

PROJECTS, ENERGY & INFRASTRUCTURE

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LEGAL & POLICY UPDATES



In this Section

[MNRE simplifies guidelines for Kusum Solar Program](#)

[MNRE issues new direction w.r.t restoration of bank guarantees](#)

[Andhra Pradesh Electricity Commission – Draft Andhra Pradesh Regulatory Commission \(Terms and Conditions for Short Term Procurement/Sale of Power\) Regulation 2021](#)

MNRE simplifies guidelines for Kusum Solar Program

- On December 14, 2021 Ministry of New and Renewable Energy (**MNRE**) issued new guidelines allowing states can invite bids to empanel vendors for different regions to install standalone solar pumps under the Pradhan Mantri Kisan Urja Suraksha evam Utthan Mahabhiyan Program (**PM-KUSUM**). However, the price discovered in the latest centralized tender would be considered as the ceiling price.
- MNRE has also decided to increase the implementation period to 24 months from the date of issue of approval for all three components of the PM-KUSUM Program in order to give sufficient time for implementation. Extension beyond 24 months will be considered as per the program guidelines.
- The provision for incentivizing farmers who consume less electricity than the benchmark consumption will be an option as not all farmers may be willing to install necessary meters to avail incentives. The distribution companies will inform the farmers about the benchmark consumption and the amount of incentive per unit they can avail in case of lower consumption.

MNRE issues new direction w.r.t restoration of bank guarantees

- On December 16, 2021 Ministry of New and Renewable Energy (**MNRE**) issued an Order by virtue of which it has directed MNRE's renewable energy implementing agencies (**SECI/NTPC/NHPC**) to incorporate the following amount in all renewable energy tenders:
 - Earnest Money Deposit - 2% of the estimated project cost
 - Performance Bank Guarantee - 4% of estimated project cost (in case of site specified by the procurer) and 5% of estimated project cost (in case of site selected by the generator)

Andhra Pradesh Electricity Commission - Draft Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Short Term Procurement/Sale of Power) Regulation, 2021

- On November 3, 2021 The APERC had notified a draft Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Short Term Procurement/Sale of Power) Regulations, 2021.
- Key aspects these regulations are:
 - **Extent and commencement**
 - This Regulation supersedes all the guidelines/directions issued by the Commission pertaining to short-term power procurement.
 - This Regulation shall be applicable to the State of Andhra Pradesh.

- **Demand estimation**
 - State Load Despatch Centre (**SLDC**) shall carry out the monthly estimation of demand of each block for 15 minute duration on the basis of historical data, demand forecasts and deep machine learning (to be used by the licensees and SLDC).
 - Weekly and day-ahead demand estimations by SLDC shall also take into consideration the weather forecasts.
 - Efficiency of AI tools for forecast of demand vis-à-vis the actual demand shall be assessed periodically.
- **Monthly power procurement plan**
 - On the 10th day of every month, every licensee shall inform the SLDC regarding its estimation of demand for each time block for the following month.
 - After assessing the demand, the SLDC shall inform the licensees regarding the power to be procured by each of them on a short-term basis for the following month within three working days from the receipt of the demand estimations from the licensees.
 - Upon receipt of the communication from SLDC, the licensees shall invite tenders.
 - After completion of bidding, the licensees shall place the details regarding the quantum and price of the power before the Andhra Pradesh Electricity Regulatory Commission (**Commission**).
 - After consideration of the details provided by the licensees, the Commission will communicate its decision and thereafter, on the basis of its approval, the licensees shall place orders for procurement.
- **Weekly power procurement plan:** On every Wednesday of the week, after assessing the demand on the basis of its own forecast and availability of power from all the sources including the sources on a short-term basis, SLDC shall communicate to the licensees regarding the short-term power requirement for the following week. The licensees have option to procure power as communicated by SLDC from the Term Ahead Market exchanges. All such procurement/purchase shall be approved by the Commission.
- **Day-ahead power procurement plan**
 - Every day by 10:00 AM, SLDC shall communicate regarding the power requirement for the next day to the licensees.
 - The licensees have option to procure power in day-ahead market; all such procurement/purchase shall be approved by the Commission.
- **Intraday purchases:** In case of less generation from the approved sources, the licensees may meet the variation by procuring the required power from the real-time/intraday market of the Power Exchanges.
- **Bilateral contracts**
 - The licensees are not allowed to purchase/procure energy through bilateral contracts except from the sources approved by the Commission.
 - In case the PPA with the approved sources is expired and procurement from them leads to reduction of purchase costs by the licensees, and the licensees still desire to procure from such sources, then the licensees shall approach the Commission at least 15 days before the commencement of the procurement.
- **Benchmark price for short-term power procurement:** The benchmark price for short-term procurement for a particular year shall be calculated as per unit weighted average price of the energy determined by the Commission for that year in the retail supply tariff order.
- **Ministry of Power guidelines on short-term power procurement:** The licensees shall follow the guidelines/procedure for short term power procurement as prescribed by the Ministry of Power (Government of India) from time to time.
- **Placing of information on website:** The monthly/weekly/day-ahead power requirement communicated by SLDC to the licensees as well as the power procurement by the licensees will be published on the websites of the licensees and the SLDC within 48 hours of such procurement.
- **Reserve shutdown**
 - In no case, the approved sources shall be put under reserve shut down without the prior approval of the Commission.
 - Any proposal for reserve shut down shall be placed at least three working days in advance before the Commission.
- **Sale of surplus power:** The licensees shall make all the efforts to sell the surplus power available during time blocks through the Power Exchanges.
- **Constitution of a dedicated cell**
 - Every licensee shall constitute a cell to monitor the prices in the market round the clock.

- The cell has power to purchase the power in real-time market of the Exchanges when the per unit landed price is below the per unit variable costs of the energy from the approved sources/stations.
- The cell has power to sell surplus energy including the surplus energy from wind and solar power plants in Green Term Ahead Market in real-time, intraday, day-ahead / week ahead market if such sales lead to reduction in overall cost of purchase.
- The guidelines shall be framed by the licensees for the functioning of the cell and the same shall be approved by the Commission.
- **Computation of landed prices of short-term procurement:** The licensees shall consider the following factors while computing the landed price:
 - The reduction in the GCV value of coal when it is stored for longer periods due to the shutdown of the approved thermal stations to accommodate market purchases.
 - The frequent shutdown of approved thermal stations to accommodate market purchases will lead to a reduction in the life of their equipment necessitating their replacement frequently which is causing an additional financial burden on the licensees in the form of additional capital expenditure.
 - The shutdown of the approved thermal stations to accommodate market purchases lead to the build-up of more coal stocks in the thermal stations with the result that these stations will declare higher availabilities. The said higher availabilities declared by the thermal stations will impose an additional financial burden on the licensees in the form of higher fixed costs.
- **Real-Time Data:** SLDC shall make available the real-time data of generation from all the sources.
- **Furnishing of the information to the Commission:** The licensees shall submit the following information to the Commission through email:
 - The details of real-time/intraday/day-ahead market power procurement and sales by the end of every day.
 - The details of weekly power procurement and sales in Term Ahead Market for the next week and the power supply status of the previous week before the end of the Wednesday of the present week.
 - The details of power procurement and sales for the next month and power supply status for the previous month before the end of the 10th day of the present month.
- **Power to relax time limits:** The Commission may relax the time limits as provided in this regulation by providing sufficient reasons in writing.
- **Power to remove difficulties:** The Commission may make any provision redundant if the same provision is causing difficulty in implementation of the provisions of this Regulations. This can be done through a general or specific order.
- **Power to amend:** The Commission may add, vary, alter, modify, delete or amend any provision of this Regulation.
- **Power to dispense with the requirement of the Regulation:** The Commission has power to dispense with any requirement of this Regulation after providing sufficient reasons in writing and with notice to the affected parties.
- **Savings**
 - The provisions of this Regulation are in addition to and not in derogation of the provisions of any other law/rules/regulations/scheme/contract.
 - Nothing in this Regulation shall bar the Commission from adopting any procedure which is in variance with any of the provisions of this Regulations.

RECENT JUDGMENTS



In this Section

Amplus Green Pvt Ltd v. Uttar Pradesh Power Company Ltd & Ors

Rajasthan Urja Vikas Nigam Ltd and Anr v. Solar Energy Corporation of India Ors

Sai Wadhwa Power Generation Ltd v. Maharashtra Electricity Regulatory Commission and Ors

M/s Maharashtra State Electricity Distribution Company Ltd (MSEDCL) v. M/s Balaji Stone Crusher and Ors

Indian Railways v. Uttar Pradesh Power Transmission Corporation Ltd & Ors

Amplus Green Pvt Ltd v. Uttar Pradesh Power Company Ltd & Ors

UPERC judgment dated December 01, 2021 in Petition No. 1757/2021

Background facts

- The present Petition has been filed before the Uttar Pradesh Electricity Regulatory Commission (**Commission**) seeking clarification on the Time-of-Day (**TOD**) structure as provided in tariff order dated November 30, 2017 and subsequent tariff orders, which are not applicable to the provisions of banking in Uttar Pradesh Electricity Regulatory Commission (Captive and Renewable Energy Generating Plants) Regulations, 2019 (**CRE Regulations, 2019**). Further, no separate Short Term Open Access Agreement is required for withdrawal and banking of power when there is an existing Long Term Open Access arrangement.
- The Petitioner is a Solar Power Developer (**SPD**) having capacity of 50 MW, and the SPD was set up pursuant to Memorandum of Understanding (**MoU**) dated February 21, 2018 entered with Government of Uttar Pradesh for its industrial captive users under open access.
- The Petitioner contended that in terms of the Regulation 31(1)(iii) of the CRE Regulations, 2019, the power banked in 'Peak Hours' (1700 Hrs to 2300 Hrs) and 'Off-Peak Hours' (2300 Hrs to 1700 Hrs) can be withdrawn in 'Peak Hours' and 'Off-Peak Hours' respectively. The TOD structure provided in tariff orders (including tariff order dated November 30, 2017) of the Commission are not applicable to the Regulation 31(1)(iii) of the CRE Regulations, 2019. The relevant excerpt of the Regulation 31(1)(iii) is set forth herein below:
'Withdrawal of banked power shall be allowed only as per TOD system i.e. withdrawal of power in the peak/off-peak hours shall not be more than the power banked in that respective TOD slot'

Issues at hand

- Whether the TOD slots as provided by the Commission vide its tariff orders are applicable to the provisions of banking and withdrawal of power under the CRE Regulations, 2019?
- What are the 'Peak Hours' and 'Off Peak Hours' for banking in CRE Regulations, 2019?
- Whether the Petitioner is required to sign new Short Term Open Access Agreement for withdrawal and banking of energy?

Decision of the Commission

- That the Commission, in terms of the pleadings/submissions held as under:
 - **Issue 1**
 - The intent of introducing TOD structure in tariff orders is to shift the load from 'Peak Hours' to 'Off-Peak Hours' so that DISCOMs can supply the power in 'Peak Hours' without any turbulence. On the other hand, the TOD system provided in the CRE Regulations, 2019 primarily deals

with feasibility of plants while maintaining the discipline of 'Peak Hours' and 'Off-Peak Hours'.

- The TOD system for banking as provided in CRE Regulations, 2019 is different from the TOD structure provided in tariff orders as the TOD structure in tariff orders deals with demand management on the consumer side.
 - The energy procured by the captive users is the energy which was banked with the DISCOMs and the same was not purchased from the DISCOMs. On the other side, TOD structure (which has four slots) as provided in the tariff orders has application when consumers are purchasing electricity from the DISCOMs. Thus, there are two separate transactions as one deals with the utilization of banked energy and the other deals with the purchase of electricity.
 - The TOD structure provided in the tariff orders is not applicable to the Regulation 31(1)(iii) of the CRE Regulations, 2019 as the objective of the Commission in the CRE Regulations, 2019 is to provide for only two slots i.e. 'Peak Hours' and 'Off-Peak Hours'.
- **Issue 2**
- As per the CRE Regulations, 2019 'Peak Hours'/'Off-Peak Hours' are such hours as declared by UPSLDC unless it is specified by an order of the Commission. Further, the 'Peak Hours' and 'Off-Peak Hours' are not declared by UPSLDC in terms of the CRE Regulations, 2019. Therefore, after examining the load curve of the licensee/DISCOMs, the 'Peak Hours' will be 1800 Hrs to 2400 (midnight) Hrs and 'Off-Peak Hours' will be from 0000 Hrs (midnight) to 1800 Hrs.
- **Issue 3**
- The Commission observed that the captive generating plant/captive users are not required to enter into separate Open Access Agreement for availing banked energy if the injection point and the withdrawal points remain same, also if the quantum of power generated by captive generating plant either for supply or banking of power does not exceed the quantum and the duration for which the open access has been granted



HSA
Viewpoint

The Commission has cogently dealt with the issue of 'Peak Hours' and 'Off-Peak Hours' as provided in the CRE Regulations, 2019 and the TOD structure provided in tariff orders. The clarity brought in by Order will assist the generators and other stake holders. Further, the approach of the Commission in determining the 'Peak Hours' and 'Off-Peak Hours' is also based on the fact that the load curve of the DISCOMs is different in winter and summer.

Rajasthan Urja Vikas Nigam Ltd and Anr v. Solar Energy Corporation of India and Ors

RERC Order dated December 13, 2021 in Petition No. 1905 of 2021 and 1933 of 2021

Background facts

- The Rajasthan Urja Vikas Nigam Ltd (**RUVNL**) had filed a petition on March 24, 2021 under Section 63 of the Electricity Act, 2003 for adoption of tariff for 1070 MW Solar PV power to be purchased by three Discoms for which bidding was conducted by Solar Energy Corporation of India Limited (**SECI**). The key issues involved were:
 - SC GIB Order in terms of which all existing and future overhead low and high voltage powerlines in the priority and potential habitats of Great-Indian Bustard shall be undergrounded.
 - Levy of Basic Custom Duty (**BCD**) on import of solar cells, modules and anels pursuant to MNRE OM dated March 09, 2021.
 - Increase in rates of BCD on import of solar inverters pursuant to MoF Notification dated February 01, 2021 whereby Exemption Notification has been rescinded.
- Rajasthan Electricity Regulatory Commission (**Commission**) passed an order dated July 23, 2021 by virtue of which the Commission adopted the tariff for the projects as agreed by the successful bidders for 1070 MW solar power as mentioned in the PSA dated January 13, 2021 between SECI and RUVNL.
- Order dated July 23, 2021 was challenged before APTEL by Green Infra Wind Energy Ltd (**Respondent No. 2**) bearing Appeal no. 251 of 2021. On October 12, 2021 APTEL remanded the matter back to Commission for hearing the matter further in relation to the three change in law events.

Issues at hand

- Whether increase in rates of BCD on import of solar inverters pursuant to the MoF Notification dated January 01, 2021, withdrawing the Exemption Notification qualifies as change in law under the Power Purchase Agreements?
- Whether levy of BCD on import of solar cells, modules and panels pursuant to MNRE OM dated March 09, 2021 with effect from April 01, 2022 qualifies as change in law under the Power Purchase Agreements?
- Whether the SC GIB Order qualifies as change in law under the Power Purchase Agreements?
- Whether increase in the rate of GST from 5% to 12% on renewable energy devices and parts for manufacture pursuant to MoF Notification No. 8/2021- Integrated Tax (**Rate**) dated September 30, 2021 qualifies as change in law under the Power Purchase Agreement?

Decision of the Commission

- That the Commission, in terms of the pleadings/submissions held as under:
 - From the perusal of the aforesaid Article of the PPA, it is clear that as per Article 12.1.3 of the PPA any change in rates qua Safeguard Duty, GST and BCD after the last date of bid submission, i.e., October 28, 2020 which resulted in change in overall cost of the project, then in that case such change will be treated as change in law.
 - Power Purchase Agreements clearly provisions that in case there are changes in the rates of Basic Custom Duty (**BCD**) after October 28, 2020 culminating into project cost change, then it will be treated as 'change in law' provided that Appropriate Commission recognizes such provisions in terms of Article 12.1.3 of PPA allowed the same
 - SC by its Order dated April 19, 2021 in a Writ Petition titled *M.K. Ranjitsinh & Ors. v. Union of India & Ors*¹ has issued certain directions in terms of which all existing and future overhead low and high voltage power lines in the priority and potential habitats of Great-Indian Bustard are necessarily required to be laid under-ground. It was further observed that the above order is applicable to the particular locations which are potential habitats of Great Indian Bustard. It is also noted that the bids invited for procurement of solar power by SECI were not location specific, therefore, SPDs can set up project anywhere in the state therefore they cannot claim the benefit of change in law relating to any specific location.



HSA **Viewpoint**

The present Order rightly allows the levy of BCD and increase in BCD as per the PPA contractual construct. Importantly, the Commission has disallowed the GIB Order as change in law interpreting the PPA/Bid Documents to hold that the project can be established anywhere in the State. This is an important judgment to this aspect as the developers who have new projects to establish and are governed by the present PPA terms will be impacted by this decision. It remains to be seen if the developers can be offered a similarly efficient connectivity as it was offered at the present location.

Sai Wadhwa Power Generation Ltd v. Maharashtra Electricity Regulatory Commission and Ors

APTEL Order dated November 26, 2021 in Appeal No. 106 of 2018 and batch

Background facts

- The present Appeals have been filed by various generators, DISCOMS and captive users challenging the orders passed by Maharashtra Electricity Regulatory Commission (**MERC**). The MERC held that certain generating units of Sai Wardha Power Generation Ltd (**SWPGL**) (**Appellant**) did not qualify as captive generating plant for the FY 2014-15 to 2017-18 in absence of meeting the proportionality criteria mentioned under Rule 3 of the Electricity Rules.
- The primary issue in the present appeals is in respect of determination of captive status of Group Captive Power Plant wherein the obligation of consumers are as specified in Section 9 of the Electricity Act, 2003 (**EA 2003**) read with Rule 3 of the Electricity Rules, 2005 (**Electricity Rules**). The captive consumers are required to hold 26% shares in the SPV and consume 51% of the power generated by the identified Captive Power Plant units.
- The current batch consisted of total 37 Appeals which have been divided into following seven sets:

¹ (Civil) No. 838 of 2019

- Appeal No. 234/2018 is filed by the Distribution licensee (Tata Power Company (**TPC (D)**)) against order dated February 09, 2018 and Corrigendum Order dated March 12, 2018 passed in Case No. 77/2015 declaring that Units 3 & 4 of the Appellant qualifies as captive units for the financial year 2014-15 and therefore SWPGL's captive consumers were entitled to the exemption from payment of Cross Subsidy Surcharge (**CSS**)
- Appeal No. 340/2018 and batch of appeals filed by Generator (**WPGL**) and captive consumers of SWPGL challenging review order dated October 22, 2018 in Case No. 132/2018 partially allowing the review of main orders dated February 09, 2018 and March 12, 2018 affording an opportunity to MERC and other distribution licensees to obtain the authenticated data from MSLDC and SWPGL and examine the same for determination of captive status of SWPGL for the financial year 2014-15
- Appeal No. 205/2018 filed by TPC-D challenging the main order dated March 19, 2018 in Case No. 159/2016 whereby the MERC declared that Units 3 & 4 of SWPGL qualifies as captive units for the financial year 2015-16 and therefore SWPGL's captive consumers were entitled to the exemption from payment of CSS
- Appeal No. 106/2018 filed by SWPGL challenging the main order dated March 19, 2018 in Case No. 159/2016 limited to the extent that the MERC declared 56.63 MUs to be unscheduled supply as the same was injected from IPP Units 1 & 2 and accordingly held that the power drawn by the captive consumers to that extent is deemed to have been drawn from respective distribution licensees with consequential implications as per applicable provisions of EA, 2003 and relevant rules and relevant regulations
- Appeal No. 341/2018 and batch of appeals filed by SWPGL and its captive consumers challenging review order dated October 22, 2018 in Case No.133/2018 partially allowing the review of main order dated March 19, 2018 in Case No.159/2016 in view of the difference in the data relied upon by the MERC pertaining to supply of electricity to captive consumers from IPP Units 1 & 2 and data derived by MSEDCL with a direction to MSEDCL with active engagement of TPC-D and other distribution licensees to obtain the authenticated data from MSLDC and SWPGL and re-examine the same for determination of captive status of SWPGL for the financial year 2015-16
- Appeal No. 196/2020 and batch of appeals filed by captive consumers challenging order dated October 22, 2020 in Case No. 175/2017 whereby the MERC has held that unit no. 3&4 of SWPGL do not qualify to be a captive generating plant for the FY 2016-17 as proportionality not been met by all the captive consumers
- Appeal No. 198/2020 and batch of appeals filed by captive consumers challenging order dated October 29, 2020 in Case No. 170/2017 whereby the MERC has held that unit no. 3&4 of SWPGL do not qualify to be a captive generating plant for the FY 2017-18 as proportionality has not been met by all the captive consumers

Issues at hand

- After considering the submissions made by the parties, following are the broad issues considered by the APTEL in the current Order:
 - Whether the issues involved in the present Appeals are covered by the APTEL's Judgment dated June 07, 2021 passed in *Tamil Nadu Power Producers Association v. TNERC & Anr*²?
 - Whether MERC has erroneously computed the quantum of power generated and supplied by SWPGL from non-captive Units 1 & 2 to its captive users?
 - Whether MERC has erred distinguishing between the quantum of power generated and supplied by SWPGL from the Captive Units (3 & 4) and quantum supplied by the non-captive/ IPP Units 1 & 2 to its captive users thereby violating the mandatory requirements of Rule 3 of Electricity Rules as affirmed by the SC in *Monnet Ispat & Energy Ltd. v. Union of India & Ors*³?
 - Whether the Impugned Original Orders have been passed in violation of principles of natural justice?
 - Whether in the facts of the present case SWPGL meets the captive requirements for FY 2014-15?
 - Whether NCLT's Order dated October 17, 2019 absolves the captive users from their liability to pay CSS?

Decision of the Tribunal

- Vide the current Order, APTEL held that the judgment dated June 07, 2021 in *Tamil Nadu Power Producers Association v. Tamil Nadu Electricity Regulatory Commission and Anr. (Supra)* (**TNPPA APTEL Judgment**) by virtue of which APTEL had inter alia declared the judgment dated September 22, 2009 of this Tribunal in appeal No.171/2008 titled as *Kadodara Power Pvt Ltd & Ors v. Gujarat*

² 2021 SCC Online APTEL 19

³ Civil Appeal No. 3285 OF 2009

*Electricity Regulatory Commission*⁴ as ‘per-incuriam’ and held that the requirement of proportionality for analysing the consumption of 51% of the aggregate generated electricity by the identified captive unit/units of a SPV is not applicable in the case of SPV. It was further held that the condition of consumption of 51% of aggregate generated electricity has to be met by the consumers of SPV collectively on par with the registered cooperative society. The APTEL through the present Judgment has held that the interpretation of Rule 3 of the Electricity Rules as made by it in TNPPA APTEL Judgment will be applied from the date of notification of the Electricity Rules i.e., from 2005.

- The APTEL examined the applicability of the observations made in TNPPA APTEL Judgment qua adjudication and verification of status of certain captive generation plant run by the Appellants. On the issue of prospective applicability of the TNPPA APTEL Judgment, APTEL held that for the ‘Doctrine of Prospective Overruling’ to be applicable, a judgment shall specifically carve out that earlier judgment is overruled or law is overruled and the interpretation will be applicable prospectively which does not apply to settled transactions. It was, however, observed that APTEL did not apply Doctrine of Prospective Overruling in the TNPPA APTEL Judgment since its ambit was limited to simply interpreting Rule 3 of the 2005 Rules. Therefore, the APTEL held that the TNPPA APTEL Judgment binds all parties including this Hon’ble APTEL and submissions regarding doctrine of prospective overruling do not apply in the matters.
- It was further held that when a court gives an interpretation to a particular statute or rule, that interpretation is deemed to have been applied since the beginning of that statute or rule. Accordingly, APTEL held that the TNPPA APTEL Judgment and its interpretation of Rule 3 will be applied from the date of notification of the Electricity Rules i.e., from 2005.
- In light of the TNPPA APTEL Judgment, APTEL held that for FY 2014-15, FY 2015-16, FY 2016-17 and FY 2017-18, Rule 3 should be interpreted only on following two counts:
 - Firstly, the captive consumers should demonstrate compliance with 26% shareholding in the captive generating plant.
 - Secondly, all the captive consumers put together who hold 26%, not proportionately, have consumed 51% of power. Out of the mix of captive consumers one may have consumed 90% of the requisite consumption and the rest may have consumed another 10% of required consumption, it would satisfy the requirement of consumption under Rule 3 because the doctrine of proportionality does not apply. Therefore, TNPPA Order binds all parties including this Hon’ble APTEL and submissions regarding doctrine of prospective overruling do not apply in the matters.
- In view of the aforementioned finding passed by APTEL, it held that the TNPPA APTEL Judgment is a law and shall apply in this case as well.
- Moreover, the APTEL rejected the submissions made by the TPC (D) and MSEDCL (DISCOMs) in respect of captive status of the unit 3 & 4 of the SWPGL captive power plant and has remanded back the matter to the MERC to decide the dispute within 3 months in line with the observation made by the APTEL.



HSA
Viewpoint

This is an important judgment from the perspective of captive generators, its users and the application of ‘doctrine of proportionality’. The judgment is also significant in terms of findings issued on the applicability of the decision laid in the TNPPA APTEL Judgment. This decision is crucial from the perspective of interpretation issued by APTEL from time to time in several judgments and as to how such judgments will have a retrospective effect and when the ‘doctrine of prospective applicability’ of a judgment can be applied.

M/s Maharashtra State Electricity Distribution Company Ltd (MSEDCL) v. M/s Balaji Stone Crusher and Ors

MERC Order dated December 03, 2021 in Case No. 141 of 2021

Background facts

- On April 22, 2021 Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) floated tenders for procurement of solar power through competitive bidding with a ceiling rate of INR 3.05/per unit for cumulative capacity 1300 MW. The last date for submission of bid was April 11, 2021. Thereafter, 33 bidders were qualified for the total capacity of 111 MW.
- Pursuant to the above, following events occurred:

⁴ Appeal No. 171 of 2008

- There were certain disruption(s) in supply of solar equipment from China which affected the timeline and ability to procure solar modules from China for the said successful bidders.
- On September 30, 2021 vide Notification No. 08/2021, Ministry of Finance increased Goods and Service Tax (GST) on import of Solar Modules and Solar Inverter from 5% to 12% (**MoF Notification**).
- On October 29, 2021, MSEDCL filed the Petition, inter alia for:
 - Adoption of (i) tariff and (ii) Draft PPA(s) with successful bidders for 111 MW as per the mandate under Section 63 of the Electricity Act, 2003 (**EA 2003**).
 - Approval of delay in procuring the solar equipment due to disruptions in China as a 'Force Majeure Event' (**FM Event**) and MoF Notification as 'Change in Law' (**CIL**) event.

Issue at hand

- Whether MERC can accord approval of the FM and CIL event at the time of adoption of tariff and approval of draft PPA for the competitive bidding under Section 63 of EA 2003?

Decision of the Commission

- MERC adopted the tariff for the aforesaid capacity of 111 MW as per the mandate of Section 63 of the EA, 2003 and also held that solar power procured from the said project shall be eligible towards fulfilment of MSEDCL's Solar RPO for the respective period.
- With regard to the approval of the FM and CIL event(s) as prayed, MERC held as under:
 - Respondents (**successful bidders**) are seeking reliefs based on provisions of draft PPA, however the said PPA(s) are yet to be signed and same will be executed post the adoption order of the Commission in the present matter.
 - However, as on date, there is no valid PPA agreement signed between parties and therefore, the claims regarding the FM and CIL events arising out of the draft PPA(s) cannot be made.
- Further, MERC also held that:
 - It is industrial practice to place/purchase orders for the project equipment only after financial closure (for which 6 months period from date of signing of PPA is provided).
 - Most of the equipment(s) are received on site only few months before the commissioning dates.
 - Hence, considerable time is available for actual purchase of equipment. During such period, purported difficulties in China may be resolved beside the fact that RFS/PPA does not mandate purchase of equipment only from China. The Respondents can avoid procuring solar modules from China by using better technical expertise/alternate remedies available in the market and thereby can avoid the implication of the said difficulties as cited by the Respondents. Similarly, rate of GST may undergo change during such period.
 - With regard to the CIL event, the APTEL in the Judgment dated September 20, 2021 in Appeal No. 215/21- *Tata Renewable Energy Ltd v. MSEDCL*⁵ has already held that the increase in the GST rate is a CIL event. Therefore, Respondents will be eligible to claim CIL compensation for GST rate pursuant to the execution of PPA.
- In view of the above, MERC concluded that:
 - Prayers for the claim of FM and CIL are premature at this stage, primarily in the absence of the execution of the PPA. Therefore, the said request/prayer of Respondents should be considered as void ab initio.
- Respondents are directed to approach MERC pursuant to execution of the PPA with all relevant documents for the said CIL claim.



HSA Viewpoint

The present order passed by APTEL is a landmark Order to the extent it settles that (a) the installation of higher DC capacity is an accepted norm and adequate restitution to this effect must follow to the benefit of the generator and (b) carrying cost being a part of the CIL clause of PPA is an in-built restitution clause and the same should be allowed actuals and not at the LPS rate specified in the PPA.

⁵ Appeal No. 32 of 2011

Indian Railways v. Uttar Pradesh Power Transmission Corporation Ltd & Ors

UPERC Judgment dated November 25, 2021 in Petition No. 1618/2020

Background facts

- The present Petition has been filed by the Indian Railways (**Petitioner**) before the Uttar Pradesh Electricity Regulatory Commission (**Commission**) seeking declaration that the recovery of charges by Uttar Pradesh State Load Despatch Centre (**UPSLDC**) on account of additional deviation and due to violation of sign change requirements as per the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) (Fourth Amendment) Regulations, 2018 (**DSM Amendment Regulations, 2018**) considering the Petitioner as a regional entity is illegal and contrary to Commission's Regulations.
- The Petitioner further appeals to the Commission to direct the Uttar Pradesh Power Transmission Corporation Limited (**UPPTCL**) to give non-discriminatory treatment for levying deviation charges and the charges for violation of sign change requirement.
- The Petitioner is procuring 100 MW power from Bhartiya Rail Bijli Company Ltd through long term inter-state open access for its Traction Substations (**TSSs**) located in the State of Uttar Pradesh. Further, the open access for inter-state transfer of power was granted to the Petitioner as deemed distribution licensee.

Issues at hand

- Whether the Commission has adopted the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2014 (**DSM Regulations, 2014**) and DSM Amendment Regulations and whether these regulations are applicable to the Petitioner, not being a regional entity?
- Whether UPSLDC has correctly raised charges of deviation, sign change violation or the same should be charged among intra-state entities in proportion to its share of quantum of power out of the total bills?

Decision of the Commission

- That the Commission, in terms of the pleadings/submissions, held as under:
 - **Issue 1**
 - Vide its order dated September 12, 2011 it adopted 'Procedure for Scheduling, Despatch, Energy Accounting, UI Accounting and Settlement system of Open Access Transactions'. Further, it is also stated that any amendment made by the Central Electricity Regulatory Commission (**CERC**) in deviation regulations should also be incorporated by the SLDC with modifications in these procedures.
 - In its various regulations framed from time to time, Commission has directed that the scheduling and dispatch along with UI Accounting to be governed as per the provisions specified by the CERC.
 - The Petitioner is a deemed distribution licensee in the State of Uttar Pradesh and it is connected with intra-state transmission system of UPPTCL and further, energy accounting and metering is performed at state Level by UPSLDC, thus, the Petitioner is an 'intra-state entity' and not an 'regional entity'.
 - The Commission vide its order dated December 31, 2018 directed UPSLDC to raise intra-state DSM bills as per the CERC's regulations i.e. DSM Amendment Regulations, 2018. Further, Commission vide its order dated February 16, 2021 in Petition No. 1538 of 2019 has adopted the DSM Amendment Regulations, 2018.
 - **Issue 2**
 - The objective of the DSM Regulations, 2014 and DSM Amendment Regulations, 2018 is to maintain the grid security as provided in the Uttar Pradesh Electricity Grid Code (**UPEGC**). Therefore, an intra-state entity also needs to comply with the said regulations and ensure that grid security is not affected due to deviation.
 - The apportionment of deviation charges between the intra-state entities will not reflect the actual violation by an intra-state entity and the charges levied through DSM Amendment Regulations, 2018 reflects the actual violation by an entity.
 - The Regulation 1.9(a) and 2.62 of the UPEGC provided that the State DSM Pool Account and Regional Pool Account are two separate DSM Pool Accounts which have different entities as its members and the Petitioner is a member of State Pool. The intra-state entities are charged independent of the charges levy on the State as regional entity.

- In light of the above, the Petitioner is liable to pay the deviation charges and charges for sign change as raised by the UPSLDC as per the methodology provided in the DSM Regulations, 2014 and the DSM Amendment Regulations, 2018.



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Viewpoint

While passing the preset Order, the Commission correctly held that the Petitioner is liable to pay charges on deviation and sign change as the Commission has adopted the DSM Regulations, 2014 and the DSM Amendment Regulations, 2018. Further, the approach of the Commission is correct in determining that the apportionment of charges between the intra-state entities will not reflect the actual violation/default by an entity since there are two different DSM Pool Accounts which have different set of members.

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