PROJECTS, ENERGY & INFRASTRUCTURE

MONTHLY NEWSLETTER

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LEGAL & POLICY UPDATES

In this Section

Ministry of New and Renewable Energy enlarges the scope of Approved List of Models and Manufacturers (ALMM)

- On January 13, 2022, Ministry of New and Renewable Energy (**MNRE**), Government of India vide its Office Memorandum amended Paragraph 3 of the Approved Models and Manufacturers of Solar Photovoltaic Modules (Requirements for Compulsory Registration) Order, 2019 to include the Renewable Energy Projects which apply for Open Access/Net Metering Projects within the ambit of the ALMM. The office memorandum also clarifies that 'Projects under Government Schemes & Programmes' include projects set up under Component 'A' of PM-KUSUM Scheme.
- Only the eligible models and manufacturers of solar PV cells and modules complying with the BIS Standards and included in the ALMM are eligible for use in Government Projects/Government assisted Projects/Projects under Government Schemes & Programmes/Open-Access/Net-Metering Projects, installed in the country, including Projects set up for sale of electricity to Government under the guidelines issued by Central Government under Section 63 of Electricity Act, 2003 and amendment thereof. Prior to this amendment, the ALMM did not cover Open Access/Net Metering Projects.

MNRE- Simplification of Guidelines for the implementation of PM-KUSUM

- On December 14, 2021, Ministry of New and Renewable Energy (**MNRE**), Government of India simplified the Guidelines for implementation of Pradhan Mantri Kisan Urja Suraksha evam Utthan Mahabhiyan Scheme that were released on July 22, 2019 (**Office Memorandum**).
- Vide the Office Memorandum, the States have been given an option to procure the standalone solar agriculture pumps (support for installation of which is provided to farmers under Component-B of the scheme) by following their respective process of inviting bids from the vendors for their empanelment and this has been done to supplement the centralised tendering process in states where the centralised process has not been able to yield sufficient vendors leading to a failure to complete the sanctioned capacities within the allocated time. However, the price discovered in the latest centralized tender shall be the ceiling price for the bids in the State tender thereby curtailing the liberty of the States on the matter of price.
- Moreover, owing to demands for extension of timelines prescribed for completion of sanctioned capacities by States, the implementation period of all the three components of PM-KUSUM has been increased to 24 months from the date of issue of sanction.
- With respect to feeder level solarization, in order to encourage conservation of groundwater and electricity, the 2019 guidelines incentivizes farmers who

consume less electricity than the benchmark consumption, by paying them per unit for the consumption less than the benchmark. However, in order to avail this mandatory benefit/incentive, it was necessary that the farmer installed a meter. Resultantly, the States were considering that some farmers may be unwilling to install meters to avail this benefit thereby hindering the effective implementation of the scheme. Therefore, the Government has decided to make the incentive optional. The farmers will no longer be under a compulsion to install meters. The DISCOM will inform the farmer of the benefit but leave it to his discretion whether to opt or not for the same.

Ministry of Power constitutes Conciliation Committee of Independent Experts (CCIE) for resolution of contractual disputes in projects implemented by CPSUs/Statutory Bodies under the administrative control of Ministry of Power

- On December 30, 2021, Ministry of Power (**MOP**), Government of India with a view to effectively, timely and amicably resolve contractual disputes between the Developer and the Contractors of power sector projects and so as to ensure that such projects are completed in a time-bound manner and no unnecessary capital or human resource is wasted towards resolution of unwarranted legal issues, decided to constitute Conciliation Committee of Independent Experts (**CCIE**).
- The Office Memorandum of the MOP states that there shall be three CCIEs, each CCIE remaining valid for a period of three years (subject to extension of validity for a maximum period of 5 years). Further, each CCIE shall have three members who shall be appointed amongst the following three categories: (i) Former Officer of the rank of Secretary/Add. Secretary to the Government of India; (ii) Sector Experts having substantial domain knowledge of project development and O&M of power projects; and (iii) Experts in finance with experience in senior positions of financial institutions, provided that one member in each CCIE belongs to the (ii) category. The working of CCIE shall be entrusted to the Central Electricity Authority.
- The conciliation proceedings envisaged under Part III of the Arbitration and Conciliation Act, 1996 are to be completed in each case through five sittings within a period of three months from the date of reference. However, in exceptional circumstances and for reasons to be recorded in writing, the period can be extended for a further period of three months.
- The OM also makes clear that the conciliation proceedings are not to be treated like arbitration proceedings with strict legal formalities but must be undertaken with a sense of ‘mutual give and take’ in the spirit of settlement. It also provides an ad-hoc, Standard Operating Procedure which lays down the manner of working of the Conciliation Committee.
- Upon conclusion of conciliation proceedings, if the parties agree on a settlement agreement, such agreement shall be entered into in writing and must be signed by both the parties and authenticated by at least two conciliators so as to bind the parties in terms of Section 73 of the Arbitration and Conciliation Act, 1996. Thereafter, all necessary actions for implementation of such settlement agreement must be taken within a period of 30 days unless an extended period is agreed to in the settlement agreement provided such extended period shall not exceed 60 days. However, if the conciliation proceedings fail, the parties may take recourse to Courts but shall be simultaneously precluded to avail the option of arbitration.

Ministry of Power seeks comments on Draft Electricity (Late Payment Surcharge and Related Matters) Rules, 2021

- On December 25, 2021, Ministry of Power (**MOP**), Government of India issued the Draft Electricity (Late Payment Surcharge and Related Matters) Rules, 2021 (**Draft Rules**) seeking comments on them till January 10, 2022 (now extended till January 24, 2022). The Draft Rules, when notified, intend to repeal and replace the Electricity (Late Payment Surcharge) Rules, 2021 in effect and notified on February 22, 2021.
- **Late Payment Surcharge**
  - The Late Payment Surcharge (**LPS**) shall be payable on the payment outstanding after the due date at the base rate of Late Payment Surcharge applicable for the period for the first month of default.
  - The rate of LPS for the successive months of default shall increase by 0.5% for every month of delay provided that the LPS shall not exceed the 3% higher than the base rate at any time. Further, LPS shall not be higher than the rate of LPS specified in the Agreement, if any.
- **Adjustment towards Late Payment Surcharge**
  - The Draft Rules also provide a priority to the LPS in case wherein any payment for procurement of power made by a DISCOM to a generating company or a trading licensee or by user of a transmission system to a transmission licensee will first be adjusted towards the LPS and only thereafter towards monthly charges.

- **Liquidation of arrears**
  - The Draft Rules seeks to reschedule and redetermine the due dates for the arrears of the distribution licensee(s) including pre-existing LPS so that outstanding payment can be made by them in equal monthly instalments, the number of which (ranging from 6 months to 24 months) shall be determined according to the corresponding amount of outstanding dues on a slab basis as follows:

Outstanding dues amount (in INR crore)	Maximum No. of equal monthly instalments (months)
Up to 500	6
501 – 1000	10
1001 – 2000	14
2001 – 4000	17
4001 – 10000	20
> 10000	24

- **Operationalizing the Payment Security Mechanism and its consequences**
  - An 'unconditional, irrevocable and adequate' Payment Security Mechanism (**PSM**) shall be maintained by the distribution licensee, non-compliance of which will lead to regulation of its power supply in accordance with the draft rules.
  - The Draft Rules also impose a corresponding obligation on the generating company to not supply any power without advance payment or PSM. Despite this, if a generating company supplies power to the distribution licensee, it shall lose the right to collect the LPS.
  - In case of default in maintaining PSM or non-payment of outstanding dues by the default trigger date, the obligation of the generating company to supply power to the distribution licensee shall be reduced to 75% of the contracted power and the generating company shall be entitled to sell the balance 25% power through the Power Exchange.
  - Even after reduction of obligation in accordance with the above rule, if the dues remain unpaid for a period of one month, the generating company will not be obligated to supply any power to the distribution licensee and can the sell the entire contracted power through the Power Exchange.
  - The obligation of the distribution licensee to bear the fixed charges or capacity charges shall not cease by virtue of its default.
  - The gains from the sale of such power shall be calculated as the difference between the selling price of such power in the power exchange and the expense borne by the generating company including energy charges, transmission charges and other incidental charges and shall be adjusted in the following order:
    - Recovery of fixed charges
    - Liquidation of overdue amount
    - The balance shall be shared in the ratio of 3:1 between the distribution licensee and the generating company
- **Regulation of access to defaulting entities**
  - The Draft Rules provide for regulation of power supply to the defaulting entity in case the dues are unpaid even post two and half months from the date of presentation of bill in the following manner:
    - Short term access to the power exchange shall be regulated entirely
    - Post one month of regulation of short term access, if the dues remain unpaid still, the medium and long term access shall be regulated by 10 %
  - The regulation of medium and long term access shall ensure that the amount of reduction in the drawl schedule increases progressively by 10 % for each month of default.
  - All regulation shall end as soon as the dues are paid.
  - NLDC shall issue detailed procedure to implement the regulation of access in terms of Draft Rules.
  - In the scenario of reduction of drawl schedule, the inter-state transmission charges as well as the capacity charges for its original share shall continue to be borne by the entity in default/Regulated Entity.
- **Supply obligation of the generating company**
  - Failure of a generating company to offer the contracted power to a distribution licensee and sale of such contracted power without its consent to any other party shall lead to debarment of such generating company from participating in power exchanges and scheduling of any new short term contracts from that generating station for a period of three months for the first default, six months for the second default and one year for each successive default thereafter.

- **Power not requisitioned by a distribution licensee**
  - A distribution licensee will be required to inform its schedule for requisitioning power for each day at least one hour before the end of the time for placing proposals/bids in the Day Ahead Market for that day failing which the generating company may sell the un-requisitioned power in the power exchange.
  - The gains from the sale of such power shall be calculated as the difference between the selling price of such power in the power exchange and the expense borne by the generating company including energy charges, transmission charges and other incidental charges and shall be adjusted in the following order:
    - Payment to generating company of up to 3 paise per unit
    - Recovery of fixed charges
    - Liquidation of overdue amount
    - The balance shall be shared in the ratio of 1:1 between the distribution licensee and the generating company
  - The payment of the fixed charges of the un-requisitioned power shall be borne by the distribution licensee.
  - In case of a distribution licensee's failure to requisition power from a must-run power plant, it shall pay compensation at the rate specified in the agreement for requisition of power and in the absence of a provision to that effect in the agreement, then in accordance with the Electricity (Promotion of Generation of Electricity from Must-Run Power Plant) Rules, 2021.
- **Order of payment and adjustment towards LPS**
  - All bills payable by a distribution licensee to be time tagged, i.e., the bill shall contain the date and time of its submission. This shall be done so as to ensure that payment against a new bill is made only after all bills submitted prior to it are paid.

RECENT JUDGMENTS

In this Section

Fortum Solar Plus Pvt Ltd and Ors v. Solar Energy Corporation of India

RERC Order dated December 30, 2021 in Petition No. 1914/21, 1922/21 and 1941/21

Background facts

- The present petitions were filed for declaration of change in law events towards the imposition of safeguard duty, increase in Basic Custom Duty (**BCD**), and grant of consequential reliefs.

Issues at hand

- Whether imposition of Safeguard Duty via Notification dated July 29, 2020 along with integrated GST is a change in law event?
- Whether increase in rates of BCD on import of solar inverters pursuant to Ministry of Finance Notification dated February 1, 2021 along with Integrated Goods and Service Tax and Social Welfare Surcharge is a change in law event?
- Whether carrying cost is admissible?
- What will be the methodology for payment of compensation on account of these change in law events?

Decision of the Commission

- That the Commission, in terms of the pleadings/submissions held as under:
  - **Issue 1**
    - It was observed that vide notification dated July 29, 2020 the safeguard duty has been reduced at the rate of 14.9% ad valorem minus anti-dumping duty for the period of import of solar panels between the period of July 30, 2020 to January 29, 2021 and 14.5% ad valorem minus anti-dumping duty between the period of January 30, 2021 to July 29, 2021. Hence the safeguard duty has actually been reduced from the rate that was applicable on the last day of bid and has no adverse financial impact on the project cost. In view of the same the Commission holds that imposition of safeguard duty via Notification dated July 29, 2020 is not a change in law in terms of Article 12 of the PPAs.
    - The Commission further observes that the claim for additional cost on account of levy of IGST on the safeguard duty will be non-admissible since the safeguard duty notified vide Notification dated July 29, 2020 is not a change in law in terms of Article 12 of the PPA.
  - **Issue 2**
    - The Commission observed that vide Ministry of Finance Notification dated February 1, 2021, the basic custom duty payable on the import of solar inverters has been effectively increased from 5% to 20%. It was further observed that the Ministry of Finance Notification dated February 1, 2021 has been issued after the last date of submission of the bids, i.e., February 19, 2019. In light of the said observations, the Commission was of the view that an increase in the rates of the BCD on import of solar inventers pursuant to the Ministry of Finance

Notification dated February 1, 2021, is a change in law in terms of provisions of the PPAs.

  - The Commission further observed that the claim for additional cost on account of levy of IGST and Social Welfare Surcharge on the increase in the rate of BCD pursuant to Ministry of Finance Notification dated February 1, 2021 is required to be considered as change in law since the BCD has been considered and approved as a change in law in terms of Article 12 of the PPAs.

- **Issue 3**
  - The Commission observed that the claim of carrying cost is based on principle of restitution and therefore is completely different than penal rate of interest which is Late Payment Surcharge. In light of the said observation, the Commissions found it appropriate to allow the actual interest rate paid by the Petitioners for raising the funds as certified by Statutory Auditor based on audited accounts as the Carrying Cost for the payment of the claims under change in law. The Carrying Cost would cover the period starting from the date when the actual payments were made to the authorities till the date of issue of this order.
- **Issue 4**
  - The Commission observed that when the tariff is determined through a competitive bidding process under Section 63 of the Electricity Act, 2003, the individual tariff elements, such as capital cost, cost of capital etc. are not known. Similarly, the expected return of equity is also unknown. In the absence of such details, it is neither possible nor appropriate to engage in detailed computation of the weighted average cost of capital based on the RE Tariff Regulations to arrive at annuity rate and period.
  - It was further observed that the Central Commission has notified the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 and RE Tariff Order dated March 31, 2021. In the said regulations read with RE Tariff Order, the Central Commission has considered only the interest rate of 9% and the term of the loan repayment as 15 years.
  - The Commission was of the view that as the actual deployment of capital by way of debt or equity and their cost in terms of rate of interest or return, respectively, is unknown, the rate of 9% can be taken as the uniform rate of compensation for the entire expenditure incurred on account of change in law events. Further, the Commission was of the view that the compensation for change in law cannot be a source for earning profit, and therefore, there cannot be any higher rate of return than the prevailing normative cost of debt.

HSA
Viewpoint

The Commission has cogently dealt with the issue of 'Change in Law' arising vide the Notification dated July 29, 2020 and Ministry of Finance Notification dated February 1, 2021. Further, the approach of the Commission in determining the 'Carrying Cost' is based on the principle of 'restitution', and it remains to be seen if the generator is going to accept it for being only a 'return on loan' or only as 'return on equity' (which the generator ought to have put in the project).

Tamil Nadu Generation and Distribution Corporation Ltd (TANGEDCO) v. Tamil Nadu Electricity Regulatory Commission and Ors

APTEL order decided on 04.01.2022 in Appeal No. 321 of 2021

Background facts

- TANGEDCO is a distribution licensee in Tamil Nadu. OPG Power Generation Pvt Ltd (**OPG**), Respondent No. 2, and TANGEDCO entered into PPA dated December 12, 2013 for supply of 74 MW RTC power at levelized tariff of INR 4.91/Kwh for period June 1, 2016 to September 30, 2028.
- OPG through letter dated January 27, 2016 offered INR 1.15/Kwh for period from January 28, 2016 to May 31, 2016 to aid in disaster relief in Tamil Nadu. This offer was modified by increasing the discount to INR 1.20/Kwh vide letter dated February 1, 2016.
- These letters were superseded by letter dated February 3, 2016 wherein OPG offered discount of INR 1.20/Kwh for a period of 5 years that could be extended. In the second part of the letter, OPG made a request to 'consider', 'if possible', to TANGEDCO for extending schedule of 85% of the contracted capacity.

- As per the Regulations of the State Commission, TANGEDCO is required to procure power on least cost basis and strictly on Merit Order Despatch (**MOD**). Owing the discount offered by OPG, it found itself ahead of other generators in the MOD.
- OPG attempted to withdraw its offer of discount through letter dated May 22, 2018 as it was not getting schedule of 85%. However, TANGEDCO instructed OPG to continue the discounted tariff vide letter dated August 7, 2016.
- Aggrieved by this direction, OPG approached Tamil Nadu Electricity Regulatory Commission (**State Commission**) by Miscellaneous Petition No. 7 of 2019 stating that the offer of discount was 'conditional, unilateral and voluntary'. The State Commission, by the Impugned Order (**IO**) dated December 15, 2020, held the matter in favor of OPG inter alia for discount was offered conditionally to get the schedule of 85% and OPG was within its rights to withdraw the same if the condition is not fulfilled.
- TANGEDCO has preferred this appeal to the Appellate Tribunal for Electricity (**APTEL**) against this finding in the IO.

Issue at hand

- Whether OPG's offer of discount was conditional or unconditional and it could be unilaterally withdrawn?

Decision of the Tribunal

- APTEL first considered the nature of the offer: -
  - The tone, tenor and content of the letter dated June 3, 2016 strongly indicate that the offer was not only voluntary but absolute and unconditional.
  - The words 'consider' and 'if possible' in the context of the request for scheduling 85% of contracted capacity make it clear that the letter dated June 3, 2016 gave TANGEDCO discretion over granting the same and not an obligation to grant it.
  - The State Commission erred in connecting the offer and the request for scheduling to hold that the offer was conditional. The document speaks for itself, and external aids cannot be used to construe it differently from what is set out therein clearly.
- APTEL then countered OPG's submission of lack of consideration: -
  - The grant of favorable position in the MOD based on the discount offered was the consideration given in return for OPG's offer.
  - OPG gained the advantage of being higher on the MOD than it would have without the discount.
- APETL held that OPG cannot be allowed to unilaterally deviate from contractual obligations: -
  - When the parties acted upon the financial terms, as modified by the discount, it became part of the contract and could not be unilaterally withdrawn.
  - A party cannot resile from its contract because it has become commercially onerous
- Considering the above, APTEL held in favor of TANGEDCO and dismissed the IO.

HSA
Viewpoint

In this decision, APTEL has applied the well settled principles of law/judgments and its finding regarding intention behind an offer must be construed from the letter of the document and not through extraneous considerations squarely applies to the circumstances of this case.

North Eastern Electric Power Corporation Ltd v. Power Grid Corporation of India Ltd

APTEL order decided on 04.01.2022 in Appeal No. 118 of 2020

Background facts

- North Eastern Electric Power Corporation Ltd. (**NEEPCO**) is generating company running several Inter State Generating Stations (**ISGS**). It sells power to, inter alia, Power Grid Corporation of India Ltd. (**PGCIL**), Respondent No. 1 herein.
- NEEPCO is governed by CERC (Terms and Conditions of Tariff) Regulations, 2001 (**Tariff Regulations, 2001**) and CERC (Terms and Conditions of Tariff) Regulations, 2004 (**Tariff Regulations, 2004)** for the period concerned. Accordingly, tariff for sale of electricity for scheduled capacity is governed under these regulations.

- Any transmission of power beyond such scheduled capacity comes under the jurisdiction of the relevant Central Transmission Utility (**CTU**) or State Transmission Utility (**STU**) and the tariff for the same is determined by the Appropriate Commission. Such transmission charges are by the beneficiaries. ISGS have to pay transmission charges only if they have a bilateral agreement for sale of power to a consumer.
- Transmission tariff in Northeast Region (**NER**) was calculated as per Uniform Common Pooled Transmission Tariff (**UCPTT**) effective from April 1, 1998 to March 31, 2007, according to which transmission charges were computed on the basis of actual drawal by beneficiaries using the transmission system. This transmission charge was then apportioned amongst PGCIL and other State Utilities.
- The NER faces the peculiar situation of having excess transmission capacity. The same was highlighted by Central Electricity Regulatory Commission (**CERC**) in order dated January 1, 2002 in Petition No. 40 of 2000 and Review Petition No. 110 of 2000 while deciding against PGCIL's request for increased transmission charge to meet its investment and setting the transmission tariff at 35 paise/kWh.
- Availability Based Tariff (**ABT**) was introduced in NER w.e.f. November 1, 2003. For determining tariff for the period beyond November 1, 2003 (Post ABT Period), CERC passed order dated September 6, 2004 in Petition No.13 of 2004 wherein it held:
  - Under-drawing beneficiaries will pay transmission charge according to their scheduled energy drawal from Central generating stations.
  - Over-drawing beneficiaries will pay transmission charge according to their actual energy drawal.
  - Central generating stations injecting energy into NER grid in excess of that required by NER beneficiaries either under bilateral agreement or for purpose of Unscheduled Interchange (**UI**), will also have to pay UCPTT rates of transmission charges.
- NEEPCO filed Review Petition No. 02 of 2005. CERC vide Impugned Order (**IO**) dated April 7, 2006 decided against NEEPCO stating:
  - To ensure that owners of transmission systems (**PGCIL**) are justly compensated for their investment irrespective of energy flows NER required a special method to determine transmission tariff.
  - Since transmission charges on the central sector generating stations are justified, if excess injection is on account of bilateral sale, then there is no reason why their injection as UI should not attract a similar transmission charge.
  - There is no 'double charge' since PGCIL cannot 'over-recover' since it is already not getting recovery commensurate with its investment.
- NEEPCO, aggrieved by the IO filed an appeal before the Appellate Tribunal for Electricity (**APTEL**) stating that the decision of CERC is against the Tariff Regulations, 2001 and Tariff Regulations, 2004. APTEL granted the appeal and held that NEEPCO is not a long-term customer transmission customer and hence cannot be held liable to pay transmission charges. It also held that the direction as per the IO amounts to double charging
- This decision was challenged before the Supreme Court by PGCIL in Appeal No. 4733 of 2008 and vide Order dated January 30, 2020 the decision of APTEL was set aside and directions for fresh decisions were issued.

Issue at hand

- After considering the submissions made by the parties, following are the broad issues considered by the APTEL in the current Order:
  - Whether CERC could direct a generating station to pay transmission tariff on account of UI injections?

Decision of the Tribunal

- APTEL agreed with need for a differentiated system of recovery of transmission charges in NER region owing to the situation where generation capacity had not increased to meet the transmission capacity; if the capacity-based recovery where adopted, then PGCIL would have faced losses.
- CERC argued that generating stations in NER are earning additional revenue from UI charges as well as deriving benefit of reduced transmission tariff and must therefore be asked to pay charges for the transmission of such UI to mitigate the benefit of such reduced transmission tariff. However, APTEL refused to accept the same as:-
  - CERC did not have any regulatory mandate to direct NEEPCO to pay such charges.
  - Under the Tariff Regulations, NEEPCO was already an ISGS and could not also be a long-term transmission customer for purposes of charging transmission tariff.
  - CERC vide the IO attempted to do do indirectly what cannot be done directly

- APTEL held that since beneficiaries are paying PGCIL on actual drawal basis which would include the UI injections, payment for same by NEEPCO would amount to double charge.
- APTEL also stated that the levy as per IO disincentivized UI injections meant to ensure grid stability which is against the objectives of the UI mechanism.
- In light of these reasons APTEL held that NEEPCO is exempt from levy of transmission charges on account of UI injections.

HSA
Viewpoint

APTEL recognized the need for system of transmission tariff that would aid PGCIL in recovering their investment in NER Grid but the same would need to come within the statutory powers of the CERC. Seeking to recover such tariff from a generator was clearly beyond the powers of CERC and undermined the objectives of grid stability under UI mechanism. APTEL correctly put a stop to such overreach.

Azure Power Forty-One Pvt Ltd and Ors v. Solar Energy Corporation of India Ltd and Ors and Azure Power Maple Pvt Ltd and Ors v. Solar Energy Corporation of India Ltd and Ors

CERC Order dated 16.12.2021 in Petition Nos. 226/MP/2021 and 227/MP/2021

Background facts

- The present petition was filed by the Petitioners, Azure Power Forty-One Pvt. Ltd. (Petition No. 226/MP/2021), Azure Power Maple Pvt Ltd (Petition No. 227/MP/2021) before the Central Electricity Regulatory Commission (**CERC**) seeking compensation for occurrence of Change in Law (**CIL**) event.
- The Petitioners sought approval of CIL event as per Article 12 of the respective Power Purchase Agreement arising out of the imposition of increased rate of Basic Customs Duty (**BCD**) on solar inverters being imported into India, due to the recession of Notification No. 1/2011-Customs dated January 6, 2011 vide Notification No.7/2021-Customs dated February 1, 2021 issued by the Department of Revenue, Ministry of Finance, Government of India.
- On October 22, 2021, the Ministry of Power has notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (**CIL Rules, 2021**).

Issue at hand

- Whether the Petitioner is entitled to seek relief and compensation on account of CIL events as per terms of the PPA signed or the mandate of recently notified Electricity (Timely Recover of Costs due to Change in Law), Rules 2021?

Decision of the Commission

- The Petitioners claimed that present Petition was filed prior to the notification of the CIL Rules, 2021 and the dispute/cause of action having occurred prior to the said Rules, the provisions of CIL Rules, 2021 would not be applicable retrospectively. In this regard, CERC inter alia held that:
  - As per reading of Rule 2(1)(c) of the CIL Rules, 2021, it is evident that definition of change in law shall come into effect unless otherwise defined in the agreement and cannot, in any manner, be construed to mean that the CIL Rules shall apply only to those agreements which do not have the change in law provisions.
  - The phrase 'unless otherwise defined in the agreement' has been used in the context of the definition of change in law and not in the context of applicability of the CIL Rules, 2021.
  - The issue of retrospective application is dealt by the Hon'ble Supreme Court in *T. Kaliamurthi and Anr. v. Five Gori Thaikal Wakf and Ors*[1] wherein it is stated that no law operates retrospectively unless it has been provided differently in the law itself or it is a procedural law.
  - CIL Rules 2021 are in the nature of procedural law and hence in terms of the decisions of the Hon'ble Supreme Court, they can apply retrospectively.
- CERC observed that the Petitioners have failed to show any provisions in CIL Rules, 2021 that prevents the recovery of customs duty under change in law claims.

[1] [2008 (9) SCC 306]

- In view of the above CERC directed that the Petitioners need to first approach SECI/procurers in terms of the Change in Law Rules for adjustment of tariff on account of such change in law and then approach the Commission only in terms of Rule 3(8) of the Change in Law Rules.

HSA
Viewpoint

The Petitions and the CIL event had occurred prior to the coming into effect of the CIL Rules, 2021 (October 22, 2021), however the CERC has interpreted the mandate of the CIL Rules, 2021 to have retrospective applicability. It has further held that agreements with CIL provisions would also come under the mandate of the CIL Rules, 2021. This application marks a significant shift in the claims of generators as the same will now have to be aligned with the CIL Rules 2021 and the methodology therein (which also includes a restitution clause). However, it is the understanding of certain generators that the CIL Rules, 2021 are not merely procedural and they impact quantification of claims and hence they cannot be treated merely for being procedural with retrospective application. Further, the re-agitation of the whole issue initiated through a fresh Change in Law Notice is bound to procrastinate the claims of the Petitioners (whereas the claimed objective of CIL Rules 2021, is inter-alia, to reduce the delays for generators in receiving such sums). Another aspect is that of parties to a dispute where they have exposed their positions in terms of a dispute and is not merely an issue of recalibration of amounts but that of a total rejection of a change in law claim or a contractual construct. In such circumstances, reinvention of the whole proceedings is only going to delay the adjudication, since procurers once having denied such claims are not expected to agree on a revised mathematical calculation.

Cogeneration Association of India (CAI) v. Maharashtra State Electricity Distribution Co Ltd (MSEDCL)

MERC order decided on 11.01.2022 in Case No. 129 of 2021

Background facts

- The Petitioner- CAI is a Pan-India association formed to promote cogeneration/captive power plants in industrial and commercial sectors. It has filed the present petition before Maharashtra Electricity Regulatory Commission (**MERC**) to seek clarification on following issues: -
  - Whether sugar factories with bagasse-based cogeneration plants (**Cogen Sugar Factories**) to be considered as 'Eligible Consumers' within the scope of MERC (Grid Interactive Rooftop Renewable Energy Generating Systems) Regulations, 2019 (**Rooftop RE Regulations, 2019**)
  - Can Cogen Sugar Factories install grid connected RE systems more particularly Solar PV on net metering basis and operate it alongside the cogeneration plant?
- CAI has proposed; -
  - By relying upon definition under the Electricity Act 2003, 'Consumer' is essentially a person, who is connected to a Distribution Licensee for receipt of electricity. In the present case, the members of CAI are connected to MSEDCL's system for receiving electricity for their own use.
  - A sugar mill/factory which manufactures sugar and other by-products requires electricity for the manufacturing process and pays demand charges to the distribution licensee throughout the year. Thus, such a sugar manufacturing entity qualifies as a 'Consumer' within the meaning of Section 2(15) of the Electricity Act, 2003. Its status as a consumer, is similar to any other industrial and/or commercial establishment, which is connected to a distribution licensee's system and draws power for its use.
  - Any sugar mill/factory may also install/set-up and operate a bagasse-based cogeneration power plant for captive use/self-consumption in terms of the provisions of the Electricity Act, 2003. Under the principles and enabling provisions of the Electricity Act, 2003 and the regulations framed thereunder, such consumer can enter into an agreement to sale of electricity from its cogeneration facility to the distribution licensee(s). Even in this scenario, such sugar mills, continues to be consumer within the meaning of Section 2(15),
  - Setting up of such RE systems alongside the cogen plant would help distribution licensees to meet their renewable purchase obligations.
  - Parallel operation of cogeneration plant and RE system (**Solar PV**) can be attempted in following manner: -
    - During season, solar rooftop generation would partially fulfil the captive consumption and only surplus part of cogeneration power would be exported.

- During off-season. there would be no cogeneration and hence the solar rooftops would operate on net-metering basis.

- MSEDCL submitted that: -
  - Cogen Sugar Factories are consumer as well as generators. For off-season period they are consumers of MSEDCL and for season period they are generators for MSEDCL.
  - Sugar factory can install the hybrid project with combination of bagasse-based co-generation project and solar project as per provisions of MERC (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2019 (**RE Tariff Regulations, 2019**)

Issues at hand

- Whether Cogen Sugar Factories qualifies within the definition of 'Eligible Consumer' in terms of Rooftop RE Regulations, 2019?
- What methodology should be adopted to enable Cogen Sugar Factories to install Solar PV plant in its premises?

Decision of the Commission

- With regard to of status of Cogen Sugar Factories, MERC inter alia held as under: -
  - To be considered as eligible consumer, an entity must be a consumer and it should setup an RE system within its premises as provided under Rooftop RE Regulations, 2019.
  - Cogen Sugar Factories are maintaining their contract demand with Distribution Licensee and paying charges for the same, therefore they are 'consumers' of Distribution Licensee under the Rooftop RE Regulations, 2019.
  - RE system includes combination of renewable energy sources and the Cogen Sugar Factories that already have a bagasse-based generation capacity can add proposed Solar PV project to have 'combination of RE Source' to setup an RE system.
  - Sugar Factories with bagasse-based cogenerating plant and proposing to install rooftop Solar PV projects can be considered as 'Eligible Consumer' under Rooftop RE Regulations, 2019.
  - Combination of RE Energy Sources can also be installed by the consumers in its premises to become 'Eligible Consumers' under the Rooftop RE Regulations, 2019.
- MERC also noted that as per application of Rooftop RE Regulation, 2019, the combination of RE Source(s):
  - It may lead to a situation wherein the total generation capacity in the sugar factory premises crosses the contract demand of sugar factory as bagasse-based generation and solar based generation when considered together.
  - Even if it is considered that such total generation capacity is within contracted capacity of sugar factory, then also in case such total generating capacity is above 1 MW, then net-billing arrangement will become applicable wherein all generated electricity (cogeneration + solar) has to be sold to distribution licensee at rate of Average Power Procurement Cost (**APPC**) of that licensee.
  - Such arrangement would not be beneficial to sugar factories with cogeneration plants who have EPA with MSEDCL for sale of surplus power at tariff ranging from INR 4.75 to 6.90 per unit, as under net-billing arrangement same power would have to be sold to MSEDCL at APPC rate of INR 3.94 per unit.
  - The present Petition has been filed seeking limited relief of getting clarification about installing rooftop capacity upto 1 MW under net metering regulations. But in view of regulatory provisions and its implications as explained above, the sugar factories with bagasse-based cogeneration plants may consider all these issues before exercising the option of installing rooftop Solar PV plants.
- To strengthen the initiative and avoid the hurdles mentioned above, MERC proposed another method enabling connection and installation of such Solar plants; -
  - RE Tariff Regulations, 2019 also recognize Hybrid RE Projects using multiple sources of renewable energy. The Cogen Sugar Factories proposing to install solar projects can come under this definition. However, RE Tariff Regulations, 2019 require capacity of one source should be at least 25% of other RE source, which is not feasible in case of Cogen Sugar Factories.
- MERC, while exercising its 'powers to remove difficulties' under Section 77 of the RE Tariff Regulations, relaxed the conditions of capacity of one source being minimum 25% of other RE sources for recognition as hybrid project for existing commissioned RE projects and held as under:
  - In hybrid project arrangement, sugar factories can continue to use energy generated by hybrid project for self-consumption and inject surplus energy into the grid as per provisions of respective EPA.
  - When both sources of RE are generating electricity, after injection into the busbar it would not be possible to identify which source of energy is consumed for captive load. Once such energy

from two different RE sources are injected into common busbar it should be considered as hybrid source. Therefore, the methodology proposed by CIA i.e. to allow solar power for self-consumption first, cannot be allowed.

- MERC also noted that the RE Tariff Regulations, 2019 would cover the procedure for tariff adoption for such a hybrid project as well, wherein:
  - Cogen Sugar Factory and MSEDCL needs to enter into amendment agreement to existing EPA for including capacity of solar project to be commissioned. The recent discovered lowest tariff by MSEDCL for similar size solar project shall be considered as tariff for solar project to be commissioned by the sugar factory. Clause for computing weighted average tariff on monthly basis shall also be included in the EPA.
  - Based on actual generation from each source of renewable energy, weighted average tariff for that month should be computed and energy purchased during that month shall be paid at such weighted average tariff.
  - Weighted average tariff for each month will be different based on contribution of energy generation from each renewable energy source in total electricity generated in that month.
- Further, MERC directed CAI and MSEDCL to create awareness about use of Solar PV technology for betterment of farmers as it would not only aid the farmers but end up useful to distribution licensees and Government.

HSA
Viewpoint

MERC has indicated its commitment to bolster hybrid initiatives of setting up roof top Solar PV with the Cogen RE Power Plant, which can benefit both the Cogen Sugar Factory and the distribution licensee. MERC has recognized the potential of solar projects to ease the burden on the energy sector and accordingly directed CAI and MSEDCL to promote such schemes within groups like farmers.

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