

# PROJECTS, ENERGY & INFRASTRUCTURE

## MONTHLY NEWSLETTER

### FEBRUARY 2022



# LEGAL & POLICY UPDATES



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## Ministry of Power issues clarification on Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2022

- On February 21, 2021, Ministry of Power (**MOP**) has issued the clarification on Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (Clarification) basis the concerns raised by stakeholders that the Central Electricity Regulatory Commission (**CERC**) has disposed of certain petitions filed by the Transmission Licensees wherein CERC has directed the developer and other parties i.e. the Respondents, to settle the Change in Law claims amongst themselves and approach CERC only in terms of Rule 3(8) of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (CIL Rules, 2021). The said petitions were filed before the CERC before the date of notification of the CIL Rules, 2021 and CERC had reserved the order after hearing the matter.
- MOP, by way of the Clarification, has stated that:
  - CIL Rules, 2021 are applicable on the Change in Law events occurred on or after the date of notification of the CIL Rules, 2021 in the Official Gazette (i.e., October 22, 2021)
  - CIL Rules, 2021 are not to have any retrospective effect
  - Change in Law events that occurred prior to notification of CIL Rules, 2021 will be dealt in accordance with prevalent dispensation/rule position at the time of occurrence of such event
- The Clarification further provides that the pending petitions before the Appropriate Commissions will be dealt in accordance with stipulations stated hereinabove.

## Ministry of Power issues clarification on usage of Energy Storage System

- On January 29, 2022, Ministry of Power (**MOP**), Government of India issued a clarification on usage of Energy Storage System (**ESS**) in order to achieve the target of installation of 500 GW of capacity from non-fossil sources by 2030. To fulfil the said target, MOP has stated that it is essential to have a mechanism for optimum utilization of resources and selection of right resource mix to meet the projected energy demand of the country.
- ESS is essential to integrate large volumes of renewable energy. ESS system can be Battery Energy Storage System (**BESS**) or Pumped Hydro Energy Storage System or Phase Change Energy System, including energy storage in the form of green ammonia or green hydrogen.
- ESS is an important aspect for grid balancing in view of large-scale penetration of renewable energy in the power system, and can provide fast response/ramping up or down/peaking support, thereby enabling flexibility

in the system operation, firming up of renewable energy sources, energy shifting enabling optimum/higher utilization of transmission network, enabling transmission and distribution capex deferral arbitrage, peak shifting, etc.

- **Status of ESS**

- The ESS is a part of the power system defined under Section 2(50) of the Electricity Act, 2003.
- ESS can be utilized either on standalone basis or complimentary with generation, distribution and transmission. ESS is accorded status on the basis of its application area i.e., generation, transmission and distribution.
- The ESS can be utilized as generator, grid element or network asset. These assets can be developed, owned, leased, and operated by a generating company or a transmission licensee or a distribution licensee or a system operator or a standalone energy storage provider. When an ESS is owned and operated by and co-located with a distribution licensee or a generating station or a transmission licensee, in that case the ESS have the same legal status as that of the generating station or distribution licensee or transmission licensee.
- If such ESS is not co-located but owned and operated by the generating station or distribution licensee, then the legal status shall be that of the generating station or distribution licensee; however, for the purpose of scheduling and dispatch and other matters, it will be treated at par with a standalone ESS.
- The developer/owner of the ESS may rent out/sell/lease the storage space in whole or in part to any utility engaged in distribution or generation or transmission, or to a Load Despatch Centre. The owner of the ESS may use part/whole of the storage space in order to buy and store electricity and sell the stored electricity at a later time/date.
- The standalone ESS shall be a delicensed activity at par with a generating company. If the owner/developer seeks to operate the ESS on a standalone basis, the owner/developer has to be registered with the Central Electricity Authority (CEA) after providing the details of the capacity and the location. Further, the said owner/developer also needs to comply with rules regarding safety, etc., as laid down by the CEA. The capacity of the ESS shall also be verified by the CEA.
- The connectivity to a standalone ESS shall be granted under the Electricity (Transmission System Planning, Development and Recovery of Inter-State Transmission Charges) Rules, 2021.

## **APERC (Terms and Conditions for Short-term Procurement/Sale of Power) Regulation, 2022**

- On February 09, 2022, the Andhra Pradesh Electricity Regulatory Commission (**APERC**) issued the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for short-term procurement/sale of power) Regulation, 2021 (**Regulations**).
- **Key features of the Regulations**
  - The monthly estimation of demand for each block of 15 minutes duration shall be carried out by State Load Despatch Centre (**SLDC**) based on historical data, demand forecasts by the licensees, latest available Artificial Intelligence (**AI**) tools like deep/machine learning (to be used by both the licensees and SLDC), etc.
  - By the 10<sup>th</sup> of every month, each licensee shall separately communicate to SLDC its estimation of demand for each block of 15 minutes duration for the immediate following month.
  - By the Wednesday of every week, SLDC, after assessing the demand based on its own forecast for the whole State (excluding OA demand) and availability of power from all the approved sources, including the availability of power from the sources on a short-term basis under the monthly power procurement plan and after taking into account the maintenance schedules of generating stations, transmission constraints, generation and transmission capacities likely to be added in the next week, shall communicate to the licensees the short-term power requirement for the immediate following week.
  - Within three working days of the close of the bidding, the licensees shall place before the Commission the details of the quantum of power and prices offered by each of the bidders in response to their tenders, along with the licensees' analysis on the bids received and also the quantum of power and the prices at which they intend to purchase the same. Based on the Commission's approval, the licensees shall place necessary orders on the successful bidders.
  - Every day by 10 AM, SLDC, after assessing the demand based on its own forecast all over the State and availability of power from all the approved sources including the availability of power from the sources on a short-term basis under monthly and weekly power procurement plan after taking into account the maintenance schedules of generating stations and transmission constraints, shall communicate the power requirement for the next day to the licensees.
  - When there is less generation from approved sources compared to the forecast/schedule leading to a gap between supply and demand during intraday, the licensees may meet the gap by procuring the required power from the Real-time/Intraday Market of the exchanges.



- Under no circumstances shall the licensees purchase energy through bilateral contracts except from the sources expressly approved by the Commission.
- **Criteria for ratification of short-term procurement/sales by the Commission**
  - The intent of the Commission is to keep the overall power purchase cost from exceeding the power purchase cost approved in the particular year of tariff order and, accordingly, the definition of benchmark price is incorporated in the regulation. This benchmark price is not applicable time block-wise as apprehended by the DISCOMs, but for purchases during the whole year.
  - Ministry of Power issued the guidelines under Section 63 of the Act for short-term power procurement by the distribution licensees, hence the same have to be followed by the DISCOMs for procurement of power on a short-term basis. DISCOMs shall have to take prior approval of the Commission if any deviation is required.
  - The monthly/weekly/day-ahead power requirement communicated by SLDC to the licensees and the monthly/weekly/day-ahead/intraday power procurement/sale by the licensees shall be made available on the websites of the licensees and SLDC within 48 hours of such procurements/sale, with ease of access to the current as well as archived data.
  - Under no circumstances, approved generators shall be kept under reserve shutdown on the pretext of saving power purchase costs, unless such shutdowns result in saving of overall power purchase costs.
  - The licensees shall make all efforts to sell the surplus power that is available during certain time blocks/periods through the exchanges, DEEP e-bidding portal or through banking/swapping/forward contracts, provided such sales do not lead to the imposition of load reliefs and/or increase in overall power purchase costs. All such sales shall be ratified by the Commission fortnightly.
  - A common round-the-clock dedicated cell comprising at least one officer of the rank of General Manager from each DISCOM shall be constituted by the three DISCOMs within one month from coming into force of the Regulations.

## Simplification of procedure – Rooftop Solar Programme Ph-II

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- On February 02, 2022, Ministry of New and Renewable (MNRE) issued an Office Memorandum regarding the revised procedure for installation of Rooftop Solar (RTS) plant under its Rooftop Solar Programme. The objective of the Rooftop Solar Programme is that the residential consumers can install the RTS plant by themselves or through any vendor of their choice.
- The revised procedure for installation of solar plant on rooftop is as follows:
  - A National portal will be created/developed for registering applications, approval of applications, tracking progress of applications. The same portal will also be created for the DISCOMs, and both the portals will be linked to each other.
  - To install RTS plant under this mechanism, the household beneficiary is required to make an application on national portal. The beneficiary will have to submit necessary information/documents, including details of bank account for transferring the subsidy amount. The beneficiary will be informed regarding the entire process of installation of RTS and the subsidy amount which can be availed at the time of registration of application.
  - The application filed by the beneficiary will be transferred to the concerned DISCOM for approval of technical feasibility, and the concerned DISCOM is required to give approval in next 15 working days.
  - The beneficiary can install the RTS plant from any vendor from the list provided on the portal by selecting solar modules which comply with the conditions of DCR and enlistment under the ALMM and inverters which are certified/ratified by BIS.
  - The beneficiary is required to install RTS plant within the specified time period; in case of delay, the application made by beneficiary will be cancelled and the beneficiary has to re-apply or make a new application.
  - After the installation of RTS plant, the beneficiary will make an application for net metering on the national portal, which will be transferred to the concerned DISCOM. The concerned DISCOM may either procure and install the net meter or it can direct the beneficiary to procure the net meter as per the prescribed specifications and to get the same checked/tested from the authorized lab of DISCOM.
  - After installation of the net meter, the DISCOM will be required to submit a commissioning and inspection report on the national portal and the said report will also be published on the DISCOM portal.
  - After receiving the commissioning and inspection report, the subsidy will be provided directly in the bank account of the beneficiary by the DISCOM.
- The existing mechanism/procedure for availing subsidy for installation of RTS plant will remain in force until the development of the national portal. The existing mechanism/procedure will be the only procedure to avail subsidy from MNRE. After the development of the national portal, the beneficiary can choose either the national Portal or the previous mechanism for installation of RTS plant.

# RECENT JUDGMENTS



## In this Section

Nisarga Renewable Energy Pvt Ltd v. Maharashtra State Electricity Distribution Co Ltd  
Juniper Green Energy Pvt Ltd v. Maharashtra State Electricity Distribution Co Ltd

GMR Energy Trading Ltd and Anr v. Tamil Nadu Generation and Distribution Co Ltd

Azure Solar Private Limited v. Central Electricity Regulatory Commission  
Azure Clean Energy Private Limited v. Central Electricity Regulatory Commission  
Azure Greentech Private Limited v. Central Electricity Regulatory Commission

Southern Power Distribution Power Co Ltd of Andhra Pradesh (APSPDCL) & Anr v. M/s Hinduja National Power Co Ltd & Anr

## Nisarga Renewable Energy Pvt Ltd v. Maharashtra State Electricity Distribution Co Ltd Juniper Green Energy Pvt Ltd v. Maharashtra State Electricity Distribution Co Ltd

MERC Order dated February 17, 2022, in Case No. 61 of 2020 and Case No. 62 of 2020

### Background facts

- The present petitions were filed by Juniper Green Energy Pvt Ltd (**Juniper**) and Nisarga Renewable Energy Pvt Ltd (**Nisarga**) – collectively, Petitioners – seeking approval of the quantum of compensation of amount incurred on account of Change in Law event i.e. imposition of Safeguard Duty (**SGD**) vide Ministry of Finance, Government of India Notification dated July 30, 2018, (**SGD Notification 2018**). The MERC has already granted an in-principle approval to the Petitioners that SGD Notification 2018 is a Change in Law event under the respective PPAs vide common order dated July 18, 2019 passed in 123 of 2019 & 124 of 2019.
- The MERC, vide common order dated July 23, 2020 passed in Case No. 61 of 2020 and 62 of 2020, has allowed compensation of INR 13,40,32,493 against the claim of INR 14,73,84,043 to Juniper and compensation of INR 31,62,49,171 against the claim of INR 34,39,14,006 to Nisarga. While granting this compensation, the MERC had restricted the maximum DC capacity eligible for such compensation by prescribing a formula and, further, allowed the carrying cost on above mentioned compensation at the rate of Late Payment Surcharge as stipulated in the respective PPAs.
- Aggrieved by this finding of the MERC, Juniper and Nisarga preferred an Appeal before APTEL bearing Appeal No. 163 of 2020 and Appeal No. 171 of 2020, respectively. APTEL, vide Judgement dated November 16, 2021, allowed these appeals and held as under:
  - The full DC capacity of the projects needs to be considered while computing the Change in Law compensation
  - Carrying costs should be allowed on actuals and not on the LPS rate specified in the respective PPAs. However, Appellants provided various methodology for computing the carrying cost and since this submission was not made before the MERC, it remitted the matter to the MERC for consideration of this matter and decide afresh.
  - The MERC is directed to reconsider the compensation of Change in Law in light of APTEL's observation and hear the parties afresh on the subject of carrying cost.

### Issues at hand

- What should be the principal amount of compensation to be payable to the Petitioners on account of Change in Law event i.e. imposition of SGD vide SGD Notification 2018?
- What should be the mechanism to compute the carrying cost on the compensation amount?

- What should be the payment mechanism for the compensation amount along with carrying cost?
- Whether the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (**CIL Rules 2021**) are applicable for computing the compensation for Change in Law event?

### Decision of the Commission

- **Issue No. 1**
  - The MERC followed the directions of APTEL and allowed total installed DC capacity of the project for computing the compensation instead of the maximum DC capacity.
- **Issue No. 2**
  - In compliance with APTEL's decision, MERC considered the three alternatives provided by Petitioners for calculating carrying cost on actuals and noted that the Petitioners failed to demonstrate actual rate of interest incurred on additional expenses on account of Change in Law. Therefore, the MERC allowed the carrying cost at the rate of actual interest rate of loans availed for additional expenditure on account of Change in Law event (if the Petitioners are able to demonstrate) or at the interest rate applicable for Working Capital Loan under the MERC RE Tariff Regulations, 2019 for the period commencing from the date of actual payments of SGD amount to the date of this Order.
- **Issue 3 & 4**
  - The MERC held that CIL Rules 2021 were notified on October 22, 2021, after the signing of the PPAs executed under the bidding process. Moreover, the tariff was determined as per competitive bidding process under Section 63 of the Electricity Act, 2003, which is different to tariff determination under Section 62 of the Electricity Act, 2003 whereunder tariff is subject to periodic changes through Rules and Regulations. In case of the former, tariff can only change according to terms of the PPA. Therefore, applicability of CIL Rules 2021 without referring them in the bidding document itself would vitiate the bidding process as they would retrospectively alter the existing PPAs with respect to the mechanism for claiming Change in Law thereunder.
  - For payment of compensation, the MERC observed that Maharashtra State Electricity Distribution Company Ltd has option to pay the amount in lumpsum to avoid further carrying cost or to make the payment over the tenure of the PPA with additional carrying cost.



HSA

#### **Viewpoint**

The MERC has relied on the normative parameters of interest on working capital (as per MERC RE Tariff Regulations, 2019) for determination of carrying cost. However, it has not agreed with the carrying cost being in tandem with the debt equity ratio of any project and carrying cost being correspondingly equivalent, which could have been an option. Further, the evidence qua actual carrying cost on the additional capital raised by the generator would have resolved the controversy. It will have to be seen if the generators will re-approach APTEL being aggrieved of the Order.

MERC's view on no retrospective application of the CIL Rules 2021 is an informed decision. This should bring relief to generators whose Change in Law claims are pending before MERC. Furthermore, with the clarification dated February 21, 2022 issued by MoP on the CIL Rules 2021, the controversy in this regard should subside in days ahead.

## **GMR Energy Trading Ltd and Anr v. Tamil Nadu Generation and Distribution Co Ltd**

CERC Order dated February 04, 2022, in Petition No. 114/MP/2019

### **Background facts**

- The present petition was filed by Petitioners, GMR Energy Trading Limited (**GMR Trading**) and GMR Warora Energy Limited (**GMR Warora**) seeking direction(s) against Tamil Nadu Generation and Distribution Corporation Limited (Respondent No. 2/TANGEDCO) for unilateral reduction of the contracted capacity and non-payment of the capacity charges as per the terms of the Power Purchase Agreement signed between GMR Trading and TANGEDCO dated November 27, 2013 (**PPA**).
- GMR Warora had developed two generating stations of 300 MW each, which was commissioned on March 19, 2013 and September 01, 2013 under a composite scheme for generation i.e. for sale of power to more than one state.

- On December 21, 2012, TANGEDCO issued a Request For Selection (**RFS**) for procurement of power to meet its base load power requirement. Subsequently, GMR Trading and GMR Warora entered Power Sale Agreement to participate in the competitive bidding process on behalf of GMR Warora. In this regard, the following events are relevant:
  - Pursuant to bidding process under the RFS, GMR Trading entered into a PPA with TANGEDCO for procurement of 150 MW, as per the tariff as determined under the competitive bidding process.
  - The power supply under the PPA began from October 22, 2015
- Post the commencement of supply of power, TANGEDCO disputed the bills raised for November 2015 and December 2015 alleging the grid constraint which occurred during the months of November and December 2015. In this regard, TANGEDCO sought revision of the incentive amount by taking into consideration the period of grid constraint during the said period. The said contention was accepted by the Petitioners. However, TANGEDCO failed to make payments for the said curtailed power.
- Thereafter, the bills for January 2016 – March 2016 were disputed by TANGEDCO, wherein it stated that TANGEDCO unilaterally reduced the contracted capacity and consequent capacity charges along with the period of November 2015 – December 2015 due to the grid constraint in the system claiming relief under Article 9.7.1(c) of the PPA (which provides for '*natural force majeure event*').

### Issue at hand

- Whether grid constraint can be considered as a '*natural force majeure event*', resulting into reduction of the contracted capacity and thereby non-payment of tariff to the Petitioners by the Respondent?

### Decision of the Commission

- With regard to the Petitioner's claims regarding payment of outstanding dues by TANGEDCO, CERC observed that:
  - As per schedule 4 of the PPA, GMR Trading can claim capacity charges upon declaring the contracted capacity at normative availability (i.e., 85%) and not on the basis of actual energy scheduled from the grid by the procurer. Therefore, lower scheduling of energy by TANGEDCO on account of grid constraint cannot lead to amendment of the formula provided under schedule 4 of the PPA.
  - Article 9.3.1 of the PPA stipulates that any restrictions or curtailment of contracted capacity imposed by Power Grid Corporation of India Limited (**PGCIL**)/Regional Load Despatch Centre (**RLDC**)/ State Load Despatch Centre (**SLDC**) in scheduling of power and thereby reducing the scheduled energy or contracted capacity to be injected by GMR Trading or GMR Warora at the interconnection point is a '*simplicitor force majeure event*'.
  - Further, Article 9.3.1(i) categorically specifies the occurrences which constitute '*natural force majeure events*', which does not include occurrences of grid constraints in any form.
- As per Article 9.3.1 and Article 9.3.1(c) of the PPA, TANGEDCO is not liable to pay tariff for natural force majeure events. However, as per the said provisions, TANGEDCO is liable to pay tariff for the events/case falling under the '*simplicitor force majeure event*' since grid constraint does not fall under a natural force majeure event but a simpliciter force majeure event (which was the case in the present matter).
- In regard to the above, the CERC relied on the Judgment dated July 02, 2019 of the Supreme Court in *M/s Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission and Ors*<sup>1</sup> to uphold the settled principle that in case of conflict between general and specific provisions, the specific provisions prevail. In the present matter, the specific inclusion of grid constraint as a simpliciter force majeure event (Article 9.3.1) would prevail over its interpretation as a natural force majeure event (9.3.1(i)). Therefore, TANGEDCO's claim that it is a natural force majeure event which grants it an exemption from paying capacity charges or allows it to reduce the contracted capacity, is untenable.
- In view of the above, the ERC held that the relief claimed by TANGEDCO was untenable and, accordingly, set aside the aforesaid Dispute Notices and directed TANGEDCO to make payment for capacity charges as per schedule 4 of the PPA along with the late payment surcharge.

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<sup>1</sup> Civil Appeal No. 11133 of 2011



#### HSA Viewpoint

The issues pertained to the contractual construct and in particular the force majeure provisions. It is well settled that inclusions as provisioned under the force majeure clauses will only qualify for relief stated thereunder. Hence, the law as upheld by CERC is going to assist the parties denying such force majeure claims.

## Azure Solar Pvt Ltd v. Central Electricity Regulatory Commission Azure Clean Energy Pvt Ltd v. Central Electricity Regulatory Commission Azure Greentech Pvt Ltd v. Central Electricity Regulatory Commission

APTEL Order dated February 3, 2022, in Appeal Nos 61 to 65 of 2021

### Background facts

- The CERC passed Common Order dated November 19, 2019 in Petition Nos. 184/MP/2018, 185/MP/2018, 188/MP/2018, 190/MP/2018 and 191/MP/2018 wherein it denied compensation on account of Change in Law (CIL) events having an impact on O&M expenses for the reason that the appellants had outsourced such activities to third parties. Further, CERC also denied carrying cost with respect to such CIL compensation stating the absence of any provision in the respective Power Purchase Agreements (PPAs) incorporating the principle of restitution to allow such CIL claims.
- The Petitioners contended that Article 12.2.2 of the PPA provided for relief of CIL through the decision of the Ld. CERC not merely for approval of CIL.
- Ld. APTEL passed the decision dated 27.04.2021 of this Tribunal in *Coastal Gujarat Power Limited v. Central Electricity Regulatory Commission and Ors*<sup>2</sup>, which held that CIL effecting O&M costs cannot be denied merely on the ground that they were being outsourced without any such prohibition under the PPA.
- This decision of APTEL was reiterated in *Azure Power Eris Private Limited v. Bihar Electricity Regulatory Commission and Ors*<sup>3</sup>, judgment dated January 13, 2022, wherein APTEL remitted the matter back to the CERC for fresh consideration.
- Pursuant to these directions of APTEL, the Petitioners in this batch of appeals sought for similar directions.

### Issue at hand

- Whether expenses related to outsourced O&M costs can be claimed under Change in Law compensation for levy of taxes?

### Decision of the Tribunal

- APTEL in its previous decisions reasoned as follows:
  - Outsourcing of O&M cost is within the discretion of the Generator in the absence of any prohibition with this regard in the PPA.
  - Explicit terms of a contract/PPA are binding and it is not open for adjudicating forums to substitute their own view on the presumed understanding of the terms of the PPA.
  - Once it is established that a levy of tax on services availed by a Generator has an impact on the cost or revenue from business and sale of electricity (whether directly or indirectly), compensation must follow.
- In respect of the decisions of APTEL on the same issues raised in the present matter, APTEL, with the consent of all parties, remitted the matter for reconsideration by CERC.



#### HSA Viewpoint

APTEL has lent further clarity to the issue of allowing outsourced O&M expenses within CIL claims as long as the operative PPA does not prohibit the same. The previous judgments of APTEL, along with the present case, bolster the imperative of Generators to claim CIL compensation and not face denial on fictitious grounds.

<sup>2</sup> Appeal No. 172 of 2017 (2021 SCC online APTEL)

<sup>3</sup> Appeal No. 129 of 2019



## Southern Power Distribution Power Co Ltd of Andhra Pradesh (APSPDCL) & Anr v. M/s Hinduja National Power Co Ltd & Anr

Supreme Court Order dated February 02, 2022, in Civil Appeal No. 1844 of 2020

### Background facts

- The present appeal has been filed by the Distribution Companies (**DISCOMs/Appellants**) challenging the judgment and order dated January 07, 2020 (**Impugned Order**) passed by the Appellate Tribunal for Electricity, New Delhi (**APTEL**) in Appeal No. 41 of 2018. Vide the Impugned Order, APTEL allowed the appeal filed by M/s Hinduja National Power Corporation Limited (**HNPC**), thereby directing the Andhra Pradesh Electricity Regulatory Commission (**APERC**) to dispose of O.P. No.21 of 2015 filed by HNPC for determination of capital cost and O.P. No.19 of 2016 filed by the DISCOMs/Appellant for approval of amended and restated Power Purchase Agreement (**PPA**) on merits.
- The facts leading to filing of the present appeal before the Supreme Court are as follows:
  - The Andhra Pradesh State Electricity Board (**APSEB**) entered into a Memorandum of Understanding dated July 17, 1992 (**MOU**), through which APSEB transferred all the licenses, approvals, clearance and permits, fuel linkage, water required for establishment of the power project at Visakhapatnam in the erstwhile State of Andhra Pradesh, to HNPC to generate and supply the electricity to APSEB.
  - Initially a PPA dated December 09, 1994 was entered into between APSEB and HNPC. Further an amended and restated PPA was entered on April 15, 1998 due to a Techno Economic Clearance for the power project for an estimated cost of INR 4628.11 crore (INR 4.45 crore per MW) granted by the Central Electricity Regulatory Commission (**CERC**) on July 25, 1996.
  - Between the years 1998 to 2007, the amended and restated PPA for sale of power by HNPC to APSEB was not implemented. In the year 2007, HNPC approached the Government of Andhra Pradesh to revive the power project, mainly structuring it as a merchant plant, offering 25% of power generated to the State and the balance 75% power to third parties.
  - In the year 2011-2012, the Central Power Distribution Company of Andhra Pradesh Limited (**APCPDCL**), for and on behalf of the DISCOMs/Appellant, had initiated the process for procurement of power under Case-1 long-term bidding route to meet the base load requirements of DISCOMs/Appellants from the years 2014-2015 onwards. HNPC participated in the said bid and emerged as the second lowest bidder.
  - After the completion of the bidding process, APCPDCL had filed O.P. No.55 of 2013 before the State Commission for approval of the tariffs emerged in the said bidding process. However, the State Level Expert Committee for evaluation of Case-1 bidding (**Bid Evaluation Committee**) in its meeting dated September 28, 2012, had noted that the State Government had informed that the entire capacity of HNPC was encumbered to the State of AP/APDISCOMS and was not available for consideration under the tender. Accordingly, the Bid Evaluation Committee had discarded HNPC from the bidding process.
  - That on August 06, 2012, HNPC addressed a letter to the then Chief Minister of the State of Andhra Pradesh, conveying its intention to develop the project and seeking State's support. Vide a communication dated December 26, 2012, the State Government addressed a letter to HNPC accepting its proposal and agreeing to purchase 100% power from the project of HNPC as per the amended and restated PPA.
  - Vide a communication dated May 16, 2013 addressed to the DISCOMs/Appellants, HNPC informed that the estimated capital cost of power will be INR 6098 crore as against INR 5545 crore that was given in June, 2010. On May 17, 2013, a Memorandum of Agreement (**MOA**) was entered into between the DISCOMs/Appellants and HNPC, thereby deciding to continue the amended and restated PPA dated April 15, 1998 and, therefore, entered into a Continuation Agreement dated April 28, 2016 (**Continuation Agreement**) to the amended and restated PPA.
  - On March 12, 2014, a petition bearing O.P. No. 21 of 2015 was filed by HNPC before the APERC for determination of capital cost and tariff of the project. The DISCOMs/Appellants filed a petition bearing O.P. No. 19 of 2016 before the APERC for approval of the Continuation Agreement. It is important to note that on July 28, 2015, HNPC filed an Addendum Application in O.P. No. 21 of 2015 thereby enhancing the capital cost of the project to INR 8,087 crore and the same was disputed by the DISCOMs/Appellants. Similarly, on March 30, 2016, HNPC filed an Interim Application bearing I.A. No. 5 of 2016 in O.P. No. 21 of 2015, for payment of variable charges and fixed charges at INR 1.80 per unit and INR 2.16 per unit aggregating to INR 3.96 per unit at 80% availability.
  - Vide order dated January 31, 2018, the APERC allowed withdrawal of O.P. No. 19 of 2016 filed by DISCOMs/Appellants seeking approval of PPA and consequently dismissed O.P. No. 21 of 2015 filed by HNPC seeking determination of tariff.

- Aggrieved by the same, an appeal bearing the Appeal No. 41 of 2018 was filed by HNPCL before APTEL. Vide the Impugned Order, APTEL allowed the appeal filed by HNPCL and directed the APERC to dispose of O.P. No. 21 of 2015 and O.P. No. 19 of 2016. Being aggrieved by this direction, the DISCOMs/Appellants have approached the Supreme Court of India.

### Issues at hand

- Whether the State of Andhra Pradesh was interested to purchase 100% power from the project of HNPCL?
- Whether the project of HNPCL be treated as a merchant power plant pursuant to the revival of the project?
- Whether the APERC was correct to entertain the Application for Withdrawal in O.P. No. 19 of 2016 and whether the APERC was justified in dismissing the O.P. No. 21 of 2015?
- Whether to discard the present project will be in the interest of the public or against it?

### Decision of the Court

#### ▪ Issue No. 1 and 2

- It was observed that in the open bidding process conducted in the year 2011-12, HNPCL emerged as the successful L2 bidder. It is, however, on account of the stand taken by the Bid Evaluation Committee that it was discarded from the bidding process. As such, the stand of the Appellants/DISCOMs that the revival of the project of HNPCL was as a merchant power plant and, therefore, the Appellants/DISCOMs cannot be compelled to purchase power from it, is self-contradictory. On one hand, HNPCL was discarded from the open bidding process, though it was the successful L2 bidder (on the ground that 100% power generated by HNPCL is encumbered to the State of Andhra Pradesh/APDISCOMS) whereas on the other hand, it is now sought to be urged that the Appellants/DISCOMs cannot be compelled to purchase the power from HNPCL, since it was a merchant power plant.
- APTEL has rightly held that on account of the assurance given by the State of Andhra Pradesh/APDISCOMS, HNPCL had altered its position and, as such, it was not permissible for the Appellants/DISCOMs to withdraw O.P. No.19 of 2016.
- The State Commission while determining the tariff would be guided by various factors as are required to be taken into consideration in view of the provisions of Section 61 of the Act of 2003. In any event, the Appellants/DISCOMs have themselves reserved their right to contest the correctness of the cost on every component at an appropriate stage before the State Commission.
- State Commission, while approving the cost of the project and determining the tariff at which the electricity would be purchased by the Appellants/DISCOMs from HNPCL, would be required to look into various factors as are stated in Section 61 of the Act of 2003, so also under the Regulations notified for that purpose. While doing so, the State Commission would be required to take into consideration the various aspects as well as submissions to be made by the Appellants/DISCOMs and HNPCL.
- Merely because the cost of the project is estimated by HNPCL at a particular amount, the State Commission is not bound to accept the same. The State Commission would only approve the cost as it would feel appropriate, as guided by the provisions under Section 61 of the Act of 2003 and the Regulations.

#### ▪ Issue No. 3

- State Commission has totally erred in dismissing O.P. No.21 of 2015 filed by HNPCL. Perusal of Section 64 of the Act of 2003 would reveal that even a generating company is entitled to make an application for determination of tariff under Section 62 of the Act of 2003. As such, irrespective of the question as to whether an application for withdrawal of O.P. No.19 of 2016 filed by the appellants DISCOMS could have been entertained, the State Commission was wholly unjustified in dismissing O.P. No.21 of 2015 filed by HNPCL.
- APTEL has rightly held that the Appellants/DISCOMs could not have been permitted to withdraw O.P. No.19 of 2016.

#### ▪ Issue No. 4

- Appellants/DISCOMs took a decision to resile from their earlier stand due to which not only the huge investment made by HNPCL would go to waste, but also valuable resources of the public, including thousands of acres of land, would go to waste. Appellants/DISCOMs could not be permitted to change the decision at their whims and fancies, particularly when it is adversarial to public interest and public good.



#### HSA **Viewpoint**

The Supreme Court has cogently dealt with the issue and has upheld the statutory scheme of the Electricity Act. It has also pointed out the impermissible act of DISCOMs resiling from their earlier stand. AP DISCOMS in 2019 also endeavored to resile from their contractual obligations under the PPAs towards renewable generators. Through the said judgment, the Supreme Court has upheld the public interest, which cannot be lost sight of by a public utility.

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