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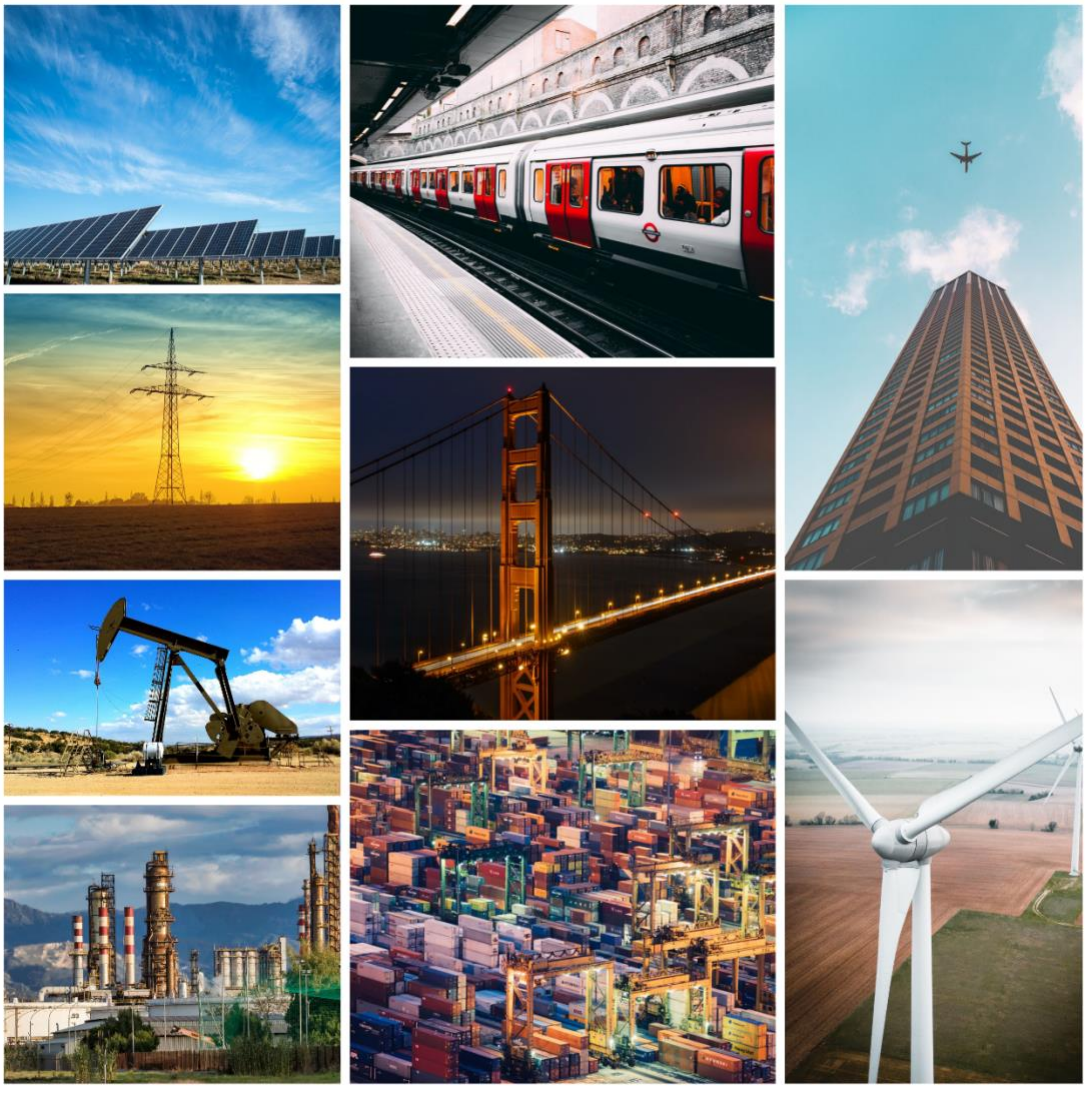
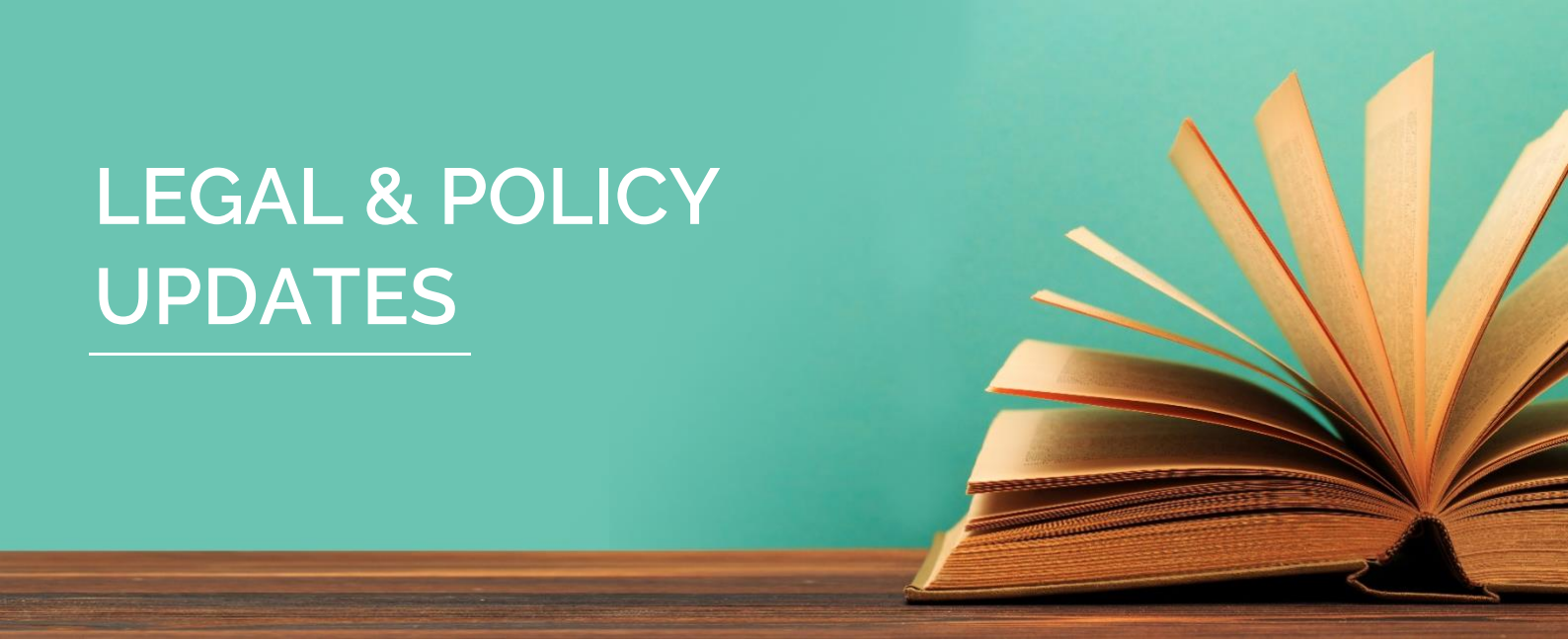
PROJECTS, ENERGY & INFRASTRUCTURE

MONTHLY NEWSLETTER

NOVEMBER 2021



LEGAL & POLICY UPDATES



In this Section

Directions by Ministry of Power for automatic pass through of fuel and power procurement cost in tariff

- The Ministry of Power (**MoP**) vide its notification/letter dated Nov 11, 2021 issued a direction to all State and Union Territory Governments, State Electricity Regulatory Commissions (**SERCs**)/Joint Electricity Regulatory Commissions (**JERCs**) regarding automatic pass through of the fuel and power procurement cost in tariff for ensuring the viability of the power sector. This letter/notification has been issued in order to ensure a mechanism for timely automatic pass through of fuel cost.
- Key aspects:
  - In order to ensure that the power sector does not face any constraints in maintaining assured power supply, all stakeholders must ensure that there is timely recovery of cost. This includes two steps:
    - Cost pass through by Generating Companies (**GENCOs**) to Distribution Companies (**DISCOMs**)
    - Cost pass through from DISCOMs to consumers
  - Due to lack of a robust mechanism for timely automatic pass through of fuel cost and transportation cost, GENCOs face constraints in maintaining stock of fuel during such periods. Similarly, the DISCOMs face revenue constraints as the corresponding pass through of cost is not done regularly and timely in the retail tariff. Timely collection of revenue from consumer would ensure regular payment by the DISCOMs to the GENCOs and coal companies.
  - Section 62(4) of the Electricity Act, 2003 provides that the tariff or part of any tariff can be amended more frequently (more than once) in any financial year in respect of any changes expressly permitted under the terms of any fuel surcharge formula, as may be specified.
  - The formula as mentioned in Section 62(4) of the Electricity Act, 2003 adopted by the various States and the present mechanism leads to delays in automatic pass through. Taking into account the above, MOP has directed to all State Governments and SERCs/JERCs:
    - To change the mechanism in order to provide for automatic pass through in cost of tariff on account of change in law/power purchase costs in accordance with the formula laid down by the SERCs
    - To consider adopting the formula given in the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 till a suitable formula is prescribed by the SERCs
    - After giving effect to the pass through, calculation sheets to be sent to the commissions, which shall verify and confirm the pass through within 60 days
    - SERCs are directed to place the mechanism as directed in this letter/notification with immediate effect

Revised scheme for flexibility in generation and scheduling of thermal and hydro power stations

- The Ministry of Power (**MoP**) on November 15, 2021 had notified a revised scheme for ensuring flexibility in generation and scheduling of thermal and hydro power stations through bundling with renewable energy and storage power. The detailed mechanism, which was issued by the MoP on April 05, 2018, is now revised to cover replacement of thermal and hydro power with renewable energy power or renewable energy combined with Battery Energy Storage Systems (**BESS**), so that the distribution licensees can meet their Renewable Purchase Obligations (**RPOs**) within the existing contracted capacity.
- **Applicability**
  - This scheme is applicable to all coal/lignite/gas based thermal generating stations or hydro power stations (**Generating Station**).
  - The following cases are eligible under this scheme:
    - Renewable Energy (**RE**) power plant co-located within the premises of a Generating Station
    - RE power plant located in the vicinity i.e., within 100 km of a Generating Station
    - RE power plant co-located within the premises or located in the vicinity of a Generating Station suppling RE power to procurers of another Generating Station, located at a different location and owned by the same generating company
  - Any generating company having such Generating Station may establish a RE power plant which is co-located within the premises or at new locations within the vicinity.
  - Bundling under this scheme is permissible for those cases where the RE power is injected through the existing electrical switchyard of the Generating Station.
- **Tariff determination of RE power plants**
  - For RE projects co-located within a Generating Station, the appropriate commission will determine the tariff for the renewable energy supplied. In this case, the project has to be set up through competitive Engineering, Procurement, and Construction (**EPC**) tendering.
  - In the case of renewable power projects located in the vicinity of Generating Station, power will be procured on a competitive bid basis.
  - A Generating Station or its subsidiary will be allowed to establish a renewable power project within its vicinity through a tariff-based competitive bidding process, provided a government-approved third party calls the bids.
  - The battery energy storage system with the renewable project should also be set up through a competitive bidding process.
- **Transmission charges**
  - No additional transmission charges will be levied for bundling of RE power with thermal/hydro power if the RE power plant is co-located or located within the premises of a Generating Station.
  - No transmission charges will be levied for use of Inter State Transmission System (**ISTS**) when a RE power plant located in one Generating Station is supplying power to procurers of another Generating Station located in different location but owned by the same generating company. Provided that the evacuation of RE power is available from the same switchyard of the Thermal/Hydro power plant, and further, such RE power is evacuated through the existing ISTS network without any augmentation.
  - The waiver of transmission charges for use of ISTS for sale of power through power exchange or to any third party will be as per the prevailing policy of the Government of India.
- **Scheduling and commercial mechanism**
  - Declared Capacity (**DC**) will be provided by a Generating Station as per the prevailing regulations of the appropriate Commission. The Generating Station will have the flexibility to use Thermal/Hydro power and RE power to meet its scheduled generation once the schedule for the next day is received.
  - The sum of all the power supplied from thermal or hydro power station and renewable sources on an actual basis will be considered for Deviation Settlement Mechanism.
  - The DC of the thermal/hydro Generating Station will be in accordance with the PPA and the availability of primary fuel, and not based on the availability of additional RE power.
  - If any changes are required in the regulations for the implementation of this scheme, then the required changes will be done by the appropriate Electricity Regulatory Commission.
  - The RE power will be supplied to the beneficiaries at a tariff which will be less than the Energy Charge Rate (**ECR**) of the Generating Station.
  - Net savings, if any, from supply of RE power instead of thermal or hydro power under existing PPA will be passed on to the beneficiary by the generating company on a monthly basis. The net

savings will be shared between the generator and the beneficiary in the ratio of 50:50 and the maximum cap for the Generator is 7 paise/kWh.

- **Deviation settlement mechanism and scheduling**
  - Deviation, if any, will be applicable to the scheduled generation from thermal/hydro power station and the sum of actual generation from thermal/hydro power station and RE power sources. Further, no DSM charges will be payable/receivable by the Generating Station if it meets its scheduled generation.
- **Renewable Purchase Obligation**
  - Energy procured by the beneficiaries will qualify towards meeting RPOs.
- **Additional mechanism for RE bundling**
  - The Distribution Licensee can procure RE power under the existing PPA to meet their RPO. There is no requirement for any additional agreement in those cases where the landed tariff of RE power is less than the ECR of the Generating Station.
  - The Generating Stations are allowed to sell RE power to third parties/power exchange when it is not feasible to replace the thermal/hydro power due to technical minimum schedule and forced/planned shutdown of a Generating Station. Further, the PPA holders will have the first right to schedule the power from the Generating Stations and if the PPA holders doesn't schedule the power, then the Generating Station will have the right to sell the unscheduled RE power in the market. In such conditions, a RE power plant is not required to share gains/losses derived through sale of such RE power in the market.

MNRE acknowledges supply disruptions in PV imports with order on dispute resolution

- On November 3, 2021 Ministry of New and Renewable Energy (**MNRE**), basis the representations and requested made by renewable power developers for extension in project commissioning timelines and postponement of scheduled date of imposition of Basic Customs Duty (**BCD**) on import of solar cells & modules, issued an Order to provide relief to such developers (**Order**). Key aspects of the said Order are as under:
  - MNRE has acknowledged that there are some temporary disruptions in supply of imported solar PV modules on account of various factors.
  - It has been noted that generally, procurement of solar PV modules for the solar power project takes place only in the last few months of commissioning and so only the projects scheduled for commissioning in coming 5-6 months are likely to get affected due to this temporary situation. In order to mitigate the situation, MNRE has already granted time extensions on account of COVID-19.
  - For projects under implementation through MNRE's Renewable Energy Implementing Agencies (**REIAs**) and having SCD before April 1, 2022 (after considering all time extensions including the extensions given on COVID-19) and considering the scheduled date of imposition of BCD on import of solar cells & modules is April 1, 2022, MNRE has decided to empower the Dispute Resolution Committee (**DRC**) to look into any additional time extension requirement of these projects in exceptional circumstances
  - As per the present provisions of Dispute Resolution Mechanism, renewable power developers are required to approach the concerned REIAs. In case the applicant developer is not in agreement with the decision of REIAs on the relief sought, the renewable power developer will have the option of approaching DRC by filing an appeal within 21 days of REIA's order. However, as a one-time special dispensation, MNRE has empowered DRC to take up such projects directly without waiting for the decision of REIAs. The concerned renewable power developers can apply to DRC within one month of this order.

MNRE provides clarification on the issuance of undertaking for extension of project timelines

- On November 3, 2021 Ministry of New and Renewable Energy (**MNRE**) provided further clarification on the issue of change-in-law in the context of its earlier Office Memorandum issued on September 15, 2021 wherein it had directed renewable power developers to submit an undertaking as a pre-requisite for extension of timelines of the projects (**OM**).
- MNRE, by way of its present OM, has clarified that the change-in-law provisions will continue to be governed by the provisions of Power Purchase Agreements (**PPA**s) and will be decided by the Appropriate Commission.

RECENT JUDGMENTS

In this Section

Determination of Forbearance and Floor Price for the REC Framework

CERC Order dated 18.11.2021 in Petition No. 05/SM/2020

Background facts

- The Ld. Central Electricity Regulatory Commission (**CERC**) vide Order dated June 17, 2020 (**First Order**) in Petition No. 05/SM/2020 had determined price for Renewable Energy Certificates (**REC**s) i.e., Forbearance Price, at INR 1000 per MWh and Floor Price at INR 0 per MWh for Solar and Non-Solar RECs.
- The CERC in the First Order had inter alia held that the aforesaid prices for Solar RECs will be effective from July 01, 2020 and shall remain in force till June 30, 2021 or until further orders. For Non-Solar RECs, the prices will be effective for the RECs issued on or after April 01, 2017.
- The CERC also held that for the RECs issued prior to April 01, 2017, trading shall take place in accordance with the Commission's Letter dated May 28, 2018 (wherein CERC inter alia stated that trading in Solar RECs would be as per the Order dated March 30, 2017 passed in 2/SM/2017 and for Non-Solar RECs, the RECs issued (i) prior to April 01, 2017 would be at floor price of INR 1500/MWh and (ii) after April 01, 2017 would be at INR 1000 (as per Order dated March 30, 2017 in 2/SM/2017) and subject to the final outcome of the Hon'ble Supreme Court in Appeal No. 4801/2018.
- The First Order was challenged before the Appellate Tribunal for Electricity (**APTEL**), wherein the APTEL vide its judgment dated November 9, 2021 in Appeal No. 113 of 2020 and Batch Appeals had set aside the First Order and inter alia held that the RECs which were still valid for trading at the power exchange as on June 17, 2020 and have remained unsold till date, shall continue to be valid and be good for sale/purchase for the remainder period of their validity. The purchase and the period of such extended validity, by the obligated entities shall be treated as compliance with Renewable Purchase Obligation (**RPO**) targets. APTEL also directed the CERC to issue formal orders to this effect within two weeks.

Issues at hand

- Whether the RECs that were issued on June 17, 2020 and have remained unsold, can be traded for the remainder period of their validity?
- Whether purchase of the RECs by the obligated entities for the RECs which were issued on June 17, 2020 and have remained unsold, can be treated as a valid compliance of the RPO targets?

Decision of the Commission

- Pursuant to the aforesaid direction passed by APTEL, the CERC in the Order dated November 18, 2021 inter alia held that RECs which were still valid for trading at the power exchange under REC Regulations as on June 17, 2020, and have remained unsold till date, shall continue to be valid and be good for sale or purchase for the then remainder period of their validity, computed with reference to June 17, 2020.

- The purchase thereof, during the period of such extended validity, by the obligated entities shall be treated as the compliance with RPO targets.

HSA
Viewpoint

The present Order dated November 18, 2021 by the CERC was passed pursuant to the direction(s) given by the APTEL in the judgement dated November 09, 2021, which was critical to safeguard the interest of several renewable generators. In terms of the APTEL's Order, the CERC has correctly held that the RECs which were valid for trading on June 17, 2020 and have remained unsold, can be traded for the remainder period of their validity and same would be considered as a valid RPO compliance by obligated entities. This order brings much needed relief to the generators.

Rattan India Power Limited v. Maharashtra State Electricity Distribution Company Ltd

MERC Order dated 16.11.2021 in Case No. 83 of 2021

Background facts

- The present Petition was filed by the Petitioner i.e. Rattan India Power Limited, before the Maharashtra Electricity Regulatory Commission (**MERC**) seeking declaration and compensation on occurrence of the several Change in Law (**CIL**) events.

Issues at hand

- Whether the Petitioner is entitled to reliefs and compensation on account of CIL events arising out of the Power Purchase Agreements (**PPAs**) signed between the Petitioner and MSEDCL under Section 63 competitive bidding process, for the following events:
  - Imposition of Port Congestion Surcharge by Indian Railways
  - Increase in Surface Transportation Charges due to Coal India Limited's Notifications dated November 13, 2013 and November 15, 2017 & Coal Sizing/Crushing Charges due to Coal India Limited's Notifications dated December 16, 2013 and August 31, 2017
  - Increase in charges towards transportation of fly ash pursuant to MOEFCC notification dated January 25, 2016

Decision of the Commission

- MERC, after analyzing the facts and circumstances of the case, observed and held as under:
  - **Disallowed imposition of Port Congestion Surcharge**
    - Imposition of Port Congestion Surcharge by Indian Railways qualifies as a CIL event as held in Judgment dated August 14, 2019 passed in Appeal No. 119 of 2016 '*Adani Power Rajasthan Limited v. RERC & Ors*'[1].
    - Petitioner has used imported coal as alternate coal for mitigating shortfall of domestic coal and the MERC in its Order dated November 16, 2021 in Case No. 240 of 2020 has already allowed compensation to the Petitioner for difference in landed cost of domestic coal and alternate coal.
    - As landed cost of alternate coal (including imported coal) includes all taxes, duties, transportation cost, etc., it also includes the said Port Congestion Surcharge paid by the Petitioner on import of coal.
    - Hence, compensation for the same is already included in dispensation as allowed in Order dated November 16, 2021 and, therefore, there cannot be any double accounting of CIL compensation.
  - **Disallowed imposition of Surface Transportation and Sizing/Crushing Charges**
    - Petitioner's primary contention was that as on the Cut-Off date i.e., July 31, 2009 (as per the PPAs), the applicable Surface Transportation Charges were levied as per the Coal India Limited's Notifications dated December 12, 2007, which were later revised through Notifications dated December 15, 2009, November 13, 2013 & November 15, 2017.
    - Similarly, the applicable Crushing/Sizing Charges levied by Coal India Limited were in line with Coal India Notification dated December 12, 2007 which was later revised through Notifications dated December 06, 2013 and August 31, 2017.

[1] Appeal no. 284 of 2017 & Appeal no. 09 of 2018

- The CERC in its Order dated October 18, 2019 in 10/SM/2019 held that Surface Transportation Charges and Sizing/Crushing Charges are not part of the price of coal notified by Coal India Limited and, therefore, not considered in the price of coal used for compilation of the coal price index.
- However, the MERC categorically stated that Surface Transportation and Sizing/ Crushing Charges are levied as per the clauses of Fuel Supply Agreement (**FSA**), which were part of the bid price quoted by the Petitioner.
- The MERC also noted that the CERC in its Order dated March 29, 2019 in Petition No. 327/MP/2018 (which was subsequent to its Suo Moto Order dated 18 October 2019) has rejected Surface Transportation Charge and Sizing Charges as CIL events as same was part of FSA document.
- The MERC, while disallowing the said claim, also relied on APTEL's Judgment dated June 07, 2021 in Appeal No. 158/2017 in *Adani Power Limited v. CERC & Ors* wherein the APTEL had rejected the claim of Sizing Charge and Surface Transportation Charge as CIL events.

– **Disallowed imposition of Fly Ash Transportation Charges**

- The MERC noted that till date, the Petitioner had not incurred any expenses on account of Fly Ash Transportation. In this regard, the MERC relied on Ministry of Power's (**MOP**) Letter dated September 22, 2021 wherein the MOP has given guidelines on supply of fly ash and accordingly directed the Petitioner to take all efforts to earn revenue from sale of fly ash instead of claiming increase in expenses under CIL.
- The MERC held that the claim regarding Fly Ash transportation is premature as no actual impact has been incurred and, accordingly, disallowed the compensation towards the same.

– **Carrying Cost**

- Though the MERC disallowed the CIL claims of the Petitioner, it inter alia held that filing the Petition for claiming CIL at delayed stage and claiming carrying cost till the date of filing of the Petition is not a prudent practice and ought to be rejected by the Commission. Petitioner cannot take undue advantage of claiming carrying cost till the date of filing of the Petition for the CIL events wherein the said Petition has been filed in delay by the Petitioner.
- Though Ld. MERC disallowed the CIL claims of the Petitioner, it inter alia held that filing the Petition for claiming CIL at delayed stage and claiming carrying cost till the date of filing of the Petition is not a prudent practice and ought to be rejected by the Ld. MERC. Petitioner cannot take undue advantage of claiming carrying cost till the date of filing of the Petition for the CIL events wherein the said Petition has been filed in delay by the Petitioner.

HSA
Viewpoint

The MERC has recognized that the compensation for CIL events is based on the principles of restitution i.e., to compensate a party affected by CIL event and to restore to the same economic position as if such CIL event had not occurred. However, while allowing the same, specific facts and circumstances of the case ought to be considered and a blanket allowance of CIL cannot be permitted. Further, based on factual matrix, the MERC has suitably held that there cannot be a double accounting of compensation. Lastly, the MERC has correctly applied the law to hold that delay on part of a litigant cannot in-turn be a reward due to such delay.

Nisagra Renewable Energy Pvt Ltd & Juniper Green Energy Pvt Ltd v. Maharashtra Electricity Regulatory Commission and Anr

APTEL Order dated 16.11.2021 in Appeal No. 163 & 171 of 2019

Background facts

- The present Appeal has been filed by the Appellants i.e. Nisagra Renewable Energy Pvt Ltd & Juniper Green Energy Pvt Ltd (**Appellants**) challenging the Order dated July 23, 2020 passed by Ld. Maharashtra Electricity Regulatory Commission (**MERC**) in Case Nos. 61 and 62 of 2020 (**Impugned Order**), whereby the Appellants are aggrieved to the extent (a) the MERC in the Impugned Order has restricted the compensation for a limited capacity of solar modules/panels as against the total installed Direct Current (**DC**) capacity; and (b) the MERC in the Impugned Order has allowed carrying cost only at LPS rate mentioned in the PPA as against the actual rate of borrowing as claimed by the Appellants.
- MSEDCL had issued Request for Selection (**RfS**) on March 27, 2018 and through the bidding process had selected the Appellant as successful bidder.

- In the meanwhile, the Ministry of Finance (**MoF**) issued notification dated July 30, 2018 imposing Safeguard Duty on import of solar cells for two years.
- In light of the above, the Appellant on January 24, 2019 issued Change in Law (**CIL**) notices to the MSEDCL for claiming compensation on account of introduction of Safeguard Duty on import of solar cells. Accordingly, the Appellant on May 27, 2019 filed the Petitions before the MERC for seeking declaration that the imposition of Safeguard Duty on import of solar cells vide Notification dated July 30, 2018 was a CIL event.
- On July 18, 2019, a Common Order was passed by MERC declaring imposition of safeguard duty as change in law event.
- On February 14, 2020, fresh Petitions were filed by the Appellant giving the details of the expenditure incurred on account of imposition of Safeguard Duty, and consequently claiming compensation on account of the same along with the Carrying Cost at the actual rate of borrowing.
- The Impugned Order was passed by the MERC on July 23, 2020, wherein the Commission devised a mechanism and limited the compensation by restricting the project DC capacity to 39.67 MW as against the total DC capacity of 43.72 MW for Juniper and to 93.33 MW as against the total DC capacity of 101.79 MW for Nisagra.
- Further, the MERC through the Impugned Order only allowed carrying cost at the LPS rate mentioned in the PPA as against the actual cost of capital or the actual cost of borrowing from Indian Renewable Energy Development Agency (**IREDA**).
- Aggrieved by the above, the Appellants filed the present Appeal before the Hon'ble APTEL.

Issues at hand

- Whether the Appellants are entitled to claim adequate relief for the actual DC capacity installed at project site?
- Whether Appellants are entitled to LPS or the rate of Carrying Cost as calculated by the Appellants?

Decision of the Tribunal

- To the extent the compensation for installed DC capacity is concerned, the APTEL through the present Order has held that the Impugned Order is contrary to the terms of the PPAs as well as settled law on the subject, particularly because it is based on normative/arbitrary formula different from the actuals.
- Under the PPAs, there is no restriction on the DC capacity to be set up or the maximum declared CUF. Further, the CUF as declared by the Appellants has been accepted by MSEDCL. The higher installed DC capacity results in higher generation from the Project while using the same AC infrastructure, thereby optimizing the utilization of the AC infrastructure, leading to a lower cost of energy, benefits of which have statedly been passed on to MSEDCL as lower tariff in terms of the PPAs. Moreover, DC overloading is accepted as an industry practice for Solar Projects.
- Since, MSEDCL has already taken the benefit of higher generation at a lower tariff, therefore, the MSEDCL cannot claim that DC overloading is high.
- Impugned Order passed by the MERC is contrary to the terms of PPA which do not bar installation of higher DC capacity, hence MSEDCL cannot escape from compensating the Appellant appropriately for the full DC capacity installed for the Project.
- Qua Carrying Cost, APTEL held that Carrying Cost is the value for money denied at the appropriate time and is different from LPS which is payable on non-payment or default in payment of invoices by the due date. Since the payment of Carrying Cost is a part of the Change in Law clause which is an in-built restitution clause, therefore, the Carrying Cost on the CIL amount should be on actuals and not the LPS rate specified in the PPAs.
- Further, it directed the MERC to hear the parties afresh on the issue of Carrying Cost and decide on the appropriate rate for full recompense after considering the pleas of the Appellants.

HSA
Viewpoint

The present order passed by APTEL is a landmark order to the extent it settles that the installation of higher Direct Current capacity is an accepted norm and adequate restitution to this effect must follow to the benefit of the generator . The order also clarified that Carrying Cost, being a part of the Change in Law clause of PPA, is an in-built restitution clause and the same should be allowed at actuals and not at the LPS rate specified in the PPA.

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