the monthly tariff due to the impact of change in law.
- As per Rule 6, the recovery of the impacted amount, in case of the fixed amount will be:
  - In case of generation project, within a period of 180 months
  - In case of recurring impact, until the impact persists
- The Appropriate Commission will verify the calculation and adjust the amount of the impact in the monthly tariff or charges within 60 days from the date of receipt of the relevant documents.

- Further, MOP, under the Must Run Status Rules, categorize a wind, solar, wind-solar hybrid or hydro power plant (in case of excess water leading to spillage) or a power plant from any other source as may be notified by the Appropriate Government, which has entered into an agreement to sell the electricity to any person, as a must-run power plant. It further lays down the following:
  - A must-run power plant will not be subjected to curtailment or regulation of generation or supply of electricity on account of merit order dispatch or any other commercial consideration. The electricity generated from a must-run power plant may be curtailed or regulated only in the event of any technical constraint in the electricity grid or for reasons of security of the electricity grid.
  - For curtailment or regulation of power, the provisions of the Indian Electricity Grid Code, 2010 will be followed. In the event of a curtailment of supply from a must-run power plant, compensation will be payable by the procurer to the must-run power plant at the rates specified in the agreement for purchase or supply of electricity.
  - The renewable energy generator is also allowed to sell power in the power exchange and recover the cost suitably. This helps in realisation of revenue by the generator and also the power is available in the electricity grid for use of consumers.
- The Must Run Status Rules also provide for the Intermediary Procurer to procure electricity for distribution licensees. In this regard, the Must Run Status Rules inter-alia state that the intermediary procurer, an agency nominated by the Central Government or State Government, may procure electricity through a transparent process of bidding in accordance with the guidelines issued by the Central Government under Section 63 of the Electricity Act, 2003 for sale to one or more distribution licensees.

RECENT JUDGMENTS

In this Section

Clean Wind Power (Manvi) Ltd v. Chamundeshwari Electricity Supply Corporation Ltd and Ors

Tata Power Renewable Energy Ltd v. Maharashtra Electricity Regulatory Commission & Anr

Inox Wind Infrastructure Services Ltd v. Power Grid Corporation of India Ltd

Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission & Ors

Adani Gas Limited v. Union of India and Ors

Prayatna Developer Pvt Ltd v. Andhra Pradesh State Load Despatch Centre & Ors

Clean Wind Power (Manvi) Pvt Ltd v. Chamundeshwari Electricity Supply Corporation Ltd and Ors

KERC Judgment dated October 11, 2021, in OP No. 120 of 2018

Background facts

- Clean Wind Power (Manvi) Pvt Ltd (**Petitioner**) filed a petition before the Karnataka Electricity Regulatory Commission (**KERC**) seeking a declaration that the Petitioner was a captive generating plant during the FY 2017-18. The Petitioner further challenged the unlawful imposition of Cross Subsidy charges on the captive users of the Petitioner's captive generating plant, as the captive users were adhering to the requirements stated under Rule 3 of the Electricity Rules, 2005 for captive consumption (**Electricity Rules**).
- It was submitted by the Petitioner that it owns and operates a 50 MW Wind Power Plant and has 12 shareholders out of which 11 shareholders are captive users who consume 100% of the electricity generated from the Petitioner's captive generating unit.
- It was contended by the state distribution companies (**Respondent Discoms**) that the Petitioner is not complying with the criteria set out in the Electricity Act, 2003 **(Electricity Act**) and the Electricity Rules regarding the captive generating plants as the consumers of the Petitioner's captive generating unit are not consuming energy in proportion to their shareholding in the Petitioner's company and thus, the captive consumers are directed to pay Cross Subsidy Surcharge. Further, it was contended by Discoms that the change in shareholding pattern among the captive consumers is happening at regular intervals in order to fulfil the criteria set out under the Rule 3 of the Electricity Rules.

Issues at hand

- Whether the Petitioner proves that it is a captive generating plant and Respondent No. 4, 5 and 6 are its captive consumers as per the Rule 3 of the Electricity Rules for FY 2017-18?
- Whether the Respondent Discoms have followed proper procedure for verification of the captive status of the Petitioner and Proforma Respondents as contemplated under Section 2(8) of the Electricity Act and Rule 3 of the Electricity Rules?

Decision of the Commission

After analysis of the pleadings submitted by the parties and based on arguments advanced, the KERC partly allowed the present petition and held as under:

- There is a change in the number of shares held by the captive consumers during the FY 2017-18, but the total number of equity shares remained unchanged. Thus, there is a change in the shareholding pattern during the FY 2017-18 as compared to the shareholding pattern during the incorporation of the Petitioner company. Further, the Petitioner has not placed any document to prove the captive status of the generating plant at the time of incorporation of the company. Therefore, the KERC cannot allow the prayer of the Petitioner seeking declaration of captive status of its generating plant for FY 2017-18.

- Section 42 of the Electricity Act exempts a captive generating plant from payment of Cross Subsidy Surcharge. In order to qualify for exemption, a captive generating company has to fulfil the requirements of Rule 3 of the Electricity Rules.
- As per the Section 9 of the Electricity Act, Respondent Discoms can be appointed by the KERC for undertaking an exercise of verification of captive status of a generating plant. However, initiating an action against any captive generating plant/captive consumers regarding its captive status or recovery of Cross Subsidy Surcharge can be done only through appropriate proceedings before KERC.
- The proportionality criteria as mentioned in the Rule 3 of the Electricity Rules has to be complied/satisfied only for the 51% of the total generation, the remaining 49% of the power generation could be sold to anyone. Thus, the proportionality rule applied by the Respondent Discoms for determining the energy consumed by the consumers of the Petitioner generating plant in proportion to their shareholding pattern on 100% energy generated by the generating plant is incorrect.
- The verification of the tests regarding the minimum equity shareholding pattern as enumerated in Rule 3 of the Electricity Rules can be done by the Respondent Discoms at the end of the financial year.
- Accordingly, the Respondent Discoms are at liberty to verify the captive status of the Petitioner in view of the observations made in this order and return the amount received, if any, against the Cross Subsidy Surcharge.

Our viewpoint

KERC, after reiterating the threshold as mentioned under Rule 3 of the Electricity Rules, passed the present Order so as to clarify the status of the consumers which are exempted from imposition of Cross Subsidy charges. In this regard, KERC further held that the proportionality criteria have to be satisfied for 51% of the total generation and the shareholding pattern should be considered at the end of the financial year for verification test. Therefore, it is correct to say that the approach of the KERC for determining the captive status is appropriate

Tata Power Renewable Energy Ltd v. Maharashtra Electricity Regulatory Commission & Anr

APTEL Order Date 20.09.2021 in Appeal No. 215 of 2021

Background facts

- The present Appeal has been filed by the Appellant i.e. Tata Power Renewable Energy Ltd (**TPREL**) challenging the legality and validity of Order dated April 30, 2021 in Case No. 25 of 2020 passed by Ld. Maharashtra Electricity Regulatory Commission (**MERC**) thereby denying compensation on account of change in rate of Goods & Services Tax (**GST**) in terms of the Central Goods and Services Tax Act, 2017 (**GST Act**), claimed as a change in law event under the Power Purchase Agreement (**PPA**) executed between the TPREL and Maharashtra State Electricity Distribution Company Ltd (**MSEDCL**).
- On April 9, 2018, the MSEDCL floated a tender for procurement of 1000 MW solar power on long term basis from new or existing solar projects through Competitive Bidding process to meet its Renewable Purchase Obligations (**RPOs**).
- Subsequent to the bidding process, TPREL was selected as one of the successful bidders, and accordingly PPA was executed on July 27, 2018 between TPREL and MSEDCL, for supply of 150 MW of AC power from TPREL's solar energy based power plant to MSEDCL at Tariff of INR 2.72/unit.
- In terms of the PPA, TPREL was required to construct, operate and maintain the solar PV project. Accordingly, on September 21, 2018, TPREL entered into Supply and Service Contracts with Tata Power Solar Systems Limited (**TPSSL**).
- Considering Ministry of Finance's Notification Nos. 1/2017 - Central Tax (Rate) and 11/2017 - Central Tax (Rate) dated 28 June 2017, TPREL at the time of the submission of the Bid, had considered GST at the rate of 5% (i.e. 2.5% of CGST and 2.5% of SGST) on Supply Contracts and 18% (i.e. 9% of CGST and 9% of SGST) on Contract for Civil Works (**Service Contracts**). After the enactment of GST Act, there were various issues raised qua the applicable GST rates for Composite Contracts i.e. contracts providing for supply and services for setting up of solar power plants. In order to resolve these issues, the Ministry of Finance on the recommendations of the Goods and Services Tax Council issued the Notifications dated December 31, 2018 as a result of which GST at the rate of 8.9% becomes payable on Supply and Service Contracts for setting up of solar power plants instead of 5% on the taxable value of the Supply Contracts and 18% on the taxable value of the Service Contracts for setting up solar power plants.
- As a result, TPREL's Supply and Service Contracts with TPSSL for setting up of the solar power plant now attracted a composite tax of 8.9% (i.e. 5% on 70% of the consolidate taxable value of the

contracts and 18% on the remaining 30% of the consolidated taxable value of the contracts). These change in law events have taken place much after TPREL submitted its bid on May 08, 2018.

- Being adversely affected by the aforementioned notification, the TPREL on November 07, 2019 issued a change in law Notice to MSEDCL highlighting the aforementioned event and requesting it to compensate TPREL to the tune of INR 24.62 crore immediately, along with appropriate carrying cost. TPREL then filed a Petition before MERC for seeking declaration that the change in rate of GST applicable to Supply and Service Contracts pursuant to the Notifications issued by Central Government is a change in law event under the PPA, and consequently sought compensation of INR 28.10 crore along with the carrying cost towards restriction on account of the impact of such change in law events on the TPREL's solar power plant.
- MERC, vide the Impugned Order, denied the relief despite accepting that the Notifications issued on December 31, 2018 are a change in law event, on the finding that the contracting practice adopted by TPREL was neither economical nor prudent, to the extent the TPREL ought to have entered into three contracts (instead of two contracts) since that would not have led to increase in rate of GST payable post the notifications dated December 31, 2018.
- Aggrieved by the aforementioned decision, the TPREL had filed the present Appeal before APTEL.

Issues at hand

- Whether the MERC has rightfully rejected the claim of the TPREL despite noting that the Notification issued by the Central Government (pertaining to change in GST rates) is a change in law event?
- Whether MERC could have applied the test of 'prudent utility practice' while examining the scope of change in law provision?

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 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.
- The APTEL while referring to its earlier judgment passed in *Coastal Gujarat Power Ltd v. Central Electricity Regulatory Commission & Ors*[1] on April 28, 2021 held that the MERC has failed to appreciate that the concept of 'prudent utility practice' has been used in the PPA in the context of operation and maintenance of the power plant or Article 3.1(vii) and (viii) of the PPA, it having no relevance to change in law provision.
- The APTEL further opined that there is inconsistency in the approach of the MERC in as much as even while holding that TPREL had entered into contract in terms of prevailing law to reduce the tax liability, the MERC has found TPREL's contracting imprudent (i.e. TPREL has entered into two contracts instead of three contracts) since additional tax liability had arisen on account of change in law events, though conscious of the fact that change in law clauses are inserted in the PPA to compensate the parties on account of impact of unforeseen events.
- The APTEL further held that MERC had glossed over the difference between 'prudence check' and 'prudence utility practice'. The prudence check is conducted by the Commission to determine the computation of compensation such that imprudence in expenditure such as for setting up the power plant is not passed on while determining the compensation of change in law. It does not extend to denying relief for change in law. Prudence check cannot be extended to arranging business affairs on the basis of law which will come in future. The impugned view would indeed make change in law provision otiose, since prudence would get tested in the context of law to come in future.
- Further, the APTEL while referring to its decision in *Karnataka Power Transmission Corporation Limited v. Karnataka Electricity Regulatory Commission & Ors*[2] held that the recourse to composite contract was a business decision of the TPREL. It is not fair to deny relief for change in law, otherwise properly made out, only because another business model commends itself as better to the regulator.
- Moreover, the APTEL opined that in terms of Article 9.2 of the PPA, the change in law event has resulted in adverse financial loss to TPREL, on which issue the MERC has concluded in the affirmative. As per the PPA the relief must be granted such that TPREL 'is placed in the same financial position as it would have been had it not been for the occurrence of the change in law', thereby the contractual provision being based on principle of restitution. Therefore, the TPREL is entitled to the compensation claim along with carrying cost.
- In this reference the APTEL referred to Supreme Court's judgment in *UHBVNL & Anr. v. Adani Power Ltd. & Ors*[3] wherein the Supreme Court has held that carrying cost is an integral part of the principle of restitution and is inbuilt in change in law provisions of the PPA.

[1] (Appeal No. 172 of 2017)
[2] 2007 ELR (APTEL) 223
[3] (2019) 5 SCC 325

- In light of the above, the APTEL set aside and vacated the impugned order and remit the matter to the MERC for passing a fresh order after determining the amount of compensation payable due to changes in the GST regime and the carrying cost in such prospect.

Our viewpoint

After due deliberation, the APTEL has laid down the parameters for assessing the claims of TPREL. The judgment gains significance regarding the law laid down qua 'prudence check' which has fared well in favour of TPREL

Inox Wind Infrastructure Services Ltd v. Power Grid Corporation of India Ltd

CERC Order dated October 15, 2021 in Petition No. 79/MP/2021

Background facts

- Inox Wind Infrastructure Services Limited (**IWISL**) filed the petition before CERC seeking directions to the Power Grid Corporation of India Ltd (**PGCIL**) to allow the transfer of LTA and Connectivity from IWISL to its respective four SPVs.
- IWISL won the bid for setting up five wind power projects near Dayapar, Gujarat, under the MNRE Scheme for total 250 MW, with each project being of 50 MW, and accordingly, SECI issued Letters of Award dated April 5, 2017 to IWISL.
- As per provisions of the Request for Selection, IWISL formed the following five SPVs as its 100% owned subsidiaries for execution of each of the said five wind power projects awarded to it.
- Four out of five aforesaid SPVs of IWISL were able to commission their respective projects under SECI Tranche-I project. On July 12, 2019 SECI terminated the PPA in respect of the non-commissioned 50 MW project of the fifth SPV, i.e., Wind Four Renergy Pvt Ltd
- On August 07, 2020 restriction period of one year (in terms of Regulation 8A of the 2009 Connectivity Regulations) for LTA and Connectivity transfer from parent company to 100% subsidiary SPVs expired, since only 200 MW (through four SPVs) out of 250 MW wind power projects could be commissioned.
- On August 27, 2020 the aforesaid four SPVs, which had commissioned their respective 50 MW wind power projects approached the Respondent PGCIL with a request to allow transfer of LTA and Connectivity from the parent company, i.e. the Petitioner.

Issue at hand

- Whether IWISL can be allowed to transfer LTA and Connectivity from the parent company to its SPVs?

Decision of the Commission

- Since there was no mention of project capacity of 250 MW in LOA issued by SECI or the PPA with PTC, rather separate LOA each of 50 MW were issued and separate PPA for 50 MW each had been signed by SPVs of IWISL. CERC allowed IWISL to transfer LTA and Connectivity to four SPVs that have commissioned their respective wind power projects totalling to 200 MW.
- CERC further observed that there is no immediate need of discharging liability of 50MW as IWISL will keep the bank guarantee(s) alive and pay for all the charges in respect of LTA and Connectivity for 50 MW that is not transferred to the SPV.
- Since IWISL have commissioned their respective wind power projects up to 200 MW from last one year, CERC was of the view that no useful purpose would be served by awaiting the outcome of the Appeal filed by IWISL before APTEL with regard to remaining 50 MW and not allowing IWISL in the interim to transfer its LTA and Connectivity in respect of the four SPVs that have commissioned their respective wind power projects.
- CERC directed that PGCIL/CTU shall ensure that IWISL is billed as per provisions of applicable regulations for the remaining 50MW

Our viewpoint

CERC followed the purposive interpretation and allowed the transfer despite an Appeal withstanding before APTEL, as it noted that no useful purpose will be served by delaying the transfer of LTA.

Maharashtra State Electricity Distribution Company Ltd v. Maharashtra Electricity Regulatory Commission & Ors

Judgment and order dated October 08, 2021 in Civil Appeal No. 1843 of 2021

Background facts

- The present Appeal had been filed under Section 125 of the Electricity Act, 2003 seeking a direction of the Supreme Court that the introduction of the Base Rate system and the Marginal Cost of Funds Based Lending Rate system by RBI constituted a change in law, as contemplated in the Power Purchase Agreements so as to alter the rate of Late Payment Surcharge (**LPS**) payable by the Appellant to the Power Generating Companies.

Issues at hand

- Has the APTEL by way of its Impugned Judgment and order dated April 27, 2021 erroneously held that change in methodology in computation of the rate of interest is not change in law?
- Has the APTEL by way of its Impugned Judgment and order dated April 27, 2021 wrongly held that LPS neither has any bearing on the income of the Respondent Power Generating Companies nor is a part of the tariff.

Decision of the Tribunal

- After analysis of the pleadings submitted by the parties and based on the arguments advanced, the observation and directions of the SC are as follows:
  - The RBI circulars referred in the present case are admittedly instructions issued to banks and financial institutions and are not applicable to the Appellant or to the Respondent-Power Generating Companies, who are engaged in the business of production, sale/purchase and/or distribution of electricity and not of advancing loans. Moreover, State Bank Advance Rate (SBAR) as defined in the Power Purchase Agreements is admittedly not linked to any RBI guidelines or circulars. The circulars are thus not relevant to the issues involved in this appeal.
  - The counsels appearing for the Power Generating Companies have correctly argued that the RBI circulars/guidelines are to banks, advising them to follow certain norms, while setting their benchmark reference rates for loans, and the amendments thereto, have no legal consequence on the contract between the parties. This has been correctly appreciated by both the forums below.
  - The provision in the Power Purchase Agreement, whereby the parties are to mutually agree on a rate of interest, in case there is no SBI Prime Lending Rate, in itself excludes the applicability of the general provision for Change in Law contained in Article 13 of the Power Purchase Agreement to Late Payment Surcharge.
  - The object of LPS is to enforce and/or encourage timely payment of charges by the procurer, i.e. the Appellant. In other words, LPS dissuades the procurer from delaying payment of charges. The rate of LPS has no bearing or impact on tariff. Changes in the basis of the rates of LPS do not affect the rate at which power was agreed to be sold and purchased under the Power Purchase Agreements. The principle of restitution under the Change in Law provisions of the Power Purchase Agreements are attracted in respect of tariff.
  - The definition of SBAR is clear and has been correctly applied by both the forums below. There are concurrent findings of fact that the SBI PLR (i.e. the benchmark reference rate mentioned in the PPA) is still being published and is available. The Court cannot, at this stage of a second appeal under Section 125 of the Electricity Act reopen the factual question of whether at all PLR rates were being notified by SBI for short term loans.
  - SC, in view of the above observations, was of the opinion that there were no grounds for interfering with the Impugned Judgement and Order dated April 27, 2021 and thus the present Appeal was dismissed.

Our viewpoint

SC while passing the present judgment and order dated October 08, 2021 has cogently taken into consideration all arguments raised and has correctly opined that the circular/notifications of the RBI under question cannot be covered under the ambit of the PPA owing to no correlation between the rate at which the PPA tariff has to be paid when compared with the LPS rate.

Adani Gas Limited v. Union of India and Ors.

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 of 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 SLP was filed by the Appellant challenging the validity of Regulation 18 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 as violative of Articles 14 and 19(1)(g) of the Constitution of India, and ultra vires Section 16 of the Petroleum and Natural Gas Regulatory Board Act, 2006 (**PNGRB Act**). The Appellant had also challenged the grant of authorization to the third respondent (**Gujarat Gas**) for laying and maintaining a gas distribution network. Gujarat Gas had succeeded in securing the authorization in an auction held by the PNGRB.
- The PNGRB Act came into effect on October 1, 2007, and mandated authorization by the Board for the laying, building, operating or expanding any city or local natural gas distribution network (**CGD network**). On October 30, 2007 the Board issued a press note directing entities engaged in CGD activities with or without authorization of the Central Government, to submit relevant details. After receiving the Appellant's details, the Board informed that recognition and acceptance could be only of a specific and formal authorization by the Central Government, in accordance with Section 17 of the Act. Accordingly, the Appellant's activities were restrained, and a direction was given to obtain authorization from the Central Government. The Board eventually granted the Appellant a provisional clearance to carry out certain capital works in the Ahmedabad, including the disputed areas of Sanand, Bavla, and Dholka.
- Section 16, relating to authorization, came into effect on July 12, 2010. On February 04, 2013 the Board granted provisional authorization to the Appellant's CGD network in Ahmedabad city and Dascroi area, excluding 18 CNG stations of Hindustan Petroleum Corporation Limited, subject to certain conditions. The disputed areas were excluded from this provisional authorization. Under protest, the Appellant accepted the grant of authorization on December 09, 2013 despite certain areas being excluded. On October 1, 2015 the Board invited bids for development of CGD networks in those disputed areas in Ahmedabad. Adani submitted its application-cum-bid documents in respect of these areas.
- The principal relief claimed by the Appellant was the quashing of the grant of authorization to Gujarat Gas, questioning the exclusion of the disputed areas by the earlier authorization dated November 28, 2013 and challenging the vires of Regulation 18 framed by the Board under the PNGRB Act. The Appellant also contended that by virtue of Section 16 of the PNGRB Act, it was entitled to be treated as an entity with 'deemed authorization'.

Issues at hand?

- The issues for consideration before the Supreme Court (SC) were as follows:
  - The scope of 'deemed authorisation' clause under the proviso to Section 16 of the PNGRB Act.
  - The validity of Regulation 18 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 of being violative of Articles 14 and 19(1)(g) of the Constitution of India.
  - Whether the exclusion of the disputed areas from the authorization granted to the Appellant was justified?

Decision of the Court

- After analysis of the pleadings submitted by the parties and based on the arguments advanced, the observation and directions of the SC are as follows:
  - On the scope of the 'deemed authorisation' clause under the proviso to Section 16 of the PNGRB Act, the decision in *Adani Gas Ltd. v. Union of India*[4] is held to have laid down the law incorrectly, and is hereby overruled.
  - It is held that the 'deemed authorization' clause under proviso to Section 16 is subject to other provisions of Chapter IV, including Section 17 and, further, that only entities granted authorization by the Central Government, fell in that category. As a sequitur, it is held that entities which had received authorization from States, had to seek authorization under the PNGRB Act, in terms of Section 17(2), and in compliance with the conditions spelt out under the CGD Regulations.
  - It is held that Regulation 18 is neither arbitrary nor ultra vires. The objective underlying Regulation 18 is compatible with the overall objectives of the PNGRB Act. Regulation 18 is not contraindicated by any specific provision of the Act. Further, as a sectoral regulator, PNGRB is

[4] (2019) 3 SCC 641

entrusted with the power to frame appropriate regulations to ensure the objectives of the Act, and thus the challenge to Regulation 18 cannot succeed.

- It is also held that the Appellant's claim is precluded by the principle of approbate-reprobate, as it accepted authorization granted by PNGRB (including exclusion of disputed areas), furnished the performance bond and even participated in the auction for the excluded areas, and only thereafter challenged authorization when its bid was unsuccessful.

Our viewpoint

The SC, in view of the above observations and findings, dismissed the appeals and directed the Appellants to pay a cost of INR 10 lakh to the Union of India. Apex Court rightly observed that although the position in law was clarified by the five judge Constitution Bench ruling in Re Special Reference of 2001 as far back as in 2004, and pursuant to the PNGRB Act, the Appellant consciously applied for authorization in 2008, later secured temporary authorization to complete certain maintenance works, and was denied authorization in 2013, by initiating the present litigation in 2015, it has in effect stalled the authorization given to Gujarat Gas. Its challenge to Regulation 18 was an instance of speculative litigation which has led to avoidable delay (and the consequential escalation of cost) of the development of the network in question.

Prayatna Developer Pvt Ltd v. Andhra Pradesh State Load Despatch Centre & Ors

CERC Order dated September 27, 2021, in Petition No. 342/MP/2021

Background facts

- Prayatna Developer Pvt Ltd (**PDPL**) was selected as the successful bidder in a bid conducted by NTPC and accordingly a Letter of Intent (LoI) was issued to PDPL for development of the solar PV project of 50 MW capacity in the Kurnool Ultra Mega Solar Park, Andhra Pradesh.
- The project was declared commissioned on October 21, 2017 however, since January 2019, APSLDC began issuing telephonic instructions to PDPL to clam down generation from its power project in Andhra Pradesh citing grid safety and security as reasons.
- On October 17, 2019 PDPL filed the present petition before CERC, wherein PDPL sought for grant of 'must run' status from APSLDC and issuance of directions to APSLDC to forthwith stop issuing instructions of backing down of solar power from the PDPL's solar power project.
- On September 21, 2020 APSLDC filed a Writ Petition before the High Court of Andhra Pradesh (**HC**) and the proceedings before CERC were stayed. However, the Writ Petition was dismissed by the HC.
- On February 04, 2021 the HC in Writ Petition No. 21512 of 2020 directed that the matter should be heard afresh and granted liberty to APSLDC to raise its objections in relation to maintainability of the present petition and the jurisdiction before CERC.

Issue at hand

- Whether PDPL can approach CERC for interpretation of provisions of the IEGC?

Decision of the Commission

- Since the NTPC coal based stations could be located anywhere in the country, the scheme of the NSM (Phase-II Batch-II Scheme) has the ingredients of a composite scheme of generation and sale in more than one State. CERC referring to the *Energy Watchdog v. CERC & Ors*[5] held that the expression 'composite scheme' does not mean anything more than a scheme for generation and sale of electricity in more than one State.
- CERC observed that the present NSM scheme has the ingredient of generation and sale of electricity is in more than one state, the same is covered under the 'composite scheme' and is consequently under the jurisdiction of the CERC. Thus, CERC held that it is the appropriate forum for deciding on applicability or otherwise, of the provisions of IEGC.

Our viewpoint

This order affirms that the CERC is the appropriate Commission for deciding on applicability or otherwise, of the provisions of IEGC, which is a relief for the renewable generators who are being curtailed illegally after having a 'Must Run' status as per law.

[5] (2017 (14) SCC 80)

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